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## Tribal Environmental Programs: Providing Meaningful Involvement and Fair Treatment

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SMALL SCHOOL.  
BIG VALUE.

## **Tribal Environmental Programs: Providing Meaningful Involvement and Fair Treatment<sup>1</sup>**

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<sup>1</sup> This Article builds upon and revises an original work Professor Wolfley prepared for and submitted to the U.S. Environmental Protection Agency as a Report for the National Environmental Justice Advisory Council, on behalf of the Indigenous Peoples Subcommittee and its Work Group. NAT’L ENVTL. JUSTICE ADVISORY COUNCIL, MEANINGFUL INVOLVEMENT AND FAIR TREATMENT BY TRIBAL ENVIRONMENTAL REGULATORY PROGRAMS (2004), *available at* <http://www.epa.gov/environmentaljustice/resources/publications/nejac/ips-final-report.pdf>. The report is used extensively in this publication with permission. The report provided independent advice and recommendations on issues of public participation and due process, and how these principles could be pursued by federally authorized tribal environmental regulatory programs. The author would like to thank the Indigenous Peoples Subcommittee and its Work Group for their insight and valuable comments on the original work. Credit must also be given to Dean Suagee, a former Subcommittee member, for his thoughts and ideas in this area. In 1999, Dean Suagee coauthored an article discussing the various federal mandates for due process in tribal environmental programs in which they briefly looked at the tribal participation presented in this article and noted the “topic likely provides fertile ground for future analysis.” Dean B. Suagee & John P. Lowndes, *Due Process and Public Participation in Tribal Environmental Programs*, 13 TUL. ENVTL. L.J 1, 3 (1999).

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**ABSTRACT**

*Tribal governments are developing and implementing federally authorized and/or approved tribal environmental programs in the areas of water quality, air quality, and solid waste. As part of this federal delegation process there are federal requirements relating to due process and fair treatment of the public and stakeholders who may be affected by the tribal environmental laws and regulations. This article explores and examines public participation and due process within the tribal context and proposes tribal institutions are in the best position to articulate the tribal cultural and social norms of public participation and fair treatment. It is through this process that tribes can best preserve, strengthen and incorporate native concepts of equity and justice, and build communication and cooperation within their communities.*

**INTRODUCTION**

Over the past two decades Indian tribes throughout the United States have begun to develop and implement tribal environmental programs based on their inherent sovereignty and amendments in federal environmental laws. Tribal governments are directly

responsible and accountable for the health and welfare of their people and reservation residents and are in the best position to meet their people's needs and community interests. Accordingly, tribes are in the process of defining their tribal authority by planning and developing the basic frameworks and institutions for protecting air quality, preserving water quality, and managing contamination and hazardous and solid waste pollution caused by industrial society. Regulating polluting activities and other threats to lands, waters, and vital cultural resources is imperative for tribes to continue their way of life and maintain a homeland in which present and future generations of the tribe may flourish.

As tribes begin administering their environmental programs, including establishing boards, commissions, and drafting codes and regulations, they must weigh carefully the concepts of public participation, meaningful involvement, and due process in decision-making affecting Indian and non-Indian reservation citizens, industry, and state interests. As discussed in this article, many tribal programs have assumed these obligations and have promulgated rules, regulations, and policies; established standards; issued or denied permits for proposed activities with full public participation and due process; and taken compliance and enforcement actions against violators of environmental laws.

This Article proposes that there must be an understanding of, or reference to, the tribal values of due process within the tribal culture and context. And a tribal institution—through rulemaking or review by a tribal administrative agency, dispute resolution board, or tribal court—must be given the opportunity to articulate the cultural and social norms of due process.<sup>2</sup> It is through the tribal process that tribes can best preserve, strengthen, and incorporate native concepts of equity and justice, and build communication, cooperation, and support within the tribal community. This represents tribal sovereignty in action. Indeed, due process, if premised on the native

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<sup>2</sup> See Anna Fleder & Darren J. Ranco, *Tribal Environmental Sovereignty: Culturally Appropriate Protection or Paternalism?*, 19 J. NAT. RESOURCES & ENVTL. L. 35 (2004), which discusses the compromise tribes may make when the EPA delegates authority to the tribes, and urges the adoption by tribes of culturally appropriate due process and public participation systems.

way of life, may well introduce the “genius of tribally held values” to a majority society.<sup>3</sup>

This Article encourages tribes to adopt standards that best reflect their community and its interests rather than seeking a path of the U.S. Environmental Protection Agency (EPA) or state standards that may not adequately protect, or even may ignore, the tribal values of due process. In doing so, tribal governments can effectively and lawfully implement their own environmental programs for both Indians and non-Indians located on tribal lands. Indeed, the ability to fully realize and apply due process principles on reservation environmental matters requires more than tribes simply adopting European-style procedures or a “one size fits all” approach. In other words, the examination of due process and public participation within the tribal context should not be limited to a comparison of state and federal due process procedures.<sup>4</sup> Moreover, the federal and state environmental procedures for public participation assume a common culture and understanding by the general nontribal public about the roles and processes of tribal institutions. This assumption of common cultural grounding for meaningful involvement and fair treatment may not be found in contemporary Indian country because Indian tribes have long sought to retain their distinctive governments, cultures, and community norms and values, and will continue to do so in the future.<sup>5</sup>

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<sup>3</sup> See Columbia River Inter-Tribal Fish Comm’n, Annual Report 4–5 (1993). Statement of Ted Strong, Executive Director of the Columbia River Inter-Tribal Fish Commission:

The ravages of technological pollution and the masquerade of politics as law and science have led us to a threshold of uncertainty. Indian people must not depend upon the customary authorities to guarantee the protection and preservation of our culture. Ethnocentrism, an unofficial but very real U.S. policy, continues to destroy ethnicity in this country. To avoid our own cultural destruction, we will have to prove to the world the genius of tribally held values.

*Id.*

<sup>4</sup> Bruce Duthu suggests that:

[t]ribal political action that uses law to resolve, mediate, or enforce tribal cultural communitarian interest should be accorded the highest form of respect. Tribal values and needs are directly implicated here . . . The federal role, properly conceived, should be limited to securing the conditions under which the tribe may pursue its cultural communitarian objectives. External constraints should thus rarely, if ever, be applied to check this form of tribal political action.

N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353, 396 (1994).

<sup>5</sup> As noted by Darren Ranco, “the basic challenge for tribal governments is to maintain ‘separateness’ by holding on to a difference that is recognizable and acceptable to the dominant culture and its institutions as well as to tribal citizens within the minority

Part I begins by discussing the background of the federal environmental laws delegating authority to tribal governments. Part II discusses policy reasons supporting due process and meaningful involvement processes. The discussion points out that in establishing environmental institutions, policies, and laws, it is critical for tribes to consider the myriad reservation interests from tribal members, non-Indians, industry, and state and local entities. Part III presents established tribal definitions of due process based upon tribal customary law, constitutions, laws, and other sources of defining due process under the Indian Civil Rights Act and federal environmental laws. Part III also explores the ways in which the application of borrowed principles of due process are inappropriate and do not reflect the unique sovereignty interests of tribes.

Finally, Part IV discusses current tribal administrative procedures and processes and specific tribal examples ensuring public participation and due process. It discusses the broad spectrum of tribal processes implemented by tribal environmental programs providing meaningful involvement and fair treatment within the particular tribal context. These tribal procedures are suited to native interests and reservation landscapes because they look to foundational principles based on tribal traditions and community values. Part IV calls upon the EPA to give deference to tribal principles of due process as established by tribal environmental programs.

## I

### BACKGROUND OF TRIBAL ENVIRONMENTAL AUTHORITY

The major federal environmental laws were originally drafted to promote a federal-state partnership in environmental regulation. The federal government established basic standards and delegated authority to the states to implement and enforce those standards. As originally drafted, the major federal environmental laws did not expressly provide a role for Indian tribes in this regulatory scheme. Beginning in the mid-1980s, through amendments of the major federal environmental laws, Congress began to include Indian tribes in the regulatory partnership. “By 1990, several federal environmental laws included provisions authorizing the [EPA] to treat qualifying

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culture.” Darren J. Ranco, *Models of Tribal Environmental Regulation: In Pursuit of a Culturally Relevant Form of Tribal Sovereignty*, 56 *FED. LAWYER*, 46, 49, (2009).

Indian tribes in a manner similar to a state for purposes of delegation of program authority.”<sup>6</sup>

Tribal management of environmental programs assumes a relationship similar to that which exists between the EPA and the states for program administration within a state. In the case of a state not taking or qualifying for delegation, the EPA continues to administer the environmental program. The same situation exists with regard to Indian tribes. The EPA works with federally recognized tribal governments on a tribe-to-tribe basis as stated in the EPA’s 1984 Indian Policy and other policies.<sup>7</sup> These policies affirm the long-standing federal principles of Indian self-determination and the government-to-government relationship between tribes and the federal government and applies these principles to the area of environmental regulatory programming.<sup>8</sup>

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<sup>6</sup> WILLIAM C. SCOTT, ROCKY MOUNTAIN MINERAL LAW FOUND., ENVIRONMENTAL PERMITTING, TRIBAL TAS STATUS UNDER FEDERAL ENVIRONMENTAL LAWS AND IMPACTS ON MINERAL DEVELOPMENT 1 (2007), available at [http://www.modrall.com/files/1388\\_environmental\\_permitting\\_tribal\\_tas\\_status\\_under\\_federal\\_environmental\\_laws.pdf](http://www.modrall.com/files/1388_environmental_permitting_tribal_tas_status_under_federal_environmental_laws.pdf). See Clean Air Act, 42 U.S.C. §§ 7401–7671(q) (2012) (authorizing the Administrator to treat qualifying Indian tribes as a state); Clean Water Act, 33 U.S.C. §§ 1251–1387 (2012) (authorizing the Administrator to treat qualifying Indian tribes as a state); Safe Drinking Water Act, 42 U.S.C. §§ 300f–300j-26 (2012) (authorizing the Administrator to treat qualifying Indian tribes as states); Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136y(a-y) (2012) (authorizing the EPA to enter into cooperative agreements with Indian tribes to delegate to a tribe the authority to cooperate in enforcement of the subchapter’s provisions); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2012) (providing no delegation of authority. However, a number of provisions provide for notification of releases, access to information, the recovery of natural resource damages, and consultation on remedial actions). *But see* Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-92 3.3(b) (2012) (providing no treatment as state status for tribes—the only major federal environmental not to do so.).

<sup>7</sup> See EPA, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (1984), available at <http://www.epa.gov/tp/pdf/indian-policy-84.pdf> (recognizing tribal governments as appropriate nonfederal parties for “setting standards, making environmental policy decisions, and managing programs for reservations, consistent with agency standards and regulations.”). See also the EPA’s accompanying legal analysis to its 1991 Policy Statement, Regulatory Jurisdiction of Indian Tribes. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876 (Dec. 12, 1991) (to be codified at 40 C.F.R. pt. 131).

<sup>8</sup> Certainly, many tribes have chosen not to seek TAS from the EPA for a number of reasons—the infrastructure needed to implement the programs has not been established, the tribe may be able to address the contamination without delegation under a federal statute or choose to let the EPA address it, and some may not wish to have the EPA “dictate” what standards and norms are to be adopted by the tribe.

Congress amended several major environmental laws to authorize Indian tribes to regulate environmental matters on their reservation lands.<sup>9</sup> These amendments, which were enacted between 1986 and 1990, typically use the phrase “treatment-as-states” (TAS) or treatment in the same manner as a State.<sup>10</sup>

The Clean Air Act (CAA), Clean Water Act (CWA), and Safe Drinking Water Act (SDWA) employ similar criteria for determining tribal eligibility for TAS status. First, the tribe must have a “governing body carrying out substantial governmental duties and powers.”<sup>11</sup> Second, the “tribe is reasonably expected to be capable,” in the EPA Administrator’s judgment, “of carrying out the functions to be exercised in a manner consistent” with the terms and purposes of the Act and applicable regulations.<sup>12</sup> Third, the “functions to be exercised by the tribe must be performed within the tribe’s jurisdiction.”<sup>13</sup> A tribe that meets the requirements is then approved

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<sup>9</sup> See Fleder & Ranco, *supra* note 2, at 36. Importantly, the tribal authority to regulate on reservations arises from the inherent sovereign powers of Indian nations. Indian nations were self-governing nations for centuries before European nations arrived on this continent. In the early 1800’s, in a trilogy of foundational Indian law cases, Supreme Court Chief Justice John Marshall established that Indian tribes possessed powers of inherent sovereignty that arise from the tribes’ status as independent nations before and at the time of European arrival. *Johnson v. McIntosh*, 21 U.S. 543, 574 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831); *Worcester v. Georgia*, 31 U.S. 515, 561 (1832). As sovereign governments, Indian nations generally have inherent civil authority to maintain law and order by enacting laws governing conduct of persons, both Indian and nonmembers, within reservations, *see United States v. Wheeler*, 435 U.S. 313, 331 (1978), to enforce and administer justice by establishing bodies like tribal law enforcement and courts, *Williams v. Lee*, 358 U.S. 217, 220 (1959), and to regulate the conduct of nonmembers who enter consensual relationships with a tribe or its members and whose conduct threatens or directly affects a significant tribal interest, economic security, or the health and general welfare of the tribe, *Montana v. United States*, 450 U.S. 544, 565–66 (1981).

<sup>10</sup> See Fleder & Ranco, *supra* note 2, at 36.

<sup>11</sup> 33 U.S.C. § 1377(e)(1) (2012); 42 U.S.C. § 300-11(b)(1)(A) (2012); 42 U.S.C. § 7601(d)(2)(A) (2012).

<sup>12</sup> 33 U.S.C. § 1377(e)(3); 42 U.S.C. § 300j-11(b)(1)(C); 42 U.S.C. § 7601(d)(2)(C).

