# JUSTICE BRANDEIS AND INDIAN COUNTRY: Lessons from the Tribal Environmental Laboratory

Elizabeth Ann Kronk Warner*

ABSTRACT

*Justice Brandeis first famously wrote of a system of federalism where states would serve as laboratories of regulatory experimentation, allowing other states and the federal government to benefit from successful regulatory experiments. Although likely beyond the contemplation of Brandeis, tribes, as separate sovereigns existing within the United States, are well-placed to experiment in new and interesting ways. In particular, given their unique connection to the land and the intensified threat of some modern environmental challenges, many tribes are already engaged in regulatory innovation related to environmental law. This is the first scholarly work to fully develop the idea of tribes as "laboratories" for examining environmental law, demonstrating that tribal experimentation can generate the same benefits typically ascribed to the system of federalism. This is also the first article to examine how tribes are already innovating in areas of environmental law outside of tribal codes. The article begins with an examination of federalism and its benefits, such as states as laboratories, typically attributed to the system of federalism. Having provided an introduction, the article then explains how federalism itself is not required to achieve the benefits associated with it, arguing that tribal regulatory experimentation can yield similar results. Next, the article establishes the modern-day need for environmental regulatory experimentation given the lack of innovation occurring at the federal level.*

---

* Associate Dean of Academic Affairs, Professor of Law and Director of the Tribal Law and Government Center at the University of Kansas School of Law. Professor Kronk Warner also serves as acting Chief Judge of the Sault Ste. Marie Tribe of Chippewa Indians Court of Appeals, and is an enrolled citizen of the same Tribe. I sincerely appreciate the help I received from my research assistants, Annette McDonough and Christopher Teters. Additionally, I thank Professors Chris Drahozal, Virginia Harper Ho, Laura Hines, Lou Mulligan, Uma Outka, Andrew Torrance, Melanie Wilson, and Lua Yuille for their helpful comments on a previous draft of this article. Any mistakes, however, are entirely my own fault. And, finally, I appreciate the generous summer financial support I received from the University of Kansas School of Law during the preparation of this article.

*And, finally, the article takes a deep look into forms of tribal environmental law related to the regulation of environmental pollution and climate change other than code provisions. Such an examination is particularly helpful given the potential for governments to use such legal tools to fill existing regulatory gaps and the ease with which innovations in this field can be diffused amongst other governments. Having considered these other forms of tribal environmental laws, the article then develops some initial thoughts of how tribes, the states and the federal government may benefit from innovations occurring within the tribal environmental laboratory. Tribal environmental law is particularly exciting given its ability to transcend federal and state environmental law. This section of the article then ends with a call for additional tribal environmental innovation within this area. Ultimately, the article concludes that, by enacting environmental laws to meet their unique tribal needs, many tribes are creating and innovating in the field under their unique powers as separate sovereigns within the United States.*

## INTRODUCTION

The concept of states as laboratories of legal experimentation is an idea long buoying the value of American federalism.[1] States, as units of government possessing inherent sovereignty, have the ability to test different regulatory structures, and, in return, other states and even the federal government may learn and benefit from the result. Historically, the discourse surrounding the value of such experimentation has focused on states as the governmental units doing the experimenting.[2] This article moves beyond this traditional narrative, arguing that tribes can serve (and are serving) as valuable laboratories of experimentation.[3] In fact, given the

1. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens chose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). Scholars have concluded that James Madison was the progenitor of Brandeis' famous statement. James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 911 (2004). I first mentioned the idea of tribes as effective "laboratories" for environmental legal experimentation in my article, *Tribes as Innovative Environmental "Laboratories,"* 86 U. COLO. L. REV. 789 (2015). This is the first article, however, to truly develop this idea.

2. *See infra* Section II.

