

CERCLA Liability and Regulation of Solid and Hazardous Waste on Indian Lands

Catherine Baker Stetson
Kevin Gover

Indian tribes have the right and the responsibility to regulate the disposition of both solid and hazardous wastes on tribal lands; however, until quite recently, tribes were neither required nor permitted to exercise such right or to meet such responsibility. Tribal environmental quality programs have received financial and other assistance from the Environmental Protection Agency (EPA), first as a matter of agency policy, then pursuant to explicit congressional authorization. By providing authority for the assistance of tribal regulatory programs, and by assuming—perhaps even mandating—that those programs apply to non-Indian lands within the exterior boundaries of Indian reservations, the tribal amendments to the federal environmental laws and EPA's Policy for the Administration of Environmental Programs on Indian Reservations very clearly preempt the states from enforcing their environmental laws on Indian reservations.

Since *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989), *aff'g Blue Legs v. EPA*, 668 F. Supp. 1329 (D.S.D. 1987) (*Blue Legs*), Indian tribes have been found to be liable under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1988), for cleaning up open dumps on reservations. While no court has made a similar determination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988 & Supp. II 1990), such liability may exist and should not be ignored. This article discusses the history of and authority for tribal regulation of solid and hazardous waste disposal on Indian lands, conclud-

ing with an analysis of the applicability of RCRA and CERCLA liability to tribes and how such liability might be minimized.

Over the last few years, the media has given extensive coverage to stories about tribes throughout the country building solid waste landfills and hazardous waste incinerators. Some of this coverage suggests that the waste industry is marauding unchecked in Indian country, totally immune from any environmental regulation. In fact, a number of proposals have been made to tribes, yet only a few remain under serious consideration, and tribal governments have demonstrated their capability to decide whether commercial waste projects serve their best interests.

One of the biggest concerns to tribal governments and communities today is how to dispose of the solid and hazardous waste generated on reservations and to address the problem of open dumping on reservations. Tribal governments face the same overwhelming problems faced by states, counties, and cities trying to deal with their own solid and hazardous waste disposal: an ever-increasing waste stream, rapidly dwindling capacity of existing landfills, widespread public opposition to the siting of waste disposal facilities, and a great and practical need to minimize the potential civil and criminal liabilities imposed by federal environmental laws.

Tribal governments could reasonably be expected to undertake responsibility for their own waste-disposal programs, as do state and local governments, except for the fact that tribes have never been eligible to assume primary responsibility for RCRA enforcement on their reservations or to benefit from the billions of federal dollars spent to support state environmental programs over the last two decades. This inequity is made worse by the magnitude of the potential clean-up costs facing tribes whose reservations contain hundreds of sites that might be considered open dumps under federal law.

Federal Indian Environmental Policy

Federal environmental laws generally require EPA to establish standards for various sources of pollution, to enforce those standards through a permitting system and, when a state so requests, to delegate primary enforcement authority to the state. When it originally enacted environmental laws, Congress failed to provide expressly for environmental regulation on Indian reservations and also failed to address the role to be played by tribal governments; thus, there has been some question as to whether Congress even intended for these laws to be applied to Indian tribes. Prior to 1986, most

Ms. Stetson and
Mr. Gover are
shareholders in the
Albuquerque law firm
of Gover, Stetson &
Williams, P.C.

environmental laws did not mention tribes or reservations, and none provided for program delegation to tribal governments. Congress' power to include Indians and tribes within the scope of federal statutes is unquestionable; however, when federal laws do not specifically refer to Indians, the United States Supreme Court generally requires that Congress' intent to invade tribal authority be clearly expressed in the legislative history or the surrounding circumstances, or by the existence of a statutory scheme requiring national or uniform application. Because the federal environmental laws require uniform application to be effective, we would expect courts to hold that all environmental regulatory laws do apply, at least in part, to tribes and Indian country.

Tribes retain broad sovereign authority to regulate activities within their territories and have the power to enforce tribal laws, including environmental ones, against their members. However, before a tribe may effectively regulate the reservation environment, it must also have authority over non-Indians on the reservation as well. The courts recognize that Congress may properly delegate federal authority to Indian tribes, including authority over non-Indian activities on Indian lands. Aside from congressionally delegated authority, courts also recognize inherent tribal powers, including broad civil jurisdiction over non-Indians. The seminal case of *Montana v. United States*, 450 U.S. 544, 565-66, *reh'g denied*, 452 U.S. 911 (1981), recognizes that tribes retain inherent civil regulatory authority over non-Indians within reservation boundaries when their "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." It is almost axiomatic that the quality of the reservation environment goes directly to the economic security and health and welfare of a tribal community. Accordingly, it is not surprising that, even before Congress expressly recognized Indian tribes in amendments to environmental laws, courts recognized the authority of tribes to regulate the environment in a way that limited non-Indians' activities on their lands, *Nance v. EPA*, 645 F.2d 701 (9th Cir.), *cert. denied sub nom. Crow Tribe v. EPA*, 454 U.S. 1081 (1981), and prohibited the application of state environmental laws to Indian reservations, *Washington Department of Ecology v. EPA*, 752 F.2d 1465, 1469-70 (9th Cir. 1985).

In 1984, EPA adopted its Policy for the Administration of Environmental Programs on Indian Reservations (Indian Policy) to support tribal "self-government" and "government-to-government" relations between federal and tribal governments and to improve environmental

quality on reservations. The Indian Policy contemplates unitary regulatory systems governing both Indians and non-Indians, preempting state regulatory authority as to the matters to which the policy is directed. The Indian Policy directs EPA to assist interested tribes in assuming regulatory environmental management over reservations, including providing grants to tribes similar to those currently available to state governments. EPA was forced to develop special rules and practices concerning environmental regulation on Indian reservations because, until 1986, none of the major federal regulatory statutes provided for delegation to tribal governments.

