

The Evolving Path Toward Achieving Environmental Justice for Native America

by James M. Grijalva and
Daniel E. Gogal

James M. Grijalva is Swenson Professor of Law and Director, Tribal Environmental Law Project, University of North Dakota. Daniel E. Gogal is Tribal Coordinator, Office of Environmental Justice (OEJ), U.S. Environmental Protection Agency.

Editors' Summary

A lack of fully functioning regulatory programs has long been the primary obstacle to achieving environmental justice in Native America. EPA recognized that challenge some two decades before the environmental justice movement took hold, and has since built an Indian program based on initial federal implementation where feasible, with aspirations for later program assumption by Indian tribal governments. Much work on the latter goal remains, but for tribes that have assumed program roles, a new environmental justice issue has arisen: ensuring the parties affected—tribal citizens, tribal grassroots environmental organizations and others within the jurisdiction of tribal programs—receive fair treatment and have meaningful opportunities for influencing tribes' environmental decisionmaking processes. Collaborative approaches for resolving tensions that arise at times between tribal government decisionmaking and community desires for greater environmental protection may be the best means for preserving both the environment and the legitimacy—political and cultural—of tribal governments.

Like indigenous peoples throughout the world, American Indian tribes and Alaska Native communities have suffered, and continue to suffer, serious negative impacts caused by the dispossession of their lands and the lack of resources to develop in accordance with their own aspirations, as well as pressures on their cultural, political, spiritual, economic, and other societal considerations. Of particular note, impacts from the imposition of energy development and the consumptive natural resource exploitation of their traditional territories have been significant. The extensive environmental and human health risks that these impacts cause give rise to the call for environmental justice for indigenous communities. In addition, and equally important, the degradation of environmental quality directly affects not only the public health of indigenous communities but, quite often, their very identity and survival as distinct peoples and cultures. The long legal and political relations between tribes and the United States, which recognize that tribes possess inherent governmental sovereignty, require considerate solutions to these concerns. This Article analyzes the evolution of the U.S. Environmental Protection Agency's (EPA's) Indian Program and Environmental Justice Program efforts to achieve environmental justice for Native America.

Section I of this Article briefly reviews the development of environmental justice as an organizing principle, and its application to Indian country. Section II focuses on EPA's early identification of Indian country's primary environmental justice challenge—the lack of functioning, effective regulatory programs—and its commitment to filling that gap through government-to-government relations with Indian tribes. Section III explores a second, emerging environmental justice issue, which is the call for greater citizen involvement in tribal environmental decisionmaking processes, and the use of collaborative approaches in resolving environmental disputes. Section IV concludes that future progress on these two fronts, and thus securing environmental justice for Native America, rests on support for both cultural and political self-determination for the nation's

Authors' Note: Prof. Grijalva served as the legal trainer for a series of tribal workshops on *Alternative Dispute Resolution, Environmental Law and Collaborative Problem-Solving*, sponsored by EPA's Office of Environmental Justice in 2006/2007 and 2009/2010. Mr. Gogal is the Program Manager for the Federal Interagency Working Group (IWG) on Environmental Justice and co-chairs the IWG's Native American Task. He also served as the Designated Federal Officer for the Indigenous Peoples Subcommittee of the National Environmental Justice Advisory Committee, and managed and co-facilitated OEJ's tribal workshops on *Alternative Dispute Resolution, Environmental Law and Collaborative Problem-Solving* held in 2006/2007 and 2009/2010. The views expressed in this Article are solely those of the authors. No official support or endorsement by EPA or any other agency of the federal government is intended or should be inferred.

indigenous peoples, as well as governments' adherence to appropriate norms for the meaningful involvement and fair treatment of all their citizens.

I. Environmental Justice as an Organizing Principle

Environmental justice gained traction as a social movement some 20 years *after* the modern age of environmental law and regulation began. Questions of inequities proliferated in the 1980s when early studies by the federal government¹ and independent organizations² identified statistically significant correlations between race, income, and environmental threats. In part because potentially dangerous pollution sources, like chemical manufacturing and hazardous waste disposal facilities, were located more often near low-income communities and those of color, including Indian country, such communities faced disproportionately higher environmental and public health risks.³ In addition, it appeared the operating environmental standards for facilities in those areas were significantly less stringent than for similar facilities elsewhere, governmental responses to accidents and violations there were slower, cleanups were less rigorous, and enforcement sanctions were lower or nonexistent.⁴

Public sentiment for the environmental justice movement coalesced in the early 1990s with an unprecedented national Peoples of Color Summit.⁵ A wide spectrum of participants including indigenous representatives declared a set of 17 principles⁶ addressing the causes and consequences of "environmental racism"⁷ perceived as stemming from the administration of federal and state environmental programs. The Summit's principles sought four broad justice goals: (1) fairer decisions on the siting of new industrial facilities; (2) more equal governmental enforcement, sanctions, and remedies when violations occurred; (3) increased involvement and access by those most affected by the governmental decision-making processes; and (4) better understanding that both public health and economic opportunities are indispensable

aspects of the quality of life in communities. The presence of indigenous advocates at the Summit was reflected clearly in the first principle's explicit affirmation of the sacredness of Mother Earth, and in other principles' recognition of Indian tribes' unique political relationship with the federal government.⁸ The principles also recognized the centrality of cultural self-determination as a fundamental issue of environmental justice for indigenous peoples.⁹

In the year following the Summit, EPA's Environmental Equity Work Group¹⁰ published a report calling for a new office to coordinate the Agency's attention on environmental equity issues.¹¹ That internal report validated a number of concerns raised by environmental justice leaders in the preceding two years, and EPA Administrator William Reilly responded by creating the Office of Environmental Equity, later renamed the Office of Environmental Justice. From its inception, the Office was charged with assisting the Agency in incorporating environmental justice concepts into its activities, including enforcement, rulemaking, policy development, and planning.¹²

In 1993, EPA's new Administrator, Carol Browner, identified environmental justice as one of her top priorities,¹³ anticipating President William J. Clinton's 1994 Executive Order directing all federal agencies to ensure that their programs, policies, and regulations did not disproportionately impact low-income, minority, or tribal communities.¹⁴ Administrator Browner stated a few years later "the nation must come together and take responsible, common sense steps to ensure protection of public health and the environment in every one of this nation's communities. Ensuring the basic rights of every citizen is not about stopping development, but about responsible development."¹⁵

At around the same time, EPA issued this detailed explanation of environmental justice, which continues to guide the Agency today:

[Environmental Justice is t]he fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, imple-

1. See, e.g., U.S. GOVERNMENT ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983).

2. See, e.g., COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987).

3. OFFICE OF POLICY, PLANNING, AND EVALUATION, U.S. EPA, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES, VOLUME 1: WORKGROUP REPORT TO THE ADMINISTRATOR 12 (1992).