3. One may wonder whether tribes are actually experimenting or rather enacting laws on an ad hoc basis to address environmental challenges facing their communities. There is evidence suggesting that true experimentation is occurring. For example, Section II.G.5 discusses the role intertribal organizations play within Indian country. As is demonstrated by

homogeneity of state governing structures,[4] the sometimes greater flexibility of tribal inherent sovereignty and increased incentive for tribal innovation, tribes may in some instances be even better placed than states to experiment with environmental laws in new and innovative ways.

This article focuses on experimentation within the field of environmental law, specifically the regulation of pollution and climate change. Although experimentation with environmental law at the federal level was quite robust 40 to 50 years ago, such experimentation has certainly lagged, and, even potentially halted in recent years.[5] Yet, the threats to the environment have not diminished in the recent decades.[6] Given the profound impacts of climate change and the trans-boundary nature of environmental pollution, finding effective solutions to these environmental challenges is of paramount importance today.

In focusing on environmental law, the article builds on my past articles that solely looked at tribal environmental code provisions,[7] or "hard law," by examining other forms of tribal environmental law, such as constitutional provisions, vision statements, customary law, tribal court decisions, regulations and intertribal organizations. Consideration of these

---

that discussion, it is clear that these organizations are developing templates of potential tribal environmental laws and regulations that some tribes are then taking and adapting to their own communities. These original templates are often based on existing tribal environmental law. This is certainly evidence of true experimentation. However, even if tribal actions are ad hoc, such regulatory innovation is still valuable as tribes are working to combat the same environmental challenges, such as environmental pollution and climate change, that other governments are combating. Accordingly, even if not done on a conscious level, considerations of areas where tribes are departing from other environmental laws is valuable.

4. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 922 (1994) ("There is one state (Nebraska) with a unicameral legislature, one state (Hawaii) with a unitary finance system, and one state (Minnesota) that refers to the Democratic and Republican Parties by funny names, but that is the limit of variation.").

5. ROBERT L. GLICKSMAN, ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 72 (Vicki Been et al. eds., 6th ed. 2011) (The rule has subsequently been finalized, notice was signed, and the rule was submitted to the federal register.). Admittedly, however, a new potential area of innovation for the federal government is in relation to the reduction of emissions of greenhouse gases. For example, on June 2, 2014, the EPA proposed a new rule that would cut carbon pollution from power plants. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 117 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

6. *See infra* Section III.

7. *See* Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental "Laboratories"*, 86 U. COLO. L. REV. 789 (2015) [hereinafter Warner, *Tribes as Innovative Environmental "Laboratories"*]; Elizabeth Ann Kronk Warner, *Examining Tribal Environmental Law*, 39 COLUM. J. ENVTL. L. 42 (2014) [hereinafter Warner, *Examining Tribal Environmental Law*].

other sources of law, some of them being examples of "soft law,"[8] is crucial to fully understanding tribal environmental law as such law is certainly not limited to code provisions. For example, considerations of innovations within soft environmental law is particularly beneficial, as this type of law both easily fills existing regulatory gaps and traverses different regulatory jurisdictions.[9]

As demonstrated by Section III, tribes are utilizing these other forms of law in exciting ways, and, therefore, such experimentation may prove helpful to other governments. Soft law also plays an incredibly important role in the development of an effective environmental regulatory scheme. Many governments are increasingly looking to options outside of the command-and-control regulatory scheme to address environmental pollution, meaning that experimentation outside of traditional regulations is particularly valuable. This discussion, therefore, completes my work on the types of tribal environmental law utilized by tribes, allowing for a robust discussion of the value of tribal environmental experimentation to emerge.

