

Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands

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Recently, the media has created a steady drumbeat of misinformed stories claiming that Indian tribes and reservations alone have been targeted by waste companies, and that the waste industry is marauding unchecked in Indian country immune from any environmental regulation. This article analyzes the controversial issue of using Indian reservations as sites for commercial solid and hazardous waste facilities and provides a model for planning, developing, and regulating commercial waste projects on Indian lands. The article concludes that, under certain circumstances, and with an adequate regulatory program, a waste disposal project may be a viable and appropriate form of industrial development for some tribes and can provide opportunities for economic development on some reservations.

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Introduction

Over the last two years, the issue of commercial solid and hazardous waste disposal on Indian lands has drawn considerable attention from a wide cross-section of America, including Congress; tribal, state, and federal governments; Indians and non-Indians; environmental organizations; and the national media. Environmental management of waste disposal on Indian lands became an important issue for tribal governments when in 1989 the Eighth Circuit Court of Appeals affirmed a decision finding Indian tribes were liable under the Resource Conservation and Recovery Act ("RCRA")¹ for cleaning up open dumps on reservations.² This decision was reached despite the fact that tribes

1. 42 U.S.C. §§ 6901-6992k (1988).
2. *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989), *aff'g* *Blue Legs v. EPA*, 668 F. Supp. 1329 (D.S.D. 1987).

have never been eligible to assume primary responsibility for RCRA enforcement on their reservations or to benefit from the billions of federal dollars spent to support state environmental programs, including RCRA programs, over the last two decades. In the aftermath of the *Blue Legs* decision, tribes face enormous potential clean-up costs for hundreds of sites on the reservations that might be considered open dumps under federal law.³

The new threat of tribal environmental liability is heightened by two factors. First, Indian reservations persist as some of the most impoverished places in the nation. Second, state and local governments are struggling with their own solid and hazardous waste disposal problems in the face of an ever increasing waste stream, rapidly dwindling capacity in existing landfills, and an epidemic of public opposition, in the form of the "Not-in-my-backyard" or "NIMBY" syndrome, to the siting of "locally unwanted land uses" ("LULUs") such as landfills and other waste disposal facilities. These factors foster the mistaken belief that the waste industry has targeted Indian reservations and that without federal intervention, tribes, with few options for economic development, will be exploited by an unprincipled industry. In fact, only a small handful of proposals out of dozens remain under serious consideration by tribes. Most of these proposals never reach the federal review process because tribal communities are deciding for themselves that the projects do not serve their best interests, demonstrating that tribal governments are fully capable of evaluating waste proposals.

This Article advocates that the evaluation of the viability of waste disposal projects to be developed on Indian lands should be governed by the overriding goals of tribal self-determination and economic self-sufficiency, not public sentiment. While "viability" cannot be defined precisely, it must include at a minimum the creation of wealth and jobs on the reservations. Isolated from the economic centers of the country, Indian tribes rarely have meaningful opportunities to establish commercial enterprises. Moreover, many tribes also lack cash assets needed for capital improvements and their primary tribal assets—land and a generally unskilled or semi-skilled work force—remain unattractive to most developers. Thus, many tribes have few options for attracting commercial development to the reservations.

Under certain circumstances, a solid or hazardous waste disposal project

3. *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989). The district court ordered the Oglala Sioux Tribe, the Bureau of Indian Affairs, and the Indian Health Service to share the clean-up costs. The Tribe's share, although only 25% of the total costs, amounted to approximately \$92,000.

A study estimates that in 1990, there were 650 solid waste sites nationwide on Indian reservations. This number included 108 tribally-owned sites of which only two are in compliance with EPA guidelines. The clean-up of the 106 non-compliant sites will cost an estimated \$68 million. See SELECT COMMITTEE ON INDIAN AFFAIRS, 102D CONG. 2D SESS., WORKSHOP ON SOLID WASTE DISPOSAL ON INDIAN LANDS, 7 (Select Comm. Print 1991).

is a viable and appropriate form of industrial development for some Indian tribes. Waste disposal projects are not only extremely profitable, but also require little up-front cash. Moreover, waste disposal projects can provide job opportunities to reduce significant involuntary tribal unemployment. The drawback is, of course, the potential environmental problems. Accordingly, to protect the reservation environment, proper technological and regulatory controls and an enforcement system are absolutely necessary.

This Article discusses considerations important to developing commercial solid and/or hazardous waste disposal projects on Indian lands. After describing the existing and proposed laws applicable to such projects, this Article discusses the extent of tribal, state, and federal powers to control environmental matters on reservations and highlights ways to minimize environmental liabilities associated with waste disposal projects. Finally, based on one Indian tribe's experience in developing a waste disposal project, this Article describes a model with which to evaluate, plan, develop, and regulate a solid waste project successfully.

I. Environmental Regulation in Indian Country

Federal environmental laws require the Environmental Protection Agency ("EPA") to establish standards for various sources of pollution, to enforce those standards through a permitting system, and, where a state so requests, to delegate primary enforcement authority to the state. In general, no person or activity is beyond the reach of federal environmental statutes or outside the jurisdiction of the states. However, special rules apply when the regulated entity is an Indian or Indian tribe or the regulated activity takes place within Indian country.

A. *Applicability of Federal Environmental Laws to Indians and Indian Lands*

Congressional power to include Indians and tribes within the scope of federal statutes is unquestionable.⁴ However, whether a specific federal statute of general applicability applies to Indians and tribes depends on the intent of Congress.⁵ General federal laws apply within Indian country and are enforceable against Indians and Indian tribes where the statute expressly

4. Indian tribes have been characterized as "domestic dependent nations" which possess all powers of government that have not been explicitly removed by the United States or held to be inconsistent with a tribe's status as a domestic dependent nation. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831); FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 231 (Rennard Strickland et al., eds., 1982) [hereinafter COHEN]. Congress has full plenary power to legislate with respect to Indians and Indian tribes. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

5. COHEN, *supra* note 4, at 282.

mentions Indians and tribes. Questions of interpretation arise when federal laws do not specifically refer to Indians and tribes, but appear to apply across the board to all persons or property.⁶ In deciding whether Congress intended to invade tribal rights and authority, the United States Supreme Court generally requires that Congress' intent be clearly expressed in the legislative history or by the existence of a statutory scheme requiring national or uniform application.⁷ Special considerations are triggered when the subject of the enactment involves treaty rights and areas traditionally left to tribal self-government.⁸

Because Congress failed to provide expressly for environmental regulation on Indian reservations and for the role to be played by tribal governments, whether Congress intended for these laws to be applied to Indian tribes remains unclear. Most federal environmental laws did not mention tribes or reservations and none of them originally provided for program delegation to tribal governments. However, because the federal environmental laws can be effective only with uniform application, courts are likely to hold that environmental laws do apply to tribes and Indian country.⁹

B. Tribal Authority to Enforce Environmental Laws

Tribes retain broad sovereign authority to regulate activities within their territory. Tribes have the power to enforce tribal laws, including environmental ones, against their members. In fact, tribal governments are the only non-federal entities that have plenary jurisdiction over Indians on Indian reservations. However, a tribe can effectively regulate the reservation environment only if it has authority over non-Indians on the reservation as well.

The United States Supreme Court has held that Congress may properly delegate federal regulatory authority to Indian tribes, including authority over non-Indian activities in Indian country.¹⁰ Aside from congressionally delegated authority, courts also recognize inherent tribal powers, including broad civil jurisdiction over non-Indians. The seminal case of *Montana v. United States*¹¹ explains the extent of tribal civil regulatory authority over non-Indians within reservation boundaries:

6. Examples of general federal laws include tax laws, environmental laws, civil rights laws, and laws regulating business activities and labor relations. COHEN, *supra* note 4 at 282.

7. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Federal Power Comm'n. v. Tuscarora Indian Nation*, 362 U.S. 99 (1960); COHEN, *supra* note 4, at 283.

8. See, e.g., *United States v. Dion*, 476 U.S. 734 (1986).

9. *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989).

10. *United States v. Mazurie*, 419 U.S. 544 (1975).

11. 450 U.S. 544 (1981).

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.¹²

The quality of the reservation environment unquestionably has a direct effect on the economic security and health and welfare of a tribal community. Subsequent cases interpreting *Montana* have upheld tribal jurisdiction on fee lands over non-Indians for tribal health and safety regulations.¹³

In addition, EPA's Indian policy presumes that tribes can and should regulate throughout their reservations, and Congress ratified EPA's policy with the enactment of the tribal amendments to the Clean Water Act,¹⁴ the Safe Drinking Water Act,¹⁵ the Clean Air Act,¹⁶ and CERCLA.¹⁷ Moreover, even

12. *Id.* at 565-66 (citations omitted).

13. See *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982).

14. 33 U.S.C. §§ 1251-1387 (1988) (previously known as the Federal Water Pollution Control Act). The Clean Water Act ("CWA") was amended in 1987 to allow tribes to be treated as states for certain purposes. See 42 U.S.C. § 1377 (1988). Under the amendments, tribes may be treated as states for purposes of, *inter alia*, the following: (a) grants for pollution control programs under Section 1256; (b) grants for construction of treatment works under Sections 1281-1299; (c) water quality standards and implementation plans under Section 1313; (d) enforcement of standards under Section 1319; (e) clean lake programs under Section 1324; (f) certification of National Pollutant Discharge Elimination System ("NPDES") permits under Section 1341; (g) issuance of NPDES permits under Section 1342; and (h) issuance of permits for dredged or fill material under Section 1344.

15. 42 U.S.C. §§ 300f-300j-12 (1988). The Safe Drinking Water Act ("SDWA") was amended in 1986 to allow tribes to be treated as states for SDWA programs. See 42 U.S.C. § 300j-11 (1988). The tribal amendments authorize EPA to treat Indian tribes as states, to delegate to tribes primary enforcement responsibility for public water systems and underground injection control, and to provide grant and contract assistance to tribes to carry out functions provided by the Act.

