Solid Waste Regulation in Indian Country

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I. INTRODUCTION

Imagine a line that describes the boundary between Indian Country1 and state lands. On the Indian side of the line, land ownership is complicated: some land is held in trust by the United States for the benefit of the tribe, some land is held by tribal members subject to a trust, some land is held in fee by tribal members, and the rest of the land is held in fee by non-members.2 Assume that a national waste treatment company seeks to use the land on the Indian side of the boundary as a solid waste or hazardous waste site. To sharpen this image and the jurisdictional conflict that such a use will inevitably cause, imagine that the site proposed for the facility is up-gradient of non-Indian land so that any contamination emanating from the site will pollute non-Indian resources. Or think of the situation in reverse: the siting of a facility on non-Indian land, up-gradient of Indian land, which threatens Indian resources. In either case, two sovereignties, Indian tribe and state, have substantial interests in regulating the facility. The extent of their power to do so, however, is uncertain under current law.

During the last decade, an increasing number of federal courts have decided questions about the source and extent of inherent sovereign tribal power to regulate activities that threaten tribal health and environment. A related issue, the extent to which the regulatory reach of the state may extend into Indian Country to protect non-Indians, is also the subject

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1. The term "Indian Country" generally includes more territory than the term "reservation." It is defined statutorily as:
   
   (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.


2. Changes in federal Indian policy have resulted in this patchwork of Indian land holding. During the treaty-making years, 1789-1871, the overriding goal of the United States was to obtain Indian lands by treaties of cession. Many treaties allowed the United States to allot land to Indians, frequently with restrictions on alienation. From 1871-1928, federal policy shifted toward allotments and individualized property. Much of the land allotted to individual Indians passed into non-Indian hands. The General Allotment Act of 1887 provided that title to allotments be held in trust by the United States for 25 years. At the end of the trust period, the laws of descent and partition in the state where land was located applied. Thus, lands allotted to Indians could end up in non-Indian hands after the end of the trust period. See generally COHEN, supra note 1, ch. 2.
of much litigation. Unfortunately, federal court decisions neither draw a bright line between areas of exclusive tribal regulatory jurisdiction and exclusive state power nor adequately explain circumstances that justify exercises of concurrent power.

Legislation is another complicating factor. Major comprehensive federal environmental laws enacted between 1970 and 1984 establish a pattern of federal-state regulatory cooperation that encourages state participation in both the development and enforcement of environmentally protective standards as long as states comply with certain federally-mandated criteria. But, until 1986, Congress nearly completely ignored the tribal role in protecting the environment. A shift came in 1986 when Congress amended the Safe Drinking Water Act and included a provision authorizing the Environmental Protection Agency ("EPA") to treat tribes as states for certain regulatory programs governed by the Act. Later, similar provisions were added to the Clean Water Act and to the Superfund law.

Congress is expected to reauthorize the Resource Conservation and Recovery Act ("RCRA"). Then, for the first time, the EPA will have authority to grant Indian tribes the status of states for enforcement of waste management programs under the RCRA.

4. Id. § 300j-11.
7. Id. §§ 6901-6987.
8. House Bill 3735 is the principal vehicle for RCRA reauthorization. It will amend 42 U.S.C. section 6903 by adding the following new paragraphs:
   (a)(41) The term "Indian Country" means (A) all land within the limits of any Indian Reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (B) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (C) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.
   (42) The term 'Indian Tribe' means any Indian tribe, band, group, community, including any Alaska native village, organization, or regional corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, recognized by the Secretary of the Interior and exercising governmental authority within Indian country.
H.R. 3735, § 904(a), 101st Cong., 1st Sess. (1989). The amendment adds a new "Sec. 1009. Indian Tribes." It authorizes:
   (a) In General—Subject to the provisions of subsection (b), the Administrator—
      (1) is authorized to treat Indian tribes as States under this Act,
      (2) may delegate to such tribes primary enforcement responsibility for programs and projects under this Act, and
      (3) may provide such tribes grant and contract assistance to carry out functions provided by this Act.
   (b) EPA Regulations—(1) The Administrator shall, not later than 18 months after the date of the enactment . . . , promulgate final regulations which specify how Indian tribes shall be treated as States for purposes of this Act. Such treatment shall be authorized only if—
      (A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
      (B) the functions to be exercised by the Indian tribe pertain to land and resources
This new authority will add still another wrinkle to the already hopelessly crumpled fabric of the law of environmental regulatory jurisdiction in Indian Country because it, like its legislative predecessors, fails to define tribal authority with sufficient clarity to allow tribal governments confidently to commit resources to environmental protection. To make matters worse, the new legislative effort will be interpreted against a backdrop of federal Indian law already flawed by indeterminate definitions of tribal authority over solid waste management in Indian Country.

This article argues that this indeterminacy itself undermines the fundamental goals of protecting human health and the environment, and, for that reason, revision of the proposed solid waste legislation is necessary to resolve federal, state and tribal clashes over regulation of solid waste facilities sited near the borders of Indian Country. To make that argument, this article first describes the present status of the law of environmental regulatory jurisdiction in Indian Country in the particular context of solid waste regulation; second, it compares the proposed authority in the RCRA reauthorization amendments with similar authorities in the Clean Water Act and the Safe Drinking Water Act, focusing on difficulties that have surfaced in the implementation of those authorities; and finally, it recommends a revised RCRA tribal authority provision aimed at promoting health and environmental protection without undermining the sovereign prerogatives of either states or tribes.

II. CURRENT LAW: SOLID WASTE REGULATORY JURISDICTION IN INDIAN COUNTRY

Currently, the Resource Conservation and Recovery Act ("RCRA"), the law establishing the regulatory framework for management of solid wastes, mentions Indian tribes only when defining "municipality." The effect of this definition is to leave the tribal governmental role indeterminate with respect to enforcement of solid waste programs while simultaneously holding the Indian tribe, held by the United States in trust for the Indian tribe, held by a member of the Indian tribe if such property interest is subject to a trust restriction on alienation, or are otherwise within Indian country; and (C) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this Act and of all applicable regulations.


12. "Municipality" is a term which includes "an Indian tribe or authorized tribal organization or Alaska Native village or organization..." Id. § 6903(13).
multaneously subjecting tribes to regulation under the Act. By contrast, the RCRA contains elaborate provisions allowing states both to administer and enforce hazardous waste programs and to develop solid waste plans. Because the RCRA currently fails to delegate regulatory power to tribal governments so that they may directly protect their environments from solid waste hazards, the general law on the sources of federal, state, and tribal sovereign power becomes relevant not only to understand the present scope of tribal power, but also as a benchmark to assess any proposed reallocation of authority.

A. Federal Regulatory Power

In general, primacy of regulatory power falls on the governmental entity with territorial jurisdiction. Accordingly, Congress has undoubted power under the Commerce Clause of the United States Constitution to delegate regulation of solid waste to a federal agency when the activity occurs anywhere within the territorial boundaries of the United States. As long as a statute is intended to apply generally, the rule is the same for Indian lands. Congress may even abrogate treaty rights reserved to tribes or to individual Indians so long as there is clear evidence that Congress actually considered the statute’s effect on treaty rights.

The dominance of federal authority over Indian lands is a corollary of Indian tribal status in the United States, described by Chief Justice Marshall as “domestic dependent nations.” Primacy of federal power is so well-settled that it may be implied.

For example, Phillips Petroleum Co. v. United States Environmental Protection Agency upheld the EPA’s power to establish an underground injection program on Indian land under the Safe Drinking Water Act even though, at the time, that Act, like the RCRA, made no mention of Indian tribes or Indian lands other than to include tribal organizations.

13. Id. § 6926.
14. Id. §§ 6941-6949(a).
15. In the context of taxation jurisdiction, the Supreme Court has recently recognized that each of the three different governmental entities, the United States, the state, and the tribe, have taxing jurisdiction over non-Indian oil and gas wells located within the borders of a reservation, as well as within a state and the borders of the United States. See Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).
21. 803 F.2d 545 (10th Cir. 1986).
within the definition of municipalities. In upholding the EPA’s direct authority over reservation land, the Court reasoned that Congress, to achieve the general purpose of clean drinking water, intended uniform nationwide application of the Act and that construing the Act to preclude the EPA from regulating Indian lands would impermissibly contradict that purpose. Similarly, a construction of the RCRA ousting EPA authority over Indian lands would be inconsistent with the national goal of eliminating threats posed by improper management of solid waste. Accordingly, the EPA has administratively applied the RCRA to Indian lands.

