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Who Should Control Hazardous Waste on Native American Lands? 
Looking Beyond Washington Department of Ecology v. EPA

Leslie Allen*

INTRODUCTION

The Resource Conservation and Recovery Act of 1976 (RCRA)\(^1\) provides a comprehensive program to manage hazardous wastes.\(^2\) A central feature of the Act is that it encourages states to assume responsibility for hazardous waste activity within their borders.\(^3\) Although the Act does not specifically address the problem of hazardous waste on Native American lands,\(^4\) the Environmental Protection Agency's (EPA) regulations under RCRA permit a state to seek control over hazardous waste on reservations.\(^5\) Washington, which has severe hazardous waste problems on numerous reservations,\(^6\) was the first state to request jurisdiction to apply its hazardous waste program to Native American lands. EPA denied the request—asserting that it had discretion to approve only that part of Washington's hazardous waste program that regulated non-Native American lands—and retained jurisdiction over reservation lands.\(^7\) In Washington Department of Ecology v. EPA,\(^8\) the Ninth Circuit Court of Appeals upheld EPA's decision after finding that the Agency's interpretation of RCRA was reasonable.\(^9\)

It is important to understand the limited scope of the court's holding. The court upheld EPA's decision only after ruling that the Agency

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\(^2\) See infra notes 48-56 and accompanying text.
\(^3\) See infra notes 51-56 and accompanying text.
\(^4\) See infra notes 60-64 and accompanying text.
\(^5\) 40 C.F.R. §§ 271.7, 271.1h (1986); see also text accompanying notes 65-66.
\(^6\) Brief for Petitioner at 4, Washington Dep't of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985) (No. 83-7763) [hereinafter Washington Brief]; see infra notes 12-24 and accompanying text.
\(^8\) 752 F.2d 1465 (9th Cir. 1985).
\(^9\) 752 F.2d at 1469.
had not abused its discretion in concluding that RCRA does not specifically authorize Washington's jurisdiction over Native American activity on the reservation.\textsuperscript{10} Washington did not present and, therefore, the Ninth Circuit did not address the more difficult question of whether a state may assert its own police power, independent of RCRA, to regulate wastes on reservations. This Note argues that the doctrine the Supreme Court has developed to resolve state-federal jurisdictional disputes in Native American cases, often referred to as the federal common law preemption analysis, supports state regulation of hazardous waste activity on reservation lands.

The issues in \textit{Washington Department of Ecology} were important to Washington, and to many other western states, because of both the vast extent of federal Native American lands in the region and the significant hazardous waste activity taking place on these lands. The decision is significant for two reasons. First, it declares that RCRA does not compel the EPA to delegate federal authority to regulate Native American lands to states. Second, it provides a useful point of departure for an inquiry into how a state could and should frame a proposal under its police power to regulate hazardous wastes on reservation lands. The importance of the case is delineated in Part I of this Note.

Part II discusses the contest between EPA and Washington before the Ninth Circuit. This Part examines the structure of RCRA, the arguments made by EPA and Washington to support their respective positions, and the Ninth Circuit's resolution of the case. This Part concludes that, although RCRA could be read to support state regulation of hazardous waste activity on Native American lands, the Ninth Circuit's decision was consistent with administrative law principles.

The Ninth Circuit was not presented with and, therefore, did not analyze Washington's jurisdiction as an assertion of its own police power to protect health and the environment. Part III of this Note argues that had Washington presented the case in this fashion, the court would have found that Washington has jurisdiction concurrent with EPA to regulate hazardous waste activity on Native American lands. Part III begins by examining the two impediments to a state's assertion of regulatory jurisdiction over Native American lands. First, it explores the traditional test of whether the state is preempted under federal interstate commerce clause principles. This Note concludes that RCRA does not "occupy the field" to prevent parallel state regulation of hazardous wastes. Second, Part III describes the federal common law preemption analysis that is employed in Native American cases. That analysis seeks to balance state, tribal, and federal interests in determining whether a state may assert regulatory jurisdiction over reservation lands. Finally, Part III ap-

\textsuperscript{10} \textit{Id.}
plies this analysis to the dispute presented in *Washington Department of Ecology* and concludes that the balance of interests weighs in favor of state regulation of hazardous waste activity on reservations.

I

**IMPORTANCE OF THE CASE**

*Washington Department of Ecology v. EPA* is important because it concerns matters of vital interest to Washington, and to many other states, in an unsettled area of the law. The problem of hazardous waste raises important issues of state and federal concern. Much has been written on how the problem ought to be regulated. The question of who, and in particular whether the states, should have jurisdiction to regulate environmental matters on Native American lands remains unresolved. The past decisions of the Supreme Court provide little guidance to the states. *Washington Department of Ecology v. EPA* is important because it both indicates how a state should not seek jurisdiction over Native American lands under RCRA and provides a starting point for an inquiry into how a state could seek jurisdiction to regulate hazardous waste activity under its own police powers.

The issue of who should regulate hazardous waste on Native American lands is important to the State of Washington because of the number and size of Native American reservations within the state and the extent of hazardous waste activity on them. There are twenty-two Native American reservations in the state covering approximately five percent of the state's total acreage. The reservations range in size from under 500 acres to well over 1,000,000 acres. The reservations also exhibit mixed Native American and non-Native American residency and ownership patterns. For example, ninety-nine percent of the Puyallup Native

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13. *Id.* at 4-5.
14. *Id.* at 5. The mixed Native American and non-Native American ownership pattern of "Native American" lands is the result of various historic policies that allowed for the free alienation of reservation lands. As a result, land owned and operated by non-Native Americans remains "Native American land" for the purposes of federal law.

For a discussion of land ownership on reservations and some of the congressional policies that led to this patchwork of ownership patterns, see, e.g., Carter, *Regulatory Jurisdiction on Indian Reservations in Montana*, 5 *PUB. LAND L. REV.* 147, 154-55 (1984); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 127-38, 471-99, 612-21 (1984). Briefly, under the assimilation policies of the General Allotment Act of 1887, 25 U.S.C. §§ 331-358 (1983), much of the reservation land was divided into tracts to be held in trust for individual Native Americans. After a period of time, fee simple title vested in the individual Native American. Some of this land was then sold to non-Native Americans. In addition, Congress further encouraged the dissolution of reservations by selling "surplus" reservation lands to non-Native Americans. As a result of these various policies, the total amount of Native American-held land declined from
American Reservation is owned by non-Native Americans, tribal members having alienated all but twenty-two acres of their 18,000 acre reservation.\textsuperscript{15} Eighty percent of the residents of the Yakima Indian Reservation and fifty percent of the residents of the Colville Reservation are non-Native Americans.\textsuperscript{16} In addition, some reservation lands encompass municipalities that operate pursuant to Washington law. For example, the City of Toppenish lies within the Yakima Indian Reservation, and much of the heavily industrialized city of Tacoma is located within the Puyallup Indian Reservation.\textsuperscript{17}

These various reservation lands contain at least seventeen known hazardous waste sites that are subject to RCRA regulation.\textsuperscript{18} For example, the Pennwalt Corporation, the Del Monte Corporation, and the Western Farm Service of Toppenish are all located on reservations.\textsuperscript{19} Pennwalt’s activities generate probably the state’s most pressing hazardous waste problem.\textsuperscript{20} The Pennwalt plant is owned and operated by non-Native Americans within the Puyallup Indian Reservation.\textsuperscript{21} This land is also within the City of Tacoma’s extensive industrial tideflats area.\textsuperscript{22} Because of Pennwalt’s activities, a portion of the Puyallup reservation has been listed on the EPA National Priorities list\textsuperscript{23} pursuant to the Superfund Act.\textsuperscript{24}

A state’s ability to coordinate a successful and comprehensive hazardous waste management plan depends at least in part on state control of all hazardous waste activity within its borders. Even EPA has noted that Congress’ federal/state regulatory scheme under RCRA “presupposes that state governments will have authority to regulate pollution sources everywhere inside state boundaries.”\textsuperscript{25} EPA’s exclusion of Native American lands from the reach of state programs under RCRA may hinder and discourage the efforts of states to regulate hazardous waste.

\textsuperscript{138} million acres in 1887 to 48 million acres in 1934. Carter, \textit{supra}, at 155. Today, reservation land may be held in trust by the government for a tribe or for an individual tribal member; land may be held in fee by a tribe or a tribal member; or it may be held in fee by non-tribal members, including non-Native Americans. \textit{Id.}

\textsuperscript{15} Washington Brief, \textit{supra} note 6, at 5-6 & n.11; Puyallup Tribe v. Washington Game Dep’t, 433 U.S. 165, 174 (1977).

\textsuperscript{16} Washington Brief, \textit{supra} note 6, at 5.

\textsuperscript{17} \textit{Id.} at 6-7.

\textsuperscript{18} \textit{Id.} at 7.

\textsuperscript{19} \textit{Id.}

\textsuperscript{20} \textit{Id.}

\textsuperscript{21} \textit{Id.}

\textsuperscript{22} \textit{Id.}


If states are not granted jurisdiction over hazardous waste activity on reservations, they will be unable to identify, monitor, or test that activity. The states therefore will be unable to predict or prevent poor hazardous waste practices or, more importantly, hazardous waste spills and leaks that may affect both reservation and nonreservation lands. As several Western States argued in their amicus brief in Washington Department of Ecology, "the vast Indian lands in the west will never be integrated into comprehensive state programs or plans for hazardous waste regulation. . . . Such an exception to the jurisdictional purview of western states renders their attempts to address the problems of hazardous waste regulation at the state level haphazard at best."26

Washington wanted to exercise jurisdiction over Native American lands both to avoid the bifurcated patchwork system that would otherwise result if EPA retained control over these lands and to maintain a consistently high level of regulation throughout the state.27 Washington's approved hazardous waste program is more stringent than the federal program.28 Washington feared that there would be an incentive for hazardous waste actors to locate on reservations if they could avoid the state's more stringent standards by doing so.29 The potential for on-reservation hazardous waste activities causing off-reservation effects, for example groundwater contamination, raised concern that Washington's own regulatory program would be undercut by the less stringent federal

26. Brief for Amicus Western States at 2, 8, Washington Dep't of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985) (No. 83-7763) [hereinafter Western States Brief].

27. Washington Brief, supra note 6, at 8-9. As Washington noted in its Reply Brief:

For example, regulated companies in the City of Tacoma's industrial tideflats will be treated differently depending upon whether they are within or without the Puyallup Indian reservation—an 18,000-acre reservation which is almost entirely owned by non-Indians. . . . Such regulated industries located within this reservation (and other reservations) will be subjected to the various extra burdens as well as confusion that comes about when two governmental units—the state and EPA—each attempt to apply their regulatory programs to the same activity. The marked contrast of the unitary state administered system, applicable to sister industries located just down the street or waterway but outside the Indian reserve, cannot be lost to even the most casual observer. Surely, Congress did not intend by adoption of the comprehensive federal-state program of RCRA to establish the duplicative, piecemeal, confused, environmental protection effort that EPA is prescribing for Washington State. Reply Brief for Appellant State of Washington at 12, Washington Dep't of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985) (No. 83-7763) [hereinafter Washington Reply Brief] (emphasis in original).


29. This form of evasion would be particularly troubling if non-Native Americans sought shelter on non-Native American lands within a reservation. Although states often lack control over Native American activity on reservations because of Native American sovereignty, states generally have the authority to regulate their own citizens' activities. See infra notes 168-72 and accompanying text. State citizens should not be allowed to escape legitimate regulatory control merely by locating in an area that is intended to afford certain immunities and privileges to Native Americans.
regulation on the reservations.\textsuperscript{30}

Washington also may have been worried that EPA management of the RCRA program on Native American lands would not be effective in implementing even the weaker federal standards. In general, EPA does not have an outstanding record in regulating environmental problems on these lands.\textsuperscript{31} Historically, EPA has hesitated to impose economically burdensome environmental regulations on Native American tribes.\textsuperscript{32} In addition, it has not taken a strong enforcement role on Native American lands until a serious problem has arisen.\textsuperscript{33} Given this record, Washington may have believed that it could better implement the RCRA program on the reservations.

The problem of on-reservation hazardous waste is not unique to Washington. Many other states, particularly western states, have substantial Native American lands within their borders and have similar concerns about the hazardous waste activity that takes place or may take place there.\textsuperscript{34} A recent study surveyed 25 representative Native American reservations out of the nation's 276 federally recognized reservations and found nearly 1200 generators or sites on or near these reservations.\textsuperscript{35} There are potentially acute health and environmental problems on at least twenty percent of the reservations surveyed.\textsuperscript{36} Six reservations have sites that currently pose serious dangers to public health.\textsuperscript{37} Because reservations are often situated in remote areas, pressure to locate both hazardous waste generating industries and disposal sites on Native American lands is likely to increase as opposition grows to locating these facilities near urban areas.\textsuperscript{38} Indeed, several tribal governments have already been contacted about developing hazardous waste disposal sites on

\begin{itemize}
\item \textsuperscript{30} Telephone interview with Charles Roe, Senior Assistant Attorney General, State of Washington (Nov. 8, 1985).
\item \textsuperscript{31} Will, \textit{Indian Lands Environment—Who Should Protect It}, 18 \textit{Nat. Resources J.} 465, 504 (1978); see also infra note 249 and accompanying text.
\item \textsuperscript{32} Will, \textit{supra} note 31, at 504.
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} All western states have Native American lands within their borders: There are over 200 parcels of Native American land, comprising over 50 million acres. Western States Brief, \textit{supra} note 26, at 2. This is an area comparable in size to the combined areas of the New England states, New Jersey, and Maryland. EPA Discussion Paper, \textit{supra} note 25. California has 81 Indian reservations that encompass hundreds of thousand of acres. Brief for Amicus State of California at 2, Washington Dep't of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985) (No. 83-7763) [hereinafter California Brief]. The western states, like Washington, are concerned that they will never have an integrated comprehensive hazardous waste program and that their environment will be threatened by hazardous wastes that escape from reservations and endanger the health of state citizens. \textit{Id.}; Western States Brief, \textit{supra} note 26, at 2.
\item \textsuperscript{35} \textit{Council of Energy Resource Tribes, Inventory of Hazardous Waste Generators and Sites on Selected Indian Reservations} iii (1985).
\item \textsuperscript{36} \textit{Id.} at 4.
\item \textsuperscript{37} \textit{Id.} at iv, app. F.
\item \textsuperscript{38} EPA Discussion Paper, \textit{supra} note 25.
\end{itemize}
their reservations. Thus, the magnitude of the hazardous waste problem on reservations, the likelihood that it will continue to grow, and the legitimate state concerns about effective management all render the jurisdictional questions raised by Washington Department of Ecology extremely important.