<sup>13</sup> Each of these statutes uses a different definition to describe the scope of tribal jurisdiction. For instance, the SDWA states “within the area of the Tribal Government’s jurisdiction . . .” 42 U.S.C. § 300j-11(b)(1)(B). The CWA provides the functions “pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation . . .” 33 U.S.C. § 1377(e)(2). Lastly, the CAA states, the functions “pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe’s jurisdiction . . .” 42 U.S.C. § 7601(d)(2)(B). In *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000), the



for TAS and becomes eligible to seek applicable grants and program approvals.

A tribe must submit a detailed application with supporting documents to the EPA showing it has met the established criteria. As part of the process, a state, other tribes, and federal land management agencies where the reservation is located may submit comments in support or opposition to the application (states often oppose based on jurisdictional grounds).<sup>14</sup> Since 1994, the EPA does not undertake a separate jurisdictional review to verify that a tribe meets the statutory jurisdictional requirement.<sup>15</sup> If the Administrator believes the tribe has met the necessary criteria it will approve the application. In 1998 the EPA issued regulations implementing the CAA TAS provisions and requires the EPA Administrator, within 30 days of receipt of a complete application, to “notify all appropriate governmental entities.”<sup>16</sup>

EPA’s decision concerning a TAS application is a final agency action that may be appealed under the Administrative Procedure Act.<sup>17</sup> EPA’s decision approving TAS delegation for tribes has been

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D.C. Circuit Court of Appeals upheld both the EPA’s interpretation that the CAA TAS constituted an express delegation of regulatory authority over all lands within reservation boundaries, including non-Indian owned fee land, and the EPA’s definition of the term “reservation.” The court stated that the “statute’s clear distinction between areas ‘within the exterior boundaries of the reservation’ and ‘other areas within the tribe’s jurisdiction’ carries with it the implication that Congress considered the areas within the exterior boundaries of a tribe’s reservation to be per se within the tribe’s jurisdiction.” *Arizona Pub. Serv. Co.* 211 F.3d at 1288.

<sup>14</sup> The original regulations implementing the SDWA and CWA TAS provisions each required the EPA to provide “appropriate governmental entities” notice and a thirty-day period to submit comments on a tribe’s jurisdictional assertions. *See* 40 C.F.R. § 142.78 (1989) (describing TAS procedures for public drinking water system program authority); 40 C.F.R. § 145.58(b) (1989) (describing TAS application for UIC program authority); 40 C.F.R. § 131.8(c) (2013) (describing TAS application for CWA water quality standards). In 1994, however, the EPA amended those regulations and deleted the notice and comment provisions for all TAS applications for program authority under the SDWA and under the CWA section 404 and NPDES programs. Indian Tribes; Eligibility for Program Authorization, 59 Fed. Reg. 64,399 (Dec. 14, 1994) (to be codified at 40 C.F.R. pts. 123, 124, 131, 142, 144, 145, 223, 501).

<sup>15</sup> Indian Tribes; Eligibility for Program Authorization, 59 Fed. Reg. at 64,340. As part of the rulemaking, “EPA may, in its discretion, seek additional information from the tribe or the commenting party, and may consult as it sees fit with other federal agencies prior to making a determination as to tribal jurisdictional authority, but is not required to do so.” *Id.*

<sup>16</sup> Tribal Self-Governance, 63 Fed. Reg. 7253 (Feb. 12, 1998) (to be codified at 40 C.F.R. pt. 49).

<sup>17</sup> 5 U.S.C. § 702 (2012).

challenged by some states and nonmember, non-Indian residents of the tribal community or reservation. The challengers maintain that the tribal governments do not possess civil jurisdiction to regulate their activities on the reservation, and argue that tribes do not provide public participation avenues and due process.<sup>18</sup> Thus far, the EPA and tribal governments have successfully overcome the challenges to their environmental regulatory authority.

Once a tribe is approved for TAS under a particular program, it must then obtain a separate approval for each new program in which it seeks to function. After an initial approval by EPA, however, a tribe generally need submit only that additional information unique to the additional program.<sup>19</sup> The amendments in the federal environmental laws have presented tribal governments with an opportunity and challenge to establish environmental programs that protect public health and the environment and provide for sustainable economic development. Many tribes have made substantial progress and are building effective environmental protection regulatory programs.<sup>20</sup>

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<sup>18</sup> See *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998) (delegating treatment as a state authority over waters within a reservation vests a tribe with jurisdiction to regulate the activities of non-Indians on non-Indian owned fee lands located within reservation boundaries); *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996) (holding that the Pueblo of Isleta could establish water quality standards that are more stringent than those imposed by the federal government); *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001) (upholding the EPA's grant of treatment of state status to Sokaogaon Chippewa Community under the Clean Water Act authorizing the tribe to establish water quality standards for lakes adjacent to or surrounded by the tribe's reservation); *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied sub. nom.* 532 U.S. 970 (2001) (upholding the EPA's interpretation that the Clean Air Act constituted an express delegation of regulatory authority over all lands within reservation boundaries, including non-Indian owned fee land). See generally *Montana v. United States*, 450 U.S. 544, 565-66 (1981) (explaining that tribes possess inherent authority over non-Indians on fee lands if the non-Indians have a consensual relationship with the tribe or the non-Indian activities have a effect on the political integrity, economic security, or health and welfare of the tribe).

<sup>19</sup> 40 C.F.R. § 131.8(b) (2013); 40 C.F.R. 233.61(f) (2013); 40 C.F.R. 142.76(f) (2013); 40 C.F.R. 145.56(f) (2013). See *Indian Tribes: Water Quality Planning and Management*, 54 Fed. Reg. 14,354, 14,356 (Apr. 11, 1989) (to be codified at 40 C.F.R. pts. 35, 130).

<sup>20</sup> Nationally, as of 2013, forty-nine Indian tribes have Water Quality Standards Programs approved by the EPA under the CWA and thirty-nine of those tribes have established water quality standards that the EPA has approved. *Indian Tribal Approvals*, EPA, <http://water.epa.gov/scitech/swguidance/standards/wqslibrary/approvttable.cfm> (last updated Jan. 15, 2014). Furthermore, as of 2010, thirty-two tribes have received eligibility determinations for treatment as a state (TAS) under the CAA, two tribes have been approved to implement Tribal Implementation Plans to address air quality issues on their reservations, and one tribe has received a delegation to implement an operating permit

In the environmental protection area, tribal governments have a strong interest in ensuring their reservation lands do not become a dumping ground for hazardous waste or threatened by pollution spillover from nearby off-reservation sources.<sup>21</sup> Development that brings a substantial and permanent non-Indian population onto a reservation and industrial development requiring regulation by the federal or state governments pose threats to tribal self-government. Moreover, tribal governments are directly responsible and accountable for the health and welfare of their people and are best able to determine their people's needs and the condition of their lands.<sup>22</sup>

Of course, each tribe must make the initial decision to seek a delegation of authority under the various federal environmental statutes. At a very basic level, the federal approval authority seems to conflict with tribal self-governance. But while the federal approval action can be characterized as an intrusion into tribal sovereignty, it can equally be interpreted as restraint or protection against a non-Indian business that is polluting or may seek to develop tribal lands.

Tribal programs must be as stringent and comprehensive as federal programs in order to gain EPA approval. Even after developing a tribal pollution program, tribal governments will experience a continued federal presence whenever regulated industries are located within their territory. As with state programs, the EPA will oversee tribal programs and undertake periodic reviews.<sup>23</sup> As part of the

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program for their reservation. *Tribal Air Basic Information*, EPA, <http://www.epa.gov/air/tribal/backgrnd.html> (last updated Aug. 1, 2013). In addition to receiving delegation of authority from the EPA, many tribes have received grants under the CAA, CWA, and SDWA to address general contamination issues that do not require a delegation of authority. For example, tribes are participating in air monitoring programs, evaluation of radon levels in homes, and inventorying emission sources on their reservations. *Id.*

<sup>21</sup> See, e.g., BNA, *Study Finds 1,200 Sites near Indian Lands, Recommends Immediate Action at Six Locations*, ENVTL. REP. at 1228 (Nov. 8, 1985). See also Judith Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 659 (1989). See also Douglas A. Brockman, *Congressional Delegation of Environmental Regulatory Jurisdiction: Native American Control of the Reservation Environment*, 41 WASH. U.J. URB. & CONTEMP. L. 133 (1992).

<sup>22</sup> See Statement of President Ronald W. Reagan on American Indian Policy (Jan. 24, 1983), available at <http://www.bia.gov/idc/groups/public/documents/text/idc-002004.pdf> (stating "[t]his administration believes that responsibilities and resources should be restored to the governments which are closest to the people served. This philosophy applies not only to state and local governments but also to federally recognized American Indian tribes.").

<sup>23</sup> See Clean Water Act, 33 U.S.C. § 1342(c)(3) (2012).

approval process and in conducting oversight, the EPA has been particularly concerned with the provision of due process by tribes and encourages tribes to adopt their public participation and meaningful involvement standards. The EPA's subcommittees on environmental justice have published various models and approaches to providing public participation and involvement.<sup>24</sup> Tribes should critically assess these standards to determine if they are appropriate within the tribal context and also evaluate what tribal cultural norms of due process are present in the tribal community.

## II POLICIES SUPPORTING MEANINGFUL INVOLVEMENT AND FAIR TREATMENT<sup>25</sup>

At the time a tribe assumes authorization to develop and implement a federal environmental program, the tribal environmental program should simultaneously seek ways to provide for due process and public participation. In addition to federal requirements for public participation and due process, there are sound policy reasons that support these principles. This Section presents three policy reasons supporting the establishment of participation and due process procedures including: (1) promoting good governance, (2) respecting the interests of community members, and (3) protecting and promoting tribal sovereignty. These are presented to articulate to tribal governments the importance of, and legal requirements for, providing meaningful involvement and fair treatment when developing and implementing federal environmental programs.

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<sup>24</sup> See generally OFFICE OF POLICY, ECON. & INNOVATION, EPA, EPA-233-B-03-002, PUBLIC INVOLVEMENT POLICY (May 2003), available at [www.epa.gov/publicinvolvement/pdf/policy2003.pdf](http://www.epa.gov/publicinvolvement/pdf/policy2003.pdf); OFFICE OF ENVTL. JUSTICE, EPA, EPA-300-k-001, THE MODEL PLAN FOR PUBLIC PARTICIPATION (Feb. 2000), available at <http://www.epa.gov/compliance/ej/resources/publications/nejac/model-public-part-plan.pdf>.

<sup>25</sup> Many tribal people struggle with the use of the phrase "fair treatment" given the history of abuse and federal policies implemented against Indian people and tribes. See Dean Saugee, *Dimensions of Environmental Justice in Indian Country and Native Alaska*, SECOND NAT'L PEOPLE OF COLOR ENVTL. LEADERSHIP SUMMIT-SUMMIT II, October 23, 2002 (discussing the difficulties in applying the EPA's environmental justice policies and principles to tribal governments), available at <http://www.ejrc.cau.edu/summit2/IndianCountry.pdf>.

### *A. Providing Good Governance*

Governance is the exercise of power or authority—political, economic, or administrative—to manage a country’s or tribe’s resources and affairs. It includes the mechanisms, processes, and institutions through which citizens and members articulate their interests, exercise their legal rights, meet their obligations and mediate their differences. Although there may not be a single and exhaustive definition of “good governance” since 2000, the Commission on Human Rights has repeatedly recognized that some key attributes of good governance include: (1) transparency, (2) responsibility, (3) accountability, (4) participation, and (5) responsiveness to the needs of the people.<sup>26</sup>

Additionally, the Centre for First Nations Governance in Canada states that strategic vision, meaningful information sharing, and participation in decision-making are critical principles for native people.<sup>27</sup> It urges that when tribal institutions are established these institutions must: (1) provide transparency and fairness to its citizens, (2) create results-based organizations which assist in moving people toward a strategic vision, (3) provide practices and beliefs consistent with the values of the people being represented, and (4) practice effective intergovernmental relations to avoid conflict.<sup>28</sup>

Governments have a broad set of responsibilities including protecting the health and safety of its citizens or members, improving the community’s quality of life through education, planning, property protection, and securing a viable economic future. With this wide range of responsibilities, governments are frequently tasked with balancing competing interests, particularly in the environmental area. Governments often mediate conflicts between those concerned with protecting the environment and those seeking to ensure long-term economic stability through development and use of natural resources, or between individual landowner interests and the interests of the greater community.

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<sup>26</sup> See Comm’n on Human Rights Res. 2000/64, Rep. of the Comm’n on Human Rights, 56th Sess., U.N. Doc. E/CN.4/2000/167 (Jan. 1, 2000). See U.N. Office of the High Comm’r for Human Rights, U.N. Doc. HR/Pub/07/4 (2007). The concept of good governance is currently within the domain of international human rights discussion but tribal governments may seek to apply these standards of fairness to their communities.

<sup>27</sup> NAT’L CENTRE FOR FIRST NATIONS GOVERNANCE, THE FIVE PILLARS OF EFFECTIVE GOVERNANCE 4–5 (2013), available at [http://fngovernance.org/publication\\_docs/Five\\_Pillars\\_EN\\_web.pdf](http://fngovernance.org/publication_docs/Five_Pillars_EN_web.pdf).

<sup>28</sup> *Id.* at 12.

To be credible, government officials must demonstrate transparency and accountability in their decision-making. This “[t]ransparency minimizes the opportunity for preferential treatment and the advancement of private interests over public good.”<sup>29</sup> Transparency means that information should be provided in easily understandable forms and media. It should be freely available and directly accessible to those who will be affected by governance laws, regulations, and policies and procedures, as well as the outcomes resulting therefrom. “Consolidating and then openly sharing processes and procedures assures citizens that decisions are made fairly.”<sup>30</sup> This includes any decisions made and any enforcement taken in compliance with established rules and regulations. A government is accountable to those who will be affected by its decisions or actions as well as the laws and regulations created.