Although these precedents leave little doubt about the dominance of federal power in the management of solid wastes on Indian lands, they do not solve the jurisdictional puzzle because, as a practical matter, the jurisdictional contest over solid wastes is not between tribes and the EPA, but is between tribes and states. This is so because the RCRA, like most other major federal environmental laws, authorizes the EPA to approve state regulatory programs, but fails to expressly authorize tribal regulation. In short, Congress has exercised its federal power in legislation that favors decentralized programmatic control for states, yet leaves the tribal regulatory role open. Thus, while the EPA has empowered many states to enforce the RCRA, tribal governments may lack similar authority over tribal lands. If tribes have any power as against states to regulate solid wastes on their lands, it derives from general federal Indian law and not from the RCRA. The starting point for analysis of the question of tribal regulatory power over solid wastes is a series of recent Supreme Court decisions which identify some of the important factors governing allocation of state and tribal regulatory power.

B. Tribal Regulatory Jurisdiction

1. Over Members

A tribe’s regulatory jurisdiction over its own members is well-established and virtually unlimited. Although subject to ultimate federal control, a tribe remains a separate people with the power to regulate its internal and social relations. As the Supreme Court explained in *United States v. Wheeler*, Indian sovereignty exists only at the sufferance of Congress, but until Congress acts the tribes retain those aspects of sovereignty not

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24. See, e.g., 40 C.F.R. § 255.33 (1989). Even though the RCRA does not authorize delegation of regulatory authority to tribes, courts have ruled that Indian tribes are regulated entities under the RCRA. Blue Legs v. Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir. 1989); Washington Dept. of Ecology v. United States Envtl. Protection Agency, 752 F.2d 1465 (9th Cir. 1985).
25. See, e.g., Cherokee Intermarriage Cases, 203 U.S. 76 (1906).
withdrawn by treaty or statute or by implication as a necessary result of their dependent status.\textsuperscript{29} Thus, courts have upheld tribal power to determine rules of membership,\textsuperscript{30} to regulate domestic relations among tribal members,\textsuperscript{31} and to establish rules of inheritance.\textsuperscript{32}

These precedents leave little question that a tribal government's powers include enforcement of solid waste regulations against its own members,\textsuperscript{33} especially if the regulated solid waste activity is located on trust or allotment land. Unless Congress acts to oust tribal authority over tribal members, this regulatory power exists as an attribute of inherent tribal sovereignty. Its scope is broad enough to extend to a tribal solid waste facility owned by a tribe or its members even when that facility might pose threats to persons or property outside tribal boundaries.\textsuperscript{34} By contrast, recent case law casts a shadow on the scope of tribal power to regulate non-members\textsuperscript{35} and may sharply limit tribal power to regulate a non-member solid waste facility, especially one located on fee land within the boundaries of a reservation.

2. Over Non-Members

Recent Supreme Court decisions\textsuperscript{36} suggest that the scope of tribal regulatory jurisdiction over non-members depends upon whether non-member activities occur on trust or allotment land or whether, instead, they occur on fee land.\textsuperscript{37} Drawing a distinction between fee and non-fee lands within the boundaries of Indian reservations, at the threshold, helps to highlight the two theories that currently compete as the rationale for judicial recognition of tribal jurisdiction over non-members—persons who, by definition, have no voice in the governance of the tribe.\textsuperscript{38}

29. Id. at 323.
32. Roff, 168 U.S. 218.
33. This conclusion is consistent with EPA policy. In 1984, the EPA issued a policy encouraging both tribal decisionmaking on environmental matters and Indian self-determination. \textsc{United States Environmental Protection Agency, EPA Policy on the Administration of Environmental Programs on Indian Reservations} (1984) [hereinafter 1984 EPA Policy].

The long tradition of tribal sovereignty, coupled with the rule that states are generally precluded from exercising jurisdiction over Indians in Indian Country, supported the Ninth Circuit Court of Appeals' decision upholding the EPA's refusal to permit the State of Washington to apply its hazardous waste regulations to Indian lands within Washington. \textit{Washington Dept. of Ecology v. United States Envtl. Protection Agency, 752 F.2d 1465 (9th Cir. 1985)}.

34. The state may claim concurrent jurisdiction over a solid waste facility located such that state natural resources are threatened. For a discussion of the contours of concurrent jurisdiction, see text accompanying notes 75-88.
36. See supra note 35.
37. See supra note 2 for an explanation of the forms of land holdings in Indian Country.
38. Justice Stevens' dissent in \textit{Merrion v. Jicarilla Apache Tribe}, 455 U.S. 130, 172 (1982), explains that tribal authority to enact legislation affecting non-members is appropriately limited because non-members are excluded from participation in tribal government. This is consistent with the fundamental principle that each sovereign governs only with the consent of the governed. \textit{Id.} at 173.
The first theory is that of inherent sovereignty. This theory holds that tribes retain attributes of sovereignty akin to those possessed by other governmental bodies; that is, power over people and territory. Its espousal leads not only to recognition of tribal regulatory authority over non-member trust or allotment land activities, but also justifies exercises of tribal power over non-Indian-owned fee land within the territorial boundaries of a reservation. \(^{39}\) Tribal retention of broad governmental powers stemming from inherent sovereignty underpins the Supreme Court's recognition of exclusive tribal power to regulate non-member hunting and fishing in \textit{New Mexico v. Mescalero Apache Tribe}\(^ {40}\) and to regulate non-member gambling in \textit{California v. Cabazon Band of Mission Indians}.\(^ {41}\)

The notion of inherent sovereignty is equally important in taxation cases. In holding that Arizona taxes imposed on non-Indian activities performed solely on a reservation are preempted, the Supreme Court relied on tribal retention of sovereignty over both members and territory.\(^ {42}\) The Court rooted tribal power to impose severance taxes on non-member oil and gas leases on trust lands in inherent tribal power to control economic activity within its territory.\(^ {43}\) Similarly, tribal power to tax cigarette sales to non-members on trust land stems from inherent sovereignty.\(^ {44}\)

By contrast, the competing theoretical framework for tribal power over non-members insists that self-governance is the only attribute of tribal sovereignty to have survived the formation of the United States; hence, there is no general tribal governmental authority over territory. At the extreme, this theory precludes extension of sovereignty-based tribal power to non-members even when they engage in activities on trust or allotment land. Adherents to this theory do not currently go this far; however, they do find that the sole source of tribal regulatory power over non-members rests on treaty provisions which allow tribes to exclude non-members from acting anywhere within the boundaries of a reservation or from territory reserved for the tribe. This treaty-based regulatory power is not an attribute of general sovereignty. Rather, the power to regulate is merely an implied incident of the power to exclude: a power to impose conditions on the entry or continued presence of non-members.\(^ {45}\)

Cases involving non-member activities on fee land show that application of the principle that tribal regulatory power over non-members is nothing more than an incident of the tribe's right to exclude non-members serves to narrow the scope of tribal regulatory jurisdiction over non-members.

\(^{39}\) Justice Blackmun's dissent in \textit{Brendale}, 109 S. Ct. at 3019, asserts that judicial precedents establish that "tribal authority is not implicitly divested except in those limited circumstances principally involving external powers of sovereignty where the exercise of tribal authority is necessarily inconsistent with their dependent status." \textit{Id.} (emphasis added).

\(^{40}\) 462 U.S. 324 (1983).


For example, *Montana v. United States*\(^{46}\) addressed the scope of tribal power to regulate non-Indian hunting and fishing on fee land owned by non-Indians within the boundaries of the reservation. The majority of the Court assumed that tribal power to exclude non-Indians from its land supports tribal regulation of non-member hunting and fishing on trust land or on land belonging to the tribe or its members.\(^{47}\)

As to fee land, however, the Court found that Congress obliterated tribal power to exclude others from land alienated to non-Indians under the Allotment Acts.\(^{48}\) Thus, the fundamental question before the Court became whether general tribal governmental powers support extension of the tribe's authority over all lands within the boundaries of the reservation so as to encompass all non-member activities. Concluding that inherent powers of a tribe do not extend to relations between the tribe and non-members, the Court barred the operation of tribal law to fee land within the reservation.\(^{49}\) The Court distinguished earlier decisions upholding tribal regulation of non-members\(^{50}\) on the grounds that those cases involved non-member activity occurring on Indian land and not non-member activity occurring on non-Indian-owned fee land, thus implying that the exclusionary theory fully explained the outcome of those cases.\(^{51}\)

For its part, *Montana* recognized only two exceptions to the general principle that limits inherent tribal powers to tribal self-governance. First, a tribe has power to regulate non-members if they engage in consensual activities with the tribe.\(^{52}\) The Court did not elaborate upon the kind of consensual activity that might satisfy this exception. In particular, it failed to explain why non-member hunting and fishing anywhere within the boundaries of a reservation does not amount to consent to regulation by tribal authorities.