The question of who has jurisdiction to regulate hazardous waste is also generally significant for the administration of other federal programs. For example, the management of air and water pollution on Native American lands under the Clean Air Act and the Federal Water Pollution Control Act poses similar issues of how federal, tribal, and state interests should be balanced in dividing political authority between these three parties.

Case law on the issue of when a state may regulate Native American lands is difficult to interpret. As a result, a great deal of regulatory uncertainty exists at the state level as to when a state may assert jurisdiction to regulate Native American lands. For example, numerous state attorneys general have written opinions concluding that their states have regulatory authority in particular instances. Arizona has even passed

39. Id.
43. For this Note's interpretation of this body of law, see infra notes 126-72 and accompanying text. Cf., R. BARSH & J. HENDERSON, THE ROAD 137-202 (1980) (discussing unprincipled decisionmaking in tribal sovereignty cases); Berkey, Recent Supreme Court Decisions Bring New Confusion to the Law of Indian Sovereignty, in COMMITTEE ON NATIVE AMERICAN STRUGGLES, NATIONAL LAWYERS GUILD, RETHINKING INDIAN LAW 77-79 (1982) (stating that recent judicial decisions on Native American sovereignty represent an abandonment of principled decisionmaking).
44. For example, in addition to Washington, the states of California, North Dakota, Arizona, New Mexico, and Montana have concluded that various state environmental laws apply to Native American reservations. See Comment, Developing Test, supra note 42, at 563 n.17; Comment, Tribal Self-Government, supra note 42, at 86 nn.125-26; see also Memorandum
laws asserting environmental regulatory authority over all Native American lands, an assertion that EPA views as illegal.

*Washington Department of Ecology v. EPA* does not resolve the question of who should regulate hazardous waste activity on Native American lands. Because of the narrow way in which Washington presented its case, the Ninth Circuit only decided who may regulate under RCRA. *Washington Department of Ecology* is useful, however, because it provides a starting point for the argument that a state may nonetheless regulate the problem.

**II**

**THE NINTH CIRCUIT CONTEST OVER RCRA**

**A. Background Provisions of RCRA**

Because the contest between EPA and Washington State turned on competing interpretations of the federal Resource Conservation and Recovery Act, it will be helpful to describe briefly the Act's framework. The Resource Conservation and Recovery Act of 1976 provides a comprehensive "cradle to grave" regulatory framework for hazardous waste that covers all aspects of the hazardous waste life cycle, from generation to storage, transportation, and, ultimately, treatment and disposal.

When Congress enacted RCRA, it vested regulatory authority over

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45. ARIZ. REV. STAT. ANN. § 36-1865 (1986).

46. EPA's position has consistently been that states have no power over Native American lands absent a clear legal demonstration in terms of treaty language or congressional statute that gives states jurisdiction over Native American lands. *Chandler Memo*, supra note 44; see also infra note 94.

Thus, EPA rejects Arizona's attempt to assume jurisdiction:

Arizona's attempted assumption of jurisdiction over Indian country for pollution control purposes is illegal. Arizona has no legal power to enforce her pollution control laws on Indians in Indian country nor has she the power to try Indians for causes of actions arising from pollution in Indian country. Apparently, until rebuked by the U.S. Supreme Court, Arizona will continue to claim jurisdiction to which she is not entitled.

Note, supra note 42, at 99 n.89 (quoting COUNSEL'S OFFICE, EPA REGION IX, APPLICABILITY OF STATE POLLUTION CONTROL LAWS TO INDIAN RESERVATIONS).

47. Washington only argued that it had authority under RCRA, not any other source. See Washington Brief, supra note 6, at 28. Consequently, the Ninth Circuit was only asked to review EPA's statutory construction of the Act. The court did not decide who generally may regulate hazardous waste on Indian lands. See infra notes 106-08 and accompanying text.


hazardous wastes in both EPA and the states. The Act requires EPA to develop and implement regulations for a comprehensive hazardous waste program that sets forth minimum standards for hazardous waste management.\(^50\) It also authorizes any state to develop, administer, and enforce its own hazardous waste program in lieu of the federal program.\(^51\) Before a state can carry out its own program, the state must submit its program to EPA for approval.\(^52\) If the program is "equivalent" to the minimum federal requirements, EPA must approve a state's alternative program.\(^53\)

Congress intended RCRA to provide minimum standards below which neither EPA nor the states could fall. At the same time, Congress intended to allow states to take a more active role in regulating hazardous waste activity. Thus, the Act specifically authorizes states to develop criteria and regulations that are more stringent than EPA's criteria and regulations.\(^54\) Although the Act vests supervisory control with EPA, it was Congress' intent that states have primary authority to implement and enforce their own programs.\(^55\) EPA also strongly supports state assumption of hazardous waste management responsibility.\(^56\)

With regard to Native Americans and their lands, RCRA is ambig-
uous. It is clear that RCRA regulation, regardless of whether EPA or the states enforce it, expressly applies to Native American activities. The Act applies to all persons who conduct hazardous waste activities. The term "person" is defined to include, among others, individuals and municipalities. A "municipality" is defined to include "an Indian tribe or authorized Indian tribal organization." Thus, by parsing the definitions, it is apparent that RCRA applies to Native American tribe hazardous waste activity.

It is not clear, however, whether RCRA allows states to assume authority over hazardous waste activity on Native American lands. The only indication that Congress may have intended to permit state jurisdiction is the Act's treatment of Native American tribes as municipalities. Various sections of the Act provide for municipalities to receive federal grants and financial assistance, either directly or through the states, for such activities as materials conservation, resource recovery, and solid and hazardous waste management facilities. The Act also authorizes the Administrator to provide money to municipalities in states that operate their own hazardous waste management plans under EPA approval. EPA may not provide any financial assistance, however, unless the state certifies that the municipality's use of the funds is consistent with the state's plan or program. Thus, at least for the purposes of receiving federal grants, Native American tribes are considered municipalities under the regulatory jurisdiction of states with approved hazardous waste management plans. It would be anomalous under the Act to argue that a state's plan has no effect on a reservation and, at the same time, condition assistance to the reservation's tribe upon a showing that its use of the funds is consistent with the state's plan. This complicated reasoning is at most an indication that Congress may have intended state regulation of hazardous waste activity on Native American lands: It is by no means conclusive.

58. 42 U.S.C. § 6903(15) (1982). Even if RCRA had not expressly mentioned "Indians," the Supreme Court has held that "general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary." Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 120 (1960). The Court has also held that "a general statute in terms applying to all persons includes Indians and their property interests." Id. at 116. See also P. MAXFIELD, M. DIETERICH & F. TRELEASE, NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS 76-80 (1977) (federal environmental laws, with the possible exception of NEPA, are generally applicable to Native American activities).
60. 42 U.S.C. § 6948(a), (d), (f), (g) (1982 & Supp. III 1985).
61. Id. § 6943(c)(1)(C).
62. Id. § 6949(a)(2)(B).
63. Id. §§ 6493, 6948(a), (f), 6949(a); see also California Brief, supra note 34, at 5.
64. The most accurate conclusion is probably that Congress did not consider the problem in the first place. This was the Ninth Circuit's conclusion. Washington Dep't of Ecology, 752
Given the uncertainty over whether a state may regulate Native American lands under RCRA, EPA promulgated regulations that allow states to seek jurisdiction over Native American lands. The regulations specify that a state must include an “appropriate analysis” by the state attorney general of the state’s authority to regulate on Native American lands. This analysis must be part of the larger appropriate analysis that the state attorney general needs to include in the state’s program submission to EPA in order to have the state’s overall program approved as consistent with RCRA.

B. The Contest Between Washington and EPA

Washington was the first state to take advantage of these regulations to seek EPA approval to control hazardous wastes on Native American lands. Washington included Native American lands in the statewide hazardous waste management program it presented to EPA for approval in 1982. Included in the submittal was a two-page analysis from the Washington Office of the Attorney General. The analysis first stated what no one denies: Congress may authorize state regulatory authority over Native American lands. It then argued that Congress drafted RCRA specifically to allow a state with a qualified hazardous waste management program to assume responsibility for all hazardous waste activity within its borders.

EPA approved Washington’s hazardous waste program, but denied jurisdiction over Native American lands, finding that the state’s assertion was “not adequately supported in law or by the analysis provided.” The Agency concluded that RCRA does not give the states “any authority relative to Native American lands jurisdiction” but rather that the states must “independently obtain such authority expressly from Con-

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F.2d at 1469. In light of the lenient canons of statutory interpretation applied to Native Americans and Native American lands, the Act’s treatment of tribes as municipalities is not at all conclusive. See infra notes 136-40 and accompanying text.


66. Id. § 271.7(b). The regulations are not specific as to what constitutes an appropriate analysis other than to note that “the statement shall include citations to the specific statutes, administrative regulations and, where appropriate, judicial decisions which demonstrate adequate authority.” Id. § 271.7(a).

67. Id.

68. Id. § 271.5.

69. Id. § 271.4; see supra notes 50-53 and accompanying text.

70. Washington Brief, supra note 6, at 3 nn.6-7.


72. Congress has plenary authority over Native American lands and may confer regulatory authority upon the states. See infra notes 123-24 and accompanying text.

73. Moos Letter, supra note 71.

gress or by treaty."\textsuperscript{75}

Washington appealed this decision in \textit{Washington Department of Ecology v. EPA}.\textsuperscript{76} In its brief, the state characterized the "sole issue" presented for review as:

[Did] the Environmental Protection Agency exceed its statutory authority under the federal Resource Conservation & Recovery Act . . . when, in approving a hazardous waste management program submitted to it by the State of Washington Department of Ecology for application throughout the entirety of the state's geographical limits, it excluded "Indian lands" from the scope of coverage of the federally approved state management program?\textsuperscript{77}

Washington used two different arguments to show that EPA had exceeded its statutory authority. First, Washington argued that the terms of RCRA itself compelled a finding that the state should have regulatory jurisdiction over hazardous waste on Native American lands. It argued that "Congress, in a clear, straightforward expression, intended that a state-administered, hazardous waste program \textit{approved} by the Environmental Protection Agency under 42 U.S.C.A. § 6926(c) was to be applicable to 'Indian lands' within a state."\textsuperscript{78} RCRA's scant treatment of Native Americans and silence with respect to Native American lands, however, provided little support for Washington's assertion that the Act explicitly authorized state jurisdiction over hazardous waste activity on Native American lands.\textsuperscript{79}

Washington's second and more persuasive argument was that Congress implicitly authorized this jurisdiction when it provided for state administration of RCRA.\textsuperscript{80} Congress specifically made the Act applicable to Native Americans.\textsuperscript{81} It also did not reserve Native American lands jurisdiction from the states. In Washington's view, \textit{either EPA or a state administers RCRA}.\textsuperscript{82} If EPA authorizes a state program, Washington reasoned, that program should apply to all hazardous waste activity within the state's borders to the exclusion of the federal program.\textsuperscript{83} The Act indicates no difference in the scope of application between an

\begin{itemize}
\item \textsuperscript{75} \textit{Id.} at 34,957.
\item \textsuperscript{76} 752 F.2d 1465 (9th Cir. 1985). RCRA gives each court of appeals jurisdiction to review EPA action concerning the grant or denial of interim authorization to a state within the circuit. 42 U.S.C. § 6976(b) (Supp. III 1985).
\item \textsuperscript{77} \textit{Id.} at 13 (emphasis in original).
\item \textsuperscript{78} \textit{Washington Dep't of Ecology}, 752 F.2d at 1469. The court noted that "Congress apparently did not consider whether state programs authorized 'in lieu of' the federal program would apply in Indian country." \textit{Id.}
\item \textsuperscript{79} \textit{See Washington Brief, supra} note 6, at 13-17, 20; \textit{Washington Reply Brief, supra} note 27, at 3-7.
\item \textsuperscript{80} \textit{See supra notes 57-59 and accompanying text.}
\item \textsuperscript{81} \textit{Id.} at 34,957.
\item \textsuperscript{82} \textit{See supra notes 57-59 and accompanying text.}
\item \textsuperscript{83} \textit{See supra} note 82.
\end{itemize}
EPA-administered program and an EPA-approved, state-administered program. Indeed, the Act itself provides that a state program is to operate "in lieu of" the federal program, and actions taken by the state under its approved program are to have the "same force and effect" as actions taken by the Administrator under EPA regulations. Unlike other environmental legislation, RCRA does not mention any exceptions for Native American lands. Therefore, because Native American hazardous waste activity is explicitly subject to RCRA regulation, both Native Americans and non-Native Americans acting on Native American lands should be subject to the reach of an approved state hazardous waste management program.

EPA disagreed with Washington's "either/or" approach to regulation, stressing the Agency's "oversight" role in hazardous waste regulation. In EPA's view, Congress did not mandate state hazardous waste programs under RCRA; instead, it gave EPA discretion to approve them. EPA's discretion persists even after it authorizes a state program. The Agency retains substantial oversight responsibility and may withdraw its approval if the state fails to properly implement the program. EPA further stressed that even if a state has an authorized plan, EPA retains concurrent authority to enter and inspect premises, bring enforcement actions, require monitoring and testing, and bring immediate injunctive actions against imminent hazards.

In the context of Native American lands, EPA emphasized both the federal government's special relationship with Native Americans and

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85. Id. § 6926(d).
86. Washington highlighted this omission by noting that, in other federal environmental statutes, Congress has explicitly preserved Native American sovereignty when it intended to do so. For example, the Safe Drinking Water Act specifically states that it is not to 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." 42 U.S.C. § 300j-6(c)(l) (1982). Similarly, the Surface Mining and Reclamation Act states that "[n]othing in this chapter shall change the existing jurisdictional status of Indian lands." 30 U.S.C. § 1300(h) (1982). Further, the Clean Air Act gives Native American tribes specific authority to redesignate their lands under the prevention of significant deterioration program. 42 U.S.C. § 7474(c), (e) (1982). Thus, Congress has in the past specifically set Native American lands apart from state regulatory jurisdiction. Its failure to do so in RCRA is a "decisive roadsign of congressional intent." Washington Brief, supra note 6, at 19; see also Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1562 (10th Cir. 1984) (discussed infra note 186) (court used similar reasoning to allow the state to apply its intrastate gas laws to reservation gas).
87. See Brief for Respondent Environmental Protection Agency at 17-19, Washington Dep't of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985) (No. 83-7763) [hereinafter EPA Brief].
88. See infra note 97.
89. See supra note 55.
90. See EPA Brief, supra note 87, at 6; 42 U.S.C. § 6927(a) (1982) (access for inspections); id. § 6928(a), (d) (enforcement); id. § 6934(a) (monitoring and testing); id. § 6973 (1982 & Supp. III 1985) (imminent hazards). All of these provisions pertain only to EPA's enforcement authority, not to EPA's authority to administer hazardous waste programs.
RCRA's silence with respect to the treatment of Native American lands. The federal government has a trust relationship with Native American tribes which requires, among other things, that it preserve tribal sovereignty. Accordingly, federal courts and agencies have, at least in the past, allowed state jurisdiction over Native American lands only upon a showing of express congressional delegation to the state. Given RCRA's silence on the issue, EPA argued that Native American sovereignty should not be lost by implication. The Agency concluded, therefore, that RCRA does not expressly or implicitly require exclusive regulation of hazardous waste activity by either the state or the federal government and that EPA approval of a state's program does not imply exclusive state jurisdiction over all waste activity within state borders.