16. 42 U.S.C. §§ 7400-7642 (1988). In 1977, Congress amended the Clean Air Act ("CAA") to allow tribes to redesignate their reservations for purposes of determining applicable air quality standards. See 42 U.S.C. § 7474 (1988). The amendment also provides that the "administrator" may resolve disputes between states and tribes arising when a redesignation or issuance of a permit for the construction of a major emitting facility would cause a change in air quality in excess of that allowed by the affected tribe or state. The 1990 CAA amendments authorize EPA to treat Indian tribes as states for federal air protection programs and to provide tribes grants and contract assistance. Like the tribal amendments to the CWA and the SDWA, the CAA now requires that an Indian tribe be federally recognized, that the functions to be exercised by the tribe fall within the tribe's jurisdiction, and that the tribe have the capability to carry out the functions of the Act.

17. 42 U.S.C. §§ 9601-9657 (1988). In 1986, Congress amended CERCLA by enacting the Superfund Amendments and Reauthorization Act ("SARA"). SARA contains provisions that require EPA to maximize tribal participation in Superfund programs. See 42 U.S.C. §§ 9601 *et seq.* (1988). Specifically, the amendments provide that tribes shall be treated as states for the following provisions:

[S]ection 103(a)(regarding notification of releases), section 104(c)(2) (regarding consultation on remedial actions), section 104(e) (regarding access to information),

before the enactment of these tribal amendments, courts recognized tribal authority to limit non-Indians' activities on off-reservation lands that affect the environmental quality of reservation lands.¹⁸

C. State Authority to Enforce Environmental Laws in Indian Country

Tribal sovereignty does not bar completely the assertion of state authority in Indian country. Where jurisdictional questions involving tribes and states do arise, courts are increasing their reliance on the preemption doctrine to resolve the jurisdictional conflict.¹⁹ Under principles of preemption, state regulatory laws cannot be applied to Indian reservations if their application interferes with the policy goals underlying federal laws relating to Indians. Where tribal and federal interests are adequately protected and the state has a strong regulatory interest, state laws can be applied to Indian reservations, at least as to non-Indian activities on fee lands. In *California v. Cabazon Band of Mission Indians*,²⁰ the United States Supreme Court articulated the preemption analysis as follows:

Decision in this case turns on whether state authority is pre-empted by the operation of federal law; and "[s]tate jurisdiction is pre-empted . . . 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." The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.²¹

Significantly, the courts thus far have prohibited the application of state

section 105 (regarding roles and responsibilities under the national contingency plan and submittal of priorities for remedial action, but not including the provision regarding the inclusion of at least one facility per State on the National Priorities List).

18. In *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1981), the Ninth Circuit upheld an EPA order granting approval to the Northern Cheyenne Tribe's redesignation of its reservation from Class II to Class I air quality standards under the CAA. No provision in the Act allowed tribes to do so.

19. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Warren Trading Post v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965).

20. 480 U.S. 202 (1987). In *Cabazon Band*, California insisted that two tribes bring their on-reservation bingo games into compliance with California law that prohibits prizes in excess of \$250. The United States Supreme Court used the preemption doctrine to reject state regulation of the tribal bingo games. The Court found that "the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them" and that "[s]tate regulation would impermissibly infringe on tribal government" *Id.* at 221-222.

21. *Id.* at 216 (citations omitted).

environmental laws to Indian reservations²² and laid the groundwork for prohibiting states from applying environmental regulation to Indians as well as non-Indians on reservations.²³

Tribal environmental quality programs have received financial and other assistance from EPA, first as a matter of EPA policy, and then pursuant to explicit congressional authorization.²⁴ By providing assistance for tribal regulatory programs and by assuming—perhaps even mandating—that those programs apply to non-Indian lands within the exterior boundaries of Indian reservations, Congress' tribal amendments and EPA's Indian Policy preempt the states from enforcing their environmental laws on Indian reservations.

D. *United States Environmental Protection Agency Indian Policy*

Until 1986, none of the major federal regulatory statutes provided for delegation to tribal governments. The jurisdictional rules applicable to Indian country left EPA unable to pursue its usual practice of delegating primary enforcement responsibility to states. Accordingly, to address these special circumstances, in November of 1984, EPA issued the Policy for the Administration of Environmental Programs on Indian Reservations (the "Indian Policy").²⁵ The Indian Policy sets forth nine principles by which EPA will pursue its objectives, including but not limited to EPA's commitment to work with tribes on a government-to-government basis, recognize tribes as the primary decision-makers for environmental matters on reservation lands, help tribes assume program responsibility, remove existing legal and procedural impediments to tribal environmental programs, and encourage tribal, state, and local government cooperation in areas of mutual concern.²⁶ The Indian Policy clearly preempts state regulatory authority on matters addressed by the policy.²⁷

22. In *Washington, Dept. of Ecology v. United States EPA*, 752 F.2d 1465 (9th Cir. 1985), the Ninth Circuit Court of Appeals upheld EPA's rejection of the State of Washington's primacy application for hazardous waste regulation under RCRA as it applied to Indians on Indian lands.

23. See, e.g., *Nance v. United States EPA*, 645 F.2d 701 (9th Cir.), cert. denied, 454 U.S. 1081 (1981); *Washington, Dept. of Ecology v. United States EPA*, 752 F.2d 1465 (9th Cir. 1985).

24. See, e.g., 42 U.S.C. § 300j-11 (1988); 42 U.S.C. § 1377 (1988); 42 U.S.C. § 7474 (1988).

25. EPA Policy for the Administration of Environmental Programs on Indian Reservations, Nov. 8, 1984.

26. *Id.* at 2-4.

27. *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), does not change any of the fundamental rules upon which Congress and EPA have based their policy. In *Brendale*, three justices held squarely for tribal land use zoning jurisdiction over non-Indians on fee lands, and undoubtedly would find tribal jurisdiction to establish and enforce tribal environmental quality laws against non-Indians. The other six justices ruled that the county had exclusive power to zone non-Indian fee lands in the "opened area" of the Yakima Reservation. Four members of the Court expressly distinguished the circumstances in *Brendale* from a tribal program under Section 518 of the CWA. *Id.* at 428 (White, J.). The opinion refers to Section 518 as a "delegation" of jurisdiction by Congress to the tribes. Whether Section 518 is viewed as a delegation or a recognition, the result is the same; Congress intended that tribes establish and enforce their water quality laws over all persons within the reservations.

E. *The Resource Conservation and Recovery Act*²⁸

Enacted in 1976 as an amendment to the Solid Waste Disposal Act,²⁹ RCRA overhauled existing federal law regulating solid waste disposal, and currently stands as the primary federal law regulating solid waste landfills and hazardous waste disposal facilities. While RCRA literally includes tribes within the class of persons against whom the statute may be enforced, Congress has not yet amended RCRA to allow tribes to be treated as states. Despite the fact that RCRA does not provide for tribal participation in grant and regulatory programs, two federal courts have held that RCRA applies to Indian lands and may be enforced against Indian tribes.³⁰ To address the obvious inequity of this "catch-22" situation, the Senate and House of Representatives are now considering amendments to RCRA dealing with tribal reauthorization.³¹

Different federal regulations apply to solid waste and hazardous waste on Indian reservations. Title III of RCRA establishes a comprehensive federal regulatory system for the transportation, handling, and disposal of hazardous waste.³² RCRA authorizes EPA to regulate hazardous waste and to implement disposal programs needed for compliance with minimum federal standards.³³ RCRA authorizes state governments to assume primary enforcement responsibility for hazardous waste disposal.³⁴ A state seeking to assume primary enforcement responsibility may develop a program and, after notice and public hearings, submit to the Administrator of EPA an application.³⁵ If the Administrator approves the state program, the state is authorized to administer and enforce its hazardous waste program in lieu of the federal program.³⁶ The state then is primarily responsible for enforcing federal standards for the treatment, handling, storage, transportation, and disposal of hazardous waste within the state, and for the issuance of permits for such activities. EPA, however, retains certain authority over state programs, including the power to review the issuance of state permits, revise state programs, and

28. 42 U.S.C. §§ 6901-6991i (1988).

29. 42 U.S.C. §§ 3251-3259 (1988).

30. *Washington, Dept. of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985); *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989).

31. See, e.g., H.R. 3865, 102nd Cong., 1st Sess. (1991), known as, the "National Waste Reduction, Recycling, and Management Act;" S. 1687, the "Indian Tribal Governmental Waste Management Act of 1991."

32. 42 U.S.C. §§ 6921-6934 (1988).

33. *Id.*

34. See 42 U.S.C. § 6926 (1988); see also 40 C.F.R. § 271 (1990). Until state programs are in effect, EPA enforces Title III against generators, transporters, and owners and operators of hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. § 6921 (1988); see also 40 C.F.R. Part 261 (1990). Enforcement may be accomplished through the use of compliance orders, criminal penalties, and/or civil penalties. 42 U.S.C. § 6928 (1988).

35. 42 U.S.C. § 6926 (1988); see also 40 C.F.R. § 271 (1990).

36. *Id.*

withdraw federal approval of state programs.³⁷

State hazardous waste programs which involve Indian lands raise jurisdictional questions. The RCRA regulations require states seeking primary enforcement responsibility on Indian lands to submit to EPA a statement analyzing their jurisdiction over Indian lands.³⁸ Thus far courts have prohibited the application of state environmental laws to Indian reservations.³⁹ On the other hand, RCRA provides few substantive federal requirements for the disposal of solid waste. No federal permitting system exists, and the development and enforcement of standards are left almost entirely to the states. If a state fails to enforce standards, EPA does not necessarily assume enforcement responsibility.⁴⁰ Instead, RCRA authorizes states to develop solid waste plans conforming to federal guidelines.⁴¹ Upon approval by EPA of these plans, states may receive federal financial and technical assistance.⁴² RCRA also provides minimum requirements for the approval of state plans by EPA, directs EPA to promulgate by regulation criteria for the establishment of sanitary landfills,⁴³ and prohibits open dumping of hazardous and solid

37. See 42 U.S.C. §§ 6926 and 6928 (1988); see also 40 C.F.R. §§ 271.19 and 271.21 (1990).

38. 40 C.F.R. § 271.7(b) (1990).