The second *Montana* exception recognizes that a tribe may regulate non-members if their activities pose a direct threat to the economic, health, and safety interests of the tribe or its members.\(^{53}\) Again, the Court did not specify the sorts of tribal interests that might justify tribal regulation of non-member activities on fee land within the boundaries of the reservation.\(^{54}\) However, the Court's bare recognition of the existence

47. Id. at 557.
48. Id. at 559-60 n.9.
49. Id. at 563-65.
52. Id. The Court explained the result in *Colville* on this basis, in part. Apparently, it saw the decisions of non-members to purchase cigarettes from tribal enterprises as consent to the imposition of tribal taxes. Id.
53. Id. at 566.
54. Compare Montana, 450 U.S. 544 with New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983). In *Mescalero*, the question was the extent of the state's power to regulate non-member hunting and fishing within the boundaries of the reservation where the tribe owned all but 193.85 acres of 460,000 acres. Id. at 325-26. The state did not dispute tribal power to regulate hunting and fishing of its members. However, it did claim concurrent power over non-Indians seeking to hunt and fish within the reservation. Id. at 330. *Montana* was distinguished on the basis that it
of these economic, health, and safety interests suggests implicit acceptance that tribal governmental powers stem from inherent sovereignty and are not merely an attribute of exclusionary powers.

At least one federal district court has so interpreted the second *Montana* exception, applying it to support tribal regulation of non-member-owned fee land when a tribal ordinance imposed a moratorium on industrial development within the reservation. A non-Indian owner of fee land within the reservation applied to the county for a permit to construct an asphalt and cement plant on its land. The county approved the permit, and the tribe sought a preliminary injunction to halt the project. The court issued the preliminary injunction, allowed tribal regulation of non-member fee land on the basis of the second *Montana* exception, and found that the tribal interests in protecting air and water quality and preventing harmful noise pollution were the kinds of health and safety interests which *Montana* recognized as justification for tribal governance of non-members on fee land.

Under this analysis, solid waste facilities that threaten tribal resources, although sited on fee land and owned by non-members, will likewise be subject to tribal regulation. However, whether anything remains of the *Montana* exception that tacitly recognizes inherent tribal authority over non-members depends upon an interpretation of the Supreme Court's most recent, sharply divided opinion on the issue of the source and scope of tribal power over non-Indian activities on fee land within reservation boundaries, *Brendale v. Confederated Tribes & Bands of Yakima*.

*Brendale* is a case which pitted tribal authority against state authority in the context of zoning. By a Treaty of 1859, the Yakima Nation ceded land to the United States, retaining a reservation of 1.3 million acres. Thereafter, some acreage was alienated, and at the time of the litigation, eighty percent of the land was held in trust for the tribe, while the remaining twenty percent was held in fee by Indian or non-Indian owners.

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56. Id. at 1044-45.

57. 109 S. Ct. 2994 (1989). As subsequent discussion will make clear, the various opinions in *Brendale* reveal the contours of the debate. The plurality opinion affirms the principle that inherent tribal powers extend only to tribal members and discredits the notion that the tribal governance extends to non-member activities on tribal land, as distinguished from non-member fee land, except as an incident of the power to exclude. See infra notes 63-65 and accompanying text. The dissenters argue to the contrary, claiming that the general principle underlying tribal authority is that the tribe retains power over non-Indians on reservation lands, even as to fee lands, unless exercise of sovereignty is inconsistent with overriding interests of the national government. They deny that the source of tribal power over non-Indians is an incident of the power to exclude non-Indians from the reservation. See infra notes 71-73 and accompanying text.

Most of the fee land was located in three towns which were generally open to non-Indians. The rest of the fee land was scattered throughout the reservation.\footnote{59. Id.}

In 1970, the tribe adopted its first zoning ordinance, applying it to all lands within the boundaries of the reservation, including non-Indian-owned fee land.\footnote{60. Id.} The County of Yakima also had a zoning ordinance which purported to apply to all real property within the county, excluding only Indian trust lands. The case involved two tracts of land, each owned by a non-Indian seeking to develop his land. One tract was in town and the other tract was in a more remote part of the reservation.\footnote{61. Justice Stevens characterized the towns as the "open part" of the reservation and the other parts as the "closed part" of the reservation. Justice White's plurality opinion rejected this classification, finding it not to be true in fact and to have no legal significance. \textit{Id.} at 3000 n.2.} Because the tribal zoning ordinance limited development which the county ordinance permitted, the Yakima Nation challenged the proposed development and the county's exercise of zoning authority. Its complaint sought a declaration that the tribe had exclusive authority to zone all of the property at issue. The Ninth Circuit Court of Appeals upheld the tribe's exclusive zoning power, rooting tribal zoning authority in the right to fulfill general governmental powers, including coordinated, comprehensive zoning.

The principle of inherent tribal regulatory power over non-members adopted by the court of appeals was endorsed by only the dissenting Supreme Court justices.\footnote{62. \textit{Id.} at 3017.} While no other theory explaining the source and scope of tribal authority captured a majority, the Supreme Court affirmed the court of appeals' conclusion about the tract located in the remote part of the reservation, but reversed as to the tract located in town.

Justice White, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, authored an opinion for a plurality of the Court that relied heavily on \textit{Montana}. First, the plurality reiterated that tribes have no power to exclude non-Indians from lands alienated under the Allotment Acts, holding that the effect of those Acts was to eliminate tribal authority to exclude non-Indians.\footnote{63. \textit{Id.} at 3004.} Accordingly, the plurality reasoned that tribes cannot rest regulatory power over fee lands on a lesser included exclusive power.

As for inherent sovereignty as a source of tribal power to regulate fee lands, the plurality reaffirmed the general principle of \textit{Montana}, holding flatly that Indian regulatory jurisdiction does not extend to fee land unless: (1) non-member activities occur through consensual arrangements; or (2) the activity threatens or directly affects the political integrity, economic security, or health and welfare of the tribe.\footnote{64. \textit{Id.} at 3006.}

Moreover, the plurality explained that a tribe bears a heavy burden to qualify for this limited, inherently sovereign tribal authority over non-
members. To justify extension of its jurisdiction over non-Indian-owned fee lands, a tribe must show that the non-member activity has a *de monstrably serious* impact that *imperils* the economic security or health and welfare of the tribe. Applying these principles, the plurality would have reversed the court of appeals as to the land in town because the tribe could not possibly make the requisite showing as to that land. However, as for the land on the more remote part of the reservation, the plurality would have remanded for a determination of the tribal interests in applying their zoning ordinance to land surrounded by undeveloped tribal land.

Justice Stevens, who was joined by Justice O’Connor, authored the dispositive opinion. He rejected the notion that tribes retain any inherent sovereign power over non-members, thus adhering to the view that the sole source of tribal power over non-members stems from tribal power to exclude non-members from reservation land. While Justice Stevens agreed with the plurality that the tribe lacked power to extend its zoning ordinance to the non-Indian-owned fee land located in town, he analyzed the problem entirely in terms of tribal power to exclude. Because, as a practical matter, the tribe relinquished its power to exclude non-members from the towns by allowing non-members free access to the towns, he concluded that the tribe likewise lost its power to impose zoning restrictions on non-member owned land in the towns even though the land was within reservation boundaries.

