

Tribal Perspective
DRAFT ENVIRONMENTAL JUSTICE
STRATEGY FRAMEWORK ELEMENTS
COMMENTS

Prepared by: Mrs. Dorothy Hallock,
Member of the Advisory Committee on Environmental Justice

Introduction: Tribal Federal Relationship

Native American communities have a well-established relationship with the Federal government that has evolved over more than 300 years. Tribes are familiar with federal law and policy, and most of their extra-Tribal dealings are with the federal government. Despite the strains in the Tribal-federal relationship, which inevitably occur, there is consistency in honoring the trust responsibility the federal government has with regard to Tribes. The trust responsibility “requires that the federal government consider the best interests of the Tribes in its dealings with them and when taking actions that may affect them. The trust responsibility includes protection of the sovereignty of each Tribal government.”¹

In addition to the trust responsibility, the Federal government has adhered to the policy of conducting affairs with Tribes in a government-to-government relationship, which specifically acknowledges the inherent sovereignty of Tribes.

These two policies--trust responsibility and government-to-government relations--carried over into Bill Clinton’s Executive Order No. 12898 on Environmental Justice. Section 6-606 of the Order states that federal agency responsibility “shall apply equally to Native American programs.”

2. Tribal-State Relationship

Tribal -State relationships are not so clearly defined as the federal relationship. The old “state’s rights” vs. “centralist” philosophy spills over to color state perception of Tribes. Tribes are a federally connected presence within the territory of states, which have Indian reservations, and Tribes are not, generally, subject to state jurisdiction. Many states are reluctant to acknowledge Tribal sovereignty, in fact or in practice. These conditions set a tone ripe for conflict between states and Tribes.

3. P.L. 280

Public Law 280 further complicates the Tribal-State relationship where it applies. California is a P.L. 280 state. In 1953, Congress delegated to states its jurisdiction over criminal and some civil matters on Indian reservations. The delegation of federal jurisdiction does not include regulatory power over environmental, land use, and other areas. Thus, state environmental regulations do not apply to Indian reservations.

P.L. 280 creates an ambiguous legal climate, where the state exercises authority over some activities on reservations, but has none over others. For example, the state has authority over actions by non-Indians committed on Reservations such as dumping of hazardous materials. The state's assumption of delegated federal powers has added to the sense of distrust between Tribes and the state because California, specifically, among the "280" states, dissents from the view that Tribes "have retained civil jurisdiction over activities within Indian country as well as criminal jurisdiction over Indians."²

4. Clouding the sovereignty issue: state assumption of federal environmental programs

The ambiguity is enhanced by the fact that California has assumed federal program responsibility for most media. To Tribes, this looks suspiciously like the wolf in sheep's clothing: state authority draped in a federal mantle.

Further investigation into the powers and responsibilities of the state vis a vis tribes under the delegation of program authority needs to be pursued.

5. Tribes as "transborder" environments

Despite the assumption of federal responsibilities by the state in the environmental regulatory arena, specifically, state regulatory authority stops at the Reservation boundary. CEQA does not cross the border, and only NEPA applies.

Similarly, Tribes, as sovereign nations, are free to adopt their own environmental regulatory standards, so long as they meet or exceed

federal standards. We encounter situations where a Tribe has enacted stringent surface water quality standards and has prevailed in court in preventing water from upstream users to enter the reservation if those standards are not met. Similarly, Tribes may declare themselves, under US EPA provisions, as Class I air quality districts: what happens when off reservation emissions drift across the reservation line and exceed Tribal standards? The Tribal/state regulatory standards interface requires further investigation. s

Protocols for cooperative activities between Tribes and the state need to be developed, such as memoranda of understanding. Cal EPA has some pilot programs with Tribes. If Cal EPA does not have a formal Native American liaison, one should be established so that there is an agency forum for Environmental Justice issues of concern to Tribes. A logical place to locate a liaison is within the Cal EPA's existing Border Environmental Program, which has already begun working with Southern California Tribes. The Border Environmental Program is a logical base to work with Tribes, as so many issues are more nearly like those with other states or foreign nations than with cities or counties.

In working with Tribes, the U.S. EPA has a useful model in its Treatment as a State regulations. The U.S. EPA was a pioneer among federal agencies in implementing government-to-government relations with Tribes, allowing Tribes to become state-equivalents in agency relationships. In particular, the flow of funds to allow Tribes to establish and administer effective environmental programs allowed them to catch up with other jurisdictions, which had had the benefit of direct funding for several decades.

An official statement of acknowledgment of Tribal sovereignty would be beneficial to evolving a cooperative forum between Tribes and the state. Despite the gray area on this subject created by P.L. 280, at least one state agency, Caltrans, has issued a policy of government to government relations with tribes.³

Conversely, there needs to be a means of respectful dialogue when Tribal activities undertaken as a sovereign may affect off-Reservation jurisdictions.

Some of these issues were explored through a series of roundtable discussions on racial and ethnic bias sponsored by the California State Court. Within the broader context of federal, state, and Tribal legal concerns, the Working Group on Environmental Law and Land recommended support of legislation which would enable reciprocity of judgments between tribal and state courts as a step toward addressing “environmental concerns related to pure water, use of pesticides on tribal and non-tribal land, air quality, waste management and the impact of each on public health.” ~ Those Tribal courts currently functioning must first be capable of working on a par with state and federal courts. However, many California Indian Tribes do not have any police or court system at all, and would have to establish justice systems before reciprocity of judgments in matters affecting Environmental Justice could be in place.