4. Marianne Lavelle et al., *Unequal Protection: The Racial Divide in Environmental Law, a Special Investigation*, NAT'L L.J. (Wash., D.C.), Sept. 21, 1992, at S1.

5. See COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, PRINCIPLES OF ENVIRONMENTAL JUSTICE, PROCEEDINGS TO THE FIRST NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT (1991), available at <http://www.ejnet.org/ej/principles.html>.

6. See *id.*

7. Environmental racism has been defined as the intentional or unintentional racial discrimination in the enforcement of environmental rules and regulations, the intentional or unintentional targeting of minority communities for the siting of polluting industries, such as toxic waste disposal, or the exclusion of people of color from public and private boards, commissions, and regulatory bodies. Benjamin F. Chavis Jr., *Foreword*, CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS (Robert Doyle Bullard ed. 1993).

8. See COMMISSION FOR RACIAL JUSTICE, *supra* note 5.

9. See *id.*

10. EPA Administrator William Reilly created the EPA-staffed Environmental Equity Work Group in 1990 "to assess the evidence that racial minority and low-income communities bear a disproportionate environmental risk burden." OFFICE OF POLICY, PLANNING, AND EVALUATION, *supra* note 3, at 2.

11. *Id.* at 4.

12. See *Reorganization to Create the Office of Environmental Equity—Decision Memorandum* (1992) (creating EPA's Office of Environmental Equity to "coordinate communication, outreach, education and training of the public on environmental equity [justice] issues, serve as a source of information, and provide technical/financial assistance on equity related issues as needed").

13. *Elevation of the Environmental Protection Agency to a Cabinet-Level Department: Joint Hearings Before the Subcomm. on Environment, Energy, and Natural Resources and Legislation and National Security of the H. Comm. on Government Operations*, 103d Cong. 188-205 (1993) (statement of Carol M. Browner, Administrator, U.S. EPA).

14. Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994). Section 6-606 of the Executive Order is entitled "Native American Programs" and declares that "[e]ach Federal agency responsibility set forth under this order shall apply equally to Native American programs." *Id.* at 7632.

15. Carol Browner, EPA Administrator, Remarks at the Environmental Justice Roundtable, Detroit, Mich. (July 17, 1998), available at <http://www.epa.gov/oswer/ej/html-doc/ejremark.htm>.

mentation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including racial, ethnic, or socioeconomic group should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.¹⁶

Later, EPA defined meaningful involvement as those situations where:

(1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) the concerns of all participants involved will be considered in the decision-making process; and (4) the decision-makers seek out and facilitate the involvement of those potentially affected.¹⁷

EPA's twin aspirations of fair treatment and meaningful involvement fairly apply to Indian country.¹⁸ Despite common perceptions, most tribes are not wealthy and do not possess significant political power. Indeed, government studies show that Indian communities consistently fall below the federal poverty guidelines¹⁹ and have few economic opportunities. The most prevalent economic activity in Indian country has been, and continues to be, natural resource development.²⁰ Exercising its role as trustee, the federal government has long encouraged resource extraction in Indian country,²¹ typically by non-Indian businesses. Historically, the government's focus on generating revenue inadequately addressed the envi-

ronmental degradation of tribes' homelands and damage to sacred sites, and thus, to tribal cultural values. Underground sources of drinking water have been contaminated with the unwanted byproducts of oil and gas production, rivers used for livestock watering and irrigation have been destroyed by runoff from mining operations, and sacred sites and burial grounds have been strip-mined and clearcut.²²

Standing alone, these negative impacts on tribes' cultural survival raised significant environmental justice concerns. Yet, they were exacerbated by a more foundational concern: despite extensive federal and state regulatory development since 1970, there were very few environmental programs operating in Indian country at the time the environmental justice movement began.²³ So, while the mainstream environmental justice movement developed in response to charges that federal and state agencies were running their programs in ways that left minority and low-income communities at disproportionately higher risks,²⁴ the primary and most pressing environmental justice concern in Indian country was the nearly complete absence of effective environmental regulatory programs.²⁵ Indeed, to this day, only a fraction of Indian country benefits from active federal or tribal environmental regulatory programs.

II. The Primary Environmental Justice Challenge: Implementing Effective Regulatory Programs in Indian Country

Understanding the causes of the lack of effective environmental regulatory programs in Indian country, and the possible solutions, requires some familiarity with the historical development of federal environmental law. Before 1970, the federal role in environmental management was limited. The U.S. Congress occasionally addressed environmentally harmful activities through its constitutional power over interstate commerce, or provided financial and technical assistance to states for developing state environmental management regimes. Unlike Congress, states possessed broad inherent authorities for protecting public health and fostering public welfare. Until 1970, Congress effectively left land use decisions and many types of environmental regulation to the local level. But state governments often were concerned that they may drive existing and new business from their states by increasing regulatory compliance costs, so they either took no action, or established programs so weak that schol-

16. U.S. EPA, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSES §1.1.1 (1998), available at http://www.epa.gov/compliance/resources/policies/ej/ej_guidance_nepa_epa0498.pdf.

17. OFFICE OF ENVIRONMENTAL JUSTICE, U.S. EPA, Frequently Asked Questions, <http://www.epa.gov/compliance/environmentaljustice/resources/faqs/index.html> (last visited June 21, 2010) (How Does EPA Define Environmental Justice?).

18. Federal law defines Indian country as (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. 18 U.S.C. §1151. The U.S. Supreme Court has summarized the concept as including "all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments." *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993) (citing F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 34 (1982 ed.)).