Given that regulatory gaps in federal law exist, there is a modern day need for laboratories of environmental regulatory experimentation to fill such gaps, especially as they relate to environmental pollution and climate change. Further, governments are increasingly moving away from traditional regulations, and, therefore, considerations of non-regulatory environmental law are particularly timely. The time is now for states and the federal government to turn to tribes and to learn from tribal environmental law how to address some of these modern day challenges. To demonstrate this, the article begins with a discussion of federalism, and, specifically, the idea of states as laboratories of experimentation. This first part of the article briefly describes the legal nature of states and tribes, and then delves into a discussion of the benefits of American federalism. This part concludes with some ideas on how tribes may generate equally the benefits of federalism typically ascribed to states. Next, the article explores the modern day need for experimentation within the field of environmental law, demonstrating that innovation in the field has substantially diminished within recent decades. Given the general lack of environmental innovation at the federal level, tribes are well placed to provide needed experimentation

8. See *infra* Section III for a discussion of what the term "soft law" refers to and how it is used in this article. Admittedly, not all types of law examined in this article are "soft" (e.g. constitutional law), but the term is used for descriptive efficiency.

9. *See generally* Daniel J. Fiorino, *Green Clubs: A New Tool for Government*, *in* VOLUNTARY PROGRAMS: A CLUB THEORY PERSPECTIVE 209 (Matthew Potoski & Aseem Prakash eds., 2009).

in this space. Finally, the article looks at types of tribal environmental law other than code provisions to identify areas where tribal environmental law may depart from state or federal environmental law.[10] This part concludes with some thoughts on trends that emerge from the tribal environmental law examined and calls for increased tribal environmental innovation.

## I. GENERATING THE BENEFITS OF FEDERALISM THROUGH TRIBAL EXPERIMENTATION

Before examining how tribes are experimenting with environmental law, it is helpful to begin with a discussion of why such experimentation is so important to the United States. This section demonstrates what role tribes can play in advancing the benefits of American federalism generally, and, one benefit, increased experimentation, in particular. Ultimately, the section shows that participation within the system of federalism is not necessary for the diffusion of tribal innovation to prove valuable. On the one hand, such an assertion may seem odd given tribes exist outside of federalism, as separate sovereigns within the United States.[11] Yet, as discussed below, diversity of tribal governments can allow for true experimentation. To explore the possibility that tribes may advance the benefits of federalism, this section begins with a concise introduction into the roles played by tribes and states within the federal structure. The section then briefly explores the origins of one benefit of federalism—increased experimentation within governmental "laboratories"—concluding with some thoughts on how tribes can advance the benefits of federalism in a manner similar to the states.

Ultimately, to obtain the benefits typically ascribed to federalism, it may not be the governmental structure itself which is required, but, rather, multiple jurisdictions experimenting to ameliorate the effects of a common challenge. Given the similarity between tribes and other governments within the United States, such as states and municipalities, tribal experimentation with environmental law is something that should no longer

---

10. The article focuses on non-code tribal environmental law because it builds on my previous research focusing on tribal environmental codes. As such the article demonstrates that tribal innovation is not limited to tribal environmental code provisions.

11. As Professor Matthew L.M. Fletcher explains, "Federalism is often in the minds of observers when analyzing tribal claims in light of state and local prerogatives, but federalism theories and precedents are often unhelpful in reaching useful outcomes." Matthew L.M. Fletcher, *Tribal Disruption and Federalism*, 76 MONT. L. REV. 97, 101 (2015) (citation omitted) [hereinafter Fletcher, *Tribal Disruption and Federalism*].

be overlooked. Having multiple actors available to work on regulatory solutions to the challenges presented in Section III increases the potential for experiments to emerge, which in turn increases the likelihood of successful experimentation. Tribal environmental experimentation therefore benefits all units of government within the United States by increasing the likelihood of successful environmental regulation.