As for the land on the more remote part of the reservation, Justices Stevens and O’Connor concluded that the tribe retained its power of exclusion by actually denying access to non-Indians. This entitled the tribe to exercise the lesser included power of imposing conditions on non-members. Just how much Justices Stevens and O’Connor depart from the plurality about the theoretical basis of tribal authority to regulate zoning becomes clear in their discussion of the remote areas. Whereas the plurality would have remanded for evidence of tribal interests in zoning that area, Justices Stevens and O’Connor explained that however important evidence of tribal interests might be to support tribal regulatory power under an inherent sovereignty theory, it is logically irrelevant if the tribal power rests solely on a tribe’s power to exclude non-Indians. Only evidence of manifestations of exclusionary intent counts for that authority. Having found such evidence with respect to the remote areas, Justices Stevens and O’Connor joined with the three dissenting Justices

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65. *Id.* at 3008.
66. *Id.* at 3009.
67. *Id.* at 3017.
68. *Id.* at 3015. Justice White disputed the facts. He saw little evidence that the tribe had actually closed the remote areas of the reservation to non-Indians. Moreover, he did not take it to be legally significant because he found that any exclusionary power formerly retained by the tribe was erased by alienation of land to non-Indians under the Allotment Acts. Once land is alienated to non-Indians, the tribe, by definition, loses its power to exclude non-Indians from that land. *Id.*
to uphold exclusive tribal power to zone fee lands located within the reservation outside of the towns.\textsuperscript{69}

Justice Blackmun, joined by Justices Brennan and Marshall, dissented. He would have upheld exclusive tribal power to zone both tracts at issue. He reasoned that the Court's precedents compel the conclusion that tribes retain sovereign power over both their people and their territory. Territory-based sovereign powers extend to non-Indians who are on reservation land\textsuperscript{70} and are qualified only by the principle of federal supremacy, which holds that tribal sovereign power may fall to inconsistent, overriding federal interests.\textsuperscript{71}

Thus, the dissenters disagreed with Justice Stevens and wholly rejected the concept that the sole source of tribal power over non-Indians is an incident of the power to exclude non-Indians from reservations. They also rejected the limitations on inherent tribal authority that the plurality found to be compelled by \textit{Montana}. Instead, the dissenters concluded that \textit{Montana} was itself an aberration from the generally accepted sovereign theory that presumes tribal regulatory power over all persons and territory within the boundaries of the reservation, a presumption that can be displaced only by a showing of contrary and overriding federal interest.\textsuperscript{72} Even so, the dissent explained that tribal zoning power satisfies even the plurality's stringent qualification test for the second \textit{Montana} exception because the power to control land use is very important to tribal economic and political interests.\textsuperscript{73}

The sharp, theoretical divisions expressed in \textit{Brendale} reveal a state of flux in general federal Indian law of regulatory jurisdiction. This state of flux clouds predictions about allocations of state and tribal regulatory power over solid waste. Nevertheless, some forecasting is possible regarding the issues raised by the hypothetical scenarios described at the beginning of this article. For example, if a non-member national waste management enterprise seeks to site a facility on trust or tribally owned land, tribal regulatory jurisdiction rests firmly on a double base. First, all members of the Supreme Court appear to agree that the tribal right to exclude non-members from land reserved to the tribe encompasses the power to regulate activities taking place there. Moreover, even those Justices who repudiate general inherent tribal sovereignty over non-members may find consensual activity of the sort which justifies tribal authority even over fee lands in an arrangement between a tribe and a national solid waste company that sites a facility on non-fee lands within a reservation's boundaries.

The non-member national solid waste management enterprise's selection of a site on non-Indian-owned fee lands presents a more difficult question, however. After \textit{Brendale}, the existence of tribal jurisdiction appears to

\begin{footnotes}
\item[69.] Id.
\item[70.] Id. at 3018.
\item[71.] Id.
\item[72.] Id.
\item[73.] Id. at 3023.
\end{footnotes}
turn on multiple factors. To satisfy proponents of the exclusionary theory of regulation, crucial evidence will focus on the location of the fee land, the location of the proposed site in relation to the rest of the tribal or trust lands, the characteristics of the surrounding tribal holdings, and the conduct of the tribe in permitting access to the region by non-members. For those who accept limited tribal regulatory authority over non-members under the second Montana exception, the central inquiry will be the degree to which lack of tribal authority over the facility imperils tribal interests in protecting the health and safety of members and interferes with tribal natural resources and economic development.

To forecast which view will gain ascendancy is perilous. If, however, a majority of the Court solidifies around the Brendale plurality’s analysis under the second Montana exception, which implicitly entails the weighing and balancing of tribal interests against the regulatory interests of the state, some judicial guidelines exist. Before Brendale, an inquiry of this kind was familiar in preemption cases, which primarily analyzed the scope of states’ power to regulate non-member activity within the boundaries of a reservation together with the related question of concurrent state and tribal regulatory jurisdiction. To help arrive at a more complete assessment of the impact of Brendale on the distribution of solid waste regulatory power between tribe and state, then, it is useful to look at earlier doctrines governing concurrent tribal/state jurisdiction.

C. Concurrent State/Tribal Jurisdiction

Return to the solid waste facility owned and operated by a non-member and located within the reservation but near its boundaries. If the facility is mismanaged, persons and property off of the reservation may be threatened. For this reason, a state may wish to assert police power authority over the facility even though it is located on the reservation. The state will claim that its authority extends to all non-members within the territorial limits of the state and that exercise of this authority is necessary to protect state health and safety interests. The success of this claim depends on whether state interests outweigh tribal and federal interests, an inquiry, according to the United States Supreme Court, that proceeds in light of traditional notions of tribal sovereignty and the congressional goal of Indian self-government. In New Mexico v. Mescalero Apache Tribe, New Mexico claimed power to regulate hunting and fishing of non-Indians on reservation lands. The Court held that state regulation of hunting and fishing by anyone on the reservation was preempted, explaining that state jurisdiction

74. Presumably, Justice White is correct when he says in Brendale that the tribe may not prevent access to a non-member to land which he owns by virtue of alienation under the Allotment Acts. Id. at 3003-04.
76. California, 480 U.S. at 216.
is preempted if it interferes with or is incompatible with federal and tribal law, unless the state interests at stake are sufficient to justify the assertion of state authority. The Court found a federal interest in a number of congressional statutes intended to promote tribal self-govern-ment and a tribal interest both in the large capital investment in the development of a resort facility intended to attract non-Indian customers and in the importance to the tribe of maintaining comprehensive management of wildlife on the reservation. The Court rejected concurrent regulatory authority because application of state law undermined the integrity of the tribe's management program.

The Court also upheld tribal law against a state assertion of regulatory authority in California v. Cabazon Band of Mission Indians, which held that California's law governing gambling was incompatible with federal and tribal interests. In that case, the Court found federal interests in a number of statutes providing federal financial assistance for construction of bingo facilities, as well as in Secretary of Interior guidelines governing review of bingo management contracts. The most important tribal interest was the economic development fueled by the revenue available from bingo, which was especially critical to a tribe that lacked other resources.

Weighing and balancing of tribal and federal interests against state interests does not, however, always result in preemption of state regulation. Where the state interests are strong and when state regulation may be accomplished without undermining a tribal regulatory scheme, the Court has upheld state regulation. In Moe v. Confederated Salish and Kootenai Tribes and in Washington v. Confederated Tribes of Colville, the Court found state interests in assuring the collection of taxes on sales of cigarettes to non-members to be sufficiently weighty to justify the imposition of tax-collecting recordkeeping burdens on tribal smokeshop operators. Concurrent regulation was permissible because the state recordkeeping requirements related only to non-member sales and were supplemental to any tribal recordkeeping requirements; thus, it did not interfere with any competing tribal regulatory scheme.

Limited tribal sovereignty was also acknowledged in Mescalero and Cabazon, even though both of those decisions confirmed tribal sovereignty over state assertions of authority within the reservation. In Cabazon, the

78. Id. at 333.
79. Id. at 341.
81. Id. at 218.
82. Id. at 218-19.
84. 447 U.S. 134 (1980).
85. Id. at 160-61. In addition, the Court has upheld state regulation against tribal sovereign claims on other grounds. For example, in Rice v. Rehner, 463 U.S. 713 (1983), the Court based California's power to require a tribal member and federally licensed Indiana trader operating a general store on a reservation to obtain a state license to sell liquor for off-reservation consumption on the historical grounds that Congress had never intended tribal sovereignty to encompass regulation of liquor traffic. Id. at 733-34.
tribes argued that "state laws [are] generally . . . [i]napplicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply." The Court refused to apply a rigid per se rule precluding state regulatory jurisdiction over tribes and tribal members. In addition, in *Mescalero*, the Court recognized that under certain circumstances a state may assert jurisdiction over even the on-reservation activities of tribal members.