The fundamental exercise of sovereignty by a government includes not only power but also the responsibility to establish a governmental infrastructure and institutions that provide for sound decision-making. These institutions create avenues for the public and local community to participate in policymaking and establish mechanisms for consultation with the community. It also requires the implementation of the laws and regulations in a manner that recognizes the interest of its citizenry and in the case of tribal governments, tribal members and nonmembers residing on the reservation. Good governance requires the set of laws governing the actions of individuals be maintained through an impartial and effective legal system. Good governance also informs the community, educates its citizens, builds public trust, and seeks to improve both the citizens’ and community’s quality of life. Responsive government also includes the capacity to comprehend and respond to the individual community member’s needs and priorities and to mediate conflicts with the community through an established process.

Providing opportunities for public participation can strengthen tribal government and sovereignty, improving the tribes’ relations with the rest of the community and with off-reservation communities. Participation by the local community and the public is a key cornerstone of good governance. Participation needs to be informed and organized. Support from the community, by recognizing the

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<sup>29</sup> *See id.*

<sup>30</sup> *Id.*

legitimacy of tribal institutions, increases a tribe's ability to exercise its sovereignty and authority and will likely result in less interference from external parties. In turn, a tribe is better able to protect and preserve its resources, land base and homeland.

Of course, it should be clear that good governance is an ideal that is difficult to achieve in its totality. But still, these ideals are viewed as legitimate and if governments seek to attain such goals their actions will be perceived as fair and just. Fairness, in turn, is equated with procedural regularity, adequate opportunity to be heard, and nondiscriminatory treatment.

### ***B. Respecting the Interests of Community Members***

Tribal environmental program decisions affect the entire social, cultural, and spiritual beliefs as well as the political fabric of a community because such decisions impact communal rights to live on, use, harvest, conserve, and transfer lands within the reservation, and the land, itself, as community. Accordingly, tribal members have a legitimate stake in the decisions affecting the environment and land base in which they hold a communal interest. Indeed, on many reservations individual tribal members own a majority of the land base as a result of the allotment era.<sup>31</sup> Moreover, communal ownership and kinship places certain duties and responsibilities on some tribal members with respect to the land resources, and all the living beings of the environment.<sup>32</sup>

Tribal leaders, in addressing the myriad of important issues pertaining to running a government, must also be cognizant of the traditional values of respect, reciprocity, humility, and connectedness as they relate to land and tribal members. Often, certain individuals, traditional and religious tribal leaders, advocate the critical importance of cultural integrities to preserve the beauty and stability of the community, to protect the health and welfare of the residents,

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<sup>31</sup> For most tribes, the allotment era, beginning in 1871, was the most devastating historical blow to tribalism and Indian life, impacting tribal cultures on a massive scale. This period of federal Indian policy converted tribally held communal lands to individual land ownership. The linchpin of this policy was the Dawes Act, also known as the General Allotment Act of 1887. Dawes Act of 1887, Ch. 119, 24 Stat. 388, 25 U.S.C. §§ 331–33 (repealed 2000). The results of allotment of 118 reservations included a loss of about two-thirds of Indian lands and tribal lands were reduced from 138 million in 1887 to 52 million by 1934. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 105–07, 127–38 (3d ed. 1982). See also Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

<sup>32</sup> Suagee & Lowndes, *supra* note 1, at 6 (“Individual tribal members have rights under tribal constitutions and customary law, as well as under the Indian Civil Rights Act.”).

and to plan for future generations. These voices, comments, and opinions serve an important role in the tribal institutional setting.

Tribal leadership often calls upon federal agencies to recognize tribal interests and to consult with them on federal decisions based upon the trust obligations owed to the tribes.<sup>33</sup> Similarly, tribal members expect and request their tribal leadership to recognize, as many tribal leaders do, the responsibilities they have to the membership, such as informing the membership of proposed tribal government actions and enabling the membership to voice an opinion in support or in opposition to governmental decision-making impacting their rights, natural resources, welfare, and daily lives. Moreover, promotion of local tribal participation is crucial to the credibility and sustainability of reforms in policy, laws and regulations, and the establishment of environmental programs. Community members do not always expect to get everything they want, but they do expect to be heard, taken seriously, and informed of tribal council decisions and processes. Indeed, the impetus for establishing tribal environmental programs is to clean up contamination, confront ecological degradation, improve the overall quality of life for tribal community members, and preserve the treaty-reserved homelands.

Moreover, tribal decision-making seeks to reflect the history, experience, culture, and wishes of the unique people and community it serves. Tribal members share culture, customs, traditions, kinships, and history with the tribal leaders that are elected or appointed as part of the established tribal government. Governance structures and issues differ from reservation to reservation; therefore, the solutions to governance matters must be tailored individually. Traditionally,

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<sup>33</sup> Tribes in the United States, unlike any other indigenous groups in the world, have significant standing because they have a trust relationship with the United States established by judicial decisions, treaties, agreements and federal laws that set forth certain commitments and guarantees for tribal homelands, peoples, and resources. The courts, Congress, and the executive branch have recognized the trust responsibility of the United States throughout the span of federal Indian law. *See* Cohen, *supra* note 31, at 220–28. *See also*, Mary C. Wood, *Indian Lands and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471 (1994). Each federal agency, including the EPA, is bound by this trust responsibility. The EPA's 1984 Indian Policy states: "[I]n keeping with the federal trust responsibility, [EPA] will assume that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments . . . . [T]he agency will endeavor to protect the environmental interests of Indian tribes when carrying out its responsibilities that affect the environment." *See* EPA, *supra* note 7.



tribal decisions were not taken lightly in Indian societies but were carefully deliberated, sometimes for days or weeks, by kinship-clan groups, elders, spiritual leaders, and tribal leaders. The groups varied from tribe to tribe. Building consensus and gaining community support were priorities before tribal leadership took action. Today, as part of this deliberative process, tribal environmental institutions should seek out comments and opinions of elders, culture committees, individuals impacted, and the community as a whole.

The federal policies of assimilation and allotment have been abandoned, but their legacy remains.<sup>34</sup> One feature of this legacy on many reservations is a large population of nonmember landowners, who are members of other tribes or are non-Indian.<sup>35</sup> Also, non-tribally-owned businesses and industry have existed on some reservations for many years prior to tribes establishing environmental programs.<sup>36</sup> Tribal governments face the challenge of how to accommodate the interests and rights of nonmembers, while still exercising tribal self-government.<sup>37</sup> It is however vitally important to involve the private sector and the general public in governance initiatives.

Surely, tribal governments are the ultimate decision makers on these governance issues and a flexible and informed approach is needed and made by the tribal leadership and community.

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<sup>34</sup> See NAT'L CENTER FOR FIRST NATIONS GOVERNANCE, *supra* note 27.

<sup>35</sup> More than 26 million acres of allotted lands were transferred from tribes to Indian allottees and then to non-Indians through purchase, fraud, mortgage, foreclosures and sales tax, which resulted in the contemporary presence of a substantial number of non-Indians living within the boundaries of many Indian reservations. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 20 (1987).

<sup>36</sup> Beginning in the 1940s, the Department of Interior encouraged non-Indian industry to locate on Indian reservations to exploit natural resources such as uranium, coal, silver, phosphate, and oil and gas. Many of those businesses remain on Indian reservations today or have left the reservation a barren landscape filled with contamination impacting the health of tribal people, water, soils, and air. See Winona LaDuke, *Environmental Work: An Indigenous Perspective*, 8 N.E. INDIAN Q. 16, 17 (1991). See also Wood, *supra* note 33, at 1480-95; Mary C. Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1 UTAH L. REV. 109, 166-67 (1995). The use of tribal lands and resources might have resulted in short-term monetary benefits to tribes, but it has also created profound long-term ecological and cultural consequences. Today, tribes have to confront severe environmental problems resulting from these actions.

<sup>37</sup> See Suagee & Lowndes, *supra* note 1, at 6 (discussing non-Indian interests, "people do not simply want to be reassured that everything is being taken care of, they want and expect opportunities to participate in the governmental decisions that affect them and to vote for at least some of the officials who make those decisions").

Additionally, any discussion of public participation and application of due process principles to tribal governments must be cognizant of the unique culture, traditions, and government structure of each tribe. There are over 565 federally recognized Indian tribes in the United States, and they are all different from one another.<sup>38</sup> In short, there is a tension between borrowing familiar principles of United States constitutional law and permitting Indian people the freedom and dignity to govern themselves according to their own vision. To this end, tribal principles and values need to be balanced carefully with general governance principles. Tribal Councilmember of the Pueblo of Laguna, Frank Cerno, shared the following:

[T]here is vision that all tribes share that is one of continuing on for generations to come, with the idea in mind that we have survived for all these years, under some very adverse circumstances, and that we will continue to survive, but only if we dream things that can definitely become reality.

. . . .

Vision is the ability to dream things that never were and bring them to reality; the ability to clearly set out goals and objectives that will produce the framework for accomplishing that vision; and the ability to bring the necessary resources to bear on the further development of that dream.

Vision is foresightedness; the ability to bring together diverse thoughts on diverse issues culminating in a plan of action, recognizing the past, building upon the present, for the purpose of securing the future.

It isn't that what we as tribal leaders, in tribal government, are all about, making sure that we can 'secure the future' for our younger generations to come.<sup>39</sup>

### ***C. Protecting and Promoting Tribal Sovereignty***

Tribal sovereign autonomy and self-government, a principled foundation for Indian law, has weathered over 150 years of U.S.

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<sup>38</sup> The Secretary of the Department of Interior maintains a list of federally recognized Indian tribes. Federally Recognized Indian Tribes List Act of 1994, 25 U.S.C. § 479a-1 (2012). The current list issued October 1, 2010, is located at <http://www.gpo.gov/fdsys/pkg/FR-2010-10-01/pdf/2010-24640.pdf>.

<sup>39</sup> Pueblo of Laguna Comments on Preliminary Draft on the Meaningful Involvement and Fair Treatment by Tribal Environmental Regulatory Programs 4, April 2, 2004. This quote is included in the final report. NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, *supra* note 1, at C-3.

jurisprudence,<sup>40</sup> and indeed, insulating tribes against the passage of time is a consistent theme in the law. Additionally, tribal separatism remains both a focal point for modern Indian policy<sup>41</sup> and for tribes themselves. A priority implicit in tribal separatism is maintaining a homeland in which both present and future generations of the tribe may live. A viable tribal land base is the linchpin to other attributes of sovereignty.<sup>42</sup> The tribal territory forms the geographical limits of the tribe's jurisdiction, supports a residing population, is the basis of the tribal economy, and provides an irreplaceable place for cultural traditions often premised on the sacredness of land.<sup>43</sup> Through control over Indian lands and resources, Indian nations maintain a degree of economic self-sufficiency necessary to Indian self-determination. Justice Black once observed the attachment that tribal people have to their established homelands as follows:

It may be hard for us to understand why these Indians cling so tenaciously to their lands and traditional tribal way of life. The record does not leave the impression that the lands of their reservation are the most fertile, the landscape the most beautiful or their homes the most splendid specimens of architecture. But this is their home—their ancestral home. There, they, their children, and their forebears were born. They, too, have their memories and their loves. Some things are worth more than money and the costs of a new enterprise.<sup>44</sup>

Land and natural-cultural resources will always occupy an important place in Indian cultures. Accordingly, tribes have a vital stake in resource and environmental management to preserve their homelands and their sovereignty.

Similarly, tribes should be aware of public perceptions about the role of tribal government in providing fundamental fairness to all residents of the reservation.<sup>45</sup> To many non-Indians, the reservation

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<sup>40</sup> WILKINSON, *supra* note 35, at 122.

<sup>41</sup> See Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450a–450m (2012); WILKINSON, *supra* note 35, at 122.

<sup>42</sup> Wood, *supra* note 36. (discussing the critical importance of a tribal land base and the attributes of tribal sovereignty in her article).

<sup>43</sup> *Id.* at 133, 150, 174, 192 (describing the characteristics of each attribute: the tribal land base, viable tribal economy, ability to govern, and cultural vitality).

<sup>44</sup> Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting) (footnote omitted).

<sup>45</sup> See Suagee & Lowndes, *supra* note 1, at 9 (stating, “[p]ublic perception of tribal governments are probably more important, pragmatically, than many tribal leaders and tribal attorneys would like to acknowledge . . . . Public perceptions of tribal governments affect what Congress does.”).

remains a foreign place and the governmental structure is a mystery. While territorial jurisdiction is a vital aspect of self-government, policy makers have noted, “[i]n most cases, non-Indians vigorously reject any type of regulation by the tribe.”<sup>46</sup> Some states voice concerns about law and order and the efficiency of government, and view tribal regulation as unduly lax in comparison to their own programs.<sup>47</sup> There are also questions about the ability of tribal governments to guarantee due process and fairness. Many of these criticisms are based upon a lack of knowledge and understanding of the structures of tribal governments, anecdotal evidence, unwillingness to recognize tribal institutions, and outright prejudice. Whether they are unfounded or not, the public and community perception of tribal institutions and their environmental programs should be recognized by tribal governments. Tribes should work to address these misconceptions.

Some of these same concerns were leveled at tribal courts in a 1978 report, developed by the National American Indian Court Judges Association that assessed the strengths and weaknesses of tribal courts.<sup>48</sup> The Judges Association describes serious problems with political interference, inadequate tribal laws, and a tendency toward summary judgment when defense counsel was absent. However, the Association also found many strengths in the tribal court system including quick access to a fair forum, the ability to bridge the gap between law and Indian culture, and a dedicated judiciary with increased respect from federal courts, agencies, and tribal

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<sup>46</sup> AMERICAN INDIAN POLICY REVIEW COMM’N, 94TH CONG., TASK FORCE SEVEN: RESERVATION AND RESOURCE DEVELOPMENT AND PROTECTION 25 (Comm. Print 1976). The political resistance of non-Indians to tribal authority has found reinforcement in several Supreme Court decisions issued over the past two decades, including *Oliphant v. Suquamish Indian Tribe*, wherein the Court held that tribes lack criminal jurisdiction over non-Indians. 435 U.S. 191, 210 (1978). And, in 1989, in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, the Court in a plurality opinion suggested that a tribe may lose aspects of its regulatory jurisdiction when there are communities of non-Indians on the reservation. 492 U.S. 408 (1989). See Craighton Goepppe, *Solutions for Uneasy Neighbors: Regulating the Reservation Environment After Brendale*, 65 WASH. L. REV. 417, 424–32 (1990).