39. In *Washington, Dept. of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985), the court addressed the issue of state and federal jurisdiction over Indian reservations under state hazardous waste programs developed under RCRA and held that EPA properly interpreted RCRA as not granting state jurisdiction over the activities of Indians on Indian lands.

40. Title IV limits federal enforcement provisions for solid waste management. The open dumping prohibition, 42 U.S.C. § 6945 (1988), combined with the citizens' suit provision of RCRA, 42 U.S.C. § 6972 (1988), creates a federal cause of action enabling citizens and states to sue persons conducting damaging solid waste activities. 42 U.S.C. §§ 6972(a), (e) (1988).

EPA also may enforce either Title III or Title IV by bringing an action against a violator. Upon evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may sue any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation, or disposal. 42 U.S.C. § 6973(a) (1988).

Moreover, the federal district court may: (a) restrain a person from improper handling, storage, treatment, transportation, or disposal of solid or hazardous wastes; (b) order a person to take other actions as may be necessary; and (c) enforce orders of the Administrator and, if a person has willfully violated or refused to comply with an order of the Administrator under Section 6973 of 42 U.S.C., fine such person not more than \$5,000 per day of violation. 42 U.S.C. §§ 6973 (a)-(b) (1988).

41. See, e.g., 40 C.F.R. §§ 240-247, 249, 255 (1991); and EPA Final Rule on Waste Disposal Criteria, 56 Fed. Reg. 50,977 (1991) (to be codified at 40 C.F.R. pt. 258). RCRA regulations require that states coordinate their solid waste management plans with programs under the following federal environmental laws: (1) the CWA (2) the National Pollution Discharge Elimination System ("NPDES"); (3) the SDWA; and (4) the CAA. Additionally, a state must coordinate with the Office of Endangered Species to ensure that any proposed activities will not jeopardize any endangered or threatened species. RCRA regulations also require states to coordinate, "where practicable," with programs under the Toxic Substances Control Act, the Federal Insecticide, Fungicide and Rodenticide Act, the Marine Protection, Research and Sanctuaries Act, and with programs administered by various federal agencies.

42. 42 U.S.C. § 6948(a)(2)(A) (1988).

43. Part 257 of 40 C.F.R. sets forth criteria for "determining which solid waste disposal facilities and practices pose a reasonable probability of adverse effects on health or the environment." A facility or practice that fails to satisfy these criteria is considered an open dump for the purpose of state solid waste management planning under RCRA. Rather than setting a minimum standard enforceable by EPA, these

waste.⁴⁴ No specific EPA regulatory authority exists with respect to solid waste management and disposal, and states do not have jurisdiction to enforce their solid waste laws on Indian reservations. As a result, a statutory void exists on reservations for regulating waste disposal. Tribes must act to fill this void, not only to protect the reservation environment, but also to protect the tribal fisc from potential cleanup liability for violations of RCRA's open dump prohibition.⁴⁵

Indian tribes unquestionably have the authority to regulate waste facility operations on their reservations. The main issue is whether and to what degree state law applies to reservations or otherwise affects tribal authority. If RCRA is amended to acknowledge tribal jurisdictional authority, Indian tribes undoubtedly would be able to establish the only regulatory system governing solid waste and hazardous waste disposal on Indian lands.⁴⁶

criteria serve merely as guidelines for the establishment of state programs. In 1991, EPA issued its final rules establishing new and stringent requirements for the siting, construction, and operation of municipal solid waste landfills. See 56 Fed. Reg. 50,977. The new rules govern both existing and new landfills operated by Indian tribes. Landfills exempted from the requirements are those: (a) that accept less than twenty tons per day of solid waste; (b) for which there is no evidence of existing groundwater contamination; and (c) that serve either:

- (i) a community that experiences an annual interruption of at least three consecutive months of surface transportation that prevents access to a regional waste management facility, or (ii) a community that has no practicable waste management alternative and the landfill unit is located in an area that annually receives less than or equal to 25 inches of precipitation. 56 Fed. Reg. at 50,990.

This so-called "small community exemption" is limited. However, the regulations offer little guidance on determining whether a community has "no practicable waste management alternative," making it difficult to know whether any particular tribal community qualifies for the exemption. If a landfill is not exempt, it must comply with all of the new rules. *Should a landfill fail to satisfy these rules, it then constitutes an open dump, thereby exposing the owner and operator of the facility to liability under the citizens' suit provision of RCRA.* Since landfills in most tribal communities do not meet the new standards, tribes will have either to close or upgrade the landfills to avoid lawsuits. Accordingly, this final rule imposes serious new obligations on tribes. The final rule's notice indicates EPA's intent to establish additional rules for evaluating state solid waste regulatory programs and for allowing tribes to be treated as states under RCRA.

44. See 42 U.S.C. §§ 6943-6945 (1988).

45. All commercial waste projects on Indian lands are subject to CERCLA that enables the federal government to respond to actual or threatened releases of hazardous substances from a facility. CERCLA authorizes EPA to use congressionally appropriated funds (the Superfund) to remediate sites placed on the National Priority List of the nation's most hazardous sites. EPA can then recover cleanup costs from any responsible party. EPA also may order a responsible party to clean up a hazardous waste site if the site presents an "imminent and substantial endangerment to the public health or welfare or the environment."

46. Additionally, however, treaties and agreements between the United States and other nations may affect environmental regulation on Indian lands. For example, on August 14, 1983, President Reagan and Mexican President Miguel de la Madrid Hurtado signed the "Agreement Between the United States and Mexico on Cooperation for the Protection and Improvement of the Environment in the Border Area." 19 Weekly Comp. Pres. Doc. 1137 (Aug. 14, 1983). This agreement recognizes the need for bilateral efforts to reduce all forms of pollution in the "border area," an area located 100 kilometers on either side of the inland and maritime boundaries. Several Indian reservations fall within this area.

Although the borders between the United States and Mexico and the United States and Canada represent a physical dividing line, these borders create no barrier to the passage of pollutants. Thus, an examination of international environmental laws is necessary for any waste disposal facility to be developed and operated on tribal lands within the border areas.

II. Keys To Successful Projects

No model exists for the development of commercial solid waste or hazardous waste projects on Indian reservations. Accordingly, tribes must create from scratch a review process to ensure that both their reservation environments and economic interests are protected adequately. This part identifies several key elements important to a project's success.

A. Developing an Infrastructure that Minimizes Environmental Liabilities Associated with Commercial Waste Projects

Tribal governments possess sweeping powers to control the activities of those who enter their territorial jurisdiction. Particularly on tribal land, tribes may control virtually every aspect of the activities of private businesses.⁴⁷ For these reasons, tribes should be attractive business associates to investors and financiers. The reality is that tribes are widely considered to be unattractive business partners, and reservations remain the least developed areas of the country. Much of the problem is that tribes have not developed the infrastructure to exercise their powers fully and appropriately and to provide outsiders with some comfort regarding doing business on the reservation. The failure to use the many and varied powers available to tribes to build the necessary infrastructure is the largest deterrent to economic development on Indian reservations. Only a few tribes have chartered their own corporations or enacted commercial, tax, and environmental codes. Some tribes continue to rely on structures that have long outlived their usefulness, and others have developed new but inappropriate structures.

Environmental liability is a major concern to both tribal governments and developers interested in doing business on Indian lands. Because environmental liability can be expensive, tribes and developers must be aware that the liabilities extend not only to commercial solid waste and hazardous waste disposal projects, but also to leases and other transactions. These concerns should not discourage tribes from proceeding with leases and development projects; however, tribes should carefully identify the likelihood of liability and should structure arrangements to minimize exposure, to maximize their flexibility to deal with the exposure, and to reduce the chances of incurring liability. Likewise, developers must realize that reservations do not insulate them from liability under the federal environmental laws. Developers remain subject to the same liabilities under these laws to which they would be subject

47. See, e.g., *Montana v. United States*, 450 U.S. 544, 565-66 (1981) (tribes possess the right to govern non-members who enter into consensual relationships with a tribe or its members and to regulate the conduct of non-Indians on fee lands within the reservation "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.").

if the projects are located off the reservations. This subpart begins with a discussion about the nature and scope of potential environmental liabilities on Indian lands and suggests several ways to reduce such liabilities.

1. *Sources and Nature of Environmental Liabilities*

Federal environmental statutes, and the case law interpreting it,⁴⁸ extend liability to anyone who buys, sells, leases, develops, or manages land, including tribal land. As such, even traditional commercial leases and economic development ventures on reservations may expose Indian tribes and developers to financial damages and tribal or corporate officials to criminal prosecution. Liabilities may arise regardless of a tribe's or developer's knowledge or contribution to the contamination. Whether sovereign immunity exists for tribes or tribal officers remains unclear.⁴⁹

EPA may enforce solid waste and hazardous waste laws and regulations against generators, transporters, owners and operators of hazardous waste treatment, storage, and disposal facilities, and any person operating an open dump.⁵⁰ Moreover, where hazardous releases are involved, EPA may seek enforcement through CERCLA.⁵¹ CERCLA is the "nuclear weapon" in EPA's arsenal of enforcement methods for federal environmental laws. Under CERCLA, entities or persons strictly liable and jointly and severally responsible for releases of hazardous substances from a facility, even if no damage has occurred include: a) the current owner and current operator; b) the owners and operators at the time of the release; c) those who arranged for the release; and d) the transporters who selected the release site.⁵²

Both civil and criminal liability are involved. Civil liability includes the costs of removal or remediation (response costs), the damage to natural resources, and the costs of assessing damages and of responding under the national contingency plan.⁵³ Civil liability includes private party remedies in the forms of declaratory relief and damages under nuisance theories.