While RCRA could be read to support either Washington's or EPA's view, the Act's management scheme does tend to favor state regulation of hazardous waste on Native American lands. A state is not under any obligation to develop and implement its own hazardous waste management plan. Nonetheless, the RCRA scheme is founded on the

91. EPA Brief, supra note 87, at 22-23.
92. The trust relationship is based on the notion that Native Americans are "wards of the nation, dependent upon its protection and its good faith." Carpenter v. Shaw, 280 U.S. 363, 367 (1939). The trust duties require that the federal government protect trust lands and the tribal right of self-government as well as provide necessary social, medical, and educational services to ensure the health and welfare of the tribe. For a discussion of the trust relationship, see infra notes 233-34.
93. This doctrine appears to be changing. See infra notes 133-62 and accompanying text.
94. EPA expressed this policy in the manual it issued for the authorization of Native American land jurisdiction under RCRA on Native American lands:

Pursuant to Federal law, EPA cannot approve a State's assertion of jurisdiction over Indian lands absent a clear and unambiguous expression of intent to confer state jurisdiction through either a federal statute or an applicable treaty with an affected tribe. (Note that RCRA itself cannot be deemed such an expression of intent.) In the absence of such a federal statute or treaty, EPA has exclusive jurisdiction over Indian lands.

95. EPA Brief, supra note 87, at 20-21. This argument refers to a traditional cannon of construction which requires that ambiguous statutes be interpreted favorably towards Native Americans. See infra note 140 and accompanying text.
96. EPA Brief, supra note 87, at 20-21.
97. Congressional concern over potential tenth amendment problems may explain the "voluntary" nature of state participation in RCRA and other environmental programs. See Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandatory State Implementation of National Environmental Policy, 86 YALE L.J. 1196, 1222-72 (1977); Comment, RCRA's State Program Provisions and the Tenth Amendment: Coercion or Cooperation?, 9 ECOLOGY L.Q. 579 (1981). Recent Supreme Court cases indicate that RCRA and other environmental statutes do not impermissibly coerce state action in violation of the tenth amendment because states are not compelled to participate; rather, the statutes "establish a program of cooperative federalism." Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289 (1981); see also Hodel v. Indiana, 452 U.S. 314 (1981).
premise that states will implement the federally mandated standards.\textsuperscript{98} Congress intended that EPA would set technical standards and oversee the implementation of state programs.\textsuperscript{99} RCRA's ultimate success depends on state operation of successful hazardous waste management programs "in lieu of" the federal program.\textsuperscript{100}

Despite the fact that RCRA's management scheme favors Washington's view that either the federal government or the state regulate hazardous waste activities within the entire state, the Ninth Circuit was compelled by administrative law principles to find in favor of EPA. Relying on the Supreme Court's decision in \textit{Chevron, U.S.A. Inc. v. Natural Resources Defense Council},\textsuperscript{101} the court noted:

When a statute is silent or unclear with respect to a particular issue, we must defer to the reasonable interpretation of the agency responsible for administering the statute. By leaving a gap in the statute, Congress implicitly has delegated policy making authority to the agency. In such a case, we may not substitute our judgment for that of the agency as long as the agency has adopted a reasonable construction of the statute.\textsuperscript{102}

The court's decision was inevitable given the current deferential standard for review of administrative agency statutory interpretations.\textsuperscript{103} The

\textsuperscript{98} See H.R. REP. NO. 1491, 94th Cong., 2d Sess., pt.1, at 6, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6243. "Cooperative federalism," as the delegation of federal programs to states is sometimes called, provides a number of advantages to the federal government. As Professor Stewart has noted, the federal government is "dependent upon state and local authorities to implement [environmental] policies because of the nation's size and geographic diversity, the close interrelations between environmental controls and local land use decisions, and federal officials' limited implementation and enforcement resources." Stewart, \textit{supra} note 97, at 1196.

For cogent criticisms of the "cooperative federalism" model of environmental regulation, see Schnapf, \textit{State Hazardous Waste Programs Under the Federal Resource Conservation and Recovery Act}, 12 ENVTL. L. 679, 701-17, 734-43 (1982); Stewart, \textit{supra} note 97, at 1196-1222. One major problem of "cooperative federalism" is the inadequacy of both federal and state resources. The federal government does not have enough money or staff to implement environmental laws and relies on states to accept much of the responsibility for environmental regulation. Unfortunately, most state budgets are also inadequate to handle this responsibility properly. Budget cuts and the increased use of block grants by the Reagan administration have exacerbated the problem. As Schnapf notes:

It is ironic that the announced goal of Reagan's "new federalism" is to return responsibility for many aspects of government to the states. But will the states accept responsibility for federal programs without the funds necessary to operate them? Not surprisingly, some states are rejecting the "opportunity" to run federal programs. Instead, they are demanding that the federal government accept responsibility for its own programs.

Schnapf, \textit{supra}, at 705.


\textsuperscript{100} Schnapf, \textit{supra} note 98, at 694-95.

\textsuperscript{101} 467 U.S. 2778 (1984).

\textsuperscript{102} \textit{Washington Dep't of Ecology}, 752 F.2d at 1469 (citations omitted).

\textsuperscript{103} The Supreme Court has recently reaffirmed its commitment to the deferential standard of administrative agency review in a number of decisions. See, e.g., Chemical Mfrs. Ass'n v. NRDC, 470 U.S. 116 (1985).
court had already found that "Congress did not consider whether state programs authorized 'in lieu of' the federal program would apply in Indian country."104 In light of the competing interests of effectively implementing hazardous waste regulation and adequately addressing questions of Native American policy, the court concluded that EPA's policy decision not to delegate RCRA authority over Native American lands was reasonable.105

III
FEDERAL PREEMPTION ANALYSES

The Ninth Circuit's decision does not settle the central jurisdictional issue that lies at the heart of the dispute over Native American lands. Washington Department of Ecology only makes clear that Washington, and other similarly situated states, may not regulate hazardous waste activity on Native American lands under RCRA. The decision does not foreclose Washington's ability to address the problems raised by a bifurcated EPA-state regulatory approach. Washington, like most states, passed its hazardous waste legislation and regulations pursuant to its police power to protect health, welfare, and the environment.106 An important and unresolved question, which the Ninth Circuit did not address because of the manner in which Washington presented the issue,107 is

104. Washington Dep't of Ecology, 752 F.2d at 1469.
105. Id. The court found its conclusion to be buttressed by the "well-settled" Native American law principle that "[s]tates are generally precluded from exercising jurisdiction over Indians in Indian country unless Congress has clearly expressed an intention to permit it." Id. at 1469-70. As discussed in Part III, infra text accompanying notes 106-262, this is not the current doctrine followed by the Supreme Court. To the contrary, state regulation does not generally have to be authorized by Congress. See infra notes 133-62 and accompanying text. In the absence of clear congressional guidance, a court will perform its own analysis, balancing competing state, federal, and tribal interests to determine whether state jurisdiction should be permitted. Thus, Native American law does not provide independent support for EPA's refusal of Washington's request. Had the Ninth Circuit acknowledged the modern analysis, it would still have upheld EPA's interpretation of RCRA because of the standard enunciated in Chevron, 467 U.S. 2778 (1984). The Ninth Circuit's failure to acknowledge the modern analysis, however, remains important for the purposes of the discussion below. Had Washington instead argued it had jurisdiction over Native American lands by virtue of its police power, the modern analysis would have been controlling. See infra notes 106-08 and accompanying text.
107. There was a reason Washington framed the issue the way it did: By arguing that EPA failed to interpret RCRA properly to authorize the state's program as it pertained to Native American lands, Washington sought federal authorization and the concomitant funding available for federally authorized state programs. Washington Brief, supra note 6, at 7, 23; see, e.g., 42 U.S.C. § 6948(a), (d) & (f) (1982 & Supp. III 1985); 42 U.S.C § 6943(b)(1)(C) (Supp. III 1985) (examples of federal funding available for state programs).

Were Washington to assert jurisdiction over Native American lands under its independent
whether a state may independently assert its legislative authority pursuant to its own police power to control hazardous waste activity on Native American reservations.  

The resolution of this issue requires the application of federal common law preemption doctrines under the interstate commerce clause and the Indian commerce clause to situations like that presented in Washington Department of Ecology. This Section first argues that under interstate commerce clause principles, RCRA does not preempt a state's ability to enact hazardous waste management legislation and regulations under its own police authority. This Section then discusses the preemption principles that courts have developed under the Indian commerce clause and applies them to the facts of Washington Department of Ecology. Finally, this Section concludes that the Native American preemption cases support Washington's assertion of its own hazardous waste statutes under state police power to regulate the hazardous waste activity of non-Native Americans and, perhaps, Native Americans on Native American lands.

A. Interstate Commerce Clause Preemption Analysis

The first step in determining whether Washington has any authority at all to enforce hazardous waste legislation under its police power is to examine the issue using a traditional interstate commerce clause preemption analysis. The federal government's power to legislate, unlike that of the state governments, is limited to those areas enumerated by the Constitution. In the past forty years, virtually all domestic federal legislation has been enacted pursuant to federal authority to regulate interstate commerce. This is true of all the federal environmental protection acts, including RCRA. This is true of all the federal environmental protection acts, including RCRA. When the federal government legislates under its interstate com-

police powers, it would be ineligible for federal funding. Given both the decrease in federal funding to states and the importance of Washington's program, Washington still has an incentive to proceed under this approach. See supra note 98.

108. Washington could force a court to resolve this question by bringing a test case enforcement action against any person violating the state's hazardous waste regulations on reservation lands. For example, it could sue a dangerous waste generator on a reservation who has spilled or discharged dangerous wastes without notifying the proper authorities and taking appropriate mitigation measures to protect human health and the environment. WASH. ADMIN. CODE § 173-303-145 (1985). Under the Washington Hazardous Waste Disposal Act, the responsible person could be liable for fines of up to $10,000 per day of noncompliance. WASH. REV. CODE § 70.105.080(1) (1985).


110. See id. at 537.


112. H.R. REP. NO. 1491, 94th Cong., 2d Sess., pt. 1, 3-5, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6240-42 (RCRA and its treatment of, inter alia, hazardous waste addresses the serious questions raised "relative to restraint of trade and interference with interstate commerce").
merce regulatory authority, in certain instances, federal law is said to preempt state authority and thereby preclude a state's exercise of the preempted law. The state's law is essentially displaced by federal law in such instances. The Supreme Court recently restated its three-part test for determining when interstate commerce clause preemption occurs as follows:

Federal law may pre-empt state law in any of three ways. First, in enacting the federal law, Congress may explicitly define the extent to which it intends to preempt state law. Second, even in the absence of express pre-emptive language, Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government. Finally, if Congress has not displaced state regulation entirely, it may nonetheless preempt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible, or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." \(^{113}\)

If RCRA preempted Washington's authority to enforce hazardous waste legislation, Washington would only be able to regulate under its EPA-approved program, a program that specifically excludes Native American lands.

Nothing in RCRA explicitly defines the extent to which Congress intended to preempt state law. The statute's preemptive effect must therefore be explored under the second and third tests set forth above. It is clear that while RCRA provides a minimum floor for state regulations, it does not "occupy the field" to preempt a state's inherent power to regulate hazardous waste. RCRA preempts a state's ability to regulate hazardous waste less stringently than under federal regulations, but section 6929 specifically allows states to enact stronger regulatory programs: "Nothing in this chapter shall be construed to prohibit . . . any requirements . . . which are more stringent than those imposed by such [federal] regulations." \(^{114}\) Because Washington's program is more stringent than the federal program, it would not be barred by the specific language of RCRA. \(^{115}\) Congress did not intend the federal government to undertake

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115. In City of Philadelphia v. State, 73 N.J. 562, 376 A.2d 888 (1977), rev'd on other grounds, 437 U.S. 617 (1978), the New Jersey Supreme Court found that neither the hazardous waste nor the non-hazardous solid waste sections of RCRA preempted the state's own solid and hazardous waste program, which was enacted under the state's police power to regulate for the public health. The court noted that RCRA was intended to achieve a degree of uniformity in hazardous waste control and to establish minimum national standards, but that RCRA specifically allowed states to pass more stringent legislation. Id. at 891. The state
all responsibility for hazardous waste management. On the contrary, the RCRA program encourages states to assume responsibility. Finally, nothing in Washington's program conflicts with RCRA so as to make compliance with both state and federal laws impossible. Washington's program is, therefore, not preempted under interstate commerce principles.

B. Federal Native American Law Preemption Analysis

Federal, state, and tribal governments have bitterly disputed the extent of state jurisdiction over Native American lands ever since the early days of western statehood. The Supreme Court has repeatedly addressed this issue, and its interpretation of Native American sovereignty has changed dramatically over time. At present, the Court has ac-

The Supreme Court, in Philadelphia v. New Jersey, 437 U.S. 617 (1978), agreed with the New Jersey court that the state law had not been preempted by RCRA. It explained:

> From our review of this federal legislation, we find no "clear and manifest purpose of Congress" to pre-empt the entire field of interstate waste management or transportation, either by express statutory command or by implicit legislative design. To the contrary, Congress expressly has provided that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies . . . ." Similarly, [the New Jersey law] is not pre-empted because of a square conflict with particular provisions of federal law or because of general incompatibility with basic federal objectives. In short, we agree with the New Jersey Supreme Court that [the state law] can be enforced consistently with the program goals and the respective federal-state roles intended by Congress when it enacted the federal legislation.

437 U.S. at 620 n.4 (citations omitted).


116. See supra notes 97-100 and accompanying text.

117. See supra note 55 and accompanying text.

118. It should be noted that while Washington's regulations may be inconsistent with federal regulations, they do not "conflict" for preemption purposes unless compliance with both would be impossible. Had EPA seen any such conflicts between Washington's program and RCRA regulations, it would not have approved Washington's program as to non-Native American lands.


120. Compare Worcester, 31 U.S. (6 Pet.) at 561 (holding that tribal sovereignty serves as an absolute bar to state jurisdiction over Native American lands) with Rice v. Rehner, 463 U.S. 713, 721 (holding that absent a Native American tradition in a particular activity, the balance
knowledged that “there is no rigid rule,” and that “[g]eneralizations on this subject have become . . . treacherous.”