**D. Application of Current Doctrine to Solid Waste Regulation**

As the foregoing discussion of precedent shows, current doctrine offers little principled guidance for resolving tribal and state jurisdictional clashes over those solid waste facilities that threaten off-reservation resources. The preemption cases suggest only that concurrent jurisdiction is theoretically possible when state and tribal regulatory schemes dovetail such that one scheme does not undermine the other. However, it is nearly impossible to conceive of such compatible state and tribal solid waste regulatory regimes.

As for competing tribal and state claims to exclusive jurisdiction, current law appears to weaken tribal regulatory powers over non-members' activities on fee land. If a non-Indian solid waste facility is located on fee land, application of *Brendale's* plurality principle favors state regulation unless the tribe can show that tribal interests substantially outweigh state interests, an impossible showing if the proposed facility threatens off-reservation health and safety. Thus, placing the burden on the tribe to make this showing, as the *Brendale* plurality does, guarantees the failure of tribal regulatory jurisdiction even if the health and safety of tribal members is also threatened by the facility. Application of Justice Stevens' exclusionary theory only reinforces this outcome if the tribe is unable...

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87. The Court explained that in the special area of taxation, the Court has adopted a per se rule invalidating state taxes of Indian tribes and individual Indians because the federal tradition of Indian immunity from state taxation is very strong and the state interest in taxation is correspondingly weak. *Cabazon*, 480 U.S. at 215 n.17. *Cf.* *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (the Court upheld state power to impose severance taxes on non-Indian held oil and gas leases on Indian lands).

88. 462 U.S. at 331-332.

89. States and tribes may enter cooperative agreements that will coordinate state and tribal regulatory schemes. These agreements are encouraged by EPA Indian policy. See 1984 EPA Policy, supra note 33.
to show that it denied general access to land surrounding the fee land.\textsuperscript{90}

Only when a non-member solid waste facility with off-reservation effects is located on tribal land is it likely that tribal interests will outweigh state interests, even if the risks to health and safety interests off-reservation are as great or greater than those on-reservation. This forecast is based upon consistent judicial recognition of the importance of a tribal interest in its economic development. Use of tribal land for solid waste disposal is an increasingly more valuable land use because of the scarcity and high cost of landfills in densely populated regions. Thus, making tribal land available for solid waste disposal may serve tribal economic interests. These economic interests, coupled with a tribe's interest in protecting the health and safety of its members and in protecting the quality of tribal soil, air, and groundwater, may very well outweigh a state's interest in protecting the health and safety of its citizens.

III. THE IMPACT OF THE RCRA

Part II of this article explains how current doctrines of federal Indian law might allocate jurisdictional authority over solid waste facilities located in Indian Country. This part of the article analyzes the impact of the RCRA on federal Indian law doctrine in two ways: first, by examining application of legislation now in force to show how the EPA has implemented the RCRA in Indian Country; and second, by forecasting the impact of proposed RCRA amendments that treat tribes as states\textsuperscript{91} by drawing on comparisons between the RCRA proposal and the implementation of similar provisions under the Safe Drinking Water and the Clean Water Acts.

\textsuperscript{90} It is unclear whether location on fee land surrounded by "closed" land would tip the balance in favor of tribal regulation even for adherents of the exclusionary theory. Research has uncovered only one post-\textsuperscript{Brendale} appellate decision, Baker Elec. Coop., Inc. v. Public Serv. Comm'n, 17 Indian L. Rep. (Am. Indian Law. Training Program) 5033 (N.D. 1990). In this case, a tribal council designated a non-member utility as the exclusive supplier of power to a tribal industries building located on tribal land that was surrounded by land that was primarily open to non-Indians. The utility challenged the assertion of regulatory authority by the state Public Service Commission by means of a writ of prohibition. On the motion of a competing utility, without the participation of the tribe as a party, the state supreme court quashed the writ and remanded to the Public Service Commission for a determination of its jurisdiction in the matter. \textit{Id.} The court upheld the Commission's decision that its jurisdiction over utilities encompassed those utilities supplying power to a building within the reservation boundaries on the ground that the utility had no standing to assert tribal sovereignty as a shield against state regulation. \textit{Id.} at 5039. While the court's \textsuperscript{Brendale} analysis is merely dicta, it is interesting that the North Dakota Supreme Court purported to apply the \textsuperscript{Brendale} plurality view even though the tribal building was located on tribal land. It stated that the general rule is that tribes lack inherent sovereignty over non-members, such as utilities. \textit{Id.} at 5036. It noted, moreover, that the tribe had previously acquiesced in state utility regulation. \textit{Id.} at 5037.

The opinion's \textsuperscript{Brendale} analysis seems flawed. The true ground of the opinion, apart from the standing issue, is that the utility is subject to state regulation because of its location within the geographical boundaries of the state. That it sells its power outside of those boundaries does not divest the state of jurisdiction.

\textsuperscript{91} See supra note 8.
A. The RCRA’s Application to Indian Country

Despite the absence of express provisions governing Indian Country in the RCRA, the EPA promulgated regulations to implement the RCRA in Indian Country.\(^{92}\) *Blue Legs v. United States Bureau of Indian Affairs*\(^{93}\) considered the applicability of the RCRA’s solid waste regulations to Indian lands and the relationship of the RCRA to traditional tribal sovereign immunity from suit.\(^{94}\) *Blue Legs* involved a tribal member’s complaint, under the citizens’ suit provision of the RCRA,\(^{95}\) that the Oglala Sioux Tribe, the Bureau of Indian Affairs, and the Indian Health Service violated the RCRA by maintaining garbage dumps\(^{96}\) on tribal land or on land held by individual members in trust for the tribe, in violation of EPA regulations. The court held that the tribe, together with the federal defendants, must clean up the dump sites. The Court rejected the argument that tribal immunity shields a tribe from RCRA suits in federal court, holding instead that Congress abrogated tribal sovereign immunity when it allowed citizens to bring suit against “persons,”\(^{97}\) defined to include “municipalities,”\(^{98}\) which in turn include Indian tribes.

The Court also refused to require the plaintiff to exhaust tribal court remedies, reasoning that the RCRA’s grant of exclusive jurisdiction to federal district courts\(^{99}\) expressly limits the usual presumption, grounded in Congress’ general preference for tribal self-government,\(^{100}\) that tribal courts have initial jurisdiction. *Blue Legs* held plainly that tribes are regulated entities under the RCRA and are thus subject to EPA regulations and to citizens’ suits. By parity of reasoning, one must also conclude

\(^{93}\) 867 F.2d 1094 (8th Cir. 1989).
\(^{94}\) See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng’g, 476 U.S. 877 (1986).
\(^{95}\) 42 U.S.C. § 6972 (1988). The RCRA’s citizens’ suit provision allows, among other things, any person to commence a civil action against any person alleged to be in violation of any permit, condition, standard regulation, prohibition, requirement, or order that has become effective under the Act, or against any person who is contributing or has contributed to the handling, treatment, storage, transportation, or disposal of any hazardous or solid waste which may present an imminent and substantial endangerment to health or the environment. *Id.*
\(^{96}\) The RCRA prohibits open dumping. Upon promulgation of criteria under section 6907(a)(3) of this title, any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited, except in the case of any practice or disposal of solid waste under a timetable or schedule for compliance established under this section. *Id.* § 6945(a).
\(^{97}\) *Id.* § 6903(15). “The term ‘person’ means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.” *Id.*
\(^{98}\) *Id.* § 6903(13). “The term ‘municipality’ (A) means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law, with responsibility for the planning or administration of solid waste management, or an Indian tribe or authorized tribal organization or Alaska Native Village or organization.” *Id.*
\(^{99}\) *Id.* § 6972(2). “The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition or order.” *Id.*
that by subjecting "persons" to the full range of hazardous waste federal enforcement options,\(^{101}\) Congress also intended to abrogate tribal immunity with respect to administrative orders assessing civil penalties,\(^{102}\) civil suits initiated by the federal government,\(^{103}\) and criminal prosecutions,\(^{104}\) thus exposing tribes to the full range of federal enforcement powers under the RCRA.