48. See, e.g., *Blue Legs v. EPA*, 668 F. Supp. 1329 (D.S.D. 1987), *aff'd sub nom. Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989), *on remand Blue Legs v. EPA*, 732 F. Supp. 81 (D.S.D. 1990).

49. In the *Blue Legs* decision, the court required contribution from tribes for remediation costs, but did not impose any civil penalties. *Blue Legs v. EPA*, 732 F.Supp. at 84. In light of *United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627 (1992), in which the Supreme Court held the United States' sovereign immunity is not waived in the CWA and RCRA, including their citizens' suit provisions, courts likely may find no congressional intent to waive tribal sovereign immunity from civil penalties under the CWA and RCRA.

50. See, e.g., 42 U.S.C. §§ 6921-6934 (1988); 42 U.S.C. § 6945 (1988); see also note 69 *infra* part II.F.

51. 42 U.S.C. §§ 9601-9675 (1988). Additionally, under the citizens' suit provision, a person may bring a civil action against any other person, including the United States and the Administrator, who violates any standard, regulation, condition, requirement, or order under CERCLA. 42 U.S.C. § 9659 (1988).

52. 42 U.S.C. § 9659 (1988).

53. See, e.g., 42 U.S.C. § 9607 (1988).

Significantly, EPA and the Department of Justice [hereinafter "DOJ"] have made criminal enforcement of federal environmental laws a top priority for the 1990s. Corporate officers, directors, and shareholders are now increasingly susceptible to criminal liability for environmental violations.⁵⁴ It is thus very important for the directors, officers, and shareholders, including tribes as shareholders of tribally-owned corporations, to understand how to minimize liability for violations of these laws.⁵⁵ Recent congressional enactments also single out corporate officers and managers for criminal prosecution.⁵⁶

In addition to holding corporate officers and managers personally liable for environmental violations, courts also may use the doctrine of "piercing the corporate veil"⁵⁷ to bypass the corporate form and force shareholders to pay for the cleanup of hazardous substances.⁵⁸ Traditionally, the elements needed before a court can pierce the corporate veil are dictated by state law. However, some courts have advocated for establishing a federal common law governing veil-piercing in environmental cases.⁵⁹

Before deciding to develop a solid waste disposal facility on tribal lands, Indian tribes also should consider EPA's special rules for dealing with municipal solid waste [hereinafter "MSW"] under CERCLA and their potential

54. Under the Federal Sentencing Guidelines, effective November 1, 1987, certain environmental crimes generally require a prison sentence. 18 U.S.C.A. app. 4 at § 2Q1.2 (West Supp. 1991). According to 1990 statistics, the Department of Justice obtained 134 indictments for environmental violations, an increase of thirty-three percent (33%) over 1989 levels. Seventy-eight percent (78%) of the indictments were brought against corporations and top officers, and more than half of the individuals convicted received prison sentences. The Department of Justice is achieving a ninety-five percent (95%) conviction rate in its environmental prosecutions. *Id.*

55. On July 1, 1991, the Department of Justice issued a set of guidelines, "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator" to inform the regulated community how the federal government will exercise its prosecutorial discretion for violations of federal environmental laws.

56. Section 103(b) of CERCLA provides that any "person in charge of a facility" who fails to report a release of a hazardous substance from the facility is subject to up to three years in prison and a fine not to exceed \$250,000 per violation. 42 U.S.C. § 9603(b)(3). Courts are interpreting this language to apply to any individual who is "in a position to detect, prevent, and abate a release of hazardous substances." *See United States v. Carr*, 880 F.2d 1550, 1554 (2d Cir. 1989). The Clean Air Act Amendments of 1990 also make a wide variety of air violations punishable as a felony, subjecting violators to imprisonment up to five years for first offenses and maximum fines of \$250,000 per violation. 42 U.S.C. § 7413(c)(1). Congress expressly singled out officers and managers by including within the 1990 Clean Air Act Amendments definition of a person "any responsible corporate officer," and within the definition of an operator "any person who is a senior management personnel or a corporate officer." 42 U.S.C. § 7413(h) (1988).

57. *See generally* JOHN E. MOYE, *THE LAW OF BUSINESS ORGANIZATIONS* 87-89 (3rd ed. 1989).

58. *See generally* Rhodes & Ettore, *Piercing the Corporate Veil for CERCLA Response Costs*, 1 *Envtl. Liab. in Common Transactions Rep.* (April 1991).

59. In *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 20 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991), the district court identified the following factors setting forth a federal rule governing the piercing of the corporate veil: (1) inadequate capitalization for the purposes for which a corporation was formed; (2) extensive control by the shareholder or shareholders; (3) intermingling of corporate assets and properties with the assets and properties of the shareholder or shareholders; (4) failure to observe corporate formalities; (5) absence of corporate records; and (6) nonfunctioning officers and directors.

liabilities as landowners and owners of the solid waste.⁶⁰ EPA's "Interim Policy on CERCLA Settlements Involving Municipalities or Municipal Wastes" [hereinafter "Policy"]⁶¹ explains how EPA will deal with MSW under CERCLA. In the past, political pressure and concerns about public relations prevented EPA from holding municipalities liable for cleanup costs. The cleanup burden has fallen principally upon businesses. However, hundreds of current CERCLA sites involving municipalities and their MSW and the anticipated high cost of cleanup compel EPA to warn municipalities. EPA now states expressly in the Policy that CERCLA does not exempt municipalities.⁶² Instead, municipalities trigger CERCLA liability if their MSW contains hazardous substances. Under the worst case scenario, anyone who sent or arranged for waste to be disposed in a site, facility, or landfill where a Superfund cleanup is underway may be subject to a CERCLA claim. Thus, a family leaving trash at curbside for pickup, the trash hauling company, the operator of a facility or site where the MSW is disposed, the lessor of the facility or site, and the owner of the facility or site all could be jointly and severally liable for cleaning up hazardous substances.

Under the Policy, EPA will not pursue municipalities or private party generators and transporters of MSW or sewage sludge as potentially responsible persons [hereinafter "PRPs"] unless EPA obtains specific information showing the municipality's waste at a particular site to contain hazardous substances from a commercial, institutional, or industrial process or activity or if the total volume of commercial or industrial waste is small relative to the volume of municipal waste.⁶³ One court has upheld this Policy on the grounds that EPA may rationally choose to use its scarce resources to pursue private parties who have profited from improperly disposing of hazardous substances rather than municipalities.⁶⁴

2. *Infrastructure*

Development on Indian lands is retarded primarily by the absence of tribal regulatory structures rather than by the probability that doing business on Indian

60. The enforcement provisions of CERCLA apply to persons who are transporters or generators of hazardous substances and to owners and operators of sites. See 42 U.S.C. § 9603(b) (1988). Because the definition of "person" does not specifically include Indian tribes, 42 U.S.C. § 9601(21) (1988), whether the Act applies to tribes is unclear. However, to date no tribe has successfully challenged the application of federal environmental laws to its lands. Three federal environmental laws, the Clean Water Act, Safe Drinking Water Act, and the Resource Conservation and Recovery Act expressly include tribes within the class of persons or municipalities against whom the laws can be enforced. Thus, it is quite likely that courts would hold that CERCLA applies to Indian tribes.

61. 54 Fed. Reg. 51,071 (1989).

62. *Id.*

63. 54 Fed. Reg. 51,075 (1989).

64. See *United States v. Kramer*, 757 F. Supp. 397, 433 (D.N.J.), *on remand*, 770 F. Supp. 954 (1991).

lands requires more approvals and subjects a business to more taxation and regulation than anywhere else in the United States. To facilitate economic development, tribes must develop a "legal infrastructure" to allow tribes to inform, and, more importantly, to control the application of federal laws and prevent the application of state laws to businesses on the reservations. A legal infrastructure provides certainty to developers. Tribes and developers can reduce the risk of environmental liability through insurance, contractual agreements, environmental audits, quality control standards, use of appropriate technology, and timely satisfaction of notice and reporting requirements. In addition, tribes may create and maintain a tribal corporation as a separate entity, as well as negotiate indemnification agreements, and representations and warranties by the operators of leaseholds or developments on reservations.

a. *Tribal Environmental Codes*

Tribal environmental codes can help decrease the risk of adverse effects as well as the potential for tribal environmental liability under federal laws. By assuming primary responsibility under the federal environmental laws whenever tribal amendments so allow, tribes can establish environmental quality standards suited to local and individual situations, rather than accept EPA's generalized standards that may have little to do with local conditions. Even when federal environmental laws, as in RCRA, for example, do not contain tribal amendments providing for primary responsibilities by tribes, tribes nevertheless should promulgate waste codes and regulations for reservations. In the absence of federal financial and technical assistance, tribes must be creative. Developers interested in commercial waste projects on Indian land are often willing to pay such costs.⁶⁵

Tribal codes must be sensitive to several concerns. First, because waste disposal projects on Indian lands remain controversial, tribal codes must be sensitive to public opposition. Second, tribal codes are required by RCRA to be "in coordination with federal, state, and substate programs for air quality, water quality, water supply, waste water treatment, pesticides, ocean protection, toxic substances control, noise control, and radiation control."⁶⁶ Moreover, tribal codes should also coordinate with solid waste management plans in neighboring states and on neighboring Indian reservations.⁶⁷ Although state environmental laws are unlikely to be enforceable on Indian reservations, a tribe may defend against potential state challenges regarding a tribal waste facility by enacting a code that not only meets applicable federal laws, but also is as stringent as the solid waste and hazardous waste laws of the state in which the

65. See generally *infra* part IV.C.

66. 40 C.F.R. § 256.50(a) (1987).