While courts have blurred much of Native American law doctrine, they have consistently recognized one principle—congressional power over Native American lands is plenary under the Indian commerce clause. What follows from this principle is that Congress may expressly assign jurisdiction over Native American lands to federal, state, or tribal governments. When Congress is either silent or ambiguous in its assignment of control, this corollary provides no guidance to courts. To determine who has jurisdiction over Native American lands (and other matters) in the absence of a clear congressional directive, federal courts have developed common law preemption principles that reflect the history of relations between Native American tribes, the federal government and state governments. Subsection 1 below examines these principles, focusing on current trends in the Native American preemption analysis. Subsection 2 below then applies the current version of this analysis to the facts of Washington Department of Ecology.

1. The Preemption Balancing Test

In 1832, the Supreme Court asserted in Worcester v. Georgia that tribal sovereignty precluded the operation of state law within reservation boundaries: “The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force.” This notion of tribal independence was based on the principle that Native American treaties preserved the right of Native American tribes, as sovereign nations, to govern

of state, federal, and tribal interests in the preemption analysis should “accord less weight to the backdrop of tribal sovereignty”). See infra notes 127-62 and accompanying text.

Congressional policies toward Native American sovereignty have also fluctuated dramatically. Since the 1780's, Congress has vacillated several times between recognizing and encouraging tribal sovereignty and attempting to disband tribal governments in order to “assimilate” Native Americans into the mainstream of American life. Today, Congress ostensibly espouses Native American self-determination and tribal self-government. See generally, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 47-206 (1982); P. MAXFIELD, M. DIETERICH & F. TRELEASE, supra note 58, at 17-38; Comment, Developing Test, supra note 42, at 561.

123. The Indian commerce clause confers authority on Congress to regulate commerce with Native American tribes. See U.S. CONST. art. I, § 8, cl. 3. The source of congressional authority over Native American lands is derived from this clause. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973); see also Washington Dep't of Ecology v. EPA, 752 F.2d 1465, 1470 (9th Cir. 1985); Rice v. Rehner, 463 U.S. 713, 718-19 (1983); F. COHEN, supra note 58, at 212-17.
124. Id.
125. Id. at 561.
themselves free from state interference. Although Worcester v. Georgia is still often cited as general support for tribal sovereignty, the Court has long since departed from the idea that this sovereignty is an absolute bar to state jurisdiction.

According to modern courts, the Indian commerce clause creates two bars to state authority over reservations. First, state jurisdiction may be preempted by federal law. This "preemption barrier" blocks state action on Native American lands that conflicts with a federal statute or treaty. The second barrier is the "infringement barrier"; it blocks state action that unduly intrudes on Native American rights of self-government, even in the absence of a federal enactment. As the Supreme Court stated in Williams v. Lee in 1959, "[e]ssentially, absent some governing Act of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."

The Supreme Court's most recent decisions are moving away from the infringement bar and are relying almost exclusively on the preemption analysis. In McClanahan v. Arizona State Tax Commission, the Court noted that modern cases "tend to avoid platonic notions of Indian sovereignty and . . . look instead to the applicable treaties and statutes which define the limits of state power." The Court's decisions since McClanahan confirm the trend away from sovereignty and towards federal preemption. Thus, the extent to which Native American sower-

128. F. COHEN, supra note 120, at 259-60. However, the Constitution delegates broad legislative power to the federal government to regulate Native American affairs. Id.; see supra note 123.


130. See, e.g., White Mountain Apache Tribe, 448 U.S. at 142-43.


134. While the cases decided since McClanahan have evidenced this trend, they have done so in a circumspect manner. For example, in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), Arizona sought to enforce its motor carrier license tax against a timber transportation enterprise conducted on Native American lands. There, the Court stressed that preemption and infringement present "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." Id. at 142-43. Indeed, White Mountain is frequently cited for this position. However, the Court did not rely on the infringement bar, and instead relied exclusively on statutory preemption principles. Under a preemption analysis, the Court held that comprehensive federal regulation of Native American timber had preempted the tax. Id. at 152-63. Similarly, in Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982), although the Court quoted White Mountain, it relied exclusively on a preemption analysis in holding that federal law preempted New Mexico's tax on gross receipts paid to a non-Native American construction company for building a school on the reservation. Id. at 837-38, 846-47; see also New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 n.16 (1983) (referring to "inherent tribal sovereignty" as an independent barrier).

It could be argued that an independent analysis of tribal sovereignty was obviated once the Court found state law preempted by federal law. This argument is considerably weakened
eighty alone may preempt state law has become "something of a moot question."135

Under the Supreme Court's recent approach, absent clear congressional intent, a court must examine and balance federal, state, and tribal interests to determine whether federal law preempts state regulation.136

by the Court's most recent decision, Rice v. Rehner, 463 U.S. 713 (1983). There, too, the Court mentioned both barriers. Id. at 718-19. Unlike White Mountain and Ramah Navajo School Bd., however, Rice v. Rehner relies only on a preemption analysis for its determination that California could apply its liquor laws within a reservation. Id. at 734. The Court's analysis is somewhat confusing because the Court spent several pages discussing notions of tribal sovereignty. Id. at 720-26. The key to understanding the opinion is to note that this discussion served only to determine the contours of the "tribal sovereignty element" of the Court's statutory preemption analysis. Id. at 720, 725. The Court did not perform an independent analysis to determine whether the state regulations would infringe on tribal self-government to such an extent that this infringement alone could bar state jurisdiction. On the contrary, the Court took the position that notions of tribal sovereignty and tradition were important primarily to determine whether Congress had expressly or impliedly authorized the state jurisdiction. Id. at 719-20.

Professor Reynolds has suggested that every Supreme Court decision on state jurisdiction issues, including Williams v. Lee, has rested on a preemption analysis, despite the language the Court may have used. Reynolds, supra note 42, at 783-85. As she explains:

The Supreme Court weighed relevant state and federal interests, measured against the "crucial" backdrop of tribal sovereignty and determined whether federal law leaves room for the application of state law. The suggestion that tribal sovereignty cannot of its own force preclude state regulation, despite repeated Court dicta to the contrary, is consistent with established principles of Indian law. Because congressional control over the contours and very existence of tribal sovereign powers is absolute, to refer to tribal sovereignty as a bar to state law is merely to articulate the preemption analysis in a slightly different form. That is, state law may be inapplicable to an Indian-related activity because Congress has confirmed the tribe's exclusive power to regulate such activity.

Id. at 784.


136. In White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), the Supreme Court described its modern analysis as follows:

The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law. . . . Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence. We have thus rejected the proposition that in order to find a particular state law to have been pre-empted by operation of federal law, an express congressional statement to that effect is required. At the same time any applicable regulatory interest of the State must be given weight. . . .

When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.
Thus, a court must first examine the applicable federal statute and its legislative history to see if Congress clearly intended either to permit or to prohibit state regulation. If Congress' intent is clear, then that intent is controlling. If its intent is ambiguous, then the court must address the competing federal and state interests to determine whether the exercise of state authority has been preempted by the operation of federal law. This basic framework generally applies to federal-state preemption problems. The Native American preemption inquiry, however, differs from that used in other areas of law primarily because it is "informed by historical notions of tribal sovereignty." Native American sovereignty, although no longer dispositive of jurisdictional disputes, "provides a backdrop against which the applicable treaties and federal statutes must be read." This backdrop creates a presumption of preemption against state regulation.

Despite this apparent solicitude toward Native American interests, the preemption inquiry is allowing increasing incursions of state regulatory jurisdiction over Native American lands. The next two subsec-

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Id. at 143-45 (citations and footnotes omitted).

The Ninth Circuit summarized this analysis in a somewhat shorter fashion by stating that, "the substance of this rule is that in Indian preemption cases, the pre-emption questions are to be settled not so much by determining the actual intent of Congress, but rather by weighing in the judicial scales the present-day state, federal, and tribal interests involved." White Mountain Apache Tribe v. Arizona, 649 F.2d 1274, 1278 (9th Cir. 1981).

137. In most cases there will be an existing federal statute that must be interpreted in relation to a state's statute. Only in rare cases will there be no applicable treaty or statute. In such cases, a court will rely on the infringement test to resolve the jurisdictional dispute. Recent cases have used the same federal common law balancing approach under this test as under the preemption test. That is, the courts have examined the state, federal, and tribal interests to determine whether the application of state laws would interfere with tribal self-government.

For example, in Cabazon Band of Mission Indians v. County of Riverside, 783 F.2d 900 (9th Cir. 1986), the Ninth Circuit held that California could not apply its gambling laws to reservations. After deciding that there was no applicable federal law to create a preemption barrier, the court employed the same "federal common law . . . particularized inquiry test," but under the guise of the infringement barrier. Id. at 903. The court decided that the federal and tribal interest in revenue and employment for the reservation outweighed the state's interest in preventing organized crime in bingo games.

See also Queets Band of Indians v. Washington, 765 F.2d 1399 (9th Cir. 1985), in which the Ninth Circuit balanced the federal, tribal, and state interests to hold that the tribal exercise of sovereignty in licensing cars on the reservation carried sufficient "preemptive" force to require Washington to afford reciprocal recognition of the licenses.


139. McClanahan, 411 U.S. at 172.

140. Rice v. Rehner, 463 U.S. at 725; White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980). Under the Supreme Court's present analysis, the presumption of preemption against state regulation varies with the activities the state is attempting to regulate. Rice v. Rehner, 463 U.S. 713 (1983); see infra note 160. For a more complete discussion of Rice, see infra notes 152-62 and accompanying text.

141. See, e.g., James v. Watt, 716 F.2d 71, 73-74 (1st Cir. 1983); Comment, Developing Test, supra note 42, at 562; see also infra notes 163-66 and accompanying text.
tions explore the trend toward decreasing emphasis on tribal sovereignty and increasing emphasis on state interests under the modern balancing approach.

a. **Diminishing Emphasis on Tribal Sovereignty**

As described above, tribal sovereignty no longer inherently bars state jurisdiction over Native American activity. Instead, it serves as a "backdrop" that informs the preemption analysis. Not surprisingly, the Supreme Court's concept of what tribal sovereignty is and how it should be weighed in the preemption balancing process has also been changing. The Court's decisions have shown a trend toward placing less emphasis on tribal sovereignty.

In *Montana v. United States*, the Supreme Court described the limited nature of Native American sovereignty. The Court stressed that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes, and so cannot survive without express congressional delegation." Thus, Native American tribes retain only those powers of self-government that involve relations among tribal members. For example, tribes retain inherent power to punish tribal offenders, determine tribal membership, and to regulate domestic relations among members.

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142. See supra notes 133-35 and accompanying text.
143. Rice v. Rehner, 463 U.S. at 78.
144. See, e.g., White Mountain Apache Tribe v. Arizona, 649 F.2d 1274, 1284 n.11 (9th Cir. 1981). "The limited, present-day right of tribal self-government has devolved from the broad tribal sovereignty principle of *Worcester v. Georgia*, as 'notions of Indian sovereignty have been adjusted to take account of the State's legitimate interest in regulating the affairs of non-Indians.'" Id. (citations omitted).

One commentator has shrewdly noted the "utter confusion" of the Supreme Court's recent notions of tribal sovereignty:

[The Court has used or cited all of the following "rules" over the past four years [1977-81]: (1) Indian governments retain only those powers not expressly taken away by Congress or voluntarily relinquished by the Indian government; (2) Indian governments are implicitly divested of all powers which are inconsistent with their status as quasi-sovereign powers completely subordinate to the sovereignty of the United States; (3) Indian governments are implicitly divested of all powers which are inconsistent with the interests of the United States; (4) Indian governments are implicitly divested of all powers other than those necessary to protect tribal self-government or to control internal relations; (5) an Indian government may regulate the activities of nonmembers when they enter into consensual relationships with the tribe; and (6) an Indian government may regulate the conduct of nonmembers on fee lands within its reservation when such conduct threatens or has some direct effect on the political integrity, economic security or health and welfare of the tribe.

Berkey, supra note 43, at 79.

145. 450 U.S. 544 (1981) (holding that a tribe has no authority to regulate hunting and fishing activities of nonmembers on fee lands within the reservation).
146. Id. at 564.
147. Id. at 563-66.
148. Id. at 565.
The Court did note in *Montana* that there are situations in which a tribe may regulate nonmembers, but those exceptions have been limited by subsequent decisions. The Court stated that a tribe may regulate nonmembers who contract with or otherwise enter commercial consensual relations with a tribe.\(^\text{149}\) In addition, a tribe may retain inherent sovereignty over nonmembers if their activity "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."\(^\text{150}\) Courts since *Montana*, however, have generally viewed the retained right of self-government narrowly, even where tribal health, welfare, or economics are involved.\(^\text{151}\) Thus, as a general proposition, tribes have no authority over the activities of nonmembers.\(^\text{152}\)

The Supreme Court has recently further emasculated the concept of inherent sovereignty. In *Rice v. Rehner*,\(^\text{153}\) the Court recast the preemption inquiry to focus on the *historical traditions* of a tribe's sovereignty in the particular regulatory area in question rather than on the importance of Native American sovereignty in the abstract.\(^\text{154}\)

When we determine that tradition has recognized a sovereign immunity in favor of the Indians in some respect, then we usually are reluctant to infer that Congress has authorized the assertion of state authority in that respect "except where Congress has expressly provided that State laws shall apply." Repeal by implication of an established tradition of immunity or self-governance is disfavored. If, however, we do not find such a tradition, or if we determine that the balance of state, federal, and tribal interests so requires, our pre-emption analysis may accord less weight to the "backdrop" of tribal sovereignty.\(^\text{155}\)

*Rice* involved the application of state liquor laws to Native American reservations to control both Native American and non-Native American activity. The petitioner asserted that the freedom to regulate liquor was "important to Indian self-governance"\(^\text{156}\) and that liquor and its reg-

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149. *Id.*

150. *Id.* at 565-66.

151. See, e.g., United States v. Anderson, 736 F.2d 1358, 1366 (9th Cir. 1984) (state may regulate surplus water use by non-Native Americans on reservation); White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129, 1138 (8th Cir.), cert. denied, 459 U.S. 1070 (1982) (state may enforce fish and game laws against non-Native Americans on reservation); Reynolds, *supra* note 42, at 788, 790; Comment, *Developing Test, supra* note 42, at 569-74. But see Cardin v. Cruz, 671 F.2d 363 (9th Cir. 1982) (tribal building, health, and safety regulations applied to non-Native American owners of grocery store within reservations because of consensual commercial relations and because conduct threatened tribal health).


153. *Id.* at 719-20. As the Court admonished, "[t]he court below erred in thinking that there was some single notion of tribal sovereignty that served to direct any preemption analysis involving Indians." *Id.* at 724 (emphasis in original). Rather, the *Rice* Court's inquiry looked to the historical tradition of sovereignty in the area of alcohol distribution and consumption, the specific activity the Native American tribe wished to regulate.

154. *Id.* at 719-20 (citations omitted).