The Indian Policy clearly assumes that tribal governments should be the primary decision-makers on environmental matters arising on Indian reservations and that, until tribes assume full responsibility for delegable programs, EPA will retain responsibility for reservations unless a state has received an express grant of jurisdiction from Congress. The Indian Policy also makes clear EPA's view that all federal environmental regulatory statutes apply to Indian reservations and are enforceable against Indians and Indian tribes. In the policy, EPA acknowledges that impediments to tribal assumption of delegable programs exist in the language of present procedures, regulations, and statutes.

Despite the support given by EPA's Indian Policy, tribes needed express statutory authority to assume formal responsibility for tribal environmental programs. Such statutory authority was added to the Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f-300j-11 (1988), in 1985; the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (1988 & Supp. II 1990), in 1987; and the Clean Air Act, 42 U.S.C. §§ 7400-7642 (1988 & Supp. II 1990), in 1990. The tribal amendments authorize EPA to treat Indian tribes as states for purposes of setting standards and receiving program grants, if (1) the tribe has a governing body carrying out substantial powers and duties; (2) the functions to be exercised by the tribe are within its jurisdiction; and (3) the tribe is reasonably expected, in the EPA Administrator's judgment, to be capable of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the federal environmental laws and all applicable regulations.

CERCLA and RCRA Liability of Indian Tribes

In *Blue Legs*, the court ruled that Indian tribes were subject to citizens' suits to enforce the open dumping prohibition in RCRA. In so

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holding, the court found that RCRA waived the sovereign immunity that tribal governments ordinarily enjoy and that tribes were literally within the class of entities to which RCRA applies.

While RCRA thus includes tribes within the class of persons against whom the statute may be enforced, Congress has not yet amended RCRA to provide for delegation of program authority to tribal governments. RCRA's hazardous waste regulatory scheme gives EPA direct regulatory powers; in contrast, very few substantive federal requirements exist in RCRA for the disposal of solid waste. The solid waste statutory scheme also is different from the regulatory plans under other federal environmental laws such as the CWA, in which EPA establishes minimum standards and a permitting system for various sources of pollution. States then may apply for primacy; however, EPA remains the ultimate enforcement agency even where a state program has been approved. As a result, primary enforcement responsibility of established standards always exists with either the state or EPA. In the area of solid waste, on the other hand, no federal permitting system exists. The development and enforcement of standards is left almost entirely to the states, and if a state fails to enforce standards, EPA does not necessarily assume enforcement responsibility. Because state standards and permitting procedures do not apply to Indian reservations and RCRA does not anticipate tribal regulatory programs, there is effectively a regulatory void on many reservations. Other than federal court enforcement of the open dumping prohibition, the statute does not offer any means for the enforcement of substantive standards on Indian reservations.

EPA's October 1991 rule on solid waste disposal facility criteria—which contains revised minimum federal criteria for municipal solid waste landfills as to location, design and operation, groundwater monitoring, corrective action, financial assurances, closure and post-closure care, and the use and disposal of sewage sludge—only highlights the enforcement void on Indian lands. Under the rule, any noncomplying landfills may be classified as open dumps. Because the open dump prohibition in RCRA applies to Indian tribes, this final rule imposes serious and important new obligations on tribes; however, no new resources are made available to the tribes. The inequity of this situation is obvious, and efforts have been under way since late 1991 to obtain tribal amendments to the RCRA reauthorization bills. The most favorable amendments to RCRA would treat Indian tribes as states for all purposes, including solid waste planning and regulation of the handling, transportation, storage, and disposal of both solid and hazardous wastes. In that event, tribes would be able to assume primary responsibility for res-

ervation hazardous waste and solid waste programs and would be eligible to receive grants for the planning and development of such programs.

Tribal liability under CERCLA is less clear. No court has yet held that CERCLA liability may be imposed on Indian tribes. Although the reasoning of the *Blue Legs* court certainly suggests that it may, a strong argument can be made that such liability may not be imposed. Prior to 1986, CERCLA made no mention of Indian tribes. Not even the broad definition of the "persons" to whom the statute applies can be read to include Indian tribes. Moreover, because tribes enjoy sovereign immunity and purported waivers of that immunity are to be construed narrowly, it well may be that tribes are not subject to CERCLA.

In 1986, Congress amended CERCLA in the Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986). SARA contains provisions that require EPA to maximize tribal participation in Superfund programs. The amendments provide that tribes shall be treated as states for various purposes including notification of releases, consultation on remedial actions, access to information, roles and responsibilities under the national contingency plan, and submittal of priorities for remedial action. Nothing in SARA, however, suggests that tribes now are to be subject to CERCLA liability. The fact that tribes are to be treated as states for certain purposes but are not specifically subjected to liability indicates that Congress did not mean to subject tribes to CERCLA liability.

Thus, it is unclear if EPA may enforce CERCLA in federal court against a tribe; however, as previously noted, to date no tribe has successfully challenged the application of a federal environmental law to itself or its lands. Moreover, Indian natural resources lands certainly appear to be within the broad class of resources to which the statute applies—air, water, and land "under the jurisdiction of the United States." Finally, while it may be that Congress has not yet subjected tribes to CERCLA liability, there is absolutely no doubt that it can do so. Thus, both tribes and any developers of tribal lands should proceed as though they are, or will be, subject to CERCLA liability for hazardous releases into the environment.

Minimizing Environmental Liabilities on Tribal Lands

A major concern to both tribal governments and developers owning or operating commer-

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