5. Inconsistency between Federal and State definitions of Environmental Justice

There is a built in inconsistency between the definition of Environmental Justice as used by the federal government, and as defined by California. Tribes, because of their traditional relationship to the federal government, and because of the universal applicability of NEPA to reservations, naturally accept the federal definition. This definition is much broader than the state’s because it explicitly includes economic and quality of life effects as part of the definition of Environmental Justice, and is not limited to toxic and contaminant effects in a much more constrained sense, as defined by Cal EPA.

In particular, economic effects are discussed in Section 3-302(b) of Executive Order No. 12898, which states that areas surrounding federal facilities shall be assessed for potential of having “substantial environmental, human health, or economic effect on surrounding populations.”

6. Inconsistencies between NEPA and CEQA re: Environmental Justice

In a broader context, NEPA is more inclusive than CEQA in addressing Environmental Justice. In addition to the need to address Executive Order No. 12898 when preparing NEPA compliance documentation, NEPA embraces a broader definition of

“environmental effects” to include quality of life factors, and economic factors, as part of the human environment. These factors are of particular relevance to NEPA implementing regulations which apply to Indian Tribes (Bureau of Indian Affairs Manual 30, and Supplements) which include mandatory analysis of aspects of particular relevance to Native American populations, such as cultural and religious considerations, and consultation between Tribes and federal agencies on matters of concern, such as repatriation of human remains, or impacts on traditional cultural sites, or sacred areas, even when located off-Reservation. Other examples of uniquely Native American environmental impacts are potential for cultural incompatibility if large numbers of non-Indians reside on, or visit, Reservations.

In particular, NEPA explicitly includes consideration of economic and social impacts in assessing consequences of a proposed action on the human environment. This is in contrast to CEQA, under which consideration of economic and social consequences has, in practice, not been given equal weight with other environmental factors because consideration is discretionary, not mandatory. CEQA states in Section 15382, “Significant Effect on the Environment,” that “[a]n economic or social change by itself shall not be considered a significant effect on the environment. A social or economic change *may* [italics added] be considered in determining whether the physical is significant.”

These inherent differences between CEQA and NEPA become important when Tribes as well as the state are involved, for example, if a federal permit is required and NEPA compliance is triggered. In joint NEPA/CEQA document preparation, it has been my experience that a CEQA mindset prevails, largely because many federal agencies, such as the Federal Highway Administration, enter into agreements to allow the state to prepare environmental compliance documents.

7. Urban Indians as a unique minority population

California has a large population of urban Indians, with an estimated 140,000 in Los Angeles and a smaller population in the Oakland area. (In fact, the state has the largest population of Indians of any

state except Oklahoma. The number of urban Indians probably exceeds those on California reservations.) Urban Indians can come from any reservation or Alaskan Native Village in the U.S. Because of their diverse tribal affiliations, the origin of many from outside California, and continued identification of themselves as citizens of their home reservation, they represent a hard to reach minority population, which may be almost invisibly commingled with other minority populations, such as Hispanic. Thus, urban Indians present a special challenge for public involvement programs because they may not be readily distinguishable, and may not have a strong emotional connection to their current place of residence.

Finding an appropriate means of contact is key. Several resources have ready access to urban Indian populations: Indian Centers; activist groups such as the Sacramento Native America Caucus; Cultural Centers, such as the Oakland Intertribal Friendship House; student groups on state university campuses; and Native American Chambers of Commerce. Indian Centers have accurate demographic data, and have assumed a positive role as a forum for Indians living off-Reservation. Activist and cultural groups, and campus organizations, have ready access to Native American constituencies. Native American Chambers of Commerce include many urban business owners in their membership, who can be an important channel for information to other urban-dwelling Indians.

8. Summary: Tribal/State Issues in Need of Resolution

- Definition and limits of sovereignty under P.L. 280
- Continuing Federal presence through trust responsibility to Tribes, with perceived blurring of what is Federal and what is state because of delegation of powers in numerous areas
- Delegation of Federal regulatory authority to California: what are implications for legal enforcement actions regarding environmental law?
- Tribal environmental standards may differ from state's
- Inherent difference between federal and state in definition of Environmental Justice which specifically includes, or excludes, socioeconomic effects
- Inherent difference between CEQA and NEPA, and effect of "CEQAizing" NEPA through delegation by federal agencies.

1. "Solid Waste Program Federal Trust Responsibility," U.S. Environmental Protection Agency Region IX, Solid and Hazardous Waste \Programs, at <http://www.epa.gov/region09/waste/solid/trust.htm> 2.
2. ~~"Questions and Answers About Public Law 280,"~~ by Carole Goldberg. Tribal Court Clearinghouse, at <http://www.tribal-institute.org/articles/Goldberg.htm>
3. "Working With Native American Communities," California Department of Transportation, Director's Policy No. 19, August 29, 2001.
4. "Legal Issues Affecting Native American Communities," p. 5, California Courts Access and Fairness Advisory Committee, at <http://www.courtinfo.ca.gov/programs/access/naiséuesrept.htm>