### *A. Tribes and States: A Primer*

As sovereign governments pre-existing the formation of the United States of America,[12] tribes exist outside of the federal system that links states and the federal government. In fact, the relationship between tribes and the federal government differs from that between states and the federal government. Tribes generally possess exclusive authority to regulate their citizens and territory, subject to limitations imposed by federal law.[13] In certain circumstances, tribes also possess authority to regulate non-Indians.[14] The genesis of tribal governmental authority, however, lies not in federal delegations to tribes, but rather within inherent tribal sovereignty.[15]

---

12. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][a] (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN'S HANDBOOK] ("Most Indian tribes were independent, self-governing societies long before their contact with European nations, although the degree and kind of organization varied widely among them."). As evidence that the framers of the U.S. Constitution did not envision tribal governments as part of the federal structure, tribes and/or Indians are only mentioned in two places in the Constitution itself: 1) Article I, Section 2, Clause 3 states: "Representatives and direct Taxes shall be apportioned among the several States . . . excluding Indians not taxed . . . ."; and 2) Article I, Section 8 states: "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes."

13. *See, e.g.*, Fisher v. Dist. Ct. of Sixteenth Jud. Dist. of Mont., 424 U.S. 382, 383 (1976) (per curiam) (holding that the Tribe possessed jurisdiction over an adoption matter involving solely tribal citizens and residents of the Tribe's reservation); *Ex parte* Crow Dog, 109 U.S. 556, 561 (1883) (holding that absent a federal law to the contrary, the Tribe possessed the authority to apply criminal punishment within its territory); Worcester v. Georgia, 31 U.S. 515, 555 (1832) (holding that absent an explicit statement to the contrary, the laws of the state of Georgia did not apply within the Cherokee territory). Admittedly, over the centuries, numerous federal laws have been enacted to curtail tribal sovereignty. However, a complete discussion of such limitations is beyond the scope of this article. For our purposes, it is enough to acknowledge that tribal sovereignty persists absent federal limitation.

14. *See, e.g.*, Montana v. United States, 450 U.S. 544, 544–46 (1981) (holding that tribes may regulate non-Indians on non-Indian land located within tribal territory where the non-Indian in question has consented to regulation or when the non-Indian conduct threatens the health, safety, and welfare of the tribal community).

15. COHEN'S HANDBOOK, *supra* note 12 ("Indian tribes consistently have been recognized, first by the European nations, and later by the United States, as 'distinct, independent political

While states also possess inherent sovereignty, tribal inherent sovereignty has a different origin, and, perhaps more importantly to this discussion, is not constrained by the United States Constitution to the same extent that states are constrained.[16]

Despite the fact that tribes exist outside of the system of federalism established within the United States, this article argues that tribal governments can play a role similar to states in the development of effective environmental regulation, and as a result, produce the same benefits as states do within the federalist system.[17] Similar to tribes, states possess sovereign authority separate from federal delegations.[18] Over the centuries, scholars have lauded the fact that states possess powers separate and apart from the federal government. "The Framers [of the U.S. Constitution] believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective 'counterpoise' to the power of the Federal Government."[19] As Justice Frankfurter explained in *National League of Cities v. Usery*, the states are a "coordinate element in the system established by the Framers for governing our Federal Union."[20]

---

communities,' qualified to exercise power of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty") (citations omitted). Notably, in some instances, the federal government may delegate authority to tribes. As an example, the tribes as states provisions of the various federal environmental statutes, although recognizing tribal sovereignty, also delegate authority to tribes in such instances, as discussed below. However, tribal sovereignty pre-dates the formation of the federal government, and, accordingly, the ability of tribes to govern generally does not spring from federal authority but rather inherent tribal sovereignty.

16. Admittedly, tribal sovereignty is constrained by federal plenary power over tribes. United States v. Kagama, 118 U.S. 375, 379 (1886). However, unless either Congress or the federal courts have acted to limit tribal sovereignty, the presumption is that tribal sovereignty persists. COHEN'S HANDBOOK, *supra* note 12.

17. Or, alternatively, as developed below, even if one views tribes as more limited governments than states, tribal innovations still have the capacity to influence other governments.

18. U.S. CONST. amend. X (explaining that any powers not explicitly given to the federal government by the Constitution or Amendments are retained by the states).

19. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 571 (1985) (Powell, J., dissenting). Justice Powell also cites James Madison in *Federalist* No. 45 for the proposition that

> the powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation [sic], and foreign commerce . . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

*Id.* at 570–71 (citations omitted).

20. Nat'l League of Cities v. Usery, 426 U.S. 833, 849 (1976).

States therefore have a significant sphere of authority within the federal system and retain authority over issues of local concern;[21] "the autonomy of a State is an essential component of federalism."[22]

### *B. The Benefits of Federalism*

Since the Founding Fathers first established federalism through the Constitution, scholars have ascribed positive values and benefits to the governmental scheme.[23] For example, Justice O'Connor and legal scholars have explained that there are several advantages of federalism generally.[24] Federalism may increase public participation in government,[25] "reduc[e] the threat of tyrannical or oppressive government by dividing power among

---

21. *Garcia*, 469 U.S. at 582 (O'Connor, J., dissenting). Conversely, not only are state governments perhaps more responsive to local concerns, but the federal government may be insensitive to local concerns given factors such as the weakening of political parties at the local level and the rise of the national media. *Id.* at 565 n.9 (citations omitted).

22. *Id.* at 588.

23. This article does not delve into the dialogue surrounding whether these benefits of federalism are normatively justified. Rather assuming such normative judgment, the article moves forward to explore whether tribes can advance such benefits, even though tribes exist outside of the federal governing structure.

24. Gregory v. Ashcroft, 501 U.S. 452, 457 (1991); Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 756 (2004) [hereinafter Mendelson, Chevron *and Preemption*]; Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 709 (2008) [hereinafter Mendelson, *A Presumption Against Agency Preemption*]; Rubin & Feeley, *supra* note 4, at 903. *But cf.* Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform of 1995*, 45 U. KAN. L. REV. 1113, 1128, 1178 (1997) ("Indeed, the lack of a consensus about the precise values that federalism serves means that arguments based on it are particularly susceptible to opportunistic misuse by people pursuing unrelated agendas.").

25. Garrett, *supra* note 24, at 1129 ("Practically, only at the state and local levels can participation by most citizens consist of more than infrequently voting for representatives; indeed, given the size of most states and complexity of state bureaucracies, participation can often be most vibrant in cities and towns.") (citation omitted); Mendelson, *A Presumption Against Agency Preemption*, *supra* note 24, at 709 ("[F]ederalism, including a state's enactment of its own laws, also may stimulate citizen participation in self-governance, on the theory that it is easier to participate at a level of government closer to one's home.") (citation omitted). This argument has its roots in Madison's *Federalist* Nos. 44 and 46, as "[i]n Nos. 44 and 46, Madison had described how this checking function [related to federalism] would work through the states' mobilization of the people: States 'will be ever ready to mark the innovation, to sound the alarm to the people, and to exert their local influence in effecting a change of federal representatives.'" Liebman & Garrett, *supra* note 1, at 893.

various entities,"[26] ensure that government is more responsive to citizens,[27] and increase experimentation between the units of government.[28]

Moreover, scholars have argued for "dynamic federalism," recognizing that the states and federal government often possess overlapping regulatory authority, especially in the case of environmental regulation, and, that such overlapping authority is good.[29] In such a system, Professor Kirsten H. Engel envisions the states and federal government appearing like runners in a relay team, passing the baton of environmental regulation between them, until the optimum regulator crosses the finish line.[30] In this fashion, environmental regulation may start with one government but end with another under the federalism system. Professor Engel provides numerous examples of this phenomenon, such as the development of the federal Clean Air Act (CAA), which initially started as the California Clean Air Act in 1965.[31] She concludes that "[i]nteraction between the federal and state governments can lead either, or both, parties to adopt policy positions significantly different from the positions they would have adopted had they been regulating in a vacuum."[32] Similarly, both the federal government and

26. Garrett, *supra* note 24, at 1128–29; Mendelson, Chevron *and Preemption*, *supra* note 24, at 757; Mendelson, *A Presumption Against Agency Preemption*, *supra* note 24, at 709 ("[P]reserving a significant degree of autonomy for state governments divides power and can be seen as a part of the Framers' efforts to ensure that no single government institution accumulates too much authority") (citation omitted).