19. The 2000 U.S. Census reported the median earnings of American Indians and Alaska Natives are significantly lower (\$22,800 for women and \$28,900 for men) compared to all others in the United States (\$27,200 for women and \$37,100 for men). Approximately 25% of American Indian and Alaskan Natives live below the official poverty level, as compared with 12.4% of the total population.

20. See, e.g., TASK FORCE SEVEN, AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT ON RESERVATION AND RESOURCE DEVELOPMENT AND PROTECTION 130-31 (1976).

21. See, e.g., TASK FORCE ONE, AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT ON TRUST RESPONSIBILITIES AND THE FEDERAL-INDIAN RELATIONSHIP, INCLUDING TREATY REVIEW (1976).

22. See, e.g., OFFICE OF FEDERAL ACTIVITIES, U.S. EPA, SURVEY OF AMERICAN INDIAN ENVIRONMENTAL PROTECTION NEEDS ON RESERVATION LANDS: 1986 (1986).

23. EPA created its Indian Policy in 1984 and began building its capacity to work with tribes, ultimately creating EPA's American Indian Environmental Office in 1994.

24. Memorandum from U.S. EPA Administrator Stephen Johnson, to Assistant Administrators, Regional Administrators, Associate Administrators, Office Directors, General Counsel, Chief Financial Officer, and Inspector General of the U.S. EPA, *Reaffirming the U.S. Environmental Protection Agency's Commitment to Environmental Justice* (Nov. 4, 2005), available at <http://www.epa.gov/compliance/resources/policies/ej/admin-ej-commit-letter-110305.pdf>.

25. See generally JAMES M. GRIJALVA, CLOSING THE CIRCLE: ENVIRONMENTAL JUSTICE IN INDIAN COUNTRY (2008).

ars sometimes refer to this time period as evidencing a state “race to the bottom.”²⁶

With minimal governmental oversight, industry had little economic incentive to consider the external social costs wrought by their environmental impacts. Rachel Carson’s 1962 book, *Silent Spring*, about widespread pesticide contamination primed the public consciousness, and the expanded media coverage soon inflamed it. Environmental catastrophes were found throughout the country in the late 1960s: an oil spill fouled popular Santa Barbara beaches; chemical pollution rendered Lake Erie “dead”; fish in the Hudson River were too toxic to eat; and the infamous Cuyahoga River in Ohio literally caught fire. It became clear that pollution, which readily migrated across state and tribal lines, was a matter of national concern.

The national crises climaxed in April 1970, when 22 million Americans went into the streets demanding federal action. That first Earth Day marked the beginning of the modern era of environmental law, provoking immediate executive and legislative reactions at the federal level. Within seven months, President Richard M. Nixon reorganized several federal departments to create EPA.²⁷ At the same time, Congress greatly enhanced the federal role in environmental management by enacting the Clean Air Act (CAA),²⁸ which directed EPA to set national air quality standards that every state would be required to meet. Over the next six years, Congress would expand the Agency’s authority to cover every environmental medium and many hazardous industries and products. States would continue to play an important role in public health, but they would do so under terms set by Congress and EPA.

The crises that prompted the modern environmental laws, and the legislative histories of those laws, made clear that Congress expected the programs would be implemented, and their requirements respected, nationwide. One court described Congress’ intention to protect the country from “border to border, ocean to ocean.”²⁹ That goal surely implied no geographic area would be left unregulated, but curiously, Congress made no mention of the over 87,000 square miles of Indian reservations (approximately the size of all the New England states) and other Indian lands scattered across the nation. However, a U.S. Supreme Court decision on a different federal agency’s authority to act in Indian country under a statute silent on the matter implicitly addressed this conundrum.³⁰ The Court noted its federal Indian law cases posited in Congress a very broad (some might say limitless) constitutional power over Indian affairs, which suggested to the Court that general federal laws should be understood to apply to Indian country unless Congress said otherwise.³¹ The environmental laws seemed to fall into this category; the

laws applied generally to their circumscribed polluting activities, and they certainly did not exempt Indian country. Additionally, it was clear to EPA that Congress’ goal of national environmental protection could not be accomplished without including Indian country.³²

The apparent conclusion that federal environmental law applied in Indian country, however, raised another pressing question also left unanswered by Congress: who would implement these programs? The regulatory model Congress incorporated into the modern environmental laws created a new federal-state partnership called “cooperative federalism,” which authorized state implementation of federal programs under EPA supervision. States had flexibility to account for local needs and priorities, so long as they met the minimum federal requirements established by Congress and EPA.

Federal Indian law again provided the context for understanding the meaning of Congress’ clear preference for state implementation of federal programs in the face of its silence on Indian country implementation. In 1973, as EPA was struggling with how to implement the Clean Water Act (CWA)³³ in Indian country, the Supreme Court barred a state tax law from applying to an Indian reservation, saying that state laws generally do not apply to Indian country unless Congress specifically authorizes their application.³⁴ The CWA contained no explicit authorization, so EPA determined that it would not approve state permit programs for Indian facilities in Indian country unless the state showed an independent source of authority. EPA would instead issue water pollution permits directly to avoid the risk of an unacceptable regulatory gap in Indian country.³⁵ That was EPA’s first Indian program action.

EPA’s approach of directly implementing federal programs was the quickest and most direct way for ensuring comprehensive national protection, and it was consistent with a long-standing national policy of federal control over Indian affairs. That policy, however, had rarely been successful and, more importantly, had just been discredited. President Nixon called for increased tribal control over federal Indian programs shortly before he created EPA in 1970.³⁶ Congress followed suit in education and human health service programs in 1972 and 1975.³⁷ This new era of decreased federal control and increased tribal self-determination meant EPA’s early solution for filling the Indian country regulatory gap through direct federal implementation needed to be revisited.

26. See, e.g., Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “To the Bottom?”*, 48 HASTINGS L.J. 271 (1997).

27. Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (Oct. 6, 1970), available at www.epa.gov/history/org/origins/reorg.htm.

28. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

29. *Phillips Petroleum Co. v. U.S. Environmental Protection Agency*, 803 F.2d 545, 553, 17 ELR 20387 (10th Cir. 1986).

30. See *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960).

31. *Id.* at 116-18.