<sup>47</sup> See Dean B. Suagee & Christopher T. Stearns, *Indigenous Self-Government, Environmental Protection, and the Consent of the Governed: A Tribal Environmental Review Process*, 5 COLO. J. INT’L ENVTL. L & POL’Y, 59, 83 (1994) (arguing that, “[i]f tribes do not establish effective environmental regulatory programs, some states will assert that there is a void and that state interests justify state regulatory jurisdiction”).

<sup>48</sup> NAT’L AM. INDIAN COURT JUDGES ASS’N, INDIAN COURTS AND THE FUTURE (David H. Getches & Orville N. Olney eds., 1978).

governments. The recommendations included professional training for judges, enhanced funding for facilities and equipment, and insulation of tribal courts from political pressures. Since 1978, Congress has provided substantial appropriations directly to tribal courts to address their infrastructure building needs, training for staff with federal courts, and law and order code drafting. This assistance has greatly improved the administration of justice throughout Indian country. Moreover, some commentators have found that tribal courts are “no less protective—and much more accessible—than federal courts have been in protecting civil rights on Indian reservations.”<sup>49</sup>

The improvement of tribal courts over the years is an example of the effective tribal institution building that has taken place on many reservations to address criticisms and to ensure that justice is accessible and affordable to all. Tribal institutions play a vital role in resolving disputes to which community norms already provide a solution. They also address new environmental conflicts that challenge community norms in a way that commands the acceptance and respect of the community and industry. Tribal environmental programs can address any criticisms by guaranteeing public participation and basic due process in their ordinances, rulemaking, and administrative procedures. Building expertise, resources, and community support can enhance the tribal goals. Tribal education for the public about the tribal process and institutions is also a necessary step. All of these measures enhance, preserve, and protect tribal sovereignty. They are necessary to maintain tribal integrity and self-determination.

Institutional support needs to come from both the Indian and non-Indian communities as well as the regulated industry. Non-Indian companies that pursue mineral or other natural resource development affecting the tribal environment are accustomed to deriving some regulatory certainty from written laws and regulations. The establishment of advisory committees or boards can also lend support to a fair and meaningful system. Dialogue among the tribes and industry can foster mutual understanding of the need to define and make known specific environmental concerns. Importantly, these forms of public involvement enable the tribes to obtain sound input

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<sup>49</sup> Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 490 (1998). See also Juliana C. Repp, *The Indian Civil Rights Act Tribal Constitutions and Tribal Courts*, in WASHINGTON LAW SCHOOL FOUNDATION, 16TH ANNUAL UNIVERSITY OF WASHINGTON INDIAN LAW SYMPOSIUM (2003).

and receive information that can assist the tribe in its thoughtful deliberations and decision-making. A structured, open process can instill a careful weighing of concerns and issues by tribal program officers, council members, and community members. This approach is similar to existing traditional tribal processes.

Some tribes have already instituted these types of measures to defray the disapproval of, and challenges to, tribal authority, and should allay the concerns of EPA and state interests. Tribes define for their community what due process means based upon their traditions and how due process should be implemented to meet the needs of their community, protect their lands and people, and ultimately protect their sovereignty.

### III DEFINING “MEANINGFUL INVOLVEMENT” AND “FAIR TREATMENT”

In defining the terms of “meaningful involvement” and “fair treatment” for tribes, some may be naturally inclined to borrow familiar principles from the areas of federal law, statutory law, or policies. For example, the EPA has defined “meaningful involvement” and “fair treatment” in their Environmental Justice Policy. In 1992, the EPA created the Office of Environmental Justice to integrate environmental justice into the Agency’s policies, programs, and activities. The EPA defines “environmental justice” as the “fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>50</sup> The EPA further defines the terms “meaningful involvement” and “fair treatment” as follows:

Meaningful involvement means that: (1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the public contribution can influence the regulatory agency’s decision; (3) the concerns of all participants involved will be considered in the decision-making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected.<sup>51</sup>

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<sup>50</sup> *Environmental Justice*, EPA, [www.epa.gov/environmentaljustice/basics/](http://www.epa.gov/environmentaljustice/basics/) (last updated May 24, 2012).

<sup>51</sup> *Id.*

Fair treatment means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.<sup>52</sup>

Direct application of due process principles developed by federal or state courts may be inappropriate for tribal communities because such standards or principles are designed to protect the interests of individuals in the majority society. Such standards or principles often do not reflect the unique communal interests of tribes. Identifying the best interests of tribal nations and their people presents a challenge for tribal governments. Ultimately, each tribe must define for itself the process best suited for their needs. Tribes may exhibit a combination of borrowed federal principles and traditional tribal principles. Various forms of public participation may be adopted or created by tribal governments are virtually endless.

Additionally, a critical point to remember is that environmental justice issues affecting Tribes must always be viewed against the backdrop of tribal sovereignty, the federal trust responsibility owed by the United States to Tribes, and the government-to-government relationship treaty rights.<sup>53</sup> Unlike other environmental justice communities, tribes are self-governing regulators and tribes define and ensure environmental justice within their own communities.<sup>54</sup>

Rather than adopting EPA's due process principles, tribes have often defined "due process" and "meaningful involvement" within their communities based upon traditional tribal principles. These principles are illustrated in tribal court decisions, constitutions, codes, and policies. Other sources, such as the Indian Civil Rights Act and judicial interpretations, International Human Rights documents, and federal environmental laws and regulations are explored. These tribal examples provide insight to the EPA as it works with tribes to provide for meaningful involvement and due process in tribal environmental

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<sup>52</sup> *Id.* See also *Environmental Justice Program and Civil Rights*, EPA, [www.epa.gov/region1/ej/](http://www.epa.gov/region1/ej/) (last updated Nov. 27, 2013).

<sup>53</sup> Jana L. Walker, Jennifer L. Bradley & Timothy L. Humphrey, Sr., *A Closer Look at Environmental Injustice In Indian Country*, 1 SEATTLE J. FOR SOC. JUST. 379, 381 (2002). See also JAMES M. GRIJALVA, *CLOSING THE CIRCLE: ENVIRONMENTAL JUSTICE IN INDIAN COUNTRY* (2008); CLIFFORD RECHTSCHAFFEN, EILEEN GAUNA & CATHERINE O'NEILL, *ENVIRONMENTAL JUSTICE: LAW, POLICY AND ENVIRONMENTAL PROTECTION*, 107-39, (2nd ed. 2009) (discussing the concept of environmental justice in Indian Country).

<sup>54</sup> Walker, Bradley & Humphrey, *supra* note 53, at 382.

regulatory programs. Also, tribes should consider them in developing their environmental programs.

### ***A. Tribal Definitions of Fairness and/or Due Process***

Fairness, or due process, is not new to tribal governments. Indeed, Chief Justice Sherman, Rosebud Sioux Tribal Court, stated in *Bloomberg v. Dreamer* (1991):

It should not be for the Congress of the United States or the Federal Court of Appeals to tell us when to give due process. Due process is a concept that has always been with us. *Although it is a legal phrase and has legal meaning, due process means nothing more than being fair and honest in our dealings with each other. We are allowed to disagree . . . . What must be remembered is that we must allow the other side the opportunity to be heard.*<sup>55</sup>

Similarly, the Navajo Supreme Court has noted that Navajo customary due process predates the Indian Civil Rights Act and the Navajo Bill of Rights. The Court described Navajo due process as a form of dispute resolution, where all interested parties get a chance to speak before a collective decision is made.<sup>56</sup> Tribal common law, as developed by the tribal judiciary, is a good source for defining due process. Today, tribal common law is the “law of preference” in the Navajo courts.<sup>57</sup> Furthermore, tribal judges are tribal leaders who must make day-to-day decisions for the good of the whole community, while simultaneously maintaining the integrity of the case for those individuals before him or her. Restorative justice, practiced by the Navajo Peacemaker Court and other similar tribal forums, advocates balance and harmony between the parties and for the overall good of the tribal community.

Many tribal constitutions include measures to provide for a good quality of life for the people and to protect the health, security, and general welfare of the tribes through mechanisms of fairness and due process. For example, the Constitution of the Spokane Tribe of Indians provides: “[t]his Constitution and the Tribal Government it

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<sup>55</sup> *Bloomberg v. Dreamer*, Oglala Sioux Court, Civ. App. 90-348 at 5–6 (1991) (emphasis added) (holding that due process requires a hearing before attempting to remove anyone from the Pine Ridge Reservation).

<sup>56</sup> *Begay v. Navajo Nation*, 6 Navajo Rptr. 20, 24–25 (Navajo 1988). See also Raymond D. Austin, NAVAJO COURTS AND NAVAJO COMMON LAW 112–13 (2009) (discussing *Begay v. Navajo Nation* and due process).

<sup>57</sup> *Navajo Nation v. Platero*, 6 Navajo Rptr. 422, 424 (Navajo 1991).



establishes shall not encroach upon or limit any person's right to enjoy freedom of worship, conscience, speech, press, assembly, and association, and other rights established by Federal Law."<sup>58</sup>

Likewise, Article X of the Rosebud Sioux Tribe Constitution, establishes a Bill of Rights: "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; not be denied equal protection of law."<sup>59</sup>

Some tribes have enacted civil rights ordinances, which similarly provide mandatory due process. The Confederated Tribes of the Colville Reservation have adopted such an ordinance. Chapter 1-5-2(h) Colville Tribal Civil Rights Act states that the Tribal government "shall not . . . [d]eny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."<sup>60</sup>

Other tribes have administrative procedure acts to establish notice, comment procedures, and due process.<sup>61</sup>

Fair dealings, honesty, integrity, and the opportunity to be heard or speak before a collective decision is made are all worthy and tribally-recognized components of due process. These universal understandings of fairness, through tribal customs and traditions, have been handed down by word of mouth or by example from one generation to another without any written instruction or mandate. These long-established practices are considered unwritten law and reflect a tribal community's practices that regulate social life.

Today, many tribal constitutions and codes provide for due process and public participation, as the examples above demonstrate. These provisions mandate that custom and tradition be utilized by tribal courts and other dispute resolution processes. Many tribal institutions apply and draw upon customary law to some extent. Applying customary law is not always simple because the customs are often

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<sup>58</sup> SPOKANE TRIBE CONST. art. IV, § 1.

<sup>59</sup> CONSTITUTION AND BYLAWS OF THE ROSEBUD SIOUX TRIBE art. X, §3, *available at* <http://www.narf.org/nill/Constitutions/rosebudconst/rstconst.htm>.

<sup>60</sup> Colville Tribal Civil Rights Act, ch. 1-5-2(h), Tribal Council Resolution 1988-76 (1988), *available at* <http://www.narf.org/nill/Codes/colvillecode/cc1.htm#15>.

<sup>61</sup> *E.g.*, Puyallup Tribal Administrative Procedures Act. Section 1.4 (1993), *available at* <http://www.codepublishing.com/WA/puyalluptribe/html/PuyallupTribe02/PuyallupTribe0208.html>. *See also* Colville Tribes Administrative Procedures Act (1985), *available at* [http://www.narf.org/nill/Codes/colvillecode/title\\_2\\_4.pdf](http://www.narf.org/nill/Codes/colvillecode/title_2_4.pdf); The Confederated Salish and Kootenai Tribes Administrative Procedures Ordinance (2000), *available at* <http://www.cskt.org/documents/laws-codified.pdf>.

contained in the oral traditions of tribes.<sup>62</sup> They are not written down or codified like state or federal standards. Instead, the sources of common law are the members of the tribe who retain the traditions of the tribe. However, this does not mean that tribal standards of due process should be disregarded simply because they are not written. Tribal definitions of due process can be adopted by tribal environmental programs and incorporated into their procedures by working with individual community representatives who can assist in the articulation of the due process within the local tribal context.

In recent years, tribes have begun to reexamine their current tribal justice practices and standards of justice and are revitalizing and re-traditionalizing their justice systems. They are exploring the old unwritten law of the past as a means to restore their tribal culture and tribal community health. The area of customary law, including methods of traditional dispute resolution, is receiving attention from legal experts and researchers. Customary law and the articulation of tribal standards, definitions and principles relating to fairness, thoughtful deliberation, honesty, the opportunity to speak before a collective decision is made, respect for each other, and harmony and balance within the community should be recognized and given due consideration by tribal environmental programs when they begin to consider and articulate public participation and fair treatment policies.

### ***B. Other Sources of Definitions of Due Process and Public Participation***

In addition to tribal legal definitions there are other sources of law defining due process and public involvement.

#### *1. Indian Civil Rights Act*

In 1968, Congress enacted the Indian Civil Rights Act of 1968 (ICRA).<sup>63</sup> Widely called the Indian Bill of Rights, this document was

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<sup>62</sup> See generally Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL'Y 17, 22 (1997) (discussing the development of tribal justice systems based on tribal custom concepts, and offering practical considerations for applying such concepts).