Ironically, \textit{Blue Legs} points in two directions simultaneously, as revealed by rulings of the district court on remand.\(^{105}\) Even as the decision weakens tribal governments by reaffirming federal supremacy over the Oglala Sioux and subjecting the tribe to RCRA enforcement, it confirms that the tribe plays a dominant role in the management of solid wastes. The latter point was clarified when the federal defendants in \textit{Blue Legs} remained recalcitrant about carrying out their shared cleanup responsibilities despite the Eighth Circuit Court of Appeals' decision imposing that burden on them. The federal defendants, the Bureau of Indian Affairs and the Indian Health Service, argued that because Congress had allocated no funds for the purpose of upgrading dumps on the reservation, the money must come from funds earmarked for water supply and sewer systems for individual Indian homes.\(^{106}\) In dismissing the federal defendants' position as "cavalier, willful, and contumacious...", the district court ordered the defendants to submit and implement a cleanup plan and to share the costs of implementation, with the Bureau of Indian Affairs bearing 50\% of the cost and the tribe and the Indian Health Service each bearing 25\% of the cost.\(^{108}\) Most interestingly, the court emphasized that the tribe, not the Indian Health Service or the Bureau of Indian Affairs, has management responsibility for reservation solid waste, responsibility which is broad enough to encompass the power to draft and implement rules for site operation and to ensure annual funding for site operation in compliance with the RCRA by setting waste disposal rates.\(^{109}\) Thus, even though the RCRA fails to grant express authority to tribes to manage solid wastes, this court found such tribal power to be implicit in the RCRA scheme, at least as to dumps on tribal land.

\textit{Washington Department of Ecology v. United States Environmental Protection Agency}\(^{110}\) also construed the RCRA both to confirm primacy of federal power in management of hazardous waste in Indian Country and to recognize tribal power over tribal lands, yet equivocated about the scope of tribal power over non-Indians. The State of Washington submitted to the EPA an application for interim authorization to carry

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\textbf{References:}

102. \textit{Id.} § 6928(a)(1).
103. \textit{Id.}
104. \textit{Id.} § 6928(d).
106. \textit{Id.} at 83.
107. \textit{Id.}
108. \textit{Id.} at 84.
109. \textit{Id.}
110. 752 F.2d 1465 (9th Cir. 1985).
\end{flushleft}
out a hazardous waste program that governed all lands within its geographical boundaries, including Indian lands. The EPA approved Washington's application except insofar as it purported to apply to Indian lands, grounding its decision on Washington's failure to adequately demonstrate its jurisdiction over those lands. The Ninth Circuit Court of Appeals affirmed the EPA's refusal to authorize Washington to regulate hazardous waste on Indian lands on the narrow ground that the RCRA does not authorize states to regulate Indians on Indian lands.

However, the Ninth Circuit expressly refused to address the impact of the RCRA on states' power over non-Indians in Indian Country. The court concluded that the RCRA's silence about the extent to which EPA-approved state programs are to operate in Indian lands left undisturbed the well-settled principle of federal Indian law that generally precludes states from exercising jurisdiction over Indians in Indian Country. The court held that this principle, taken together with the long tradition of tribal sovereignty, justified the EPA's refusal to allow Washington to apply its hazardous waste program to Indian lands within the geographical boundaries of Washington.

Although Washington Department of Ecology did not settle whether the RCRA's state authorization scheme disturbs the backdrop of federal Indian law with respect to state regulation of non-Indian activities on Indian lands, its reasoning compels the conclusion that the RCRA leaves intact general Indian law governing that subject. Certainly, Congress is as resoundingly silent about allocations of state and tribal regulatory jurisdiction over non-Indian activity as it is about Indian activity on Indian lands.

Brendale shows how difficult it is to ascertain exactly how general federal Indian law allocates regulatory jurisdiction. If Brendale allows state jurisdiction over non-member activity on fee land, as it arguably does so long as the tribe has permitted general access to the area by non-members, and also on tribal land if state interests outweigh tribal interests, the net effect of Blue Legs and Washington Department of Ecology, both of which affirm tribal power under the RCRA, is actually to disempower tribes from regulating non-member solid waste facilities. First, Blue Legs construes the RCRA to strip tribes of their traditional


Any State which has in existence a hazardous waste program pursuant to State law before the date ninety days after the promulgation of regulations under ... [this title], may submit to the administrator evidence of such existing program and may request a temporary authorization to carry out such program under this title.

Id. (citations omitted). See id. § 6926(b) for general authorization to the EPA to approve state programs "in lieu" of the federal program.

112. Washington Dept. of Ecology, 752 F.2d at 1467.

113. Id. at 1467-68.

114. Id. at 1469-72.

115. Id. at 1472.

116. See supra text accompanying notes 36-75.

117. There is no principled distinction between regulation of hazardous waste and regulation of solid waste.
immunity from suit.\textsuperscript{118} Second, by allowing the current general federal Indian law to operate within the RCRA scheme, \textit{Washington Department of Ecology} preserves state regulatory power over non-member activity on lands within the boundaries of the reservation, thereby depriving tribes of power possessed by other governmental entities: full autonomy to protect their vital interests.\textsuperscript{119}

\section*{B. The Proposed RCRA Amendment}

The proposed RCRA amendment, House Bill 3735, the principal vehicle of RCRA reauthorization, adds authority to grant state status to Indian tribes for enforcement of the Solid Waste Disposal Act.\textsuperscript{120} However, it will do little to strengthen tribal regulatory power. The proposed amendment follows the pattern of earlier "tribes-as-states" authorizations in the Clean Water Act and the Safe Drinking Water Act. As an analysis of the regulatory experience under the Clean Water Act and Safe Drinking Water Act "tribes-as-states" authority shows, changes in the proposed RCRA amendment are necessary to clarify and strengthen tribal authority over the management of solid waste, particularly when the solid waste activity is carried on by non-members.

\subsection*{1. Scope of Proposed Delegation to Tribes}

The proposed RCRA "tribes-as-states" provision, like the analogous Clean Water Act section, defines tribal jurisdiction in broad territorial terms. Section 904 of House Bill 3735 defines the term "Indian Country" and links the scope of tribal jurisdiction over solid waste to that definition\textsuperscript{121} by limiting

the functions to be exercised by the Indian tribe . . . to land and resources which are held by the Indian tribe, held by the United

\textsuperscript{118} In doing so, \textit{Blue Legs} brought tribes into parity with other federal defendants with respect to solid waste disposal. \textit{See} 42 U.S.C. § 6964 (1988), which makes solid waste disposal guidelines applicable to any executive agency and to any unit of the legislative branch which has jurisdiction over any real property or facility, the administration of which involves the agency in solid waste management activities. The court concluded that this provision, together with the citizens' suit provision, constitute a waiver of tribal sovereign immunity. \textit{Blue Legs v. United States Bureau of Indian Affairs}, 867 F.2d 1094, 1096-97 (8th Cir. 1989).

\textsuperscript{119} Some may argue that states ought to retain regulatory authority over non-members to further health and safety interests. This argument proceeds from the assumption that states have superior technical and financial resources to manage the environment. While this may be true, the costs of lost tribal autonomy to national political health are great, and relative tribal technical and financial weaknesses may be overcome by a combination of federal support to the tribes and contractual agreements with the states. The concern that solid waste management companies might prefer to be regulated by weak tribal governments anxious to find employment opportunities for their people can be met by the requirement that tribal programs, like state programs, must satisfy federal EPA standards. \textit{H.R. 3735}, 101st Cong., 1st Sess. (1989).


\textsuperscript{121} House Bill 3735 adds a new section 1009 to the RCRA that defines "Indian Country." The proposed RCRA definition is identical to the definition of "Indian Country" in 18 U.S.C. § 1151 (1988) and has been interpreted to include non-Indian-owned fee land within the boundaries of a reservation. \textit{See supra} note 1.
States in trust for the Indian tribe, held by a member of the Indian tribe if such property interest is subject to a trust restriction on alienation, or are otherwise within Indian country.\textsuperscript{122}

While the Clean Water Act lacks its own definition of "Indian Country," its description of functions to be exercised by the tribe is similar to the proposed RCRA amendment: those which 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.\textsuperscript{123}

On their face, these provisions permit a construction that allows the EPA to authorize a tribal government to regulate a non-member; however, as will be shown, the EPA has declined to construe its Clean Water Act authority so broadly. The Safe Drinking Water Act addresses the scope of tribal jurisdiction somewhat differently by limiting the functions to be exercised by the Indian tribe to those "within the area of the Tribal Government's jurisdiction,"\textsuperscript{124} thus explicitly referring the question of tribal jurisdiction back to general Indian law doctrine.\textsuperscript{125}

Whether Congress intended these different formulations of the extent of the power authorized to be delegated to tribes to express differences in the scope of tribal regulatory jurisdiction over non-members, if any at all, is obscure.\textsuperscript{126} Nevertheless, the EPA's implementation of these


\textsuperscript{125} 42 U.S.C. § 300j-6(c)(1) (1988) shows the circularity of the Safe Drinking Water Act's treatment of Indian jurisdiction. It provides that "[n]othing in the Safe Drinking Water Amendments of 1977 shall be construed to alter or affect the status of American Indian lands or water rights nor to waive any sovereignty over Indian lands guaranteed by treaty or statute."