32. U.S. EPA POLICY FOR PROGRAM IMPLEMENTATION ON INDIAN LANDS (Dec. 19, 1980) (on file with authors); U.S. EPA, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS 1 (Nov. 8, 1984), available at <http://www.epa.gov/tribal/pdf/indian-policy-84.pdf>.

33. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

34. *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 170-71 (1973).

35. National Pollutant Discharge Elimination System, 38 Fed. Reg. 13528, 13530 (May 22, 1973) (codified at 40 C.F.R. §125.2(b)).

36. Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS 564 (July 8, 1970).

37. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975); Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972).

A. *Laying the Foundation for Environmental Justice in Indian Country*

The nation's new policy of tribal self-determination was consistent with numerous references in Supreme Court cases acknowledging the governmental status of Indian tribes. In 1975, the Court emphasized that the unique sovereign attributes of tribes existed independently of the United States, and included jurisdiction not only over tribal citizens but also over tribal territories.³⁸ That case supported EPA's emerging view that its proper partners in Indian country were the tribes themselves.³⁹ Tribal governments were better positioned to implement federal programs consistent with local needs and priorities, just as states were outside Indian country. EPA thus began viewing its direct implementation approach to the Indian country regulatory gap as an interim solution; a more effective permanent strategy would feature tribal implementation of federal programs.⁴⁰

EPA's second and third Indian program actions explicitly included a tribal program role identical to states. EPA's 1974 rules for air programs offered tribes the same opportunity as states to classify their air quality⁴¹ even though EPA was fully aware that such classifications affected the stringency of federal permits issued to Indian facilities and to non-Indian facilities both inside and adjacent to Indian country. EPA's 1975 pesticide regulations specifically prohibited the commercial use of pesticides in Indian country unless the applicator, whether Indian or non-Indian, was certified by the tribe.⁴²

EPA's actions here were quite bold. At that time, neither the air nor pesticides acts even hinted at potential tribal regulatory roles. The air program role contained no direct regulatory authority over non-Indian polluters, though it clearly had potential to affect them through federal permit conditions. On the other hand, the pesticide program role explicitly envisioned tribes exercising direct regulatory authority over non-Indians, which has always been a contentious issue in federal Indian law. Yet, within three years, Congress codified those two specific state-like program roles.

EPA's state-like approach for tribal governments spoke directly to the primary environmental justice challenge in Indian country: the lack of actual operating programs providing public health protection equal to areas outside Indian country. As importantly, however, the state-like model acknowledged tribes' inherent governmental sovereignty as a fundamental difference from other minor-

ity and low-income communities. In addition to general public-participation opportunities for influencing program operation, cooperative federalism allowed tribal governments a regulatory role through the delegation of primary responsibility for implementing environmental programs. By law, tribal value judgments on environmental protection, e.g., water quality standards, air quality classifications, etc., would be incorporated into federal programs, primarily through the issuance of pollution discharge permits by EPA or the tribes themselves.

The first time that EPA's state-like approach was implemented, it was directly challenged in court. At issue was the air program that allowed tribes, like states, to choose among three classifications of air quality. The stringency of permits issued to new major sources of air pollution depended on the applicable class. The state of Montana elected to keep the default Class II set by EPA. The Northern Cheyenne Tribe, whose reservation is located in south-central Montana, desired greater protection for its air quality, and applied to EPA for redesignation from Class II to the more stringent Class I. EPA found the tribe had followed the statutory procedure, and approved the redesignation.⁴³

A group of mining and energy companies challenged EPA's authority to approve the Northern Cheyenne Tribe's redesignation. One energy company was particularly concerned. It was planning a new 760-megawatt coal-burning power plant in Colstrip, Montana, about 13 miles upwind of the Tribe's reservation. As designed, the plant's proposed controls for sulfur dioxide and nitrogen oxide emissions would not comply with the Tribe's Class I designation. The court upheld EPA's approval, finding EPA's approach a reasonable interpretation of CAA in light of federal Indian law principles.⁴⁴

Once legally effective, the tribe's Class I designation triggered CAA's transboundary pollution provisions authorizing the imposition of permit conditions prohibiting source emissions that would violate a downwind jurisdiction's more stringent standards. EPA ultimately required the Colstrip plant to redesign its pollution control system, reducing its annual pollution emissions by over 90%. But for the Northern Cheyenne Tribe's redesignation authority, tribal citizens and Montana residents would have been exposed to thousands of tons of additional hazardous airborne emissions over the life of the plant.

B. *Institutionalizing EPA's Legal Approach to Indian Country*

EPA's Indian program has come a long way since the 1970s. In 1980 and 1984, EPA adopted official Indian policies specifically embracing tribal self-determination.⁴⁵ Recognizing EPA's prior assistance for state program development, the Indian policies pledged technical and financial assistance

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

39. U.S. EPA, *supra* note 32, at 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.").

40. *See id.* ("The Agency will take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands.").

41. Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. 42510, 42515 (Dec. 5, 1974) (codified at 40 C.F.R. §52.21(c)(3)(i)).

42. Submission and Approval of State Plans for Certification of Commercial and Private Applicators of Restricted Use Pesticides, 40 Fed. Reg. 11698, 11704 (Mar. 12, 1975) (codified at 40 C.F.R. §171.10(a)).

43. *Montana; Redesignation of Northern Cheyenne Indian Reservation for Prevention of Significant Deterioration*, 42 Fed. Reg. 40695 (Aug. 11, 1977).

44. *Nance v. U.S. EPA*, 645 F.2d 701, 11 ELR 20526 (9th Cir. 1981).

45. *See* U.S. EPA, *supra* note 32.

for tribes, as well as resolution of legal and other barriers to tribal program development. EPA would delegate Indian country programs to states only pursuant to express congressional direction. EPA would give special consideration to tribal interests consistent with the federal government's trust responsibility over Indian lands and resources.