67. 40 C.F.R. § 256.50(m) (1987).

reservation is located.

Tribes should provide frequent opportunities for public comment and input when developing tribal regulatory programs so that developers and existing industry on reservations, as well as residents of the reservation and neighboring counties, may express their views. Tribes may then adapt the regulatory system to meet the particular needs presented. Tribes failing to heed industry input risk slowing economic development. Moreover, tribes failing to address legitimate public concerns risk escalating opposition from NIMBY groups that can paralyze a commercial project, escalate project costs, and, ultimately, cause damaging political fallout.

In setting up a successful tribal environmental regulatory system, tribes also need to plan for effective administration. Many tribes are creating their own tribal environmental protection agencies authorized to administer and enforce tribal environmental codes. Such a separate regulatory agency may avoid conflicts of interest that can result when a single entity serves as both the regulator and the regulated entity or the permit issuer and the permittee. Finally, a separate tribal environmental agency facilitates cooperative efforts with state and federal environmental agencies.⁶⁸

b. *Operating Standards*

Developers and tribes can reduce liability by setting and enforcing efficient operating and cleanup standards, as well as designing and employing state-of-the-art technologies. In addition, tribes and developers should require immediate notice upon discovery of contamination or discharge. Many of the federal laws require owners and operators to give specific notices and to make disclosures and reports.⁶⁹ Releases of oil and hazardous materials must be reported to the Coast Guard's National Response Center in Washington D.C. Failure to report may result in jail and hefty fines.⁷⁰ Overall, however, there is little guidance as to what sorts of chemical releases in what quantities must be reported. Persons in charge⁷¹ who have knowledge of a release also are required to report. Those dealing with hazardous waste must satisfy additional

68. The Campo Environmental Protection Agency established by the Campo Band of Mission Indians and the Wind River Environmental Quality Commission established by the Shoshone and Northern Arapaho Tribes of the Wind River Indian Reservation are examples of tribal environmental agencies.

69. See, e.g., CERCLA, 42 U.S.C. §§ 9601-9675 (1988); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2671 (1988); RCRA, 42 U.S.C. §§ 6901-6992k (1988); Clean Water Act, 33 U.S.C. §§ 1251-1386 (1988); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11,001-11,050 (1988); Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.* (1988); and Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-26 (1988).

70. See 42 U.S.C. §§ 9603, 9604 (1988).

71. Such persons quite likely would include tribal officers and council members, tribal corporate boards, and operators.

requirements.⁷² Failure to report discharges and dangerous conditions to third parties may also result in liability under common law and other legal theories.⁷³

c. *Environmental Audits*

Some states require environmental audits for certain events, such as when industries close down or are transferred. Audits are becoming more commonplace and can be expected to be a requirement for all transactions involving real estate or corporations with physical assets. Traditional audits tend to be primarily technical and limited to discussions of regulatory compliance. The more advanced audits take a combined legal and technical approach by discussing contamination, internal conflicts, liability, and technical compliance issues. Tribes should require the advanced audits and conduct periodic site inspections to monitor and control potentially dangerous activities on their lands.

d. *Other Tribal Codes*

In addition to developing environmental tribal codes, tribes should consider developing tribal codes dealing with land use, taxation, and business practices. Tribes also should invite developers to participate in developing tribal regulatory systems. The developer's participation in the tribe's law-making will increase his confidence that the tribe will not undertake a regulatory program that unduly inhibits the project. Developers who mistakenly believe that an enterprise on an Indian reservation is shielded from regulation and taxation must be corrected. While a particular project or enterprise may be exempt from certain taxes or federal and state regulations, economic activities on Indian reservations are in general not free from the usual panoply of taxes and regulations. Most general federal regulatory and tax laws apply to Indian reservations.⁷⁴ Some exemptions and immunities extend to transactions with tribes on reservations, most notably, the tribes' status as nontaxable entities for purposes of federal income taxation.

72. See, e.g., 42 U.S.C. § 9603(c) (1988) (any person who owns or operates a facility where hazardous substances have been disposed of must notify the EPA Administrator).

73. See, e.g., *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991); *United States v. Frezzo Brothers, Inc.*, 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

74. See generally COHEN, *supra*, note 4.

e. *Choosing a Business Form*

Alternative structural forms of a tribal enterprise range from tribally-owned sole proprietorships to tribally-owned and chartered corporations and to numerous forms of joint venture. In deciding ownership structures, tribes first must weigh the benefits of incorporating over establishing a sole proprietorship. If a corporation is the preferred form, a tribe then must determine whether to charter the enterprise under tribal or state law.

A corporation will be the better choice in most situations. This is particularly true for commercial waste projects where the potential for environmental liabilities pose an enormous risk. A tribally-owned sole proprietorship which lacks a separate identity could prove problematic in liability disputes. For example, if the enterprise is not legally separate from the tribe, acts by employees or agents of the enterprise can be attributed to the tribe, thereby subjecting it to liability. A tribally-owned sole proprietorship may also force a waiver of tribal sovereign immunity. If the tribe and the enterprise are indistinguishable, a court might find an enterprise that has waived its immunity from suit also waives the immunity of the tribe. While these difficulties could be overcome by carefully drafted provisions in tribal law, these difficulties can simply be avoided by creating a separate entity, a corporation. Furthermore, financiers and developers who are already familiar with the corporate form are more comfortable dealing with a corporation than with the tribe directly. Using a corporate form to conduct commercial for-profit activities shields a tribe against liability so long as the tribal government does not overlap or control the tribal corporation, oversee the corporation's financial and operating procedures, or share officers.⁷⁵ Since the internal policies of EPA and the DOJ, and recent case law, expand the scope of the federal environmental laws, including CERCLA, to reach corporate officers, directors, managers, and shareholders for environmental violations, such persons should structure business activities to avoid individual liability.⁷⁶

75. For a discussion on when shareholder's involvement in a corporation's affairs may expose them to liability, see, for example, *Joslyn Corp. v. T.L. James & Co.*, 696 F. Supp. 222 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991); *United States v. Nicolet, Inc.*, 712 F. Supp. 1193 (E.D. Pa. 1989).

76. A corporation can protect its officers, directors, shareholders, and managers by: (1) strictly observing corporate formalities; (2) adequately capitalizing the corporation; (3) avoiding extensive control by the shareholder; (4) keeping corporate assets separate from the assets of the directors, officers, managers, and shareholders; (5) maintaining written corporate records, including a minute book; (6) promoting functioning officers and directors who manage the day-to-day affairs; (7) attempting to uncover contamination on corporate real property by determining the property's past and present uses and if any hazardous or toxic materials were/are associated with those uses, it should look for possible routes of entry of contaminants into the subsurface and check for spills and leaks; (8) determining if a professional environmental consultant is needed to conduct further investigations or evaluate information about the environmental condition of corporate real property; (9) promptly reporting discharges of hazardous substances; and (10) determining the "permit" status of corporate property.

f. *Insurance*

Insurance coverage usually is limited to "sudden and accidental" pollution; most comprehensive general liability policies after 1970 exempt pollution.⁷⁷ Courts are divided as to whether comprehensive general liability policies cover hazardous waste cleanups, investigation costs and response costs. Although most courts find environmental damage to be property damage, a small number do not.⁷⁸ It is important to understand one's policy coverage, especially any applicable notice requirements, including notice to the insurer. Bonds, insurance, indemnifications, representations, and warranties are typical ways of allocating risk.⁷⁹ In addition, a tribe may charge fees and/or rents to build cash reserves for self-insurance.

B. *Feasibility*

Tribes should conduct feasibility studies before embarking on any form of economic development. A feasibility study identifies potential business opportunities based on a specific tribe's investment strategies and development policies. It analyzes a particular business in light of the market, competition within that market, and a tribe's expected share of that market under the project proposal. A feasibility study discusses advantages and disadvantages of locating the business on a reservation, estimates expected development costs, and identifies the infrastructure necessary for development. Furthermore, studies for tribal projects also should analyze the proposed project's compatibility with tribal policy, investment and land use plans. Tribes interested in developing such projects should work closely with environmental and financial consultants

77. See generally Carl A. Salisbury, *Pollution Liability Insurance Coverage, the Standard-form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective Amnesia*, 21 ENVTL.L. 357 (1991).

78. *Id.*

79. An Indian tribe, as land owner, cannot avoid exposure liability; indemnification and other contract protections are useful to identify who is an operator. Indemnification does not affect EPA's right to proceed against all owners and operators but may shift the ultimate burden. There is some inconsistency among the courts on this. Critical to the usefulness of an indemnity agreement is the solvency of the party agreeing to indemnify. With corporations nationwide declaring bankruptcy, tribes should not assume that their lessees will have the wherewithal to indemnify them for remediation and other costs associated with contamination of tribal resources. The indemnification is only as good as the financial condition of the party giving it.

In proceeding with any lease or economic development project involving real estate on the reservation, tribes should negotiate all contracts carefully, detailing liability ceilings and contributions; retaining the right to enter, monitor, and inspect; and providing the right to receive test results. In the case of a buy-out or expiration of the lease, tribes should also negotiate for a due diligence period to review and inspect thoroughly every aspect of the lessee's/operator's project before taking it over, and should obtain representations and warranties from the developer. Tribes also may choose to control who can be a successor or assignee of the developer, including involuntary successors (such as lenders). Finally, tribes should seriously consider including requirements for their lessees to comply with laws, clean up, insure, have regular audits, report, and guarantee their payment and performance obligations.

and experts to assess project feasibility.

C. Building and Maintaining Community Support

Tribal community support for a project is crucial to successful reservation development. Participation by tribal members in each step of the development process, from the feasibility study to planning and implementing a particular business project, fosters tribal community support. Community meetings and open hearings conducted by the tribe facilitates tribal member participation. Because commercial waste projects on Indian lands have high visibility in the media, it is extremely important that tribes considering such projects have the enthusiastic support of their members.