<sup>63</sup> 25 U.S.C. §§ 1301–1303 (2012). ICRA was enacted over the objections of many tribal governments, some of which believed that economic burdens of compliance would be too great and others, especially the Pueblos of New Mexico, felt that their own cultural traditions were superior to “white man’s justice.” Witnesses also testified at the Senate hearing on ICRA that tribal traditions of fairness and justice made ICRA an unnecessary intrusion on tribal sovereignty.

used by Congress to impose certain limitations on tribes closely resembling provisions of the U.S. Constitution's First, Fourth, Fifth, Sixth, and Eighth Amendments and the equal protection and due process provisions of the Fourteenth Amendment.<sup>64</sup> Section 1302(a) of ICRA provides that "no tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."<sup>65</sup> The Act applies to tribal action against all individuals, both tribal members and nonmembers.<sup>66</sup>

Some tribes have incorporated ICRA into their constitutions or tribal codes, while others include the Bill of Rights provisions in their constitutions. For example, the Jamestown S'Klallam Tribe of Indians in Washington adopted the ICRA provisions verbatim into their tribal constitution.<sup>67</sup> Another Washington tribe, the Skokomish Indian Tribe, paraphrased the ICRA provisions in their constitution and added that the Tribe, "shall provide to all persons within its jurisdiction the rights guaranteed by the Indian Civil Rights Act of 1968."<sup>68</sup>

The Constitution of the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota confers on its Tribal court the authority "to enforce the provisions of the Indian Civil Rights Act."<sup>69</sup> Additionally, the Constitution of the Confederated Tribes of the Grand Ronde in Oregon permits its Tribal courts the authority to "review and overturn Tribal legislation and executive actions for violation of this Constitution or the Indian Civil Rights Act."<sup>70</sup>

Under ICRA, tribal courts or forums review and interpret tribal law and actions to determine if there is a violation of certain individual rights, such as due process.<sup>71</sup> In 1978, in the landmark case of *Santa Clara Pueblo v. Martinez*, the Supreme Court held that Section 1303 of ICRA is the exclusive federal remedy (*habeas corpus*) under the

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<sup>64</sup> U.S. COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT 5 (1991).

<sup>65</sup> 25 U.S.C. § 1302(a) (2012).

<sup>66</sup> U.S. COMM'N ON CIVIL RIGHTS, *supra* note 64.

<sup>67</sup> CONST. OF JAMESTOWN S'KLALLAM TRIBE OF INDIANS, art. IX, *available at* [http://www.jamestowntribe.org/govdocs/10\\_6\\_12\\_Tribal\\_Constitution.pdf](http://www.jamestowntribe.org/govdocs/10_6_12_Tribal_Constitution.pdf).

<sup>68</sup> CONST. OF THE SKOKOMISH INDIAN TRIBE art. IX (amended 1980), *available at* <http://www.skokomish.org/SkokConstitution&Codes/Constitution/SkokConst.htm>.

<sup>69</sup> *See Boreaux v. Wilkinson*, 21 Indian L. Rptr. 6131, 6133 (Ft. Bert. Tr. Ct. 1993).

<sup>70</sup> *See McCallister v. Spirit Mountain Gaming, Inc.*, 33 Indian L. Rptr. 6057, 6061 (Confed. Tribes of Grand Ronde Comm. Tr. Ct. 2005).

<sup>71</sup> 25 U.S.C. § 1302.

statute.<sup>72</sup> This means that virtually all ICRA litigation proceeds through the tribal judicial systems and federal courts rarely hear Indian civil rights cases.<sup>73</sup>

Accordingly, tribal courts have had the opportunity to define due process under ICRA involving a variety of issues. Tribal courts have looked to federal precedent and tribal traditions to discern the essential fairness implied by the requirement of due process. Many tribal courts have held that tribes have greater flexibility in applying principles of due process as found in ICRA than state and federal courts have in applying principles of due process under their respective constitutions.<sup>74</sup> Moreover, the tribal courts routinely rule that the meaning and application of ICRA is not determined by European-style constitutional interpretations.<sup>75</sup> Importantly, the rights of individuals often are balanced against the communal good of the tribe.

Some federal courts, when faced with claims of due process violations by tribes, have found that a ten-day notice and opportunity to speak before a tribal council met the requirements of due process.<sup>76</sup> In addition, the courts have found that the failure of a tribal chairman to present his side of the case in the traditional tribal forum—a tribal council—did not constitute a violation of due process.<sup>77</sup> However, a federal court found a violation of due process when a tribal member was not given a meaningful opportunity to be heard<sup>78</sup> and when a

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<sup>72</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

<sup>73</sup> *Id.* At issue in *Santa Clara Pueblo* was a tribal ordinance enacted by the Santa Clara Pueblo in 1939 barring tribal membership to children of female tribal members married to nonmembers. *Id.* at 49. The Supreme Court ruled that ICRA only provided relief by writ of habeas corpus and did not waive tribal sovereign immunity. *Id.* at 59.

<sup>74</sup> See, e.g., *In re The Sacred Arrows*, 3 Okla Trib. 332, 337–38 (D. Ct. Cheyenne-Arapaho Tribes 1990). “Anglo-American concepts of fairness and civil rights are sometimes inappropriate, in their raw form, to Indian communities. These concepts can be applied only in conjunction with the unique cultural, social, and political attributes of the Indian heritage.” *Id.*

<sup>75</sup> See *Colville Confederated Tribes v. St. Peter*, 20 Indian L. Rep. 6108, 6110 (Colv. Ct. App. 1993). “We . . . apply due process principles under ICRA with flexibility and in a manner contextually adapted by the Colville Confederated Tribes.” *Id.*

<sup>76</sup> *Berry v. Arapahoe and Shoshone Tribes*, 420 F. Supp. 934, 943–44 (D. Wyo. 1976).

<sup>77</sup> *Stands Over Bull v. Bureau of Indian Affairs*, 442 F. Supp. 360, 376 (D. Mont. 1977).

<sup>78</sup> *Johnson v. Lower Elwha Tribal Cmty.*, 484 F.2d 200, 203 (9th Cir. 1973).

tribe imposed permanent orders of banishment without a hearing or prior notice.<sup>79</sup>

It is clear from a review of case law that tribal courts are making a good faith interpretation of ICRA.<sup>80</sup> Mark Rosen, in a broad study of tribal court decisions concerning ICRA, found that tribal court decisions showed “responsible and good faith interpretation of ICRA,” and that none of the selected cases involved “patently outrageous reasoning or outcomes.”<sup>81</sup> Within his samples of tribal court decisions taken from the Indian Law Reporter between 1986 and 1998, Rosen concluded, “there is no indication that courts have succumbed to the temptation to favor the insider at the expense of outsiders.”<sup>82</sup> The substantive holdings of tribal court cases protect individual rights and contemplate unique tribal customs and traditions. Indeed, promoting tribal sovereignty begins with tribal courts applying tribal law to settle tribal member and tribal government disputes. This includes disputes involving nonmembers who are building contractors, mining companies, farmers, irrigators, and store owners.

Recognition of these principles of due process under ICRA provides a foundation for such application in the environmental regulatory setting and should be used as a guide for implementing tribal environmental acts and regulations. Common due process principles, such as a notice of a hearing, a forum or body to hear complaints or permits, the opportunity to be heard, and the right to an appeal of a decision have been upheld by the tribal courts and federal courts in interpreting ICRA. These basic principles should also apply to tribal environmental programs when they implement their rules and regulations.

David Getches long supported the development of tribal jurisprudence on due process and equal protection based upon tribal

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<sup>79</sup> Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2d Cir. 1996).

<sup>80</sup> Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 *FORDHAM L. REV.* 479, 573–78 (2000).

<sup>81</sup> *Id.* at 578.

<sup>82</sup> *Id.*

traditions and customs.<sup>83</sup> A recent 2008 study, however, found ninety-five percent of tribal courts rely on the Indian Civil Rights Act.<sup>84</sup>

In addition to the basic principles of due process established in the ICRA context, in the international law arena, tribes may look to concepts and principles relating to human rights.<sup>85</sup>

## 2. *Federal Environmental Laws*

### a. *Public Participation Under the Clean Water Act, the Safe Drinking Water Act, and the Clean Air Act*

Tribes who have received federal authority, under the TAS provisions of the various federal environmental acts, should be keenly aware of the federal requirements for public participation set forth in the federal regulations. Part 25 of Title 40 of the Code of Federal Regulations governs public participation in programs under three of the primary laws administered by the EPA: the Clean Water Act

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<sup>83</sup> NAT'L AM. INDIAN COURT JUDGES ASS'N, *supra* note 48.

<sup>84</sup> Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 COLO. L. REV. 59, 75 (2013), available at [lawreview.colorado.edu/wp-content/uploads/2013/11/9.-Fletcher\\_1713\\_s.pdf](http://lawreview.colorado.edu/wp-content/uploads/2013/11/9.-Fletcher_1713_s.pdf).

<sup>85</sup> The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Draft American Declaration on the Rights of Indigenous Peoples are important international sources of human rights law for American Indians, Alaska Natives, Native Hawaiians, and tribal governments. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200A(XXI) (Dec. 16, 1966); *Draft American Declaration on the Rights of Indigenous Peoples*, ORG. OF AM. STATES, <http://www.oas.org/en/iachr/indigenous/activities/declaration.asp> (last visited Feb. 4, 2014). The first two documents transform the value embodied in the Universal Declaration of Human Rights into binding legal norms or standards. Three articles (14, 25, 26) of the International Covenant on Civil and Political Rights are relevant to the issue of due process and the provision of basic human rights to all people within the jurisdiction of a tribe. Article 14 proclaims that “[a]ll persons shall be equal before the courts and tribunals” and that any persons rights and obligations are to be determined in a “suit at law . . . shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” Article 25 provides that “[e]very citizen shall have the right and the opportunity . . . without unreasonable restrictions . . . to take part in the conduct of public affairs, directly or through freely chosen representatives.” Certainly, nonmembers are not “citizens” of the tribe, but this provision aptly applies to tribal members who believe that their rights have been restricted or that they are not able to access or participate in tribal government hearings and meetings. Finally, Article 26, like ICRA, provides: “All [tribal members or nonmembers] are equal before the law and are entitled without any discrimination to the equal protection of the law.” Suagee and Lowndes discuss the international human rights more fully in their article. *See* Suagee & Lowndes, *supra* note 1, at 12–14.

(CWA), the Safe Drinking Water Act (SDWA), and the Resource Conservation and Recovery Act (RCRA).<sup>86</sup> Although Part 25 does not expressly apply to tribes, other EPA regulations do make Part 25 applicable. For example, regulations under the CWA for water quality standards state that Part 131 regulations are applicable to states and then to tribes when they seek treatment as a state and seek to adopt and review water quality standards.<sup>87</sup> The Clean Water Act authorizes the EPA to treat tribes as states for a number of purposes under the federal statute, including § 303 for water quality standards, § 319 to control non-point sources of water pollution, § 401 for certification of compliance with water quality standards, § 402 for NPDES permits, and § 404 for dredging or filling wetlands. This means that tribal environmental programs must comply with these federal public participation regulations for rulemaking.

Part 25 regulations establish a host of requirements for sharing information, public notices, and consultation.<sup>88</sup> These requirements include: (1) a proactive program to provide information to the public, including making documents and summaries of complex documents available, establishing central and convenient collections points for documents, and maintaining an interested persons list for any activity covered by Part 25; (2) providing ample notice to all interested persons and affected parties, and making reports, documents and data available at least 30 days before a hearing; (3) the establishment of advisory groups, task forces, and informal communication; and (4) preparation of responsiveness summaries by agencies to public comments.<sup>89</sup> If a tribe has enacted an administrative procedure act, or includes public participation requirements in their environmental act, the requirements of the tribal law should prevail if they conflict with the Part 25 requirements.

A second section of the Code of Federal Regulations that applies to tribes is Part 124. The procedures in Part 124 address permits issued by tribes who choose to be treated like states, under RCRA Subtitle C, the SDWA underground injection control program, the CAA prevention of significant deterioration program and the NPDES program.<sup>90</sup> Part 124 sets forth program requirements for draft permits,

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<sup>86</sup> 40 C.F.R. § 25.1 (2013).

<sup>87</sup> 40 C.F.R. § 131.20(b) (2013).

<sup>88</sup> 40 C.F.R. § 25.4 (2013).

<sup>89</sup> *Id.*

<sup>90</sup> *See* 40 C.F.R. § 124.1 (2013).

public notices, requests for hearings, final decisions and administrative appeals from decisions or orders, and judicial review of agency actions.<sup>91</sup>

In addition, under the Clean Air Act Tribal Implementation Program (TIP) guideline, there are requirements that are consistent with 40 C.F.R. Part 51.102(d), that cover notice to be given to the public for the proposed plan, time, date, and place of the hearings, and making the proposed plan available for public inspection on and off the reservation and to ensure advertisement in a general circulation newspaper. Tribes have complied with this section in informing the public on their TIPs. For example, the St. Regis Mohawk Tribe in New York publishes the notice in their local Tribal newspaper and circulates the information widely in the area. The Gila River Indian Community in Arizona publishes in a Phoenix newspaper and on the Reservation.<sup>92</sup>

*b. The National Environmental Policy Act*

A significant federal law that establishes a comprehensive environment review of federal actions is the National Environmental Policy Act (NEPA).<sup>93</sup> Under NEPA, a federal agency may be required to prepare an environmental assessment or environmental impact statement prior to taking any “major Federal actions significantly affecting the quality of the human environment.”<sup>94</sup> NEPA requires federal agencies to prepare documents analyzing the impacts and giving the public the right to participate in the process.<sup>95</sup> In short, NEPA makes the federal decision-making process a transparent one. Within the past ten years, several tribes have initiated the adoption of NEPA-like review processes to consider the impacts of projects on public health and safety, natural and cultural resources, socioeconomic conditions, and the environment.<sup>96</sup> Some tribes have

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<sup>91</sup> See 40 C.F.R. § 124.6(b)-(c), (e) (2013); 40 C.F.R. § 124.10(a)-(b) (2013); 40 C.F.R. § 124.11 (2013). See 40 C.F.R. § 124.19 (2013).

<sup>92</sup> Correspondence between author and EPA Region 10 representative.

<sup>93</sup> 42 U.S.C. § 4321 (2012).

<sup>94</sup> 42 U.S.C. § 4332(C) (2012). These statutory requirements are implemented under regulations issued by the President’s Council on Environmental Quality (CEQ). 40 C.F.R. § 1500.1 (2013).