Consistent with its policy pledge to address legal barriers to tribal program roles, EPA (with tribes' assistance) secured amendments inserting general "treatment as a state" (TAS) provisions⁴⁶ in most of the major environmental statutes.⁴⁷ The only notable exception is the Resource Conservation and Recovery Act (RCRA),⁴⁸ which has not been substantially reviewed since 1984. The U.S. Court of Appeals for the District of Columbia (D.C.) Circuit has held that RCRA's lack of a TAS provision (combined with the its reference to Indian tribes as municipalities) precludes EPA from delegating state-like solid and hazardous waste regulatory roles to tribes.⁴⁹

The program roles authorized by the acts with TAS provisions vary with the relevant programs, but all posit a relative equality between tribal and state governments in both the opportunities and limitations presented by the cooperative federalist model. Several amendments included provisions for resolution of tribe-state disputes, underscoring Congress' view that adjacent tribes and states might legitimately make different value judgments for similar media. With clear authority in hand, EPA promulgated a number of regulations establishing procedures for TAS approval and tribal grant funding in the late 1980s and early 1990s,⁵⁰ setting the stage for Indian policy implementation to begin in earnest.

The EPA Indian Program began in 1994 with the creation of the Agency's Tribal Operations Committee,⁵¹ the American Indian Environmental Office, and a commitment of EPA senior managers to meet regularly to address tribal policy

issues. These bodies, along with more specific tribal advisory councils, created later, significantly increased opportunities for tribal involvement in Agency processes, broadened Agency awareness of tribal issues, and encouraged institutional changes. Scattered references to tribal program development and Indian country protection appeared in the Agency's strategic plans during the 1990s and 2000s, certain offices and regions developed Indian-specific strategic plans and policies, regions created regional tribal operations committees, and Agency-wide resource allocations began to increase.⁵²

Tribal interest in program delegation, as measured by applications for grants and TAS, increased significantly during this time, although the overall number of tribes operating delegated programs was and remains relatively small. Like the tribes themselves, the reasons for this modest growth are diverse. There is little doubt that resource limitations are a major obstacle. Tribes lack the tax base that even the poorest states enjoy, and the limited increases in federal funding for tribal program development in recent years are dwarfed by the federal assistance historically granted to states. When Congress began the modern era of environmental law by greatly expanding the federal role in environmental management in the 1970s, massive expenditures were made to assist states in developing compliant regulatory programs. In contrast, EPA's Indian Program resource allocations have never amounted to more than one-half of 1% of the Agency's overall budget.

An equally compelling but less acknowledged reason for limited tribal programs is historical. Before the nation embraced tribal self-determination, federal policy flipped every few decades between supporting and dismantling tribal governments.⁵³ So, while states have had two centuries to build governmental infrastructure and capability, the institution of the modern tribal government has been developing for approximately 25 years.

Another important factor implicating both tribal and Agency hesitance is the unpredictability of Indian law litigation. In recent nonenvironmental cases, the Supreme Court has described inherent tribal sovereignty over non-Indians as limited to health and welfare matters essential to tribal self-government, but it has never defined that test.⁵⁴ Nor has the Supreme Court accepted appeals from repeated lower court decisions supporting EPA's view of tribal self-government and upholding various aspects of the Indian Program. From 1996 to 2003, lower courts have consistently relied on standard administrative law principles to defer to the Agency's recon-

46. Treatment as state eligibility criteria vary among the statutory programs but require generally that the tribe be federally recognized by the U.S. Department of the Interior, have a governing body carrying out substantial duties and powers, and demonstrate technical capability and legal authority to manage and protect the Indian country environment. *See, e.g.*, FWPCA, 33 U.S.C. §1377(e) (2006).

47. *See, e.g.*, Water Quality Act of 1987, Pub. L. No. 100-4, §506, 101 Stat. 7 (Feb. 4, 1987) (codified at 33 U.S.C. §1377(e)); Pub. L. No. 93-523, 88 Stat. 1660 (Dec. 16, 1974) (codified at 42 U.S.C. §300f(1)); Pub. L. No. 101-549, §§107(d), 108(i), 104 Stat. 2464 (Nov. 15, 1990) (codified at 42 U.S.C. §7601(d), 7601(a)(1)); Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, §207(e), 100 Stat. 1613 (Oct. 17, 1986) (codified at 42 U.S.C. §9626).

48. 42 U.S.C. §§6901-6992k, ELR STAT. RCRA §§1001-11011.

49. *Backcountry Against Dumps v. U.S. Environmental Protection Agency*, 100 F.3d 147, 27 ELR 20471 (D.C. Cir. 1996).

50. *See, e.g.*, Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254 (Feb. 12, 1998) (codified at 40 C.F.R. pts. 9, 35, 49, 50, and 81); Safe Drinking Water Act—National Drinking Water Regulations, Underground Injection Control Program; Indian Lands, 53 Fed. Reg. 37396, 37400 (Sept. 26, 1988) (codified at 40 C.F.R. pts. 35, 124, 141-146); Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64876, 64878 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131); Underground Injection Control Programs on Indian Lands, 53 Fed. Reg. 43084 (Oct. 25, 1988) (codified at 40 C.F.R. pt. 147).

51. To improve communication and build stronger partnerships with the tribes, EPA established a National Tribal Operations Committee (NTOC) in February 1994. The NTOC is comprised of 19 tribal leaders (Tribal Caucus) and EPA's Senior Leadership Team, including the Administrator, the Deputy Administrator, and the Agency's Assistant Administrators and Regional Administrators.

52. In 1992, Congress passed the Indian Environmental General Assistance Program Act of 1992, 42 U.S.C. §4368b (2006), which authorizes EPA to provide General Assistance Program (GAP) grants to federally recognized tribes and tribal consortia for planning, developing, and establishing environmental protection programs in Indian country.

53. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW §§1.03-1.07 (Univ. of N.M. Press 2005).

54. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353 (2001); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001). In *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709, 2726-27 (2008), the Court, in dicta, said the tribal power "must be necessary to avert catastrophic consequences" for tribal self-government, as for example where non-Indian conduct "imperil[s] the subsistence or welfare of the tribe."

ciliation of Indian law and environmental law unless Congress clearly spoke otherwise. Those cases effectively endorse the three main components of the Indian program: a commitment to full tribal regulatory roles on a par with states⁵⁵; an unwillingness to delegate Indian country responsibilities to states absent clear congressional permission;⁵⁶ and federal direct implementation while tribal programs develop.⁵⁷

Although not fully consistent with EPA's goal of tribal environmental self-determination, federal direct implementation was initially, and remains today, a mainstay of the Agency's Indian Program.⁵⁸ Federal direct implementation partially addresses the Indian country regulatory gap, while minimizing the presence of state regulatory mechanisms. Because courts sometimes rely on state regulatory presence in Indian country to find regulated matters are not important to tribal self-government,⁵⁹ EPA's disapproval of state programs in Indian country indirectly supports tribal sovereignty. Courts have generally accepted direct implementation as a rational interim step toward full tribal roles, although in two recent cases the courts ruled against direct implementation actions perceived as limiting or precluding later tribal program assumptions.⁶⁰

III. An Emerging Environmental Justice Challenge: Achieving Meaningful Involvement and Fair Treatment in Tribal Program Operation

As tribes build capacity and obtain federal environmental program delegations, the parties affected—tribal members, tribal grassroots environmental organizations, and others within the jurisdiction of tribal programs—have begun and will continue to seek meaningful opportunities for influencing tribes' environmental decisionmaking processes and receiving fair treatment. This is an expected development that follows the trend of citizens, community-based orga-

nizations, and other environmental stakeholders seeking greater public involvement and fair treatment in both the states' and the federal government's environmental decision-making processes.

Public participation and due process are nationally and internationally recognized as core rights of citizens and persons being governed,⁶¹ and Congress enacted the federal Administrative Procedure Act⁶² in large part to provide for due process and greater public access and involvement in government operations. Federal environmental laws and their administrative implementing rules also incorporate public participation and due process requirements, which apply to the operation of federal environmental programs whether run by EPA or delegated to states and tribes. Implementing those administrative procedures in Indian country, however, raises some unique challenges.

EPA's federal advisory committee on environmental justice, the National Environmental Justice Advisory Council (NEJAC), has observed that public participation and due process procedures in the context of federally approved tribal environmental programs "may have implications for tribal decision making, values, sovereignty, and tribal efforts to exert jurisdictional authority."⁶³ While NEJAC encouraged collaborative federal-tribal efforts toward effective public participation and due process, it also cautioned that "EPA should be sensitive to these concerns and to the challenges these bring to tribes."⁶⁴

EPA has acknowledged the importance of ensuring federally mandated due process and public participation processes are appropriately considered in light of tribal self-determination. To address this concern, the Agency has split its programmatic efforts in Indian country: the American Indian Environmental Office has the lead for the Agency's work with tribal governments, and EPA's Office of Environmental Justice (OEJ) heads EPA's work with tribal grassroots organizations and tribal members. Through these offices, the Agency supported NEJAC's Indigenous Peoples Subcommittee as it prepared two reports: *Meaningful Involvement and Fair Treatment by Tribal Environmental Regulatory Programs*⁶⁵ and *Guide on Consultation and Collaboration With Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Environmental Decision Making*.⁶⁶

NEJAC's report on meaningful involvement emphasized active involvement by tribal members and tribal grassroots

55. See, e.g., *Arizona v. U.S. EPA*, 151 F.3d 1205 (9th Cir. 1998) (upholding EPA's approval of a tribe's redesignation of its air quality classification); *Montana v. U.S. EPA*, 137 F.3d 1135, 28 ELR 21033 (9th Cir. 1998) (upholding EPA's approval of tribal water quality standards for a reservation with significant non-Indian lands); *Albuquerque v. Browner*, 97 F.3d 415, 27 ELR 20283 (10th Cir. 1996) (upholding EPA's approval of tribal water quality standards more stringent than federal minimum requirements).

56. See, e.g., *Wash. Dep't of Ecology v. U.S. EPA*, 752 F.2d 1465 (9th Cir. 1985) (upholding EPA's rejection of a state's application for hazardous waste regulatory authority over Indian reservations).

57. See, e.g., *HRI, Inc. v. U.S. EPA*, 198 F.3d 1224, 30 ELR 20231 (10th Cir. 2000) (upholding EPA's direct implementation of the Safe Drinking Water Act's Underground Injection Control Program on Indian lands); *Phillips Petroleum Co. v. U.S. EPA*, 803 F.2d 545, 17 ELR 20387 (10th Cir. 1986) (same).

58. See, e.g., *Federal Implementation Plans Under the Clean Air Act for Indian Reservations in Idaho, Oregon, and Washington*, 70 Fed. Reg. 18074 (Apr. 8, 2005) (codified at 40 C.F.R. pts. 9 and 49).

59. See, e.g., *Montana v. United States*, 450 U.S. 544, 565-66 (1981) (finding insufficient impacts on tribal health and welfare to justify tribal regulation over non-Indians because of long history of state regulation of the non-Indian activities).

60. See *Michigan v. U.S. EPA*, 268 F.3d 1075, 32 ELR 20248 (D.C. Cir. 2001) (invalidating provision for direct implementation of the federal operating permits program on lands whose Indian country status was in question); *Arizona v. U.S. EPA*, 151 F.3d 1205 (9th Cir. 1998) (invalidating a federal implementation plan intended to activate a tribal air quality redesignation).

61. International Covenant on Civil and Political Rights, arts. 25, 26, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171.

62. 5 U.S.C. §§551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2006).

63. NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL, U.S. EPA, MEANINGFUL INVOLVEMENT AND FAIR TREATMENT BY TRIBAL ENVIRONMENTAL REGULATORY PROGRAMS 4 (2004), available at <http://www.epa.gov/compliance/ej/resources/publications/nejac/ips-final-report.pdf>.

64. *Id.*

65. *Id.*

66. NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL & INDIGENOUS PEOPLES SUBCOMMITTEE, U.S. EPA, GUIDE ON CONSULTATION AND COLLABORATION WITH INDIAN TRIBAL GOVERNMENTS AND THE PUBLIC PARTICIPATION OF INDIGENOUS GROUPS AND TRIBAL MEMBERS IN ENVIRONMENTAL DECISION MAKING 16-20, 24-26 (2000).

organizations in protecting the environment and public health in Indian country. A number of the Agency's activities incorporate that theme, including initiatives for protecting tribal culture and traditional lifeways,⁶⁷ promoting sustainable and renewable tribal energy development,⁶⁸ and supporting collaborative problem solving.⁶⁹

A collaborative approach to resolving environmental conflict is the centerpiece of an instructional course first offered by the OEJ in 2006, and has since been offered several additional times. Representatives of tribal grassroots organizations and tribal governmental officials collectively explored hypothetical environmental conflicts through the twin lenses of federal public participation requirements and alternative dispute resolution mechanisms. The inclusion of traditional peacemaking approaches in these training workshops helped participants focus on culturally appropriate means for hearing the community's voice and meeting all parties' interests.