D. Financing the Project

Commercial solid waste or hazardous waste disposal projects are attractive to tribes because disposal projects require no equity capital outlay at the beginning of a project. Tribes may seek financial advice in any case to determine whether federal grants and public and private financing are available.

E. Finding the Vendor

Tribes may use environmental and financial consultants to identify potential solid waste or hazardous waste vendors. On the other hand, industry and the federal government may directly contact tribes that are developing solid waste and hazardous waste disposal facilities.⁸⁰ Regardless of who contacts whom, tribes should thoroughly investigate the reputation, background, and financial condition of suitors.

F. Environmental Impact Statement

The National Environmental Policy Act⁸¹ [hereinafter "NEPA"] requires the preparation of an Environmental Impact Statement [hereinafter "EIS"] for all "major federal actions." The required approval of the Department of the Interior for waste project leases and subleases clearly will be deemed a "major federal action" under NEPA, requiring the preparation of an EIS. By providing primary operating standards for a project, the EIS can become an indispensable

80. The Office of the Nuclear Waste Negotiator, a federal agency charged with finding a site for the storage and disposal of high-level radioactive waste, recently wrote to every tribe and state informing them of its desire for a willing volunteer. The Mescalero Apache Tribe received the first federal grant to study the feasibility of temporarily storing high-level radioactive waste on its reservation. *Enterprising Tribe Weighs Risks of Going to Waste*, ALBUQUERQUE J., Nov. 3, 1991, at F1.

81. 42 U.S.C. §§ 4321-4361 (1988).

part of a tribal regulatory and permitting program. Private consultants can be very helpful in preparing the initial environmental assessment and shepherding the EIS through potential bottlenecks within the Bureau of Indian Affairs' ("BIA") review process.

G. Tribal-State Cooperative Agreements for Technical Services

In tribal amendments to the federal environmental laws Congress expressly authorized tribes and states to use cooperative agreements to implement programs.⁸² Even in the absence of such express authorization, tribes and states may use intergovernmental agreements to administer environmental programs jointly. Whether such agreements require specific state statutory or tribal approval must be determined on a state-by-state and tribe-by-tribe basis.

Cooperative agreements can be essential for environmental control because pollution does not respect political boundaries. Neither tribes nor states can effectively regulate regional environmental quality without the cooperation of the other. Joint regulatory programs avoid jurisdictional disputes by allowing the parties to agree on who will regulate a particular activity for a particular period of time. Moreover, cooperative agreements lower intergovernmental tensions that can damage the overall quality of state/tribal relations and also provide greater flexibility for both tribal and state policy-makers in the future. Finally, environmental agreements stretch limited tribal and state funds by reducing administrative and service costs. Given the limited resources of most tribes and the twenty-year head-start on environmental regulation enjoyed by states, cooperative agreements may give tribes the ability to call upon state resources and expertise in creating tribal programs.⁸³

III. The Campo Model For Solid Waste Project Development

No model now exists for the development of commercial solid waste projects on Indian reservations.⁸⁴ However, the processes, systems, and entities established by the Campo Band of Mission Indians ("the Band") can guide other tribes interested in developing waste projects.

82. See, e.g., Clean Water Act, 33 U.S.C. § 1377 (1988).

83. See, e.g., Air Quality Memorandum of Agreement, Jan. 30, 1989, Idaho-Shoshone-Bannock Tribes of the Fort Hall Indian Reservation.

84. Since the Campo Band began developing its commercial solid waste project over five years ago, several tribes also have started working on commercial waste projects. Most notable is the La Posta Band, located in Southern California, which is developing a commercial hazardous waste project.

A. Background

The Band is a federally recognized Indian tribe located on the Campo Indian Reservation ("the Reservation") in eastern San Diego County, California. The tribal community is economically depressed with an unemployment rate of 58%. Most homes on the Reservation are overcrowded and substandard. Tribal members suffer from endemic health problems; alcohol and drug abuse threaten the younger generation of tribal members. In short, poverty prevails on the Reservation.⁸⁵

The Band has been seeking economic development on the Reservation, but prospects have been bleak. The Reservation is located relatively far from the industrial and business centers of coastal California. Its remote location, high desert environment, and lack of natural attractions leaves the Band unable to attract manufacturers or tourists. Even gaming, which has proven beneficial to many tribes, is not a viable option for the Band. Because three major Indian gaming establishments stand between the Reservation and the major population centers in San Diego County, it is unlikely that the Band could draw patrons to its Reservation.

Moreover, the Reservation offers virtually none of the infrastructure necessary to attract development. Until recently, for example, there were no waste disposal services on the Reservation; several open dump sites have been identified and unauthorized dumping occurs frequently. All homes on the Reservation are on septic systems rather than sewer lines. The Band simply has had no resources to develop the environmental infrastructure and regulatory controls necessary to prevent further degradation of the Reservation environment.

B. The Search For Solutions

In 1987, the Band began investigating the solid waste industry as a possibility for economic development. The impetus for this investigation was that the County of San Diego, in a preliminary siting study, had identified the Reservation as a potential landfill site. While the Band's initial reaction was negative, the Band's leadership ultimately authorized a feasibility study for a solid waste project on the Reservation. The study found that the County of San Diego was producing in 1990 approximately 3.9 million tons of solid waste per year; that figure is expected to rise to 5.8 million tons per year by the year 2000.⁸⁶ The County's primary disposal facilities are landfills nearing exhaustion and scheduled for closure by 1995. The County is now scrambling

85. Environmental Protection Agency, DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR THE CAMPO SOLID WASTE MANAGEMENT PROJECT § 3.6, at 3-78 to 3-83 (Feb. 1992).

86. *Id.* at § 1.5 ("Demand for Waste Disposal Capacity"), 1-10.

to expand the existing landfills beyond their original capacity. In short, the County faces a solid waste crisis and must find new landfill space.⁸⁷

The Band also learned that the solid waste industry is a good match for tribal communities. The isolation and abundance of reservation land fulfill a primary need of the solid waste industry. In return, the industry offers many jobs for unskilled and semi-skilled workers, as well as opportunities for training in marketable skills. Developers in the industry are accustomed to capitalizing projects without cash contributions from host communities. Each of these industrial characteristics are attractive to a community with high unemployment, low educational levels, and no investment capital.

The drawback of solid waste projects is, of course, the potential environmental problems. The Band became convinced, however, that with proper technological and regulatory controls, waste disposal facilities could be operated with no more environmental impact on the environment than any other industrial development. The Band decided that the first step was to develop environmental regulatory controls and a system for enforcing them. The Band therefore established the Campo Environmental Protection Agency ("CEPA") and charged CEPA with the responsibility for developing a plan for the management of solid waste on the Reservation, developing an ordinance specifying the requirements for a solid waste regulatory system, and developing detailed regulations for solid waste facilities on the Reservation.⁸⁸ Importantly, the Band required the developers of the project to pay for the costs of developing and carrying out the environmental regulatory program for the Reservation. The Band was gratified to discover early in the process that developers in the industry are willing to pay such costs.

Thus, the Band determined that a solid waste project would provide an extraordinary opportunity for economic development on the Reservation. The industry would require no up-front cash, would provide sufficient job opportunities to eliminate involuntary unemployment, and posed no insurmountable threats to the Reservation environment. The Band also determined that a solid waste project would provide the resources for addressing several long-standing environmental problems on the Reservation, thus solving environmental problems rather than creating new ones. With a solid understanding of the economic and environmental issues that would arise, the Band decided to proceed with developing a solid waste project on the Reservation. The project will consist of a recycling facility that handles primarily commercial and industrial recyclable materials, a composting facility that handles sewage sludge and "green" waste, and a sanitary landfill that disposes of municipal solid waste. *The Band prohibits the handling, processing,*

87. *Id.*

88. Campo Band of Mission Indians General Council Resolution No. 88-005 (Feb. 10, 1988).

*and disposal of hazardous waste within the Reservation, and the Campo solid waste project will not accept any hazardous waste for recycling, composting, or disposal.*⁸⁹

C. Organizing For Project Development

Even at very early stages of the project, the tribal leadership determined that the project could not succeed without the enthusiastic support of the tribal community. The leadership was completely open with the tribal members. All legislative and proprietary powers of the Band are vested by the tribal constitution in the General Council of the Tribe.⁹⁰ The General Council consists of all adult members of the Band, and each may vote on any matter that comes before the General Council. Over the past four years, the General Council has voted on dozens of matters relating to the project; the project has had the overwhelming support of the tribal community on every occasion. Indeed, over 90% of the voters approved leasing tribal lands for the project.⁹¹

The General Council authorized the Chairman to assemble a team of experts to assist the Band in the development of the project. By early 1988, the Band had assembled a development team comprised of a financial advisor, legal counsel, and solid waste industry consultants. The Band required the developers to pay the fees and expenses of the consultants retained by the Band. Despite having received thousands of hours of consultation from the experts, the Band has not spent any of its own funds for the consultation. Responsible solid waste project developers were entirely willing to pay for this expert assistance.

Next, the General Council established a tribal development corporation, Muht-Hei, Inc. ("MHI"), to handle the business interests of the Band in the project. The Board of Directors of MHI consists entirely of tribal members. MHI serves as the leader of the development team and directs the activities of the consultants and advisors of the Band. MHI prepared an economic package detailing the proposed terms of leases to developers for the operation of the landfill and recycling facility. In addition to very aggressive rent, royalty, and bonus payment terms, the MHI proposal included strict requirements regarding compliance with tribal environmental laws, Indian preference in employment and training, indemnification, and insurance. MHI then opened negotiations with

89. See Campo Band of Mission Indians Solid Waste Management Code, Title I, § 103 (1992). Section 103 provides:

Prohibition of Hazardous Waste. In order to protect the limited land, air, and water resources of the Reservation from irremediable hazardous pollution and to protect the health, safety, and welfare of all residents of the Reservation and surrounding communities, receiving, accepting, handling, transportation, treatment, storage, composting, processing, and disposal of hazardous waste is expressly prohibited within the exterior boundaries of the Reservation.