While the Safe Drinking Water Act expressly preserves Indian sovereignty from state intrusions, its failure to state the scope of that sovereignty makes the backdrop of federal Indian law relevant to questions of the extent of the state power over non-member activity on Indian lands. The EPA's response to this legislative gap suggests reluctance to construe the Safe Drinking Water Act to apply to non-member activity on Indian lands. For example, in the Preamble to the regulations implementing the Safe Drinking Water Act "tribes-as-states" provision, the EPA declined to indulge in the presumption that a tribe has jurisdiction over public water supplies serving its members, a presumption that is supported by the second Montana exception. 53 Fed. Reg. 37,396, 37,399-400 (1988). Instead, the Agency explained that there are two situations where such a presumption is inappropriate: (1) where tribal authority has been expressly limited by statute; and (2) where complex ownership patterns create "checkerboard" areas of federal, state, and tribal ownership, i.e., non-Indian owned fee lands interspersed with Indian-owned lands. Id. at 37,400.

\textsuperscript{126} For example, under the Senate version of the Safe Drinking Water Act amendments, [t]he Administrator is authorized to make special provision for the treatment of Indian Tribes under this Act, including the treatment of Indian tribes as States to the degree necessary to carry out the purposes of this Act. Such special provision may include the direct provision of funds to the governing bodies of Indian tribes, and the determination of priorities by the Indian tribes, where not determined by
"tribes-as-states" provisions suggests it perceives differences among them. In particular, it considers the Clean Water Act to authorize broader delegations to qualifying tribes than does the Safe Drinking Water Act.127

a. Safe Drinking Water Act Regulations

The EPA has promulgated regulations setting out requirements for tribal primacy over the national primary drinking water standards.128 To be eligible, a tribe must be one that is recognized by the Secretary of the Interior and is carrying out police powers within a defined geographic area.129 In addition, the EPA requires the tribe to demonstrate that the functions it seeks to perform in regulating public water systems are within the tribal government's jurisdiction.130 This demonstration can be made by a tribal attorney or other competent tribal official, who presumably has to show: (1) that the public water system is tribally-owned or is owned by a tribal member or enterprise; or (2) that tribal jurisdiction exists over a water system owned by a non-member by virtue of consent to regulation, exercise of tribal exclusionary rights, or by a showing that the relative important interests of the tribe justify its exercise of regulatory authority.131 In other words, instead of helping to delineate the extent of tribal jurisdiction, the regulations leave the jurisdical determination to the EPA based on the same sort of particularized inquiry that has so muddled general Indian law on the subject.

b. Clean Water Act Regulations

Section 518 of the Clean Water Act132 authorizes the EPA to delegate primary authority to tribes for a number of programs133 and provides

the Administrator in cooperation with the Director of the Indian Health Service. S. 124, 99th Cong., 1st Sess., 131 CONG. REC. 4300, 4305 (1985).

However, Congress deleted the Senate Bill and substituted a House Bill which contained language requiring the tribe to show that the functions to be exercised are within the area of the tribal government's jurisdiction. H.R. 1650, 99th Cong., 1st Sess., 131 CONG. REC. 4290, 4296, 4305 (1985).

127. This is interesting in light of the principle of Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) (when reviewing agency action, federal courts must defer to an agency construction of its authority absent clear expression of contradictory Congressional intent).

128. 40 C.F.R. § 142.72-.78 (1990). The Safe Drinking Water Act establishes two independent regulatory schemes to control contaminants in drinking water. The Public Water System Program establishes water quality standards for water delivered by public water systems. 42 U.S.C. §§ 300g to 300g-6 (1988). The Underground Injection Program regulates injection to protect underground sources of drinking water. Id. §§ 300h to 300h-7. A state may apply for primary enforcement responsibility if it can show, inter alia, that it has adopted regulations which are no less stringent that those established by the EPA. Id. § 300h-1(b)(1)(A). Section 1451 of the 1986 amendments authorizes the EPA to permit a tribe treated as a state to apply for grant and contract assistance and for primary enforcement of both the Public Water System and the Underground Injection programs. Id. § 300j-11(a).


130. Id.

131. Id. § 142.76.


133. Indian tribes are to be treated as states to carry out the objectives of certain sections of the Clean Water Act, 33 U.S.C. §§ 1254 (research, investigation and training); 1256 (grants for
for tribal treatment as states with respect to federal financial assistance for construction of waste-water facilities. Although EPA rulemakings implementing section 518 are in various stages, the EPA has expressed its desire for uniform treatment of tribes under Clean Water Act authority. The EPA's proposal for treatment of Indian tribes as states under section 404 of the Act illustrates the EPA's approach. Just as under the Safe Drinking Water Act regulations, a tribe must show that it is federally-recognized and that it possesses substantial governmental powers in order to qualify for treatment as a state under the Clean Water Act. Because the EPA construes the Clean Water Act to grant it greater discretion to recognize broad tribal jurisdiction, the tribe need only show that the water resource it seeks to regulate is within the boundaries of the reservation, a showing that may be made by submission of maps and tribal ordinances and codes. The EPA has expressed the view that fewer jurisdictional disputes will arise under the Clean Water Act than under the Safe Drinking Water Act, at least with respect to the section 404 program, because the EPA interprets the Clean Water Act to allow the EPA to recognize tribal authority anywhere within the reservation even though that authority operates against non-members.

The EPA's view, however, appears to shift in its proposed regulations pertaining to water quality standards. In its discussion of the proposed rulemaking, the EPA explains that it can treat an Indian Tribe as a State only where the Tribe already possesses and can adequately demonstrate authority to manage and protect water resources within the reservation. The Clean Water Act authorizes use of existing Tribal authority for managing EPA programs, but it does not grant additional authority to Tribes. Thus, to gain authority over water quality standards, the EPA requires a tribe to demonstrate its authority by submitting a statement signed by tribal legal counsel or other tribal official explaining the legal basis for the tribe's regulatory authority. While maps, codes, and ordinances are appropriate supplemental documentation, they alone are insufficient to justify tribal authority. It appears, then, that the EPA's proposal for treating tribes as states for water quality standards reverts to the EPA's position under the Safe Drinking Water Act, with tribal jurisdiction depending on a multi-faceted factual review. Such a review provides

pollution control); 1313 (water quality standards); 1315 (water quality inventory); 1318 (inspections, monitoring, and entry); 1319 (federal enforcement); 1324 (clean lakes); 1329 (nonpoint sources); 1341 (certification); 1342 (national pollutant discharge elimination system); and 1344 (dredge and fill material) (1988).

135. This section describes the dredge and fill permit system.
137. Id. at 39,098.
138. Id. at 39,101.
139. Id.
140. Id.
opportunities for regulated entities to thwart Congress' will by challenging either state or tribal jurisdiction under the guise of seeking review of the EPA's decision to approve or disapprove a state or tribal program. States may also mount challenges to the EPA's approval of tribal jurisdiction.

One such challenge is South Dakota v. United States Environmental Protection Agency, a case of first impression, where South Dakota seeks to set aside an EPA determination to treat a tribe as a state under the Safe Drinking Water Act. The EPA granted the Standing Rock Sioux Tribe treatment as a state under the Safe Drinking Water Act regulations promulgated in 1988. South Dakota challenges both the procedural regularity and the substance of the EPA's decision.

The tribe's application for "treatment as a state" covers public drinking water systems owned and operated by the tribe itself, as well as systems owned and operated by municipalities located within the exterior boundaries of the reservation. South Dakota objects to the Standing Rock Sioux Tribe's initial application for "treatment as a state" because the state believes that the tribe has failed to show its jurisdiction over the municipal public drinking water systems. Relying on Montana v. United States, the EPA found that the tribe established a basis for assertion of regulatory jurisdiction over all the public drinking water systems within the exterior boundaries of the reservation because provision of safe drinking water is important to the tribal health and safety interests.