It is too early to determine how useful or beneficial this tool will be for stakeholders across Indian country, but the initiative has shown positive initial results. The first training resulted in the completion of a written set of protocols for communication and collaboration between the tribal government and tribal grassroots organizations.⁷⁰ The second training generated a set of identified opportunities to enhance coordination and collaboration on water quality issues, developed by the tribal environmental program, tribal environmental grassroots organizations, and other stakeholders on the reservation, including owners of adjoining private lands.⁷¹

Although this training has been well-received by tribal participants, and EPA has been encouraged to offer more training opportunities for tribes and tribal grassroots organizations,⁷² some tribal governments have been reluctant

to explore collaborative problem solving and dispute resolution as viable tools for managing environmental programs.⁷³ Their reluctance may be due to simple misunderstanding of the tools being discussed, or mistrust of another federal program proclaiming benefits for tribes. A more problematic motive may be the concern of some tribal governments that genuine involvement of their members will only delay or derail proposed development projects, thus exacerbating the difficulty of attracting new businesses and industries and the jobs and revenues they represent. Whatever the reasons, the perception that tribal governments are neither engaged with the citizenry nor open to their views breeds a divisive sense of disenfranchisement⁷⁴ that fuels a long-standing criticism that modern tribal governments, which are modeled largely on their state and federal counterparts, lack cultural legitimacy.⁷⁵

IV. Conclusion

As citizens of the United States, tribal members should receive the same quality of environmental and public health protection as other citizens. EPA's Indian Program—guided from the outset by a self-determination policy highlighting tribal governments as partners in developing and implementing effective Indian country environmental programs—has made significant progress toward addressing Indian country's most pressing environmental justice challenge of filling the regulatory void left by the modern cooperative federalist model of environmental law. Congress has validated the Agency's tribal treatment as a state paradigm on multiple occasions, and federal courts have repeatedly turned away legal challenges to it. Tribes have generally welcomed the federal trend toward increased tribal capacity, although their optimism and progress have been tempered by a long history of disjointed federal policies and the reality that current funding levels fall short of the financial and technical resources needed for comprehensive tribal environmental programs.

A natural extension of EPA's and tribes' initial successes in developing more culturally relevant environmental programs is the challenge of ensuring that tribal members and tribal organizations have meaningful and effective opportunities for influencing the operation of those programs, and that they are treated fairly. This

67. NATIONAL EPA-TRIBAL SCIENCE COUNCIL, U.S. EPA, PAPER ON TRIBAL ISSUES RELATED TO TRIBAL TRADITIONAL LIFEWAYS, RISK ASSESSMENT, AND HEALTH & WELL BEING: DOCUMENTING WHAT WE'VE HEARD (2006), available at <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=900U0100.txt>.

68. EPA co-chairs the Interagency Working Group on Environmental Justice's Native American Task Force, which has focused attention on sustainable development/wind power development in Indian country and the protection of cultural resources. The working group has supported 30 revitalization demonstration projects, including the Intertribal Council on Utility Policy Tribal Wind Power Development Project. See U.S. EPA, INTEGRATED FEDERAL INTERAGENCY ENVIRONMENTAL JUSTICE ACTION AGENDA (2000), available at <http://www.epa.gov/compliance/ej/resources/publications/interagency/actionagenda.pdf>.

69. OFFICE OF ENVIRONMENTAL JUSTICE, U.S. EPA, EPA'S ENVIRONMENTAL JUSTICE COLLABORATIVE PROBLEM-SOLVING MODEL (2008), available at <http://www.epa.gov/compliance/ej/resources/publications/grants/cps-manual-12-27-06.pdf>.

70. EPA worked in partnership with the Navajo Nation and Navajo environmental justice grassroots organizations to hold the Alternative Dispute Resolution and Environmental Laws Workshop on October 24-26, 2006, including follow-up facilitated sessions resulting in the development of *Protocols for Communication and Collaboration*, completed in April 2007.

71. EPA worked in partnership with the Wind River Environmental Quality Commission and the Wind River Alliance to hold the Collaborative Approaches and Problem-Solving Workshop, Nov. 12-13, 2009, including a facilitated session that resulted in the development of the list of identified opportunities for enhanced coordination and collaboration among the Shoshone and Arapaho peoples, as well as others, including non-tribal residents, living on the reservation.

72. Participants in each of the trainings offered from 2006-2010 have almost unanimously indicated the course was well worth taking and requested opportunities for others to attend the course.

73. In early 2010, several tribes initially committed to host a regional training workshop for tribal environmental officials and tribal grassroots groups in their areas, but later abruptly withdrew without explanation. One tribe strongly opposed even the offering of the training at a private facility on its reservation.

74. See, e.g., Black Mesa Water Coalition, *Organization Responds to President Shirley's Chastisement of "Environmental" Groups*, NATIVE AMERICAN TIMES, Oct. 2, 2009, available at http://nativetimes.com/index.php?option=com_content&view=article&id=2459:organization-responds-to-president-shirleys-chastisement-of-environmental-groups&catid=56&Itemid=32; Ahni, *Tribal Members Concerned About Proposed Oil Refinery*, available at <http://intercontinentalcry.org/tribal-members-concerned-about-proposed-oil-refinery/> (Sept. 25, 2008).

75. The Indian Reorganization Act of 1934, 25 U.S.C. §§461-479a-1 (2006), established forms of government for tribes that followed to some extent the federal and state pattern of divided executive, legislative, and judicial authority, which generally did not correspond with most traditional forms of tribal governance, and were, therefore, often unsuited to tribal needs and conditions. See WILLIAM C. CANBY JR., *AMERICAN INDIAN LAW* 25 (1998).

second and emerging Indian country environmental justice issue, like the first, presents unique considerations. Both cultural and political self-determination are at stake for the nation's indigenous communities.