155. *Id.* at 721.
ulation affected the “internal and social relations of tribal life.” The Court accorded “little if any weight to any asserted interest in tribal sovereignty” both because the Court found no history of tribal control in the licensing and distribution of alcoholic beverages and because the on-reservation liquor sales would have substantial “spillover” effects on the state regulatory program outside the reservation. Thus, tribal sovereignty plays a decreased role either where there is no historical tradition or where there are strong state interests that weigh against it.

In summary, Rice v. Rehner substantially undermines the importance of tribal sovereignty and self-government, even as it stood after Montana. While it is uncertain how courts will apply Rice, the decision will allow further inroads of state regulation over both non-Native American and Native American activity within reservation borders.

157. Id. (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)).
158. Id. at 720-25. The Court stressed that alcohol regulation and distribution had been jointly in the hands of the federal and state governments since the founding of the country. It noted further that state and federal laws had long excluded Native Americans from any role in regulating alcohol. The Court found, therefore, that Native American sovereignty interests were entitled to little or no weight. Id. The Court’s use of this argument may serve to limit the effect of the decision to its facts. See infra note 161.
159. Rice, 463 U.S. at 724. The Court specifically found that the regulation of sales to non-Native Americans on the reservation did not contravene the right to tribal self-government. Id. at 720 & n.7. It did not specifically determine whether sales to Native Americans would contravene this right; it simply found the issue of sovereignty in general deserved “little if any weight.” Id. at 725.
160. Under Rice, tribal sovereignty in “non-traditional” Native American activities also has an impact on a court’s initial inquiry into congressional intent. The Rice Court announced for the first time that state regulatory activities on Native American lands require express congressional consent only if there is a clear tradition of self-governance in that particular area. 463 U.S. at 720.
161. It is unclear what precedential value Rice will have because the Supreme Court appeared to employ two arguably independent rationales for allowing California to impose its liquor laws on the reservation. Besides the balancing analysis, which deemphasized sovereignty and weighed in favor of state control, the Court also analyzed the federal statute involved. Id. at 725-33. The Court’s analysis here was unclear. Once the Court found there was no tradition of tribal self-governance in liquor regulation, and thus that Congress need not expressly provide for state regulation, the Court construed the legislative history to conclude that Congress had intended to authorize the regulation. Id. at 726. Later in the opinion, the Court stated that the federal statute and legislative history did satisfy the canon of construction requiring express congressional approval of state regulation. Id. at 732. The legislative history quoted in the opinion, however, does not seem to support express congressional intent. See id. at 726-28. If the Court chooses to continue its trend toward increasing state regulation on reservations, Rice provides ample precedent. At the same time, lower courts or the Supreme Court could distinguish Rice from other situations both because of the supposed congressional authorization of regulation and because of the unique history of liquor on Native American reservations. See, e.g., id. at 731 n.15; see also Note, Indian Law—State Regulation of Liquor Transactions on Indian Reservations, 19 LAND & WATER L. REV. 457, 466-69 (1984).
162. For criticism of Rice's “historical tradition” approach, see Rice, 463 U.S. at 738-39 (Blackmun, J., dissenting) (“[t]he Court's analysis has never turned on whether the particular area being regulated is one traditionally within the tribe's control”); Note, supra note 161, at
b. Increasing Emphasis on State Interests

As shown above, the Supreme Court has become less willing to protect tribal sovereignty in disputes over state regulation of on-reservation activities. Instead, the Court seems to be slanting its analysis to favor state regulation. The cases previously evidenced a clear presumption against state regulation on reservations. Now, some cases seem to indicate that a presumption in favor of state regulation is factored into the preemption inquiry. As one pre-Rice commentator summarized the Supreme Court's approach:

Even though the tradition of tribal sovereignty still provides a backdrop for the interpretation of ambiguous congressional actions, unless congressional preemption intent is express, the balancing test and the arguable presumption of state jurisdiction may permit deep state incursions into tribal sovereignty.

In the aftermath of Rice v. Rehner, the Supreme Court will accord more weight to state interests and place less emphasis on tribal sovereignty, thus allowing increased state jurisdiction over Native American lands.

c. Native American Activity Versus Non-Native American Activity on Reservations

It is worth noting that, for the purposes of the balancing test, the Court draws a fundamental distinction between Native American and non-Native American activity on reservations. As a result of various historical congressional policies, much land within reservations is owned by

463-69 ("[t]he majority's analysis can be seen as a result-oriented approach designed to ensure that state regulation will be permitted," id. at 464.).

163. See, e.g., Berkey, supra note 43, at 77-79; Carter, supra note 42, at 166-69; Reynolds, supra note 42, at 788; COMMITTEE ON NATIVE AMERICAN STRUGGLES, NATIONAL LAWYERS GUILD, RETHINKING INDIAN LAW 86 (1982) ("States have found the Supreme Court leaning, even tipping over, in their direction. The present Supreme Court has begun deliberately to abandon many long established principles and to diminish Indian governmental power in favor of the states."); Comment, Developing Test, supra note 42, at 575.

164. See supra note 140 and accompanying text.

165. See, e.g., discussion of Rice v. Rehner, supra text accompanying notes 154-62; New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334, 341-43 (1983) (state jurisdiction preempted if it interferes with federal and tribal interests "unless the state interests at stake are sufficient to justify" it; tribe may regulate fish and game where it has developed a comprehensive program with the federal government and state has failed to identify any regulatory function or service or any off-reservation effects); James v. Watt, 716 F.2d 71, 76 (1st Cir. 1983), cert. denied, 467 U.S. 1209 (1984) ("given a lack of any substantial federal or tribal interests that significantly support preemption," state interests are sufficient to justify preemption); White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129, 1138 & n.9 (8th Cir. 1982) (burden of proof on tribe to show that state game laws should not apply; Congress could choose to preempt state authority); Confederated Tribes v. Washington, 591 F.2d 89, 91 (9th Cir. 1979) (must be a clear manifestation of congressional or tribal intent to preempt state regulation); see also Comment, Developing Test, supra note 42, at 571 & n.67, 574 & n.92, 576 & n.109, 577 (discussing various other Supreme Court cases that support a presumption in favor of state regulation).

166. Comment, Developing Test, supra note 42, at 577.
non-Native Americans in fee simple. The Court has allowed far more state control over non-Native American activity on non-Native American owned lands within reservations than over Native American activity on Native American lands. Thus, in applying its preemption analysis, the Court has said:

When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. More difficult questions arise where a state asserts authority over the conduct of non-Indians engaging in activity on the reservation. [Such cases call] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

Courts are generally finding, under this particularized inquiry, that where a state has an important interest, a state may apply its laws to non-Native American activity on reservations. In exceptional circum-

167. See supra note 14.

168. Different permutations of activity and ownership are possible and would probably yield different results when factored into the preemption analysis. For an assessment of how the analysis might vary with non-Native American activity on non-Native American fee land, non-Native American activity on leased Native American land, non-Native Americans contracting with Native Americans, and Native American activity on Native American land, see Comment, Developing Test, supra note 42, at 578-85.

169. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144-45 (1980); see also Fort Mohave v. San Bernadino County, 543 F.2d 1253, 1257 (9th Cir. 1976) (state allowed to impose its possessory interest tax on non-Native American leases of trust property; "[w]hen the state action is directed at non-Indians, it is necessary to reconcile the federal preemption rationale with the state's recognized authority to regulate its citizens").

170. See Carter, supra note 42, at 166; Reynolds, supra note 42, at 781. Washington in fact argued that its program should at least apply to non-Native American hazardous waste activities on reservations, but it did so too late in the proceedings for the Ninth Circuit to address the argument. In its EPA submittal, Washington sought to apply its hazardous waste program to all hazardous waste activity within the state, including all activity on reservations; it did not distinguish between hazardous waste activity by non-Native Americans and hazardous waste activity by Native Americans or Native American tribes. See supra notes 70-73 and accompanying text. However, Washington was primarily concerned with non-Native American activities, particularly non-Native American activity on the Tacoma industrial tidelands within the Puyallup Reservation. According to Charles Roe, the attorney for Washington, the hazardous waste activities of non-Native Americans are causing the greatest problems. There is at present essentially no Native American hazardous waste activity. Furthermore, several of Washington's reservations are owned almost entirely by non-Native Americans, and virtually all of the reservations in the state are owned by more than 50% non-Native Americans. Except for a footnote in the Reply Brief, though, Washington did not structure its argument to reflect its particular concern for non-Native American activity. Telephone interview with Charles Roe, supra note 30; see Washington Reply Brief, supra note 27, at 14 n.6. In its Reply Brief, Washington urged the court first to find the state program generally applicable to reservation lands but, at a minimum, to limit EPA's Native American lands exclusion to Native American activity on reservations and to let the state control non-Native American activity. Washington Reply Brief, supra note 27, at 14 n.6. The court refused to address this request after noting that the alternative suggestion was not part of the program submitted to EPA by Washington. Washington Dep't of Ecology, 752 F.2d at 1468 ("We do not decide the question
stances, the Court has allowed state laws to apply even to on-reservation Native American activity.\textsuperscript{171} For example, a state may be allowed to regulate both Native American and non-Native American activity if the state has a strong interest in a cohesive management program to conserve a scarce common resource or if there are significant off-reservation effects.\textsuperscript{172}


Under the current federal preemption approach to jurisdictional questions involving Native American reservations, a court would probably find that Washington has jurisdiction to regulate the hazardous waste activities of at least non-Native Americans on Native American lands if the state presented its regulatory program as an exercise of the state's police powers. The following discussion examines the state, tribal, and federal interests raised by the facts of \textit{Washington Department of Ecology} and balances them against one another.

\textit{a. State Interests}

Washington has numerous compelling interests in regulating hazardous waste activity on Native American reservations. Courts have explicitly recognized some of these interests as carrying weight in the preemption balance; others are buttressed by administrative or management policies.

Washington's most pressing interest is in not having its regulatory program undercut by the enforcement of more lenient federal standards on Native American lands. While EPA's regulatory program does not leave the problem of hazardous waste ungoverned,\textsuperscript{173} it is likely to undercut Washington's program in a number of ways.

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\textsuperscript{172} Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165, 174, 175-77 (1977) (upholding state fish and game laws as applied to both Native American and non-Native American activity on reservation); United States v. Anderson, 736 F.2d 1358, 1366 (9th Cir. 1984) (allowing state to regulate non-Native American use of excess waters within the reservation, in part because of a strong state interest in developing a comprehensive water program); Rice v. Rehner, 463 U.S. 713 (1983) (upholding state liquor laws as applied to Native American activity on the reservation in part because of substantial off-reservation effects).

\textsuperscript{173} The court of appeals in \textit{Washington Dep't of Ecology} noted:

The absence of state enforcement power over reservation Indians . . . does not leave a vacuum in which hazardous wastes go unregulated. EPA remains responsible for ensuring that the federal standards are met on the reservations. Those standards are designed to protect human health and the environment. See 42 U.S.C. 6924. The state and its citizens will not be without protection.

752 F.2d at 1472.
First and foremost, EPA's weaker standards increase the risk that a hazardous waste leak will occur within Washington's borders. The potential for hazardous waste spills is perhaps the most vexing problem facing Washington. The risks posed by hazardous wastes are enormous. The effects of a single hazardous waste spill or leak can destroy groundwater supplies for the foreseeable future. Given the proximity of some reservations to heavily developed areas, an on-reservation accident could have significant off-reservation effects. Second, the risk of spills will increase as more hazardous waste actors locate their activities on Native American lands either specifically to take advantage of the more lenient federal standards or simply because the location is expedient. Finally, local governments may become less vigilant in enforcing state hazardous waste programs because nearby reservations are not bound by the same strict standards.

Courts have often regarded the existence of "spillover" off-reservation effects as support for state regulatory jurisdiction over reservations, particularly in the area of natural resources and conservation. In Puyallup Tribe v. Department of the State of Washington, the Court...
even allowed the state to regulate fishing on a reservation by both Native Americans and non-Native Americans.\textsuperscript{181} Although fishing is an area traditionally left to tribal control, the Court recognized the state’s need for a comprehensive plan to manage a scarce natural resource when that resource, a species of fish, was threatened with extinction.\textsuperscript{182} While the state’s interest in natural resources is not negated even if the resources are wholly within a reservation, the greater the actual or potential off-reservation effects, the more compelling the state’s interest.\textsuperscript{183}

Courts have found that state interests are strengthened when Native American land and non-Native American land lie in close proximity.\textsuperscript{184} In \textit{Washington Department of Ecology}, the Puyallup Reservation, which has considerable ongoing hazardous waste activity and contains a Superfund site, is intermingled with the City of Tacoma.\textsuperscript{185} Thus, hazardous waste seeping off the reservation could have serious effects on the health of Tacoma residents and on the natural resource base close to this major industrial area. The ecological concerns and the risks posed by hazardous waste activities combine to render Washington’s interest in protecting the effectiveness of its program significant.

Courts and commentators have also recognized a state’s strong interest in administrative simplicity and a unified regulatory program.\textsuperscript{186}

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\item Id. at 175.
\item Id. at 175-77; see also \textit{Washington Game Dep’t v. Puyallup Tribe}, 414 U.S. 44, 49 (1973).
\item United States \textit{v.} Anderson, 736 F.2d 1358, 1366 (9th Cir. 1984) (state interest in water); \textit{White Mountain Apache Tribe v. Arizona}, 649 F.2d at 1283 (state interest in fish and game). These courts noted that the state interest is shared with and not displaced by the tribal interest in natural resources on the reservation, but that the weight of the state’s interest depends in large part on, for example, the extent of fish and game migration or the extent to which waterways or aquifers transcend the reservation borders.
\item See, e.g., Comment, \textit{Tribal Self-Government}, \textit{supra} note 42, at 85-86 & n.122; \textit{Caliente Band v. Palm Springs}, 347 F. Supp. 42 (C.D. Cal. 1972) (allowing county zoning laws and state land use laws to apply to a Native American reservation that posed special problems because it was intermingled with state regulated land). This intermingling of tribal and municipal lands is not uncommon. See, e.g., \textit{supra} text accompanying note 17.
\item Not all the reservations in Washington or in other states are in close proximity to heavily developed areas. In fact, most Native American lands are located in remote areas. EPA Discussion Paper, \textit{supra} note 25, at 83. EPA has noted that increased hazardous waste activity will occur on Native American lands because of their isolation. \textit{Id.} To an extent, therefore, Washington’s efforts may be somewhat atypical given the proximity of developed areas to Native American lands. The degree to which a court will give weight to the state’s interest in hazardous waste regulation on Native American lands, presumably, will vary depending on the extent to which Native American and non-Native American lands intermingle.
\item Concern for a comprehensive regulatory scheme has motivated courts in several cases. For example, in \textit{Jicarilla Apache Tribe v. Supron Energy Corp.}, 728 F.2d 1555 (10th Cir. 1984), the court upheld the statewide application of the New Mexico Natural Gas Pricing Act price ceiling, holding it applicable to gas produced on Native American reservations. \textit{Id.} at 1561. The court reasoned that the federal Natural Gas Policy Act called for state regulation over intrastate gas, and the federal Act said nothing about tribal lands, so the state Pricing Act should apply to all intrastate gas. \textit{See also United States \textit{v.} Anderson}, 736 F.2d 1358, 1366 (9th Cir. 1984) (allowing state to regulate non-Native American use of excess waters within the
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EPA, by regulating hazardous waste activity only on Native American lands, creates a confusing patchwork of regulatory jurisdiction. Washington is legitimately concerned over the havoc that this "checkerboard jurisdiction" might wreak on its management program. While granting Washington concurrent jurisdiction over Native American lands may frustrate the goal of administrative simplicity to a degree, the state has an interest in having a single set of standards apply within its borders, particularly when the areas that will require the closest regulatory scrutiny lie within Native American lands which are otherwise out of Washington's reach.