South Dakota challenges the applicability of the second Montana exception and argues that the EPA's determination should be remanded on the ground, inter alia, that Brendale v. Confederated Tribes & Bands of Yakima precludes a finding that the tribe has jurisdiction over municipalities and municipal officers even though the public water systems owned by those municipalities supply some water to individual tribal members.

South Dakota argues that Brendale's plurality opinion makes clear that the tribe's inherent sovereignty is divested to the extent it involves a tribe's external relations. The state also argues that the circumstances justifying application of the Montana exceptions are absent. Concerning the exception based on consent, South Dakota asserts that consent to tribal jurisdiction cannot be based on providing a service to one or more tribal members. As for the second Montana exception, grounded in a residuum of tribal sovereignty to govern non-members on fee land when necessary to protect vital tribal interests, the state argues its effective

141. No. 89-2772 (8th Cir. filed Nov. 8, 1989).
143. 450 U.S. 544 (1981); see supra text accompanying notes 46-51.
144. Brief for Respondent at 9, South Dakota, No. 89-2772 (8th Cir. 1989).
145. 109 S. Ct. 2994 (1989); see supra text accompanying notes 58-73.
146. Brief for Petitioner at 9, South Dakota, No. 89-2772 (8th Cir. 1989).
147. Cf. Governing Council of Pinoleville Indian Comm'n v. Mendocino County, 684 F. Supp. 1042 (N.D. Cal. 1988) (utility claimed that state regulatory authority was ousted in respect to its provision of electrical service to a tribal enterprise).
obliteration by the plurality opinion in *Brendale*, citing Justice White's conclusion that "[t]he governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in tribal courts, to regulate the use of fee land." The state thereby concludes that a tribe necessarily lacks authority over non-Indian-owned public water systems performing municipal functions.

South Dakota buttresses its conclusion by turning to the opinion authored by Justice Stevens, contending that Justice Stevens determined that a tribe may exercise jurisdiction over non-Indians on fee land only if two requisites are met: first, the area of the reservation must be shown to be of a "pristine character"; and second, even in a pristine area, the tribe must show that tribal interests outweigh state interests and that regulatory jurisdiction is genuinely necessary to protect significant tribal interests from direct and immediate threats. The state's argument concludes that no justification exists for exercise of tribal authority over the municipal water systems involved in this application because the area is not pristine and because continued state primacy does not present any threat to tribal interests.

In response, the EPA argues that its reliance on *Montana* is entirely proper in light of *Brendale* for two reasons: first, the *Brendale* decision applied the *Montana* tests; and second, a majority of the *Brendale* court, plurality and dissent, agree that jurisdiction on fee lands is properly analyzed as a question of a tribe's inherent authority. The EPA supports its contention that the *Montana* analysis survives *Brendale* on the ground that seven justices relied on it and disagreed only on whether authority to zone fell within those health, safety, and economic interests so vital to a tribe as to justify tribal jurisdiction. The EPA makes the further argument that the plurality opinion actually supports a presumption that tribal authority exists to regulate public water supplies under the Safe Drinking Water Act. The EPA bases this contention on Justice White's inclusion of the Safe Drinking Water Act within a list of statutes that, by delegating federal authority to tribes, may provide a basis for authority over all lands within a reservation.

IV. PROPOSAL TO CHANGE THE RCRA'S PROPOSED "TRIBES-AS-STATES" PROVISION

Both the regulatory experience under the Clean Water Act, the Safe Drinking Water Act, and the *South Dakota* litigation reveal that current "tribes-as-states" provisions do little more to settle the scope of tribal

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149. *Id.* at 26-27 (citing *Brendale*, 109 S. Ct. at 3014).
150. *See id.* at 29.
152. *Id.* at 35-37.
153. *Id.*
154. *Id.* at 39.
regulatory jurisdiction than does general federal Indian law, which is itself in a state of flux. There is no reason to suppose that the proposed RCRA amendment, so similar to the Clean Water Act provision, will meet a better fate. For that reason, Congress should refuse to enact the proposed RCRA amendment as it now stands. To meet the RCRA's goal of protecting health and environment primarily through decentralized programmatic control, tribal authority to regulate any solid waste activity within the boundaries of a reservation, whether carried on by Indian or non-Indian, whether on fee or non-fee land, should be secured subject to EPA approval and retention of EPA enforcement power. This may be achieved by adding language to the definition of Indian Country explicitly including fee land owned by non-members.

This change is necessary because the present proposed amendment is insufficient to displace general federal Indian law on regulatory jurisdiction. In turn, this body of law contradicts the Indian policy espoused by the federal government and undermines the RCRA's purpose of protecting human health and the environment from hazards stemming from improper management and disposal of solid waste. Federal Indian policy provides for treatment of tribal governments on a government to government basis and supports self-determination and local decision-making by Indian tribes. If the RCRA does not displace general federal Indian law, then, after Brendale that law may allocate regulatory jurisdiction over a non-member solid waste facility located within reservation boundaries to the affected state, not to the tribe, even if the risks of a mismanaged facility are as great for tribal members and property as they are for persons and property off the reservation.

To be sure, whether state regulation will ultimately prevail over tribal management may vary from site to site because general federal Indian law now holds that the jurisdictional outcome hinges on either a particularized inquiry into the relative state and tribal interests or on a fact-dependent inquiry focusing on tribal efforts to exclude non-members from the region. The fact that allocation of regulatory authority is indeterminate itself undermines the aims of the RCRA insofar as uncertainty encourages resistance to state regulation on the part of both the tribe and the solid waste company located within the boundaries of Indian lands: a tribe is likely to resist state jurisdiction to advance its sovereignty claims; a solid waste company is likely to resist assertions of both state and tribal authority because of claimed uncertainty about which sovereign is the appropriate regulator and to save costs of compliance by delaying enforcement of standards promulgated to protect health and safety.

To foster the purposes of the RCRA and to facilitate federal Indian policy, the RCRA must be amended so that tribes become full partners in the regulation of solid waste. Full partnership calls for federal assistance at two different levels. First, the tribes must be furnished the resources,
both technical and financial, to carry out the federally-mandated health and environmental purposes of the RCRA. Second, tribes must receive explicit federal recognition that their sovereign powers include the power to regulate the activities of non-members within the boundaries of the reservation. Only such a broad delegation of programmatic responsibility will displace the uncertainty of current general federal Indian law that invites litigation and delayed compliance. Unequivocal federal recognition of tribal regulatory authority to regulate solid wastes, coupled with a federal infusion of resources enabling the tribes to carry out their responsibilities, offers another potential benefit as well. Placing tribes on an equal footing with states may reduce the competitive hostility that now governs so many state and tribal relations, thereby encouraging agreements for sharing their regulatory resources so as to maximize their combined strength in the service of environmental and health protection.156

The concern that weak tribal governments will underregulate non-member solid waste facilities is met by the requirement that the EPA must approve tribal programs to ensure that they are as stringent as the federal requirements and by the retention of federal enforcement power in the EPA. This arrangement, of course, simply parallels the federal-state relationship now in force under the RCRA.

V. CONCLUSION

The RCRA’s silence respecting tribal authority to regulate solid wastes leaves a gap which general federal Indian law fills. That law currently tends in the direction of weak tribal regulatory authority, especially over non-member activity on fee land within the boundaries of an Indian reservation. Because that land may become increasingly attractive for use as waste disposal sites by solid waste management enterprises, growing health and environmental threats to Indian people and resources are likely.

By proposing to authorize tribes to act as states in the RCRA amendments, Congress evinces an intention to extend decentralized programmatic control over solid wastes to tribes, presumably because local control better serves the RCRA’s environmental goals than does the EPA’s more removed management. However, an examination of similar provisions in the Clean Water Act and Safe Drinking Water Act shows that the proposed amendment is insufficiently explicit to displace current federal Indian law. In reconsidering the RCRA, Congress should expressly recognize tribal authority to regulate non-members. Assuming the retention of both the requirement that tribal programs must be at least as stringent as the federal program and federal financial and technical support of tribal efforts to regulate solid waste, this recognition will advance efforts to protect all people and the environment.

156. That Congress favors cooperative agreements between tribes and states in solid waste management is manifested by a provision in the proposed RCRA which expressly encourages them. H.R. 3735, § 1009(c), 101st Cong., 1st Sess. (1989).