<sup>95</sup> *Id.*

<sup>96</sup> The Tulalip Tribes in Washington and the Rosebud Sioux Tribe of South Dakota have established such review processes.



established laws in order to have a uniform system to review permits and tribal on-reservation activities. These laws are referred to as “TEPAs” or Tribal Environmental Policy Acts.<sup>97</sup>

As part of the review process, the TEPA provides for the reservation population, Indian and non-Indian, to participate in the tribal decision-making. There are established procedures that permit public participation and due process as the tribal government moves through its decision-making process to consider a development project by the tribe itself or a private entity. For example, a tribe may establish a TEPA that has a permit review process that gives individuals the opportunity to express their concerns to the permitting agency on a housing or commercial development, and the applicant the opportunity to respond. Commonly, a TEPA has a process for administrative appeals and judicial review similar to the procedures discussed in Section IV of this Article under the administrative law procedures section. In addition, a tribe may craft a TEPA to include rulemaking under its coverage to enable the public to comment on and participate in the drafting of rules or regulations relating to the tribal clean air, water quality, or solid waste laws.

*c. EPA Public Involvement Policy*

In May 2003, the EPA released its Public Involvement Policy (Policy) to “provide for meaningful public involvement in all its programs, and consistently look for new ways to enhance public input.”<sup>98</sup> The term “public involvement” is used in the Policy to “encompass the full range of actions and processes that EPA uses to engage the public in the Agency’s work, and means that the Agency considers public concerns, values, and preferences when making decisions.”<sup>99</sup> The Policy’s purposes are to:

Improve the acceptability, efficiency, feasibility and durability of the Agency’s decisions; [r]eaffirm EPA’s commitment to early and meaningful public involvement; [e]nsure that EPA makes its decisions considering the interests and concerns of affected people and entities; [p]romote the use of a wide variety of techniques to

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<sup>97</sup> See Dean B. Suagee, *Tribal Environmental Policy Acts And The Landscape Of Environmental Law*, 23 NAT. RESOURCES & ENV’T 12 (2009) (discussing TEPAs comprehensively).

<sup>98</sup> EPA OFFICE OF POLICY, ECON. & INNOVATION, EPA233-B-03-002, PUBLIC INVOLVEMENT POLICY OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY 1 (2003). The 2003 policy updated the EPA’s 1981 Public Participation Policy, which had evolved from the EPA’s 1979 regulations that included requirements for public participation.

<sup>99</sup> *Id.* at 1.

create early and, when appropriate, continuing opportunities for public involvement in Agency decisions; [and establish] clear and effective guidance for conducting public involvement activities.<sup>100</sup>

The EPA identified seven basic steps to ensure that it conducts effective meaningful public involvement:

(1) Plan and budget for public involvement activities; (2) identify the interested and affected public; (3) consider providing technical or financial assistance to the public to facilitate involvement; (4) provide information and outreach to the public; (5) conduct public consultation and involvement activities; (6) review and use input and provide feedback to the public; and (7) evaluate public involvement activities.<sup>101</sup>

The Policy includes a comprehensive guidance to help the EPA staff and managers in implementing the seven steps.<sup>102</sup>

The Policy offers comprehensive creative methods, outreach efforts, and alternative courses of action that can be utilized to inform the public about a wide variety of agency-proposed actions. Tribal environmental managers may wish to review the Policy in order to gain insight and ideas that may be useful in their public participation efforts. Additionally, such measures enhance the deliberative process and promote a careful, critical examination of government decision-making.

#### **IV ESTABLISHED TRIBAL PROCESSES PROVIDING PUBLIC PARTICIPATION AND DUE PROCESS**

This Article has discussed various definitions of due process and meaningful involvement and provided examples of tribes who have defined the phrases within the tribal context. This part further illustrates various processes, procedures, and principles tribes have established and utilized to ensure that meaningful public participation and due process are afforded to tribal members and other reservation residents. Accordingly, beyond the federal standards additional safeguards can be found in tribal administrative law codes, environmental statutes, policies, memoranda of agreements, and community rules and regulations.

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<sup>100</sup> *Id.* at 1–2.

<sup>101</sup> *Id.* at 5–6.

<sup>102</sup> *Id.* at 7.

This information can assist tribes in their efforts to develop or enhance their own processes since tribes can benefit from the successes of existing tribal programs. Section A explores the use of administrative law principles for addressing due process and meaningful involvement by tribal environmental programs. Section B discusses other tribal measures for ensuring public participation. Section C includes additional examples of how tribes are providing for meaningful public involvement and fair treatment in the area of environmental protection. Finally, Section D discusses the EPA's role in providing educational programs and financial and technical support to aid tribes in developing and/or implementing meaningful public involvement and due process approaches in tribal environmental programs. It also urges the EPA to support and give deference to tribal due process principles.

The myriad of creative processes developed and utilized by tribes based on tribal traditions and customs, and discussed below, provide the necessary procedural due process as established by the United States Supreme Court. “[D]ue process,’ unlike some legal rules, is not a technical conception with fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands.”<sup>103</sup> To determine what process is constitutionally due, courts have generally balanced three distinct factors found in *Mathews v. Eldridge*:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute requirements would entail.<sup>104</sup>

Certainly, tribes must be mindful of this federal due process standard set forth in *Mathews* in drafting laws and regulations, but it does not mean tribes need to adopt verbatim the federal environmental standards, guidance, or rules detailing the notice and procedural requirements of opportunities to be heard. Indeed, in administrative adjudications the procedural safeguards essential for

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<sup>103</sup> *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (citations omitted).

<sup>104</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (stating that procedural due process imposes constraints on governmental decisions which deprive individuals of “liberty” or “property” interests within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendment).

fairness in administrative hearings are: “(1) notice of the proposed action and the grounds asserted for it, (2) an opportunity to present reasons why the action should not be taken, (3) an unbiased tribunal, and (4) a statement of reasons.”<sup>105</sup>

Davis and Pierce propose that a reviewing court of an administrative body’s decision should “acquiesce in any decisionmaking procedure chosen by a legislature or by any agency as long as that procedure seems to represent a reasonable, good faith application of the *Matthews* cost-benefit test.”<sup>106</sup> The tribes that have created their own approaches by legislative acts of a tribal council or regulations by agency promulgation and have adequately provided for the guarantee of due process under *Matthews*.

### ***A. Administrative Law Principles in Environmental Programs***

To address the myriad of environmental issues and implementation of complex and highly specialized laws, tribal governments have established boards, departments, commissions and other administrative entities to oversee these programs. Some tribal environmental programs, as departments or agencies of a tribe, have chosen to conform their decision-making and actions under administrative procedures known as administrative law.<sup>107</sup> Certainly, each tribe, in exercising their sovereignty, will determine what public participation processes and notions of due process are applicable to its community. Tribal administrative procedure laws, however, provide a guide for tribal administrative agencies to address permitting, enforcement, and general rulemaking, which affect development and regulation of natural resources on Indian reservations. Administrative procedures are an accepted and established process that provides fundamental fairness, meaningful public participation, and greater certainty and predictability for the implementation of tribal environmental laws and regulatory programs.<sup>108</sup>

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<sup>105</sup> KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* vol. II at 48 (3rd ed. 1994).

<sup>106</sup> *Id.* at 67.

<sup>107</sup> In 1996, Michael O’Connell wrote a comprehensive paper on administrative law and its application to tribal governments. The paper and its administrative body examples have been relied upon and utilized in this section of the article. See Michael P. O’Connell, *Tribal Administrative Law*, in AM. BAR ASS’N, 8TH ANNUAL CONFERENCE ON ENVIRONMENT AND DEVELOPMENT IN INDIAN COUNTRY (1996).

<sup>108</sup> *Id.*

Administrative law is described as follows:

Administrative law is that branch of the law that controls the administrative operations of government. Its primary purpose is to keep governmental powers within their legal bounds and to protect individuals against the abuse of such powers. It sets forth the powers that may be exercised by administrative agencies, lays down the principles governing the exercise of those powers, and provides legal remedies to those aggrieved by administrative action.<sup>109</sup>

Broadly speaking, administrative law covers three sets of issues: (1) delegation of powers by the legislative body to an administrative agency, (2) procedural and substantive limitations on the execution of those powers, and (3) procedural requirements and standards for administrative appeals and judicial review of administrative action. For purposes of this document, the two primary types of processes, “rulemaking” and “adjudication,” may impact the interests and concerns of individuals, tribal members, or nonmembers. These two processes have been adopted in administrative procedure acts by some tribal governments and are explored as approaches to ensure public participation and due process.

### *1. Public Participation in Rulemaking*

Rulemaking by a tribe is a legislative process that clarifies ambiguities or fills in gaps in the environmental ordinance or law that was passed by the tribal governing body. Usually, the governing body (typically the tribal council) has delegated the authority to draft and promulgate rules or regulations to the environmental program and then the program undertakes this task to provide more details and specifics in the rules. For example, a tribal council may enact an air quality protection act and delegate authority to its air program to draft specific standards. The act itself is usually broader or more general in nature. For this reason, the air program staff will undertake rulemaking by drafting detailed rules or regulations defining air emission rates, setting emission limits, emission inventories, control measures, and technologies for various sources, compliance schedules, as well as others.

“Generally, an environmental program or agency is accountable to the legislative body or tribal council, but not directly to the community or public.”<sup>110</sup> In order to provide public participation and

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<sup>109</sup> BERNARD SCHWARTZ, ADMINISTRATIVE LAW 1 (3d ed. 1991).

<sup>110</sup> NAT’L ENVTL. JUSTICE ADVISORY COUNCIL, *supra* note 1, at 18.

allow federal agencies to be more accountable to the public, Congress has enacted the Administrative Procedures Act (APA).<sup>111</sup> Likewise, some tribes have enacted APAs to govern rulemaking for the tribal departments in general<sup>112</sup> and specifically to environmental programs.<sup>113</sup> The tribal APAs establish procedural and substantive limitations on the exercise of tribal administrative authority, and typically establish notice, publication, and public comment procedures in connection with the adoption of rules or regulations (rulemaking). The acts also provide for public inspection of department decisions, orders, and opinions. For example, the Puyallup Tribal Administrative Procedure Act, Section 1.4, states:

Prior to proposing that the Tribal Council adopt, amend or repeal any rule, the sponsoring Department proposing that the Tribal Council take such action shall:

Afford all interested persons reasonable opportunity to submit data, views, or arguments in writing. Opportunity for public hearing may be granted if requested in a timely manner and determined by the sponsoring department to be in the public interest. It is the intent of this Act that reasonable and timely requests for public hearings be favorably acted upon by the sponsoring department. Following the close of the public comment period, and prior to making its final recommendation to the Tribal Council, the department shall fully consider all oral comments and written submissions respecting the proposed action.<sup>114</sup>

Public participation is recognized and accommodated by many tribes as demonstrated under the Puyallup APA and other similarly enacted tribal administrative procedure acts. The key procedures

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<sup>111</sup> 5 U.S.C. §§ 550–596 (2013).

<sup>112</sup> See Puyallup Tribal Admin. Procedure Act of 1993; Colville Tribal Admin. Procedure Act of 1983 (*amended* Sept. 6, 2001); Confederated Salish and Kootenai Tribes Administrative Procedures Ordinance (Ordinance No. 86A (1990), *amended* June 22, 1993). See also Three Affiliated Tribes Administrative Procedures Act of 2004; Crow Tribe Administrative Procedures Act, (Bill No. CLB02-12 (2012)).

<sup>113</sup> See the Shoshone-Bannock Tribes Administrative Procedure Act (1989) that applies to Tribal agencies, which administer or enforce the Tribes' Pesticide Control Act, the Air Quality Control Act, and the Sanitary Sewer Ordinance. The Navajo Nation has promulgated the Uniform Regulations for Permit Review, Administrative Enforcement Orders, Hearings, and Rulemakings Under Navajo Nation Environmental Acts which apply to the Navajo Nation's Air Pollution Prevention and Control Act, Clean Water Act, Safe Drinking Water Act, Solid Waste Act, Hazardous Substances Act, Pesticide Act, and Underground Storage Tank Act.

<sup>114</sup> Puyallup Tribal Administrative Procedure Act, 2 Puyallup Tribal Codes § 2.08.040(a)(2) (2010).

provide for notice of the rulemaking, an opportunity for community members to participate by submitting comments, views, or arguments in writing or at a public hearing, and to have their oral or written comments considered by the tribal agency. These tribal procedures for public participation are similar to the federal APA. Adherence to good rulemaking is important for tribes and affected industry. Such procedures will likely result in a more carefully considered rule but also may increase confidence of the regulated community by assuring more opportunity for formal participation in the development of the rules and regulations by which they will be governed.

The use of regulatory boards of experts to adopt regulations and overhear disputes is well established at the state and federal level. Tribes might well profit from the adoption of such a framework and from the board members possessing a wide range of expertise and perspective. Inclusion of nontribal representatives on tribal boards and perhaps including representatives from the regulated community may prove to be useful. Industry representatives have significant expertise to lend to such boards. Also, different perspectives help governing bodies make informed decisions. A tribe that is secure in its authority to regulate environmental matters need not confirm that authority by staffing its regulatory boards exclusively with tribal members; significant gain in expertise and perspective may result from a more diverse composition of the regulatory board.

For example, in 1995 the Shoshone-Bannock Tribes and the FMC Corporation in Idaho entered into an agreement on the regulatory authority of the Tribes over the industry relating to air emissions, including permitting, regulations, and fees. As part of this agreement, the parties agreed to an administrative committee to facilitate and implement the agreement for rulemaking, nonattainment matters, permitting, as well as to address other matters. The seven-member committee was comprised of two Tribal representatives, two from FMC, one EPA representative, one State of Idaho representative, and one at-large member selected by the other six representatives. Any disputes under the agreement were handled by a special panel of the Tribal court consisting of three attorney members—one selected by the Tribes, one selected by FMC, and one selected by the two panel members.<sup>115</sup>

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<sup>115</sup> Memorandum of Agreement Between the Shoshone-Bannock Tribes and FMC Corporation. As of this date, the parties have not had to use the Committee. The FMC Corporation, located on the Fort Hall Reservation in the late 1940s to mine phosphate

## 2. *Due Process in Adjudication*

Adjudication occurs when an agency or department of the tribe makes a decision, such as acting on a permit application, enforcement action, a contested action or violation by a permittee, or issuance of a major decision affecting the rights of individuals or companies. Simply stated, if an agency makes a decision that affects an individual on grounds that are particularized to the individual then the agency has engaged in adjudication.