90. Campo Band of Mission Indians Const., art. IV, § 1.

91. Campo Band of Mission Indians General Council Resolution No. 89-0012 (Dec. 10, 1989).

major solid waste management firms. After searching for approximately eighteen months, MHI closed agreements with Mid-American Waste Systems, Inc. ("Mid-American"), a publicly traded company then operating more than a dozen landfills in eight states, and Campo Projects Corporation, a closely-held corporation whose principals have successfully operated recycling facilities for almost twenty years.

The General Council also established the Campo Environmental Protection Agency (CEPA). CEPA is led by a three-member Board of Commissioners and employs legal counsel as well as one of the largest and best environmental engineering and consulting firms in the country. In September, 1990, CEPA proposed and the General Council enacted the Campo Tribal Environmental Policy Act.⁹² The Act authorizes and empowers CEPA to act as the principal agency in enforcing environmental laws enacted by the General Council; to apply for primacy under federal environmental laws and seek federal grant funds to carry out its regulatory programs; to establish, with General Council approval, environmental standards applicable to all persons within the Reservation; and to take emergency response measures to address any release or threatened release of pollution that threatens public health and safety.

At the same time, the General Council also enacted the Campo Solid Waste Management Code.⁹³ The Code authorizes and directs CEPA to develop a plan for the management of solid and household hazardous waste generated on the Reservation; to develop a plan for the cleanup of all open and unauthorized dump sites within the Reservation; and to develop comprehensive regulations to govern the operation of the solid waste project. CEPA has prepared and the General Council has adopted a solid waste management plan for the Reservation. Under the CEPA plan, the Reservation now has trash removal services, including the provision of such services to each household. CEPA also has proposed, the General Council has approved, and the Band's Public Works Department has executed a plan for the closure and cleanup of all open dump sites on the Reservation. In February, 1991, the Band issued, after public review and comment, its solid waste regulations governing the landfill and the recycling facility.⁹⁴ The regulations lay out a comprehensive regulatory system for the permitting, construction, operation, closure, and post-closure maintenance of the facilities.

Finally, CEPA has applied to EPA for "treatment as a state" under Section 518 of the Clean Water Act. Under the proposed program, CEPA will develop and enforce water quality standards for the Campo Reservation. CEPA currently

92. Campo Band of Mission Indians Environmental Policy Code of 1990, enacted by Campo Band of Mission Indians General Council Resolution No. 90-0019 (Sep. 9, 1990).

93. Campo Band of Mission Indians Solid Waste Management Code of 1990, enacted by Campo Band of Mission Indians General Council Resolution No. 90-0019 (Sep. 9, 1990).

94. Campo Band of Mission Indians General Council Resolution No. 91-0032 (Feb. 10, 1991).

is developing an application for treatment as a state under the Clean Air Act as well. Both programs will enhance CEPA's ability to address not only the environmental impact of the solid waste project, but also the long-standing environmental problems of the Reservation.

D. The Federal Statutory Framework For Project Development

Federal laws governing Indian lands are written in very general terms. Federal laws neither prohibit solid waste projects on Indian lands, nor expressly anticipate such projects. The Band faced the challenge of taking strands of various federal laws and weaving them into a consistent whole that would both facilitate the development of the solid waste project and protect the Reservation's environment.

Even though the federal laws governing industrial development on Indian lands are old, the Band found that they offered a sufficient basis for the structure of the transaction. The Band determined that the easiest way to proceed was by a simple lease of tribal lands. Such a lease is authorized specifically by federal law,⁹⁵ while more complex forms of business relationships, such as partnerships and joint ventures, are not. The General Council leased to MHI approximately 600 acres of tribal land—land that was designated in 1978 for industrial development—for the solid waste project. MHI, in turn, has agreed to sublease part of the land to Campo Projects Corporation for the development of a recycling facility, and part to Mid-American for the development of a sanitary landfill.⁹⁶

The lease to MHI and the subleases to Mid-American and Campo Projects Corporation all require the approval of the Department of the Interior ("the Department").⁹⁷ The Band realized very early that the standards for Interior-approved leases with Indian tribes were inadequate to protect tribal interests in this setting. For example, the Department is required to ensure that the tribes receive the entire value of the land being leased.⁹⁸ The Department does so by comparing the lease terms to the "market value" of the land.⁹⁹ However, the Department's measurement of market value in evaluating the adequacy of compensation grossly underestimates the value of the land in a transaction with the waste industry. Most tribal land on the Reservation is leased for cattle

95. See 25 U.S.C. § 415 (1988); 25 C.F.R. Part 162.

96. As of this writing, MHI has not yet selected a developer for the composting facility.

97. 25 C.F.R. § 162.5(a) (1991).

98. Section 415 of 25 U.S.C. (1988) is the principal statutory authority for business site or commercial leases. Section 415 sets a maximum term of 25 years and provides in part that "[p]rior to approval of any lease or extension [sic] of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands."

99. Consideration for leases must be at least the fair market value, subject to certain exceptions. 25 C.F.R. § 162.5(b) (1991).

grazing. The land is so barren that it will support very few cattle. Accordingly, if market value were assessed on the basis of grazing leases, the Band would receive only a few dollars per year per acre. The Band thus conducted an analysis of the value of lands used for sanitary landfills to establish its asking price. Negotiations with the developers resulted in a lease requiring annual payments of seven figures to the Band and MHI.

Similarly, federal regulations do not adequately address questions of indemnification and insurance. To eliminate the potential liability of the United States as the legal owner of Indian lands, the Band negotiated with the developers for indemnification of the Band and the Department of the Interior for any liability resulting from the development and the operation of the facility. In addition, insurance policies, bonds, or other financial assurances, coupled with a thorough investigation of the developers' ability to make good on those assurances, ensure that the Band and the United States will be held harmless against liability.

Finally, federal Indian leasing regulations say little about requiring Indian preference in training and employment. Employment is a primary goal of the Band. Therefore, the Band negotiated a strict Indian preference requirement. The Band required the developers to submit detailed plans describing how Indian preference will be applied to employment and training decisions. The Band's goal is one day to have tribal members doing not only manual labor at the project, but also the marketing, engineering, and management of the project facilities.

The Band found federal laws helpful in the area of environmental regulation and permitting. The Department of the Interior's required approval of the lease and subleases for the project is a "major federal action" under NEPA¹⁰⁰ that requires the preparation of an EIS. The Band initiated the federal environmental review process by employing a private consultant to prepare an environmental assessment. The environmental assessment served as the starting point for the preparation of an EIS for the project.

The EIS process is indispensable to the Band's regulatory and permitting program. The mitigation measures imposed on the operation of the project in the EIS will be the primary operating standards for the project. Any violation of those mitigation measures constitutes a breach of the underlying lease and subjects the developers to penalties under the lease and subleases, including cancellation of the lease or subleases. Under RCRA, any facility that receives hazardous waste must receive a federal permit.¹⁰¹ For non-hazardous solid waste, however, there is no federal permitting system. The EIS and the mitigation measures it imposes are, in essence, the only federal permit for the

100. 2 U.S.C. § 4332(2)(c) (1988).

101. *Id.* at § 6925(a).

project.

The tribal amendments found in the Clean Water Act, the Safe Drinking Water Act, and the Clean Air Act that allow tribes to assume primacy for environmental programs serve as sources of authority, grants, and technical assistance.¹⁰² Although the Band has not yet received federal assistance, it has made enormous progress in developing a regulatory program for enforcing stringent tribal laws governing the project. The tribal regulatory standards and the program for enforcing those standards use California law as their baseline. In many important respects, the Band has toughened the state law standards and will have the most stringent and aggressive regulatory program in the State of California. Because the Band's members are not yet adequately trained in the technical aspects of regulatory enforcement, CEPA has retained a reputable private environmental engineering and consulting firm to serve as its source of technical expertise in carrying out the program.¹⁰³

Even though Congress has not yet enacted amendments to RCRA allowing EPA to treat tribes as states, both RCRA and the landfill siting and operational standards developed by EPA under the statute¹⁰⁴ clearly apply to the project. If the developers, MHI, and the Band fail to comply with these standards, the standards are enforceable as conditions of the lease and subleases and through the citizens' suit provision.¹⁰⁵

Moreover, because the tribal regulatory program is a key element in insuring the safety of the project facilities, the BIA can and should measure the effectiveness of that program in the process of approving the lease and subleases for the project. The tribal amendments to the other federal environmental laws provide a ready measure against which the tribal regulatory program can be evaluated. In its review of waste projects on Indian lands, the BIA should determine the adequacy of tribal environmental laws governing solid waste disposal by: (1) measuring those laws against the applicable federal standards issued by EPA under RCRA; (2) investigating the tribal environmental agency's enforcement plan and its technical capability to carry out that plan; and (3) determining whether adequate financial resources are available to the Band to carry out the enforcement plan.

The federal statutory framework governing the project is comprehensive and, if properly implemented by the Department of the Interior, adequate to protect both the economic and the environmental interests of Indian tribes considering such projects. While the laws undoubtedly could be fine-tuned to provide even greater protection for tribal communities, Campo has shown that

102. See *supra* notes 14-16 and accompanying text.

103. CEPA retains ERC Environmental and Energy Services Co. of San Diego, California.

104. See 40 C.F.R. § 257 (1991).

105. See, e.g., *Blue Legs v. EPA*, 668 F. Supp. 1329 (D.S.D. 1987), *aff'd sub nom Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989).

existing laws can work if three elements are present: (1) a tribal community that sincerely desires effective environmental protection; (2) officials at every level of the BIA who are willing to conduct a careful and comprehensive process of environmental review; and (3) developers who are not discouraged by rigorous and comprehensive tribal and federal environmental review. The federal review process fails if the BIA is not aggressive and creative in conducting the required reviews. To the extent the BIA does not have adequate resources to conduct the required reviews, Congress can and must provide those resources. Moreover, responsible developers will assist in providing both the tribes and the BIA with the resources necessary to carry out thorough and independent reviews. Tribes should refuse a developer who is unwilling to provide those resources.