Washington's interests in regulating hazardous wastes on Native American lands are strengthened by the extent to which non-Native Americans are responsible for the problem. As discussed above, current doctrine implies that a state's interest is strongest (and a tribe's interest weakest) when the state's regulations would apply primarily to the activities of non-Native Americans, particularly when those activities take place on non-Native American fee land within the reservation. Indeed, in some cases the outcome of jurisdictional disputes seems to actually turn on the amount of reservation land that has been alienated versus the amount that remains under Native American control. Washington's regulatory interest, therefore, is especially strong in light of the hazardous waste activity by non-Native Americans on the Puyallup reservation, in part because of a strong state interest in developing a comprehensive water program; Comment, Developing Test, supra note 42, at 582.

188. The interest of a simple and unified regulatory approach may seem at first glance to be defeated by the concurrent state-federal regulation of Native American lands proposed here. In fact, EPA considered and rejected this approach as being too confusing for compliance by industry. 44 Fed. Reg. 34,259 (1979); see also 43 Fed. Reg. 4368 (1978) discussed infra note 255.

This interest is not thwarted, however, because RCRA explicitly allows for stricter state regulations. See supra note 54 and accompanying text. While there may be instances where concurrent regulation complicates compliance, for the most part the state and federal statutes are identical in their approaches. Washington's program differs only by setting stricter standards of regulation. Were this not the case, EPA would not have approved Washington's program as being "equivalent" to the federal program. See supra note 53 and accompanying text. Thus, Washington's standards will operate as the controlling standards by effectively displacing EPA's regulatory program. EPA will only actually enforce its standards if Washington fails to carry out its regulatory function. Concurrent jurisdiction will not, however, avoid making EPA's continuing regulatory effort on the Native American lands located in Washington both redundant and superfluous.

189. See supra notes 167-72 and accompanying text.
Reservation where only 18 of 22,000 acres remain under tribal control.\footnote{91}{The fact that so little land remains under tribal control was crucial to the Supreme Court's determination that Washington could regulate fish and game on the Puyallup Reservation. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (discussing \textit{Puyallup}, 433 U.S. at 174). The same reasoning should apply here as well. It does bear noting, however, that this argument favors limited jurisdiction over only certain problem reservations like the Puyallup Reservation.}

\subsection*{b. Tribal Interests}

\textit{Washington Department of Ecology} did not concern the ability of tribes to regulate hazardous waste, but instead involved the contest between Washington and the federal government for jurisdiction to manage Native American lands. Nevertheless, Native American interests must be considered under the modern preemption analysis.\footnote{92}{See \textit{supra} note 136.} As the \textit{Washington Department of Ecology} court noted, "[t]he sovereign role of the tribes \ldots does not disappear when the federal government takes responsibility for the management of a federal program on tribal lands."\footnote{93}{Washington Dep't of Ecology, 752 F.2d at 1471.}

Native Americans have historically shown great concern for their natural resources and their reservation environment in general.\footnote{94}{See, e.g., Tribes Brief, \textit{supra} note 94, at 10 (quoting \textit{ENVIRONMENTAL PROTECTION AGENCY, POLICY FOR PROGRAM ADMINISTRATION ON AMERICAN INDIAN RESERVATIONS} 4-5 (1980)):}
The environment is generally best protected by those who have the concern and ability to protect it. Indian people show an acute sensitivity to their loss of great tracts of this country. \ldots This historical fact, combined with a long-standing cultural respect for the earth and its environment, is reflected in tribal expressions of concern for the land, its irreplaceability, and the importance of its environmental quality. Certainly, if the principle favoring local stewardship of the environment has meaning anywhere, it is on the Indian reservation.\footnote{95}{Comment, \textit{Tribal Self-Government}, \textit{supra} note 42, at 89.}

Some Native American tribes have made significant efforts to regulate environmental activity on their reservations. For example, the Navajo Nation formed an Environmental Protection Commission that has been active in regulating the reservation environment. Similarly, the Crow Tribe passed an Environmental Health and Sanitation Ordinance, and the Cheyenne River Sioux Tribe passed a comprehensive land use ordinance with an environmental component to it. \textit{West, Environmental Law: Introductory Comments}, in \textit{AMERICAN INDIAN LAWYER TRAINING PROGRAM, SEMINAR ON INDIAN NATURAL RESOURCE LAW AND FINANCE, MAY 1979}, at 283, 286-87 (1980).

In addition, pursuant to federal law, Native Americans have increasingly taken part in environmental matters affecting the reservation. \textit{See, e.g., United States v. Oregon}, 769 F.2d 1410, 1412-13 (9th Cir. 1985) (Columbia River Management Plan agreement contains provisions for tribes and State of Oregon to establish and manage goals for fish species in the Columbia River); \textit{Pacific Northwest Electric Power Planning and Conservation Act}, 16 U.S.C. §§ 839-839(h), especially, § 839b(h)(11)(B) (1982 & Supp. III 1985) (requiring that Bonneville Power Administration coordinate the Agency's action with Native American tribes, fish and wildlife agencies, and other relevant political bodies "to the greatest extent practicable").
Ecology asserted an interest in self-government and sovereignty, particularly in "the ability of Indian tribal governments to exercise their powers to regulate the reservation environment and protect the health and welfare of the reservation population." 196

Montana v. United States 197 may be interpreted to support the Washington tribes' interest in regulating hazardous waste activity within their reservation borders, including non-Native American hazardous waste activity, because such activity affects tribal health, welfare, and economic development. 198 While there are no cases that discuss the tribal interest in self-government in the context of hazardous waste activity, a number of courts have noted this interest in the context of land use and zoning regulation on reservations. For example, in Confederated Salish and Kootenai Tribes v. Namen, 199 the Ninth Circuit Court of Appeals held that the tribes could apply their zoning laws to Native Americans and non-Native Americans alike on the reservation. 200 After observing that building on the reservation, "if unregulated, could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake, which is one of the most important tribal resources," the court concluded that "the challenged ordinance falls squarely within the exception recognized in Montana." 201 Similarly, in Shoshone and Arapaho Indian Tribes v. Knight, 202 a court upheld a zoning ordinance that sought to prevent uncontrolled development which jeopardized the value of the reservation's natural resources and its environment because "it cannot seriously be questioned that the ability to govern one's affairs includes the ability to exercise authority within the boundaries controlled by the sovereign." 203

While both Confederated Salish and Kootenai Tribes and Shoshone and Arapaho Indian Tribes highlight a tribe's valid interest in land use and pollution control, it is important to remain aware of the differences between land use regulation and attempts to control hazardous waste. Federal statutes and regulations involving land use encourage tribal jurisdiction on reservations. 204 By contrast, all of the major federal pollution

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196. Tribes Brief, supra note 94, at 4.
197. 450 U.S. 544 (1981); see discussion supra notes 145-52.
198. 450 U.S. at 566.
199. 665 F.2d 951 (9th Cir. 1982).
200. Id.
201. Id. at 964.
203. Id. at 3118; see also Cardin v. Cruz, 671 F.2d 363 (9th Cir. 1982) (tribal building, health, and safety regulations applied to non-Native American owner of grocery store within reservation because of consensual commercial relations and because conduct threatened tribal health).
204. E.g., Mineral Leasing Act of 1938, 25 U.S.C. § 396(a)-(g) (1982) and 25 C.F.R. §§ 171.1-171.23 (1986) (preempting state law over mineral and gas leasing on reservations and giving control to tribes in conjunction with the Secretary of the Interior); Surface Mining
HAZARDOUS WASTE ON NATIVE AMERICAN LANDS

statutes, including RCRA, generally delegate program administration to the states, providing little or no role for Native Americans in program management.205 Thus, while the zoning and land use cases effectively demonstrate the tribal interest in protecting the reservation environment, they do not necessarily create the presumption that that interest will carry substantial weight in the context of hazardous wastes.

The tribal interest in regulating the environment is further weakened by the fact that, in Washington, the Native Americans themselves are currently neither directly nor indirectly involved with hazardous waste activity. In Montana v. United States,206 the Court noted that tribal interests are particularly strong when one of the tribes is involved in the relevant activity or when the tribe has contracted with or leased land to nonmembers engaged in the activity.207 The hazardous waste activity on the reservations in Washington is conducted almost exclusively by non-Native Americans on non-Native American lands.208 Because Native Americans neither conduct the hazardous waste activity nor own the lands upon which it takes place, their interest in regulating the problem is weakened.209

The tribes' interest is also weakened by their failure to implement or seek to enforce their own regulation of the problem. Courts have accorded more weight to tribal environmental and resource interests when tribes have sought to implement a regulatory program of their own on reservation lands. For example, in New Mexico v. Mescalero Apache Tribe,210 the Supreme Court enjoined New Mexico from enforcing its fish


205. Only two federal pollution statutes provide any explicit role for Native Americans in managing their reservation lands. Under the Clean Air Act, tribal governments are authorized to redesignate Native American lands under the Prevention of Significant Deterioration (PSD) program. 42 U.S.C. § 7474(C) (1982). Several tribes have already acted to redesignate lands to protect air quality. See, e.g., Note, supra note 42, at 86-89. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) also provides a limited role for Native American tribes. Under the Act, tribes may enter cooperative agreements with EPA and receive grants for enforcement as well as training and certification of pesticide applicators. 7 U.S.C. § 136(u) (1982). Other than these limited statutory delegations, Congress has not addressed the issue of Native American jurisdiction over Native American lands under environmental statutes. But see infra note 264.


207. Id. at 565.

208. See supra note 170. This situation could change in the future if the current bifurcated regulatory approach persists. See supra text accompanying note 39.

209. See supra note 170.

and game laws against non-Native Americans on a reservation in large part because the tribal government, working closely with the federal government, had implemented a comprehensive tribal regulatory scheme for hunting and fishing on the reservation that was incompatible with the state's regulations. The Washington tribes neither have nor plan to develop any hazardous waste management programs.

The Washington tribes would be able to assert a strong interest if they could show that Washington would impose less stringent regulations than the federal regulations on the reservations or would otherwise abuse or abdicate its responsibility under a regulatory program applied to Native American lands. The Washington tribes did voice a concern that their "reservations will become 'dumping grounds' for off-reservation hazardous wastes if the state is permitted to control the hazardous waste program on the reservations." This concern is not well-founded, however, because, under the approach advocated in this Note, the state would regulate concurrently with EPA. If Washington in any way abused or abdicated its responsibility, EPA would, pursuant to its retained enforcement authority under RCRA and the federal government's trust responsibility, ensure that at least federal standards were complied with on Native American lands.

The concern of the tribes who participated in the Washington Department of Ecology litigation was probably based more on sovereignty grounds than on health or environmental concerns. Tribal-state rela-

211. Id. at 343-44. Similarly, in Washington v. Confederated Tribes of Colville, 447 U.S. 134 (1980), the Supreme Court invalidated state taxation of on-reservation sales to nonmembers because the tribal government was deeply involved in the sales and imposed their own federally approved tribal sales tax. Tarlock, Environmental Law and Land Use Control, in Seminar on Indian Natural Resources Law and Finance, Summary of Proceedings, May 1979, at 295 (1980) ("[i]n the face of the tribes' regulatory programs, the more the tribes do towards regulating in the environmental area, the more they improve their position under the Williams v. Lee test to resist a later state bid to take over environmental regulation on tribal lands"). See generally Comment, Tribal Self-Government, supra note 42, at 88-93 (tribal air and water programs could be developed with the assistance of EPA).

212. Even if the Washington tribes were involved in hazardous waste regulation, a court still might find sufficient state interest to justify state intervention. New Mexico v. Mescalero Apache Tribe, 462 U.S. at 341-44; Comment, Developing Test, supra note 42, at 581-82. A court also might allow a state to apply its conservation program because it is stricter than the tribe's program. White Mountain Apache Tribe v. Bracker, 448 U.S. 1274, 1283 (1981); Confederated Tribes v. Washington, 591 F.2d 89 (9th Cir. 1979).


214. Washington Dept' of Ecology, 752 F.2d at 1470. This concern did not appear in the Tribes' brief, but it may have been voiced at oral argument.

215. See supra note 188 and accompanying text.

216. See supra note 90 and accompanying text. For a discussion of the federal government's trust responsibility and fiduciary duty to Native American tribes, see infra note 233.

217. Interview with Logan Slagle, Professor, Native American Studies Department, University of California, Berkeley (Oct. 21, 1985); Telephone interview with Rod Walston, Director, Natural Resources Section, California Office of Attorney General (Oct. 30, 1985);
tionships have typically been marked by hostility. Native Americans see states as adversaries who try to take from tribes what power they still retain. Each new state regulatory attempt represents another attack on their diminishing tribal sovereignty. Because cases addressing jurisdiction over Native American reservations draw from all types of regulatory situations, there is the distinct possibility that the assertion of state authority in an area that benefits Native American tribes may be used as precedent for a less beneficial regulatory arrangement in the future. Thus, even if Washington would conscientiously manage hazardous waste on the reservations, Native American tribes might legitimately fear that submitting to jurisdiction in this case would encourage additional assertions of jurisdiction in other areas. Consequently, as a general proposition, Native Americans resist additional incursions into any aspects of their reservation life.

The tribes favored EPA jurisdiction over reservation lands because they believed that EPA would better preserve Native American sovereignty on the reservation than would Washington State. This belief may be valid because, under its federal trust responsibility, EPA is required to foster Native American sovereignty, where possible, in environmental program implementation. The state is under no such obli-


218. See, e.g., United States v. Kagama, 118 U.S. 375, 384 (1886) ("[Native Americans] owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their worst enemy."); COUNCIL OF STATE GOVERNMENTS, INDIAN RIGHTS AND CLAIMS: ENVIRONMENTAL MANAGEMENT CONSIDERATIONS FOR THE STATES 1, 3 (1977).