As EPA endeavors to ensure the voices of individual tribal citizens are heard, it must be mindful of tribal sovereignty. The OEJ's recent success in facilitating collaboration and improving communication between tribal governments and tribal grassroots organizations is a promising indication that the two goals can be mutually reinforcing. Through similar creative efforts in the future, EPA and tribes may develop collaborative means of co-regulating the Indian country environment that protect the needs and interests of the entire population while respecting, and perhaps enriching, indigenous core values and tribal sovereignty.

It seems evident that collaborative approaches to resolving environmental and public health issues maximize the limited technical and financial resources of all governments (federal, tribal, state, and local), as well as capitalize on the expertise and interests of each party to improve overall environmental and public health protection for all citizens of our nation. EPA Administrator Lisa Jackson has recently called for the "building of strong state and tribal partnerships [to] ensure that programs are consistently delivered nationwide."⁷⁶ She also emphasized as top priorities the need to protect vulnerable populations and include environmental justice principles in all Agency decisions.

While EPA has endeavored, in the many years since adopting the 1984 Indian Policy, to address these issues through building tribal regulatory capacity, it has only recently turned to the relationship between tribal governments and their citizens. How successfully EPA's programs and regional offices implement Administrator Jackson's priorities will in part be determined by the engagement and outreach of all parties (EPA to tribal governments, tribal governments to tribal community-based organizations, tribal governments to EPA, tribal community-based organizations to tribal governments, EPA to tribal community-based organizations, etc.). It seems clear that EPA's environmental justice outreach is aimed at engaging and collaborating collectively with tribes and disadvantaged communities. It is less clear whether tribal governments and tribal grassroots organizations will seize the resulting opportunities to work collaboratively in identifying and addressing their collective environmental and public health concerns in partnership with EPA and other stakeholders. That decision cannot be taken lightly, for hanging in the balance is not only environmental justice for Native America, but also the perceived legitimacy of modern tribal governments.

76. Memorandum from Lisa P. Jackson, U.S. EPA Administrator, to All EPA Employees (Jan. 12, 2010) (assessing implementation of her first year's stated priorities: taking action on climate change; improving air quality; assuring the safety of chemicals; cleaning up our communities; protection of America's waters; expanding the conversation on environmentalism and working for environmental justice; and building strong state and tribal partnerships).

Federal Circuit's Economic Failings Undo the *Penn Central* Test

by William W. Wade, Ph.D.

William W. Wade is a resource economist with the firm Energy and Water Economics, Columbia, Tennessee.

Editors' Summary

Faulty understanding of standard economic and financial analysis within regulatory takings cases continues to set this jurisprudence apart from standard tort cases, where state of the art economic methods typically are applied within both liability and damages phases of the trial. Clear examples of economic nonsense can be found in three recent decisions by the U.S. Court of Appeals for the Federal Circuit that ignored competent economic evidence within the *Penn Central* test to overturn temporary takings decisions. The Federal Circuit's flip-flop between its 2003 decision in *Cienega Garden VIII* and its more recent decisions in *Cienega Gardens X*, *Rose Acre Farms*, and *CCA* reveals both misapplication of "parcel as a temporal whole" from *Tahoe Sierra*, a *Lucas* case, to *Penn Central* cases and faulty use of valuation methods appropriate for real property to evaluate the severity of economic impact of temporary business income losses. Confused legal theories cannot be shoehorned into standard economic methods essential to evaluate the *Penn Central* test.

I. Progeny of *Cienega X* Supplant Standard Economic Methods With Confused Legal Theories

Thirty years after Justice William J. Brennan's decision in *Penn Central*,¹ the federal circuit created an economic *tsemisht* of the *Penn Central* test in its *Cienega X* decision.² Progeny of *Cienega X* demonstrate that faulty legal theories of economics developed in *Cienega X* should not displace well-established economic theories of measuring and benchmarking financial losses. This Article takes a meta-look at recent federal circuit and federal claims court decisions to reveal that confused legal theories cannot be shoehorned into standard economic methods essential to evaluate the *Penn Central* test.³

Progeny of *Cienega X* at issue are:

- *Rose Acre Farms, Inc. v. United States* (*Rose Acre Farms VI*)⁴;
- *CCA Associates v. United States* (*Fed. Cl.*)⁵; and
- *CCA Associates v. United States* (*Fed. Cir.*)⁶

An earlier Article by the author details the economic failings of *Cienega X*⁷; a recent Article explains the deficiencies of *Rose Acre Farms*' analytic approaches to *Cienega X*'s *Penn Central* test.⁸ Reliance on diminution in value of property in lieu of loss of income led each of the federal circuit decisions astray.

Not surprisingly, *CCA Associates*' post-trial memorandum put the court on notice that they were playing under protest of the *Cienega X Penn Central* rules.

Author's Note: The author served as expert financial economist and testified for the plaintiff in the Palazzolo remand trial at Wakefield, Rhode Island, June 2004. He has testified on economic elements of the Penn Central test and estimated economic losses in takings cases at the Court of Federal Claims. He can be reached at wade@energyandwatereconomics.com. The author acknowledges helpful comments from an anonymous legal reviewer; remaining errors are the author's.

1. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 8 ELR 20528 (1978).
2. *Cienega Gardens v. United States* (*Cienega X*), 503 F.3d 1266 (Fed. Cir. 2007). "Tsemisht," or "simist," is Yiddish for confused, befuddled, mixed up.
3. *Penn Cent.*, 438 U.S. at 124. To establish a regulatory taking, a plaintiff must provide evidence regarding: (1) the regulation's economic impact on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations (DIBE); and (3) the character of the government's actions. The court must then balance these factors in some manner. *Id.*
4. 559 F.3d 1260, 39 ELR 20058 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 1501 (2010).
5. 91 Fed. Cl. 580 (2010), *appeal docketed* (Fed. Cir. July 19, 2010).
6. 284 Fed. Appx. 810, 811 (Fed. Cir. 2008).
7. William W. Wade, *Confusion About "Change in Value" and "Return on Equity" Approaches to the Penn Central Test in Temporary Takings*, 38 ELR 10486 (July 2008).
8. See William W. Wade, *A Tale of Two Circuits: Penn Central's Ad Hocery Yields Inconsistent Takings Decisions*, 42 URB. LAW. (forthcoming 2010).