E. The Benefits Of The Project

This project will benefit the Band in numerous ways. The Band's projections indicate that the project will provide full employment to Band members. The revenues from the project, half of which have been reserved by the General Council for reinvestment by MHI in other enterprises, will provide the elusive economic self-sufficiency that the Band and all other tribal communities seek.

The other half of the revenues will be used for governmental services to reverse the social deterioration that poverty breeds. Current plans include full scholarships for any tribal member admitted to college; refurbishing all existing tribal facilities; construction of new public facilities; establishment of a tribal housing authority and construction of new homes for every family now living in sub-standard housing; and income supplements to each member of the Band.

Most importantly, perhaps, the project has instilled a sense of pride and purpose in the Indian community. In a few short years, the Band has changed from a pocket of poverty and hopelessness to a community of Indian people united by a determination to succeed. The extraordinary resolve and native ability of Band members are evident from their principled, deliberate approach toward the project. Every significant development in the project is reported to and ratified by the General Council. Again and again, the General Council has acted with care, deliberation, and restraint in making the key decisions regarding the project.

This project also represents the principled application of tribal proprietary and regulatory powers to achieve economic self-sufficiency. The project is a visible exercise of sovereignty which has given tribal members a feeling of accomplishment and pride. The project promises to convert what was an impoverished reservation into an educated, healthy, and productive community of Indian people who have risen above their circumstances to make a better life

for themselves and their children.

F. *The New Problems*

The Band has confronted the bitter reality that Indian people suffer in political fora which often are unresponsive to Indian interests. Predictably, the Band is facing local opposition to the project, such as the "not-in-my-backyard," or NIMBY, syndrome and citizens against virtually everything, or "CAVEs." The Band and its developers have taken extraordinary measures to address the concerns of the local non-Indian population. The Band has conducted, and will continue to conduct, an open process in the development of its environmental regulatory program. Even the Band's adversaries have been given a meaningful opportunity to influence the development and implementation of the environmental program. Moreover, the public has had many opportunities for input in the development of the EIS. The Band has addressed every legitimate environmental issue presented and will continue to do so. Mid-American even has offered a property value guarantee to all non-Indians owning lands adjacent to the landfill site.

Nevertheless, the Band has faced many unprincipled and dishonest attacks from neighbors and their "environmentalist" allies. The attacks from the environmental community, few of whom have ever seen the Reservation, are particularly disappointing. The Band has been willing to address legitimate environmental concerns and is convinced that any open-minded, responsible, and practical member of the environmental community would respect its decisions if they knew the facts.

The political fora of the United States and the State of California, in which Indian people traditionally have had little influence, genuinely threaten the project. Such was the case in California, where NIMBYs forced tribal/state negotiations regarding waste disposal on Indian lands into the political arena. In 1990 and 1991, a state legislator introduced a bill that would have made illegal the delivery of waste to a tribal landfill unless the landfill had been permitted by California. Even though there was little, if any, question that federal law would preempt the bill,¹⁰⁶ the California legislature passed the bill in 1990. The Governor quickly vetoed it, but the bill was reintroduced in 1991 as AB 240. After substantial lobbying at the state and federal levels by the Campo Band and other California Indian tribes, AB 240 eventually became a law directing the state to enter into cooperative agreements with Indian tribes.¹⁰⁷

106. Not only did Tribal General Counsel, EPA Regional Counsel, and Department of the Interior Regional Counsel opine to that effect, even California Legislative Counsel agreed. No agency of the State of California ever issued a written opinion to the contrary.

107. The Governor of California signed AB 240 into law in October, 1991.

On the federal forefront, the Band is forced to deal with concerns in Congress that have no basis in fact with regard to the Campo project. Waste projects on Indian lands have become the subject of much attention in the national media; unfortunately, much of that attention is misguided and uninformed.¹⁰⁸ Members of Congress are concerned that tribal communities are being exploited by an unprincipled industry that takes advantage of poor communities with few options for economic development.¹⁰⁹ Vigorous tribal lobbying will be necessary to help Congress set favorable and fair federal Indian policy with regard to the development, operation, and regulation of commercial solid waste and hazardous waste projects on Indian lands.

IV. Policy Recommendations

Congress and the Administration should take actions to help tribes in evaluating waste project proposals. Beginning with the administrative agencies, the Department of the Interior should establish criteria for evaluating proposed waste projects on Indian lands.

First, the Department should make clear that no waste project on Indian lands may proceed in the absence of a legally sufficient EIS and Departmental approval. Such a policy will eliminate any developers who may be looking to Indian lands as a means of avoiding environmental review processes. Second, the Department must formulate a measure of market value that adequately compensates the tribe for the use of its land for a waste facility. The valuation method used to determine the fair market value of land formerly used for grazing cows grossly under-values the market value of the same land used as a waste facility. A permitted landfill site has extraordinarily valuable characteristics beyond the mere value of the acreage. Third, federal approval should require any such transaction to provide for indemnification of the tribe and the United States against environmental liabilities. Developers must purchase insurance and/or provide other assurances to ensure that the indemnification requirement will be met. The new RCRA Subtitle D regulations establish criteria for financial assurances, but do not address indemnification.¹¹⁰

Fourth, in a manner similar to that established in the Indian Gaming

108. See, e.g., Thomas A. Daschle, *Dances With Garbage*, CHRISTIAN SCIENCE MONITOR, Feb. 14, 1991; Conger Beasley, Jr., *Of Landfill Reservations*, BUZZWORM: THE ENVIRONMENTAL JOURNAL, Sep./Oct. 1991; Conger Beasley, Jr., *Dances With Garbage*, E MAGAZINE: THE ENVIRONMENTAL MAGAZINE, Nov./Dec. 1991, at 38.

109. See, e.g., Daschle, *supra* note 108, at 18; see generally SENATE SELECT COMMITTEE ON INDIAN AFFAIRS, 102D CONG., 2D SESS., WORKSHOP ON SOLID WASTE DISPOSAL ON INDIAN LANDS (Comm. Print 1992).

110. 40 C.F.R. §§ 258.70-74 (1992).

Regulatory Act,¹¹¹ the tribe or the Department should examine thoroughly the background of any potential developer to ensure that the developer has sufficient economic resources and business integrity to carry out its obligations to the tribe. Fifth, the transaction should strictly require Indian preference in employment and training at all skill levels. These projects can leave a lasting legacy of a trained tribal work force. Sixth, the Department should set criteria to evaluate the legal and practical abilities of tribal environmental agencies to regulate the project. The criteria set forth for tribal primacy in the tribal amendments to federal environmental laws may serve as a guide. If a tribe chooses to leave the responsibility to the federal government, the transaction should not be approved unless the Department determines that adequate federal resources are available to monitor and regulate the facility.

With respect to needed congressional action, first, Congress must not delay consideration of this issue by enacting a moratorium on the approval of such projects. Such a moratorium would have little effect on the less well-considered projects, but would devastate well-planned projects such as the Band's project. The Band has worked earnestly for several years on its project and has thoroughly evaluated the disadvantages and advantages. The BIA is now reviewing the project for lease approval and environmental review processes. The Band's vision and its understanding of the market in the local community give the Band an enormous market advantage. If the project proceeds as scheduled, it will enjoy a well-deserved advantage over competing projects and its economic viability will be virtually assured.

Additionally, Congress should amend RCRA¹¹² to allow tribes to be treated as states for purposes of the regulation and grant programs. Tribes are required to meet RCRA's waste disposal standards even though they have never been eligible for the enormous amounts of grant assistance available to the states over the past fifteen years. Congress should act immediately to address this inequity. In addition, Congress may require EPA to be responsible for permitting or licensing solid waste facilities on Indian lands where the tribe chooses not to establish a permitting system. Such a requirement allows for independent federal permitting and enforcement.

Finally, Congress must provide resources to the BIA to thoroughly review these projects. BIA now carries out environmental reviews on a shoestring budget. The threat of enormous potential liabilities for the tribes and the BIA for environmental violations warrant allocating to the Bureau increased resources to permit thorough environmental review of such projects.

Finally, Congress must appropriate funds to the tribes to allow them to regulate solid waste disposal and commercial facilities proposed for Indian

111. 25 U.S.C. § 2701-2721 (1988).

112. 2 U.S.C. §§ 6901-6992k (1988).

lands. Indian country has suffered much too long from poor waste disposal systems, inadequate regulation, and unauthorized dumping on tribal lands. The urgent problem on reservations is not that the waste industry wants to use Indian land for disposal sites; it is that Indian lands already are being used as illegal disposal sites. Congress should address this issue.

Conclusion

Commercial waste projects on Indian lands can provide excellent business opportunities for some tribes. However, tribal governments interested in such projects must carefully weigh the economic benefits against potential environmental risks. Moreover, tribes that choose this form of development must tailor their projects to maximize economic gain and minimize environmental risks.

The guiding principle and overriding goal of congressional policy toward Indian tribal governments are self-determination and economic self-sufficiency. Federal policy on Indian waste projects must recognize that the waste disposal industry is an indispensable element of the environmental services sector of the economy and is a viable and appropriate form of industrial development for some Indian tribes. More importantly, federal policy must recognize that tribal communities are fully capable of evaluating waste project proposals and making good decisions for themselves. Literally dozens of waste projects have been proposed to tribal communities; however, tribes have quickly rejected most of these, and only a handful are still being considered. Congress must avoid environmental paternalism and instead show its confidence in tribal decision-making. If and when a tribal community decides that it wishes to pursue such a project, Congress should not only accept, but also respect that decision.