Relations between Washington State and the Native American tribes within its borders have been particularly bitter because of struggles over fishing rights. See generally AMERICAN FRIENDS SERVICE COMMITTEE, UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP AND NISQUALLY INDIANS (1970) (discussing the bitter struggles of the Muckleshoot, Puyallup, and Nisqually tribes). As the District Court for the Western District of Washington characterized the situation: "More than a century of frequent and often violent controversy between Indians and non-Indians over treaty right fishing has resulted in deep distrust and animosity on both sides. This has been inflamed by provocative, sometimes illegal, conduct of extremists on both sides...." United States v. Washington, 384 F. Supp 312, 329 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

Given this documented hostility, the tribes are probably particularly wary and resentful of any attempts by Washington to assert regulatory jurisdiction. Interview with Logan Slagle, supra note 217.


220. See Tarlock, supra note 211, at 295.

221. Cf. Tribes Brief, supra note 94, at 5-18 (recognizing EPA's trust responsibility toward Native Americans and Native American sovereignty issues).

222. For a discussion of the federal trust doctrine, see infra note 233.

223. On the other hand, although EPA has expressed a policy of encouraging Native American sovereignty, it has done little in actuality to further this goal. See infra note 238. In addition, despite its professed obligations, the federal government has often acted inconsistently with the best interests of Native Americans. See infra note 233. Therefore, in practice,
Washington does have an incentive, however, to consider Native American sovereignty issues in carrying out its hazardous waste management plan. State encouragement of tribal participation and explicit acknowledgment of tribal concerns would undoubtedly further Washington's regulatory efforts on the reservations.\footnote{224}

The legal significance of the tribes' interest in safeguarding their sovereignty, however, is uncertain under the current preemption analysis. After \textit{Rice v. Rehner},\footnote{225} which looks to the tribe's historical tradition of tribal sovereignty, the interest may be accorded very little deference at all in the area of hazardous waste regulation. As noted by the State of California in its Amicus Brief, \textit{"[s]ince hazardous waste pollution activity is a relatively recent phenomenon, there is, of course, no history or tribal tradition of sovereignty in this area."}\footnote{226} Under \textit{Rice}, without such a tradition, there is no need for express congressional intent to allow state regulation, and related tribal interests will therefore be accorded less weight in the preemption balancing. Thus, it is likely that a court would there may be little reason to assume the federal government will be more sensitive to Native American concerns than the states.

\footnote{224. EPA encourages joint state-tribal program administration. States are increasingly acknowledging Native American sovereignty and showing a preference for cooperation with tribes to resolve shared environmental problems. Likewise, tribal leaders are increasingly willing to work with state governments for their mutual environmental interests. State tribal cooperation has met with particular success in regulating pesticide application on reservations. EPA Discussion Paper, \textit{supra} note 25, at 27 n.6, 33-34. California is presently working with the Hoopla tribe to regulate and develop remedial actions for hazardous waste on reservations. Telephone interview with Warner Reese, Council of Energy Resource Tribes, Denver, Colorado (Nov. 11, 1985). In some cases, tribes and states have even been able to work out compromise, concurrent regulation of fishing and hunting on reservations, as for example, on the Quechan Reservation in California. Telephone interview with Rod Walston, \textit{supra} note 217 (cooperative agreement arising out of litigation in California v. Quechan Tribes, 595 F.2d 1153 (9th Cir.), cert. denied, 464 U.S. 820 (1983) and California v. Harvier, 700 F.2d 1217 (1983)). As another example, the Menominee Tribe is cooperating closely with the Minnesota Department of Natural Resources to regulate environmental affairs on the reservation. Telephone interview with Mary Lou Soscia, \textit{supra} note 217. Even Washington State has worked with its Native American tribes in the past on environmental matters, particularly in the area of water pollution discharge permits and water quality generally. Telephone interview with Charles Roe, \textit{supra} note 30.}

\textit{See also} COMMITTEE ON NATIVE AMERICAN STRUGGLES, NATIONAL LAWYERS GUILD, \textit{supra} note 163 (tribal-state compacts); R. B\textit{arsh} \& J. H\textit{enderson}, \textit{supra} note 43, at 223-24, 229-30 (tribes should move away from reliance on federal government and should seek to ally themselves instead with the states).\footnote{225. 463 U.S. 713 (1983).}

\footnote{226. California Brief, \textit{supra} note 34, at 10.}

The Ninth Circuit has suggested that focusing on the particular activity at issue reads the tribal self-government analysis too narrowly. \textit{Cabazon Band v. County of Riverside}, 783 F.2d 900, 906 (9th Cir. 1986). The court stated that the "focus in determining whether a tribal tradition exists should instead be on whether the tribe is engaged in a traditional governmental function, not whether it historically engaged in a particular activity." \textit{Id.}

The Court in \textit{Rice v. Rehner}, 463 U.S. 713, 721-24 (1983), however, did focus specifically on the historical tradition of tribal involvement in the area of liquor licensing and distribution. The Ninth Circuit's interpretation, therefore, impermissibly broadens the \textit{Rice} analysis.
not weigh the Native American self-government concerns very heavily in this situation.

c. Federal Interests

The preemption analysis also looks to the federal interests in the particular Native American activity.\textsuperscript{227} To assess the federal interests, courts look both to federal legislation and regulations in the area and to general federal policies toward Native Americans.\textsuperscript{228}

The general history of federal involvement in the particular area often serves as the first source of a court's evaluation of the federal interests.\textsuperscript{229} If there is a comprehensive federal regulatory scheme, the federal interest may preempt the state's authority to regulate. Thus, numerous cases have held that a comprehensive and pervasive federal regulatory scheme governing Native American conduct may leave no room for the application of state laws, particularly where the state regulations would obstruct the federal scheme.\textsuperscript{230} Generally, however, comprehensive federal regulatory efforts preempt state law only when the federal laws apply specifically to Native Americans.\textsuperscript{231}

Federal legislation in the area of hazardous waste shows no particu-

\textsuperscript{227} The federal interest in Native American tribes arises from the broad congressional power to regulate tribal affairs under the Indian commerce clause, U.S. Const. art. I, § 8, cl. 3, and from the federal trust responsibility resulting from the semi-autonomous status of tribes. Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 837 (1982). For a discussion of the federal trust doctrine, see infra note 233.

\textsuperscript{228} See, e.g., New Mexico v. Mescalero Apache Tribe, 462 U.S. at 334, 336-41 (where the Supreme Court assessed both federal statutes and congressional policies favoring Native American sovereignty: "[s]tate jurisdiction is preempted if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority").

\textsuperscript{229} For example, in Rice v. Rehner, the Supreme Court looked at the federal interest as evidenced by the history of federal liquor control on the reservation. Rice, 463 U.S. at 720-23.

\textsuperscript{230} For example, in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), Arizona sought to tax logging by non-Native Americans on the reservation. The Court held that statutes, detailed regulations, and daily supervision by the Bureau of Indian Affairs wholly governed timber operations on the reservation and that the state taxes would threaten the policies underlying the federal scheme. See also, e.g., Mescalero Apache Tribe, 462 U.S. at 343 (state law would interfere with comprehensive tribal regulations developed under close supervision of federal government); Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982) (federal interest and regulations governing Native American education); Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980) (federal interest and regulations governing Native American education).

\textsuperscript{231} All of the cases cited supra note 230 concern legislation and regulations that specifically pertain to Native Americans and Native American lands. See also White Mountain Apache Tribe v. Arizona, 649 F.2d at 1279 & n.4 (general federal statutes relating to hunting or fishing or to North American sovereignty do not constitute comprehensive regulation that would preempt state law); Reynolds, supra note 42, at 743; Comment, Developing Test, supra note 42, at 579-80.

This is not to say, however, that the federal law must explicitly preempt state law. Under the traditional presumption in favor of preemption, the particular statute may preempt state law simply by its operation. See supra note 140 and accompanying text.
lar federal interest or involvement with Native Americans that would preempt state law. RCRA is not specific to Native Americans, but rather has general applicability throughout the United States. Far from restricting state jurisdiction, RCRA grants states broad authority to regulate hazardous waste. Thus, the Act does not support any demonstrated federal interests in tribal or federal regulation of wastes.

The federal government also has an interest in all Native American affairs because of its trust responsibility toward Native Americans. Pursuant to its responsibility, the federal government has a strong and often-stated interest in furthering tribal sovereignty. The current congressional and presidential policies favor Native American self-determination. Accordingly, EPA policies reflect this commitment to

232. See supra notes 50-56 and accompanying text.
233. As Felix Cohen has stated, "the trust relationship is one of the primary cornerstones of Indian law." F. COHEN, supra note 120, at 221. See generally id. at 220-28. The concept was first enunciated in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-17 (1831):

The condition of the Indians in relation to the United States is, perhaps, unlike that of any other two people in existence. . . . They may, . . . perhaps, be denominated domestic dependent nations. . . . [T]hey are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power [and] appeal to it for relief to their wants . . . .

Several principles have evolved because of the Native Americans' status as "wards of the nation." United States v. Kagama, 118 U.S. 375, 383 (1886). First, the plenary power of Congress over Native American affairs must be exercised in accordance with the trust responsibility. That is, Congress must generally protect Native American interests. Second, when administering Native American affairs, executive agencies are also subject to the trust responsibility and must act in accordance with strict fiduciary standards. Finally, the trust responsibility has given rise to canons of construction that treaties and statutes should be read, where possible, to protect Native American rights. As the Supreme Court stated, "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." Carpenter v. Shaw, 280 U.S. 363, 367 (1930).

Unfortunately, although these principles are often reiterated, there have been innumerable instances of government action inconsistent with its trust responsibility. See, e.g., K. KICKINGBIRD, A. SKIBINE & L. KICKINGBIRD, INDIAN JURISDICTION 35-39 (1983). One has only to examine the extreme fluctuations in federal Native American policies to realize that the government has often acted in a self-serving manner with respect to Native Americans and in violation of its trust responsibility.

234. See White Mountain Apache Tribe v. Bracker, 448 U.S. at 144; Washington Dep't of Ecology, 752 F.2d at 1470-71.

Trust duties fall into three broad areas: protection of trust lands; protection of the tribal right of self-government; and provision of necessary social, medical, and educational services. K. KICKINGBIRD, A. SKIBINE & L. KICKINGBIRD, supra note 233, at 6. All of these duties may be implicated in the present conflict over hazardous waste regulation.

235. F. COHEN, supra note 120, at 180-206. This professed policy is belied, first, by the fact that Congress rarely considers Native Americans in its general statutes, thus giving rise to jurisdictional problems such as the one at issue in this Note, and second, by the fact that Congress has failed to react to the significant inroads that courts have been making on notions of tribal sovereignty.

236. See Presidential Statements of Indian Policy, exhibits B & C, in Tribes Brief, supra note 94, at 7-8.
tribal self-government in environmental matters.\textsuperscript{237}

This general federal interest in tribal sovereignty does not tip the balance against state regulation of hazardous wastes however. First, while EPA ostensibly favors Native American sovereignty, EPA has not delegated hazardous waste management authority to Native Americans, and it has not taken any other concrete action to further self-government in the area of hazardous waste.\textsuperscript{238} The court in \textit{Washington Department of Ecology} acknowledged that EPA's efforts to support Native American sovereignty under RCRA consist, at most, of EPA "consulting with the tribes over matters of hazardous waste management policy, such as the siting of waste disposal facilities."\textsuperscript{239} Thus, EPA and the Washington tribes are not working together to manage hazardous waste on the reservations to any extent that might preempt state regulation or even evidence a particular federal involvement or interest in Native American management of wastes.

Perhaps one reason why EPA has not taken concrete steps towards tribal assumption of hazardous waste regulation is that such regulation is problematic on a number of levels. First, it is unclear whether tribes have jurisdiction to regulate nonmember activity.\textsuperscript{240} Second, tribal regulation would increase the number of regulatory bodies, adding complex-

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\item \textsuperscript{237} 752 F.2d at 1470-72; EPA Discussion Paper, \textit{supra} note 25, at 35-36 ("The Agency will endeavor where appropriate to give tribal governments the primary role in environmental program management and decision-making relating to EPA's delegable programs on reservation lands.").
\item EPA denied Washington's request for jurisdiction over Native American lands largely because of its perceived trust responsibilities. EPA felt it could not delegate such jurisdiction unless it was "crystal clear" that Washington had the requisite authority under federal law to assume the responsibility. EPA noted that section 3006 of RCRA placed the burden on Washington to demonstrate all elements of an approvable program. With respect to assertion of jurisdiction over Native American lands, the state had an even heavier burden both because of the confused and complex nature of federal Native American law and because of EPA's trust responsibility to protect Native American health and foster Native American sovereignty. EPA Brief, \textit{supra} note 87, at 21-22. \textit{See also supra} note 94.
\item \textsuperscript{238} EPA has allowed Native Americans some management authority under other environmental programs. EPA has provided some assistance to tribes to help them manage air and water quality on the reservation, and EPA is working with the Menominee Tribes in Wisconsin on a pilot solid waste management program. EPA Discussion Paper, \textit{supra} note 25, at 10-14; Telephone interview with Mary Lou Soscia, \textit{supra} note 217. However, "the overall Agency response to tribal initiatives . . . has been limited in scope and effect." EPA Discussion Paper, \textit{supra} note 25, at 10; \textit{see also supra} note 195.
\item \textsuperscript{239} 752 F.2d at 1472.
\item \textsuperscript{240} \textit{See}, e.g., \textit{Montana v. United States}, 450 U.S. 544 (1981); \textit{supra} notes 145-51 and accompanying text; \textsc{K. Kickingbird, A. Skibine} \& \textsc{L. Kickingbird}, \textit{supra} note 233, at 50. \textit{See also supra} notes 200-05 and accompanying text. \textsc{Cf.} \textit{Nance v. EPA}, 645 F.2d 701, 715 (9th Cir. 1981) (upholding EPA delegation of PSD redesignation authority to tribes: "We do not . . . decide whether the Indians would possess independent authority to maintain their air quality."). \textit{But see} \textit{Confederated Salish and Kootenai Tribes v. Namen}, 665 F.2d 951 (9th Cir. 1982) (holding that tribe has jurisdiction to regulate non-Native Americans' activities under zoning ordinance to protect reservation environment).
\end{itemize}
ity and a piecemeal component to environmental regulation.\(^{241}\) Most importantly, there are serious practical problems in delegating significant regulatory authority to tribes. RCRA relies on a "cradle to grave" management of wastes.\(^{242}\) In general, tribal governments lack the administrative capability, the technical expertise, and the resources to assume the "cradle to grave" responsibilities of RCRA.\(^{243}\)

It is unclear how much independent weight courts ever accord federal interests in making decisions about tribal sovereignty. Usually, the federal interest in tribal self-determination is not separated from a tribe's own sovereignty interest,\(^{244}\) an interest which at best is accorded uncertain weight in the current judicial analysis. While this interest underlies all Native American jurisdictional disputes because of the federal government's trust relationship to the tribes, many recent cases find in favor of state jurisdiction, at least over non-Native American activity on reservations.\(^{245}\) Thus, while the federal interest in tribal self-determination must

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242. See supra notes 48-49 and accompanying text.
244. See, e.g., White Mountain Apache Tribe v. Arizona, 649 F.2d 1274, 1280 (9th Cir. 1981), where the court noted that "the federal policy of self-determination doesn't necessarily preclude state regulation of non-Indian" activity on the reservation. The court went on to hold that the "policy and the corresponding tribal interests are entitled to weight in the pre-emption scales here only to the extent that concurrent . . . regulation of non-Indian . . . activity] on reservations actually impede[s] tribal authority and self-determination." Id. The court continued:

[T]he federal interest in tribal political autonomy does not itself negate the fact that Indian reservations are parts of the states. Whether the federal interest in tribal autonomy, combined with the tribe's own interest, is sufficient to preclude the operation of state law upon non-Indians on Indian land depends upon a careful weighing of those interests and that of the state in the particular situation under review.

