
TRIBAL LANDS AND ENVIRONMENT FORUM
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OVERVIEW & LEARNING OBJECTIVES

Overview

• Explore the history & content of EPA’s 1984 Indian Policy, EPA’s Indian Program & the 1992 General Assistance Program

Learning Objectives

• Understand the legal bases for EPA’s Indian Policy & Program, & GAP funding
• Understand the continuing relevance of the Indian Policy & Program, & GAP, to achieving tribal environmental sovereignty
PROGRAM FOUNDATIONS—INTRODUCTION

Legal Foundations

- **Intersection** of federal Indian Law, Environmental Law and Administrative Law
- Law made by Congress (statutes), Courts (decisions) & Administrative Agencies (regulations)

Policy Foundations

- Changing eras from federal control & program implementation to tribal control & program implementation
LEGAL FOUNDATIONS IN 1970s

• **Environmental Law:** Federal programs feature state implementation, *but silent on Indian country (IC)*

• **Indian Law:** Court cases say *state laws don’t apply to Indians in IC unless Congress says so*

• **Administrative Law:** Agencies have *ONLY* the powers Congress gives them

**EPA conclusion:** Congress did not authorize EPA to delegate *to States* environmental programs for IC
CONSEQUENCES OF LEGAL FOUNDATIONS

• “[O]ur programs, as designed [by Congress], often fail to function adequately on Indian lands.”

• “This raises the serious possibility that without some special alternative response by EPA . . .

• . . . the environment of Indian reservations will be less effectively protected than the environment elsewhere. Such a result is unacceptable.”

-- EPA’S FIRST INDIAN POLICY (1980)
Policy Foundations in 1970s

• EPA’s main “special alternative response”: EPA would “directly implement” (DI) Indian country programs

• But, emerging national policies view ...
  – Federal control as ineffective and paternalistic
  – Tribal control as appropriate Self-Determination

So, EPA conclusion: Tribal governments should play “a key role in implementing pollution control programs affecting their reservations”
EPA’s 1984 Indian Policy Goals

• Respect tribes’ inherent governmental sovereignty with public health & welfare responsibilities

• Fill regulatory gap in Indian country

• Protect Indian country human health & environmental quality as effectively as other places

• Discharge federal trust responsibility for EPA to consider closely tribal interests before acting
1. “The Agency stands ready to work directly with Indian Tribal Governments on a one-to-one basis (the ‘government-to-government relationship’), rather than as subdivisions of other governments.”

2. “The Agency will recognize Tribal Governments as the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with Agency standards and regulations.”
3. “The Agency will take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands.”

4. “The Agency will take appropriate steps to remove existing legal and procedural impediments to working directly and effectively with tribal governments on reservation programs.”
5. “The Agency, in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA’s actions and/or decisions [DI] may affect reservation environments.”

[NOT: EPA will do what the Tribe wants (downplay environmental protection, or require particular protective actions)]
6. “The Agency will encourage *cooperation* between tribal, state and local governments to resolve environmental problems of mutual concern.”

7. “The Agency will *work with other federal agencies* which have related responsibilities on Indian reservations to enlist their interest and support in cooperative *efforts to help tribes assume environmental program responsibilities* for reservations.”
8. “The Agency will strive to assure compliance with environmental statutes and regulations on Indian reservations.”

9. “The Agency will incorporate these Indian policy goals into its planning and management activities, including its budget, operating guidance, legislative initiatives, management accountability system and ongoing policy and regulation development processes.”
Break
Tribal Env't'l Program Roles 1986-1990

• Treatment “as a State”: Tribes can seek delegation from EPA of many of the same environmental regulatory roles that state governments play

• Impact: Once approved, tribes set standards, monitor & control environmentally harmful activities in IC
  – Tribal standards sometimes affect polluting activities outside IC

• Key Benefit: Programs reflect tribes’ unique cultural and socio-economic values*
RECENT INFLUENCES OF 1984 INDIAN POLICY

- Consultation Policy (2011): Specific protocols for communication & coordination on federal actions & decisions affecting tribal interests

- Environmental Justice Policy (2014): EJ in DI by EPA, capacity-building with tribal governments, and grassroots involvement

- Treaty Guidance (2016): Specific consultations on actions affecting treaty resources & environments, including areas outside IC
**Recent Policy Influences ... con’t**

Clean Water Act Program Revision (2016)

- **1991 Rule**: CWA TAS for waters “within the borders of an Indian reservation” requires tribes prove inherent jurisdiction
  
  *(Burden eased greatly by Rule’s assumptions)*

- **Law suits** on tribal programs: Montana (2 won); Wisconsin (1 won, 4 forfeit) = “chilling effect”

- **2016 “Rule”**: Reinterpret CWA to relieve tribes of burden to prove jurisdiction over reservation waters
  
  *(Still must show IC boundaries)*
INDIAN ENVIRONMENTAL GENERAL ASSISTANCE PROGRAM ACT OF 1992 (AS AMENDED)

• **Before GAP**: EPA’s financial grants were **tied to specific regulatory programs** (air, surface water, etc.)

• **Unintended Result**: **Tribes struggled to build a general environmental self-governance foundation**, leading to an inconsistent regulatory presence

• **GAP Concept**: **Enhance tribes’ environmental sovereignty by building broad capacity for administering various programs**
GAP Act Purposes

• Provide financial grants to tribes and intertribal consortia “to build capacity to administer environmental regulatory programs that may be delegated” by EPA to tribes

• Provide technical assistance to tribes and intertribal consortia for “the development of multimedia programs” to address environmental issues
GAP ACT AUTHORIZATIONS

• EPA can give financial grants to tribes and intertribal consortia for the “costs of planning, developing, and establishing environmental protection programs” consistent with laws allowing tribal implementation.

• GAP grants must be spent for “planning, developing, and establishing the capability to implement [EPA] programs ... and the development and implementation of solid and hazardous waste programs” in accordance with the solid waste statute.
DISCUSSION

• Is the Indian Policy relevant to environmental Self-Governance as the tribes define it?

• Are tribal leaders and environmental professionals committed to achieving environmental Self-Governance as defined by the Indian Policy?

• How can EPA better advance Tribal Self-Governance?
Thank You
for your Participation!