When an adjudication occurs, the fundamental requirements of due process apply and provide that a person whose property interests may be adversely affected by a proposed governmental action be given notice, an opportunity to be heard, a fair hearing, and a decision based upon the relevant facts and applicable legal standards. The precise procedural safeguards applicable to a given case depend on consideration of the *Matthews v. Eldridge* factors.

As discussed in Section III, tribal constitutions and other laws may establish due process and equal protection procedures as matters of tribal law. Also, the Indian Civil Rights Act incorporates due process, equal protection, and other limitations on the exercise of governmental power as such limitations apply to tribal administrative agencies.<sup>116</sup> Tribal APAs supplement the minimum requirements of the due process by establishing criteria for tribal agency decision-making, establish rules and evidentiary requirements for contested cases, and set procedures and standards for administrative appeals and judicial review of administrative actions. These administrative procedures provide greater certainty and predictability and greater openness and accountability than is required by the due process clause itself.

Tribal administrative laws establish procedural requirements for administrative appeals and judicial review of administrative actions. For instance, the requirements for timeliness of a notice of appeal to a commission or petition for judicial review are covered in tribal APAs. Tribal laws also set notice requirements for contested cases (i.e., statement of time, place, and notice of hearing, statement of authority

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shale that was then manufactured in elemental phosphorous until the mid-1990s. Over the years, the FMC Corporation and Shoshone-Bannock Tribes had a contentious relationship over employment and environmental contamination, leasing, permitting, and cleanup issues.

<sup>116</sup> See The Indian Civil Rights Act of 1986 (ICRA), 25 U.S.C. §§ 1301–1304 (2012).



and jurisdiction of authority, and issue and matters to be decided).<sup>117</sup> Many tribal administrative laws establish substantive standards for administrative appeals, such as the appeal to be made on the record developed before the administrative appeals board or commission.<sup>118</sup> This means that the reviewing tribal court will consider briefs, pleadings, evidence, decisions, and orders received and issued by a tribal commission or board upon appeal.

For instance, in Montana, the Confederated Salish and Kootenai Tribal Administrative Procedure Ordinance provides:

If a timely petition for review of a commission decision is filed for judicial review, the tribal administrative laws provide that the court may affirm the final decision of the agency or uphold the promulgation of the rule, it may remand the case for further proceedings, or it may reverse the final decision or the rule, in whole or part, if the substantial rights of the petitioners have been prejudiced because the administrative findings, inferences, conclusions, or decisions are in violation of constitutional provisions, in excess of lawful authority or jurisdiction, clearly erroneous or arbitrary or capricious.<sup>119</sup>

Such provisions are very similar to the federal and state APAs.

Tribal administrative procedures acts and ordinances provide a guide for tribal environmental programs to address issues associated with implementation of the tribal laws and the regulation of activities affecting natural resources in tribal communities. The tribal administrative procedure acts seek to ensure their administrative bodies carry out their programs consistent with the notions of common sense, justice, and fairness. They institutionalize public participation by establishing a process that:

- (1) requires public participation through oral and written comment;
- (2) promotes honesty and integrity in the process;
- (3) offers a means for public hearings;
- (4) fosters predictability and greater certainty to the community; and
- (5) ensures that the comments, questions and concerns of the community will be recorded and considered by the tribal agencies.<sup>120</sup>

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<sup>117</sup> Puyallup Tribal Administrative Procedure Act, 2 Puyallup Tribal Codes § 2.08.040(c) (2010).

<sup>118</sup> Confederated Tribes of Colville Administrative Procedure Act, 2 Colville Tribal Law and Order Code § 2-4-19 (2004); Puyallup Administrative Procedure Act, Section 2.08.180 & 2.08.190.

<sup>119</sup> Salish & Kootenai Tribes Administrative Procedure Ordinance, § 28(a), § 29(4); Three Affiliated Administrative Procedure Act, § 1.12(4) and 1.15.

<sup>120</sup> NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, *supra* note 1.

The tribal administrative procedures laws provide for limited waivers of tribal sovereign immunity. Typically, the relief provided under the laws do not include monetary judgments against the tribal sovereign. In Washington, under the Puyallup Tribes and Confederated Colville Tribes APAs the Tribal courts can affirm or remand the Tribal administrative agency's actions on a permit, license, or administrative order, but the Tribal court is not authorized to enter a monetary judgment against the Tribe.<sup>121</sup>

Additionally, tribal APAs create supplemental due process requirements to those found in the tribal constitution, tribal civil rights acts, and ICRA. The APAs ensure that when a tribal action or proposed action may affect an individual's property, "that individual is to be given notice, an opportunity to be heard by the administrative body, receive a fair hearing and a decision upon the relevant facts, and be able to seek judicial review of the administrative decision."

These basic requirements certainly meet the fundamental requirements of due process as envisioned in *Matthews*. A tribal APA can be a mechanism for achieving goals of certainty, fairness, timeliness, and technical expertise. The simple existence of this type of procedural mechanism can provide the regulated industry with some degree of confidence and tribes with greater credibility as most industry and non-Indian are accustomed to operating by established administrative procedures in state and federal jurisdictions. An APA is not the only means of constructing a framework for environmental regulation; specific tribal environmental laws and regulations may also describe the administrative process for certain specific regulations.<sup>122</sup>

### ***B. Other Tribal Measures Ensuring Meaningful Involvement***

In 2000, the Indigenous Peoples Subcommittee published a "Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Environmental Decision-Making."<sup>123</sup> The Guide, an

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<sup>121</sup> Puyallup Tribal Administrative Procedures Act, § 1.97(7); Colville APA, Section 2-4-19(7).

<sup>122</sup> For example, the Shoshone-Bannock Tribes Water Resources Department recently incorporated administrative procedures into their draft Water Quality Act rather than follow the Tribal Administrative Procedures Act. See Davis & Pierce, *supra* note 105.

<sup>123</sup> NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, GUIDE ON CONSULTATION AND COLLABORATION WITH INDIAN TRIBAL GOVERNMENTS AND THE PUBLIC PARTICIPATION

impetus for this article, includes a plan setting forth certain guiding principles and critical elements tribal governments should consider for effective public participation.<sup>124</sup> Two key guiding principles are to (1) “encourage public participation [by having interactions] that encourage active community participation, institutionalize public participation, recognize community knowledge, and utilize cross-cultural formats and exchanges”; and (2) maintain honesty and integrity by establishing the goals, expectations, and limitations early in the process.<sup>125</sup>

The critical elements include a means for meeting preparation, meeting participation, logistics, agenda setting, information sharing, and seeking and gaining valuable community input.<sup>126</sup> These are good starting points, but more is needed in terms of practical approaches and processes for tribal governments.

The approaches to accomplishing these critical elements will vary according to the tribal community and culture, tribal commitment, the particular issue and decision, and resources the tribal government may have in order to seek public participation. Tribes have an opportunity to develop innovative measures outside of the administrative law context to effectively provide meaningful public participation for their communities. Continuing education of the community, two-way communication, responsiveness, and information sharing are vital components to effectively gain community support and input.

Establishing a community advisory board or committee for the environmental program, as discussed earlier, may prove helpful in gaining a community and cultural perspective that may be different than the governmental decision-making body. An advisory board used in the initial stages of a rulemaking can help, “[g]enerate questions, identify public concerns, make recommendations, provide independent views on issues, formulate meeting formats, and give insight on locations for meetings, stakeholders or segments of the community whose comments should be sought out.”<sup>127</sup>

The advisory board could meet on a monthly or quarterly basis depending on the environmental program activities. In addition, a

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OF INDIGENOUS GROUPS AND TRIBAL MEMBERS IN ENVIRONMENTAL DECISION MAKING (2000), available at <http://www.epa.gov/compliance/ej/resources/publications/nejac/ips-consultation-guide.pdf>.

<sup>124</sup> *Id.* at 48.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 48–50.

<sup>127</sup> NAT’L ENVTL. JUSTICE ADVISORY COUNCIL, *supra* note 1.

community working group comprised of a variety of tribal, nontribal, and industry representatives may assist in draft rulemaking and review prior to public comments being solicited.

Some tribes have explored the issue of providing nonmembers with meaningful opportunities to be involved and treated fairly by developing innovative approaches from a tribal perspective. This is a timely issue as tribal environmental laws are increasingly regulating nonmember activities and industry continues to bring economic development to reservations. The Tulalip Tribes of Washington, for example, have enacted a Planning Enabling Act<sup>128</sup> that provides nonmembers a fair voice in tribal land use planning. Like many checker-boarded reservations, the Tulalip Reservation is held in both trust and fee simple ownership after the sale of Indian allotments made during the early twentieth century. Reflecting the Tribes' desire for good governance in tribal land use decision-making, the Act requires that: "[a]t least two members of the Tulalip Planning Commission be non-Indian persons residing, occupying or owning land located within the exterior boundaries of the Tulalip Indian Reservation."<sup>129</sup> These types of advisory boards of tribal members and/or nontribal members can prove helpful in establishing trust in a community and bringing together a cross section of the tribal community.

Going out to the community to seek tribal member input rather than requesting them to come to a government office is productive. Holding small group meetings at tribal district or chapter halls will gain more public participation than a large community hearing. Tribal members are more likely to ask questions and give their opinion in a smaller community setting. Tribal environmental programs may schedule open houses to encourage tribal members to attend without the pressure of being recorded or feeling as though they have to offer comment. This atmosphere allows individuals to review the project and talk one-on-one with the program staff. A short survey wherein the responder can remain anonymous can also prove valuable if information or comments are sought on a specific issue. Of course, the survey has to be carefully drafted to clearly and concisely gain a response without any built-in biases, and the staff must be willing to undertake interviews using the survey instrument. It may also prove

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<sup>128</sup> Tulalip Tribal Codes § 7.05.

<sup>129</sup> *Id.*

helpful to involve representatives from various stakeholders in developing the survey, if one is to be used.

In 1999, the Gila River Indian Community in Arizona (near Phoenix) established an Environmental Quality Compliance and Enforcement Policy, which includes an outreach program to assist the regulated facilities in voluntarily complying with the Tribe's environmental laws.<sup>130</sup> This policy advocates education and technical assistance, and requires the Department of Environmental Quality to: "(1) Provide technical assistance to regulated community, as resources permit, (2) provide current rules, policies and guidelines to affected and interested parties, and (3) provide compliance education opportunities for the regulated community."<sup>131</sup> This policy encourages the environmental programs to seek public participation, to inform through education and information dissemination, and draft clear and consistent rules and regulations. Although the Gila River Tribal Policy does not specifically state "public participation," "meaningful involvement," or "fair treatment," the policy addresses and implements these fundamental principles.

All of these measures require a commitment on the part of the tribal environmental programs to be more proactive and to solicit input from the community rather than meeting the bare minimum standards of public participation. These measures are intended to foster public awareness and make the government decision-making processes more open to the public. It is through these measures that tribal governments can begin to gain input from its tribal community and build support for its decision-making.

These tribal public processes are very proactive and go beyond the mere scheduling of hearings and meetings. They actively work with the affected community members and regulated industry to seek input and educate the public about the environmental program, its rules and regulations, and proposed actions.

### ***C. Tribal Examples Effectively Providing Meaningful Involvement and Fair Treatment***

In addition to some tribes adopting administrative procedure laws, policies, guidelines, and advisory boards to ensure fair treatment and meaningful public participation, tribes have developed other fair

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<sup>130</sup> DEP'T OF ENVTL. QUALITY, GILA RIVER INDIAN COMMUNITY, INTERIM COMPLIANCE AND ENFORCEMENT POLICY (Feb. 5, 1999) revised June 1, 2001.

<sup>131</sup> *Id.* at 1.

treatment and meaningful involvement measures for reservation residents. Some specific examples are presented below in the following order: (1) the Alaska Native villages process of meaningful involvement, (2) Confederated Tribes of the Colville Reservation Holistic Approach to Resources Management, and (3) Shoshone-Bannock Tribes Minority Communications Board.

First, the work of the Maniilaq Association in Kotzebue (northwest Alaska)<sup>132</sup> highlights the continuing importance and use of oral traditions in Alaska Native villages. Many Alaska Native villages are still very rural and isolated with no road system into or out of the village, so access is generally by airplane or boat. In these communities, interaction and communication is by word of mouth. Direct, one-to-one communication with the local official and decision-maker on environmental issues is the standard and is the best means of providing input. Certainly, this process is ideal for small communities where everyone knows one another, families go back many generations, and there is established trust and goodwill. Traditional observations and knowledge are also important and play a central role in decision-making.

The public process of gathering comments and input on land management and environmental issues often begins with the posting of notices at the community post office and stores, announcements on the public radio stations, communication via citizen-band radios, and direct contact with individuals. A meeting is held and comments gathered. There are no set limits on oral presentations by members and no guidelines or restrictions on the length of the meeting, though the meetings generally are lengthy since many individuals express their opinions. Again, this follows the Native traditions. The process is generally informal, which is conducive to good communication. In addition, the language spoken is the native language. Often, the decision-makers gather comments or input by tape recording small groups or gatherings, taking trips to the homes to communicate with elders and family leaders, or talking with individuals as they visit with them in the community. Written comments are rarely received. In addition to the posted meetings, the environmental managers distribute monthly and quarterly newsletters to all residents of the

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<sup>132</sup> Interview with Hazel Apok, Environmental Program Director, Maniilaq Association. (Ms. Hazel provided extensive information on the Alaska Native oral traditions and process of community participation).

community to give updates and solicit participation. Daily interactions between the environmental staff and community members are a priority. There is no established written protocol or process for these public meetings, but they are successful in addressing the needs and concerns of the community. The process conforms more closely to the norms and values of the tribal community, placing greater emphasis on direct communication, consensus building, and reaching a common mutual understanding, while placing less emphasis on written procedures and time deadlines. This process, based upon Alaska Native traditions, provides for meaningful involvement of community members.