Id. at 1281-82.
245. See supra note 170 and accompanying text.
be considered, it is not likely to be heavily weighted under the current federal preemption analysis.

How much weight a court should accord EPA's interest in fulfilling its trust responsibility to protect Native American health and welfare is also uncertain. On the one hand, EPA has considered both the advantages and disadvantages of state administration of environmental programs on Native American lands and concluded that, among other disadvantages, states may not adequately address tribes' perceived needs and priorities. Given the often tense relations between states and tribes, this interest is worthy of consideration.

On the other hand, for a number of reasons, this interest is not entitled to much weight. First, the federal government has a poor track record both in hazardous waste management and in environmental regulation on Native American lands. By contrast, while some states

246. EPA Discussion Paper, supra note 25, at 27-30. Among the advantages EPA noted in an internal report are that states are closer to reservations and may have a better understanding of environmental problems there; that state management would reduce regulatory complexity and avoid splintered authority; that states may have existing and adequate personnel, equipment, and programs to handle many management aspects; and that because intra-reservation activities and decisions will have off-reservation effects, state management would ensure that these effects are fully addressed.

Among the disadvantages, EPA noted that states lack adequate legal jurisdiction over Native American lands; that many states don't want regulatory authority over Native American lands; that states may not adequately address tribes' perceived needs and priorities; and that state management conflicts with the concept of Native American self-determination and the sovereign nature of the relationship between the federal government and Native American tribes. Id.

247. Id. at 29.

248. See supra notes 218-19 and accompanying text.

249. For example, a report by a House Commerce subcommittee recently blistered EPA for dilatory and seriously deficient enforcement of RCRA, finding that barely 40% of licensed landfill operators have complied with 1981 groundwater monitoring requirements. Ground Water Monitoring: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 99th Cong., 1st Sess. 78-81 (1985) (statement of Linda E. Greer). Moreover, of the 1246 regulated sites, 559 show some evidence of leaking. Lax Monitoring of Leaks at Toxic Dumps Charged, L.A. Times, Apr. 29, 1985, § 1, at 1, col. 1; see also, e.g., Lennett & Greer, supra note 174, at 184-85.

250. See supra notes 31-33 and accompanying text; see also Churchill, American Indian Lands: The Native Ethic and Resource Development, 28 Envtl. 13 (1986) (discussion of federal government's failure to enforce environmental or occupational health regulation in the context of coal and uranium mining on Native American lands to the detriment of Native American health).

One suggested, but somewhat implausible, explanation for the federal government's poor performance in regulating hazardous waste activity lies in the competing interests it faces. The argument asserts that the federal government is often met with competing concerns. The federal government's mission to foster tribal sovereignty, primarily through the Department of Interior and the Bureau of Indian Affairs, may clash with its responsibility to protect environmental resources. Thus, the federal government may regulate tribal activity less stringently than a state with a strong record in environmental protection would. COUNCIL OF STATE GOVERNMENTS, supra note 218, at 4; Telephone interview with Rod Walston, supra note 217. This argument is unpersuasive, given both the federal government's less than wholehearted
have been lax in hazardous waste management and enforcement (and for these states, at least there is a federal program with minimum standards and federal enforcement capability in place), many states are acutely aware of their hazardous waste problems and are trying hard to remedy them.\textsuperscript{251} Second, hazardous wastes often have been termed, even by EPA, "essentially a state problem."\textsuperscript{252} The protection of public health, safety, and welfare is a traditional function of state and local governments; state governments are closer to the problem and often have greater knowledge of local environmental, economic, and political conditions.\textsuperscript{253} Third, and last, the federal interest in protecting the health and welfare of tribes is assured because EPA will continue to administer RCRA concurrently with the state program.\textsuperscript{254}

Finally, the federal government has an interest in making certain that RCRA is effectively implemented. To an extent, EPA can argue that concurrent federal-state regulation of hazardous wastes will make compliance with the program difficult. EPA originally concluded just this in deciding whether to have concurrent regulation under RCRA.\textsuperscript{255}

\begin{footnotes}
\item[251] See generally Lennett & Greer, supra note 174. If a state is aggressive enough to seek control over hazardous waste on Native American lands, it is likely to be particularly conscientious in regulating these wastes. Not all states will want to regulate hazardous waste on Native American lands. It is likely that only "environmentally-progressive" states will seek control over Native American lands. For example, Washington sought control over the Native American lands particularly because of its environmental concern about the substantial hazardous waste activity on the Puyallup Reservation. States that are less stringent on environmental matters will not adopt hazardous waste programs that are more strict than the federal program and will probably not seek the additional regulatory burden of managing Native American activities. Telephone interview with Rod Walston, supra note 217. On the other hand, not all "environmentally-progressive" states will seek regulation either. For example, California did not seek such authority when it submitted its hazardous waste management plan for EPA approval. The state felt that at the time it didn't have sufficient resources or personnel to effectively manage hazardous waste activity within the state's many reservations. California did join Washington as amicus, however, because it felt, ideally, that a unitary system with authority over all lands within the state would yield the most effective control of hazardous waste. Interview with Rod Walston, Director, Natural Resources Section, California Office of the Attorney General (Apr. 1984). Nothing prevents California from revising its plan to seek control over Native American lands at some point in the future. See 40 C.F.R. § 271.21 (1986).
\item[252] See Schnapf, supra note 98, at 685.
\item[253] See, e.g., id. at 737-38. It has also been suggested that state agencies may be more responsive to citizens, act faster, and be more flexible, pragmatic, and creative in their solution of hazardous waste problems than EPA. Id.
\item[254] See supra note 216 and accompanying text.
\item[255] EPA considered, 43 Fed. Reg. 4370 (1978) (codified at 40 C.F.R. § 250.71(h)); 43 Fed. Reg. 4372 (1978) (codified at 40 C.F.R. § 250.72(b)), but then rejected, 44 Fed. Reg. 34,305 (1979) (codified at 40 C.F.R. § 123.33(b)), the idea of authorizing partial programs where a state would be authorized to operate only some elements of a hazardous waste management program, with EPA having responsibility over the remainder. EPA rejected the idea primarily because it would be too confusing and too burdensome for industry. 44 Fed. Reg. 34,259 (1979) (preamble). EPA has specifically noted that a state's lack of authority over
\end{footnotes}
Given the similarity between the federal and the state programs, however, concurrent federal-state regulation should not overly interfere with the interest in simplifying compliance as much as possible. Thus, there are no pressing federal interests which dictate that EPA retain exclusive jurisdiction over hazardous waste regulation on Native American lands.

d. The Judicial Balance

RCRA neither expressly delegates federal authority over hazardous waste activity on Native American lands to the states nor expressly forbids states from asserting their own police power over such activity. Under Rice, this lack of express delegation does not bar Washington from asserting its police power to regulate and instead requires that a court balance the interests involved to determine whether or not to permit state regulation. Under the current common law balancing test, a court should find that Washington may regulate hazardous waste on Native American lands. In addition, given the unique risks posed by the hazardous waste problem, a court could find that Washington has jurisdiction to regulate Native American activity as well.

Washington can assert compelling health and environmental concerns given the potential for significant off-reservation effects of hazardous waste activity on Native American lands. Washington also has a valid interest in a unitary waste management program that is not thwarted by its inapplicability on reservation lands.

The federal government and the Washington tribes have common interests in protecting tribal sovereignty. However, the federal government has not passed legislation or implemented regulations to highlight this interest. Similarly, the tribes have not shown any interest in regulating the waste themselves. Thus, the tribes and the government exhibit only generalized concerns for notions of tribal self-government. Given the Rice precedent and the high degree of non-Native American involvement in on-reservation waste activity, general sovereignty interests should be viewed as insufficient to overcome concrete and compelling state interests. The federal government and the tribes also are concerned about tribal health and the reservation environment, but there is no indication that these joint interests are in any way compromised by concurrent state regulation of on-reservation activity.

Because state interests outweigh tribal and federal interests, Native American lands is not considered a partial program and is thus not a barrier to general program approval. See supra note 188.

256. In Washington's case, their program has already been approved as equivalent; its enforcement should not, therefore, be confusing to industry. See supra note 188.
257. See supra note 107 and accompanying text.
258. See supra notes 174-78 & 184-85 and accompanying text.
259. See supra notes 186-88 and accompanying text.
American law preemption principles favor state jurisdiction. This is especially true with respect to Washington’s regulation of the hazardous waste activity of non-Native Americans on Native American lands.260 Here, Washington’s interest is greatest and in least conflict with tribal sovereignty.261 However, a court could find that Washington has jurisdiction to control Native American activity on the reservation as well.262 Given the unique risks presented by hazardous waste activity on Native American lands with respect to non-Native American land and resources, the interest in enforcing Washington’s more stringent regulatory program may be sufficiently significant to justify a court’s conclusion that Native American activity also comes under the state’s purview.

CONCLUSION

In Washington Department of Ecology v. EPA, the Ninth Circuit upheld EPA’s determination that RCRA does not specifically authorize states to apply their hazardous waste management programs to Native American reservations.263 This decision seriously impedes Washington’s ability to regulate hazardous waste within the state.

Given the way in which Washington framed the case, however, the Ninth Circuit’s decision does not preclude Washington from regulating hazardous waste activity on reservations under its existing hazardous waste laws. The state’s regulatory program was enacted under its police powers to promote public health, safety, and welfare. If Washington seeks to enforce its regulations on Native American lands under its police powers, as opposed to under RCRA as it did in Washington Department of Ecology, a court will first have to examine whether, using a traditional interstate commerce clause analysis, Washington has any authority under its police power to regulate hazardous waste, on or off the reservation. There is little question that RCRA does not preempt Washington from enacting such legislation.

After finding that Washington is not preempted under the interstate commerce clause analysis, a court would then have to balance the competing federal, state, and tribal interests under the federal Native American law preemption analysis. After balancing the respective interests, a court would be likely to find that Washington’s program is not pre-

260. See supra notes 189-91 and accompanying text.
261. Washington would probably be satisfied with this compromise position because there is presently little Native American hazardous waste activity and because Washington specifically asked the Ninth Circuit to consider this option. See supra note 170.
262. This holding might be more difficult, of course, given Washington Dep’t of Ecology as precedent. However, the case only stands for the proposition that RCRA does not authorize state regulation of Native Americans on the reservation. As this Note argues, a court might achieve a different result employing a preemption analysis. Because the Washington Dep’t of Ecology court did not perform this balancing test, the issue is not foreclosed.
263. See supra notes 101-05 and accompanying text.
empted by federal Native American law because Washington's interests outweigh the federal and tribal interests. The result would be that Washington could regulate concurrently with EPA's program at least as to non-Native American activity on Native American lands. As hazardous waste producers would have to comply with both programs, the more stringent of the two programs, Washington's, would set the operative standards. This would remedy the problems of the current bifurcated regulatory approach.

The problem of hazardous waste regulation on Native American lands, as highlighted by Washington Department of Ecology, illustrates the general uncertainty that exists concerning jurisdictional disputes over Native American lands. The Supreme Court's recent attempts to balance tribal, state, and federal interests may produce fairer results than the Court's previous approach, which merely held all state regulation inapplicable on reservations. On the other hand, the balancing approach, especially after Rice v. Rehner, may cut drastic inroads into previous notions of tribal sovereignty. Overall, however, the balancing approach will produce results narrowly tailored to specific situations and, therefore, will lead to conflicting and less widely applicable precedents. The Supreme Court should therefore help the lower courts and all the concerned parties by providing clearer guidelines on how to apply the Native American preemption analysis.

Given the plenary authority of Congress over Indian sovereignty, the ultimate responsibility for state/Native American jurisdictional disputes rests on congressional shoulders. This Note has argued that state jurisdiction over all the lands within the state would best further environmental and administrative concerns under RCRA. Congress could obviate the need for litigation like Washington Department of Ecology by amending RCRA to expressly require EPA to delegate regulatory authority over Native American lands to states that request such authority. Alternatively, Congress could amend RCRA to clearly state the circumstances under which states are allowed to assert jurisdiction. In either case, a great deal of litigation and regulatory uncertainty would be avoided.

In the future, Congress should give greater consideration to how it wishes authority to be exercised on Native American lands under environmental statutes.\textsuperscript{264} Congressional resolution of these matters would

\textsuperscript{264} Congress recently explicitly considered Native Americans in the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986), which amends the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9657 (1982 & Supp. III 1985). Section 126 of the Amendments, 100 Stat. at 1706, states that the "governing body of an Indian tribe shall be afforded substantially the same treatment as a State" under several sections of CERCLA. Thus, for example, Native American tribal governments must be notified of releases of hazardous substances on their lands, must be consulted before remedial actions are taken on reservation lands, and may
delineate clearer boundaries of authority and would reduce the need for ad hoc, often inconsistent, judicial balancing. Clearer pronouncements by Congress could also ease the jurisdictional tensions between Native American tribes and the states. A more assertive role on the part of Congress in the resolution of such tensions is especially important for hazardous waste management where both tribal and state interests are strong and mismanagement can be particularly deleterious to the health and environment of all people.

participate in listing sites on the National Priorities List. In addition, § 126(c), 100 Stat. at 1706, requires EPA to do a study with Native American tribes to determine the extent of hazardous waste sites on Native American lands and to make recommendations on the program needs of Native Americans, with particular consideration of how tribal participation can be maximized in the administration of such programs.

The Amendments specifically reflect the congressional policy that Native Americans should play a greater role in the administration of environmental programs on reservations. Nevertheless, these amendments to CERCLA do not settle the jurisdictional problems under RCRA, the Clean Air Act, the Clean Water Act, or other environmental statutes that create environmental regulatory programs that are then delegated to the states. Perhaps Congress will similarly take a closer look at these statutes to delineate explicitly the roles that the federal government, states, and tribes are to play.