Secondly, the Confederated Tribes of the Colville Reservation in Washington created a holistic resource management approach to gather community input from their tribal membership on a resource management plan including environmental regulation. Importantly, the Colville Tribe recognized that its community members had the right to participate fully in formulating, planning, managing and applying governmental regulations, and environmental decisions affecting tribal and individually held lands and resources.<sup>133</sup>

The project was an ambitious one and it was completed over a two-year period. It is a model for identifying issues and matters affecting the health, culture, and environment of the people by organizing community support, acquiring tribal member input, and establishing creative methods of gathering and responding to tribal member needs and rights. The project gathered information and input at tribal district meetings, community gatherings, special meetings, one-on-one interviews, and public meetings. The Tribe provided written presentations, handouts, and clearly documented goals and objectives for Tribal members to comment on. The Tribal program staff ensured that they were responsive to Tribal members' needs and inquiries to facilitate and empower the Tribal community. The results of the project have enabled the Tribe to formulate Tribal goals, future visions, and resource management plans for the Reservation which holds a variety of resources managed by the Tribe.

The third illustration is the establishment of a "Minority Communications Board" by the Shoshone-Bannock Tribes in

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<sup>133</sup> INTEGRATED RES. MGMT. PROGRAM, CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, RES. MGMT. PLAN (2003) (providing "[t]he Colville Business Council will use its leadership, financial, and natural resources to maximize opportunities for tribal members to participate in the development of a strong cultural and economic future").

Idaho.<sup>134</sup> The Board was established in 1979 for the following reasons:

The Tribes have existed as a minority for more than a century, and thus are highly aware of the feelings of frustration and helplessness associated with minority status. To ensure a voice on land use matters for non-Indians who reside on the Reservation and who are ineligible to vote in Tribal elections by virtue of the Tribal Constitution and Bylaws, the [Land Use Policy] Commission shall appoint a board to be known as the “Minority Communication Board.”<sup>135</sup>

The purpose of the three-member Board is to “provide a vehicle for communication and cooperation between the Tribes and non-Indians residing on the Reservation.”<sup>136</sup> The Land Use Policy Commission works “with the Board to ensure that the land use problems and needs of non-Indians are expressed, and that the legitimate land use rights of non-Indians are protected.”<sup>137</sup>

The Board meets on a quarterly basis with the Commission to discuss issues, gather information about the status of various environmental matters, give input on pending matters, raise questions, and voice concerns that they may have about tribal land use issues and environmental programs. The Board is informed of pending rulemaking and regulations. The Board has proved useful in building non-Indian support for Tribal jurisdiction over non-Indians on a wide variety of issues beyond environmental regulation. The Board distributes information to other non-Indian landowners about the Tribal programs, permits, and other regulations that are required throughout the Reservation. Non-Indians routinely telephone or contact the tribal land use and environmental programs about possible violators of Tribal law from assistance with potential pollution discharges to inquiries about permits and a myriad of other issues.

The Fort Hall Reservation is comprised of 97% tribal trust lands and 3% fee lands owned by individual tribal members and non-Indians. The Tribes instituted this process over 35 years ago, and it has proven successful in gathering input and providing for public participation of all residents of the reservation. The Confederated

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<sup>134</sup> SHOSHONE-BANNOCK TRIBES, FORT HALL LAND USE OPERATIVE POLICY GUIDELINES, § VI (1979).

<sup>135</sup> *Id.* § VI-1.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* § VI-2.



Salish and Kootenai Tribes of the Flathead Reservation in Montana have established a similar board to provide for meaningful involvement of reservation residents. The Flathead Reservation is severely checker-boarded with non-Indians owning a majority of the reservation lands. The Tribes initiated this board after non-Indians challenged their jurisdiction during the approval of their treatment as a state application under the Clean Water Act.

The various tribal examples offer a broad spectrum of boards and committees providing fundamental due process by giving notice and a meaningful opportunity to be heard. Each process is as unique as the tribal nation that has adopted it. At one end of the spectrum are the tribal administrative laws for rulemaking and adjudication adopted by the Puyallup, Confederated Tribes of the Colville, Confederated Salish and Kootenai, Three Affiliated Tribes of Fort Berthold, Shoshone-Bannock Tribes, Crow Tribe, and Navajo Nation, which are similar to state and federal administrative laws. The rules set out notice deadlines, time for comments, limits on testimony, and a time and place to be heard. Certainly these laws and processes are most familiar to the non-Indian and regulated industry communities.

Next, there are the Tulalip Tribes, Gila River Indian Community, Shoshone-Bannock Tribes, and Confederated Tribes of the Colville establishing tribal advisory boards including industry representatives and non-Indian community members who provide ongoing input to the tribal departments and commissions about their affected interests. These community-centered boards hold monthly meetings, survey their constituents about environmental matters, and distribute educational materials and information about their programs. These boards have incorporated the tribal traditions of seeking full community input at community halls, one-on-one interviews, and tribal gatherings.

Finally, at perhaps the other end of the spectrum, there are the Native Alaskan villages that rely upon their oral traditions to provide full meaningful public participation. The process implemented in Alaska reflects the standards of the tribal culture and is an example of how there may be differences in tribal and federal approaches. Yet, the Alaska traditional process goes far beyond the standard state or federal fair treatment and meaningful involvement processes. Communication is often one-on-one, meetings have no time limits and individual's presentations are not limited. Consensus-building at the hearing is a priority. Informal meetings are conducive to soliciting comments. The participants in this traditional tribal process have

plenty of opportunity to be heard and their comments considered. Individuals are able to gain a clear and accurate understanding of the proposed actions by the environmental programs. In short, the voice of the community is heard.

Each of these tribal processes has merit and deserves respect and deference. They demonstrate that the particular tribal context is central to defining and shaping the unique tribal due process format based on the reservation land base, its community members and residents, and resources sought to be protected. Consequently, the Alaska Native villages process may not fit on the Gila River Reservation in Arizona, and likewise, the Gila River Tribal process may not work at the Colville Reservation in Washington. Yet, they all share the tribal values of providing meaningful involvement and fair treatment.

In sum, tribes are providing due process and public participation during the drafting of laws and regulation (the legislative process), the implementation or administration of laws (the executive process), and review of laws, regulations, and actions of the administrative body (the judicial process). These various tribal environmental standards and avenues of review demonstrate they do not have to mirror a state or federal program as long as it provides the community with notice and opportunity to be heard. Tribal environmental programs can and do provide for the fair treatment of people subject to tribal regulatory authority. Additionally, tribes have and should continue to build environmental programs that reflect their own cultural values and devise culturally appropriate approaches to protect their tribal people and homelands. After all, the ideals of due process are embedded in the tribal traditions—fairness, honesty, deliberation, ability to speak and be heard, and consensus building.

#### ***D. The EPA's Role in Fostering Meaningful Involvement and Fair Treatment***

Beginning in 1970, with NEPA, the United States Congress officially “recognize[d] the profound impact of man’s activity on the interrelations of all components of the natural environment . . . [and] the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man . . . .”<sup>138</sup> To this end, the federal government has committed billions of dollars in

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<sup>138</sup> 42 U.S.C. § 4331(a) (2012).

funding and technical resources to the states for building environmental institutions, drafting codes and regulations, and compliance and enforcement to administer the various environmental protection programs contemplated in federal environmental legislation. Equitable tribal capacity building to protect tribal lands and resources is needed because tribal governments share the same environmental concerns as the states, and therefore need similar support.<sup>139</sup>

Today, many federal statutes permit the EPA to authorize tribes to run federal environmental programs.<sup>140</sup> The EPA has been a leader in its commitment to assist in legislative amendments and to provide assistance to tribes. However, additional technical support and funding are needed to help tribes develop their environmental programs. The EPA, and Congress specifically, have committed over thirty years and billions of dollars to building state environmental programs, environmental management, and enforcement infrastructures.<sup>141</sup> Regulatory development funding and technical assistance from the federal government also needs to be increased to help tribes develop and implement more effective environmental programs. The EPA has an unparalleled opportunity to help tribes attain environmental integrity within their reservations and protect their reservations' resources.

There are great differences among tribes in their capabilities and desires to actually exercise their sovereign powers in the area of environmental management. Some have well-developed and sophisticated governmental institutions that function effectively. Other tribal governments are in great need of technical assistance, training programs, and stable sources of funding in order to function to their full potential and serve the needs of their people. Some tribal environmental programs are ineffective, in part, due to the lack or inadequacy of financial resources and institutional development.

In the context of public participation and due process, the EPA should give deference and support the tribal environmental programs that seek to develop or rely upon principles of tribal due process based on their traditions and values. Indeed, the EPA should promote

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<sup>139</sup> See Tom B. K. Goldtooth, *Indigenous Nations: Summary of Sovereignty and Its Implications for Environmental Protection*, in ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS, 138 (Bunyan Bryant ed., 1995) (discussing the EPA's underfunding of tribes).

<sup>140</sup> See *supra* Part I.

<sup>141</sup> See Royster and SnowArrow Fausett, *supra* note 21, at 629–30.

such tribal processes rather than seeking to apply its model environmental justice principles to tribal communities.<sup>142</sup> Such deference is appropriate when tribal agencies have expertise in the traditional values of due process and know the reservation population and their interests. As discussed in this article, application of a “cookie cutter” model to tribal communities does not consider or respect the unique and diverse tribal communities throughout the United States. Importantly, many of the procedural aspects developed by tribal agencies add to the protection of reservation population interests above and beyond that provided in the EPA’s model of public participation.

Additionally, the EPA must operate within the government-to-government relationship with tribes as echoed in its 1984 EPA Indian Policy. The EPA, as trustee to Indian tribes, must act in the best interest of the tribes rather than as a sovereign solely accountable to the general public. The EPA may view such due consideration or deference as a conflicting duty, but that does not relieve the government of its fiduciary obligations to tribes.<sup>143</sup> Accommodation of the tribal definitions of due process by the EPA is possible, and should not be swayed by majority preferences under the guise of fairness.

Tribal environmental programs are evolving at a rapid rate and are in the early stages of developing ordinances and regulations for the tribal community. Some tribes may not have a process to provide for meaningful public participation and fair treatment within their

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<sup>142</sup> NAT’L ENVTL. JUSTICE ADVISORY COUNCIL, THE MODEL PLAN FOR PUBLIC PARTICIPATION (1996), available at <http://www.greenlink.org/assess/pdfs/modelplan.pdf>. See also NAT’L ENVTL. JUSTICE ADVISORY COUNCIL, THE MODEL PLAN FOR PUBLIC PARTICIPATION: AN UPDATE TO THE 1996 NEJAC MODEL PLAN FOR PUBLIC PARTICIPATION (2013), available at <http://www.epa.gov/compliance/ej/resources/publications/nejac/recommendations-model-guide-pp-2013.pdf>.

<sup>143</sup> Northern Cheyenne Tribe v. Hodel, 12 Indian L. Rep. 3065, 3071 (D. Mont. 1985) (*mem*) (internal citations omitted).

[the Secretary] correctly points out that his duties and responsibilities extend to all United States citizens, and he takes the position that federal coal development is vital to the nation’s energy future. The Secretary’s conflicting responsibilities . . . however, do not relieve him of his trust obligations. To the contrary, identifying and fulfilling the trust responsibility is even more important in situations such as the present case where an agency’s conflicting goals and responsibilities combined with political pressure asserted by non-Indians can lead federal agencies to compromise or ignore Indian rights.

*Id.*

established infrastructure. Accordingly, tribal agencies can learn from other tribal environmental program examples and federal processes and consider how such processes can be incorporated by the tribe, taking into account their particular tribal values and cultural and social norms. Some tribes do not have the staff or expertise to develop these procedures and processes. Training should be offered at national or regional EPA meetings or be provided upon request by a specific tribe. Furthermore, training could be developed by various tribal organizations with support from the EPA. Building expertise, resources, and community support can enhance tribal goals. Tribal education of the public about the tribal process and institutions is also a necessary step. All of these measures enhance, preserve, and protect tribal sovereignty, and are necessary to maintain tribal integrity and self-determination.

Many tribes need financial and technical support to fully develop and implement their environmental protection ordinances and processes. Additional regulations, administrative procedures, or other mechanisms to ensure public participation and fair treatment increase the burden on new programs and utilize the limited resources available for program implementation. A new program that is inadequately funded or staffed is likely to fail, wasting the limited resources that exist. Effective and efficient programs require funds, training, and technical expertise.

### CONCLUSION

The basic tribal traditional values of fairness, respect, honesty, the opportunity to speak before a collective decision is made, consensus decision-making, and careful and thoughtful deliberation predate any United States constitutional provisions or civil rights laws. Tribes know how to best accommodate, define, and incorporate these fundamental tribal teachings of due process and meaningful involvement within the tribal context as they relate to environmental regulatory authority.

This Article advises tribal governments to provide for meaningful involvement and fair treatment of the tribal community at large, otherwise they will likely face legal challenges. There are numerous tribal examples and models, standards, tribal laws, administrative procedures, and policies addressing fair treatment and public participation that are working effectively in tribal communities. Jurisdiction over these matters, albeit through a tribal environmental administrative board, mediation, informal decision-making, or tribal

court is crucial in preserving fairness, both for tribal members and nonmembers. The author anticipates that these recommendations may, in some measure, add to the development of tribal environmental programs as they serve their people and community, and protect and preserve the integrity of tribal culture, institutions, and homelands.

The EPA, since 1984, has encouraged tribes to implement federal pollution controls on reservations. The 1984 Indian Policy recognizes tribal governments as the entities with primary responsibility for the reservation environment and pledges the EPA's support in developing tribal environmental programs.<sup>144</sup> In keeping with these policy commitments and in fulfilling its trust obligations to tribes, the EPA is urged to acknowledge and give deference to the tribal principles of due process and support such concepts as it reviews and approves tribal environmental programs standards, criteria, and public involvement rules. Acceptance will promote the federal-trust relationship, the federal policy goals of self-determination, federalism, and tribal sovereignty. Ultimately, it will protect tribal lands, waters, resources and reservation populations from pollution, and begin to address the legacy of contamination affecting many tribal communities.

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<sup>144</sup> EPA, *supra* note 7, at 2.