27. Mendelson, *A Presumption Against Agency Preemption*, *supra* note 24, at 709 ("[W]e may value the authority of states to respond to particular preferences held by their residents") (citation omitted); Deborah J. Merritt, *Federalism as Empowerment*, 47 FLA. L. REV. 541, 548 (1995) ("The Supreme Court also has praised state governments as more responsive than Congress to the needs of local citizens. This value of federalism includes two related, but different, benefits. First, the Court has suggested that states are smaller, more homogenous units than our nation, allowing state governments to purpose programs that are better tailored to the distinctive preferences of their citizens. Second, the relative accessibility of state and local government encourages citizens to participate in the governmental process, teaching the lessons of self rule.") (citations omitted).

28. *Gregory*, 501 U.S. at 457; Rubin & Feeley, *supra* note 4, at 924.

29. *See generally* Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 174–78 (2006). A complete discussion of whether dual federalism or dynamic federalism is preferable in the modern era is beyond the scope of this article. For a discussion of the benefits of dual federalism, see Richard B. Stewart, *Environmental Quality as a National Good in a Federal State*, 1997 U. CHI. LEGAL F. 199 (1997).

30. Engel, *supra* note 29, at 170.

31. *Id.*

32. *Id.* at 171.

tribes have overlapping regulatory authority when it comes to regulating the tribal environment.[33]

### *C. Laboratories of Experimentation*

Of the several benefits of federalism, this article focuses on the concept of states as "laboratories" that may experiment with regulations. Based on the results of these experiments, other state governments or the federal government will select the best outcomes.[34] This benefit of federalism is national in nature, as other governments potentially benefit from the experimentation.[35] Although he argued for a federal "veto" against unjust state actions,[36] the origins of this argument favoring federalism may be found in the ideals of founding father, James Madison. Madison expected that legislators would rely on local knowledge and state laws when drafting federal laws.[37] Justice Johnson in his opinion in *Anderson v. Dunn* was one of the first to connect the idea of governing to experimentation. He explained that:

> [t]he science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists of little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment.[38]

---

33. *See generally* Warner, *Tribes as Innovative Environmental "Laboratories"*, *supra* note 7, at 791.

34. Mendelson, *A Presumption Against Agency Preemption*, *supra* note 24, at 709 ("[S]tate policymaking experiments can be a useful source of information to other states and to the federal government."). This generally accepted benefit of federalism closely aligns with the benefits of dynamic federalism discussed by Professor Engel. Engel, *supra* note 29, at 177–84.

35. Mendelson, Chevron *and Preemption*, *supra* note 24, at 767 (arguing that the individual governments will benefit from the flexibility inherent in being a laboratory of governmental experimentation and that the federal government learns and therefore benefits from such experimentation).

36. *See generally* Liebman & Garrett, *supra* note 1, at 852 (explaining that "[r]aising up Madison the equal protection theorist and constitutional prognosticator means knocking down Madison the idol of New Federalism.").

37. *Id.* at 911. *See also* THE FEDERALIST NO. 56, at 275 (James Madison) (Terrence Ball, ed., 2003) ("The representatives of each State will not only bring with them a considerable knowledge of its laws, and a local knowledge of their respective districts, but will probably in all cases have been members, and may even at the very time be members, of the State legislature, where all the local information and interests of the State are assembled, and from whence they may easily be conveyed by a very few hands into the legislature of the United States."). *Federalist* No. 56 is often attributed to either James Madison or Alexander Hamilton.

38. Anderson v. Dunn, 19 U.S. 204, 226 (1821).

In 1932, in his dissent in *New State Ice Co. v. Liebmann*, Justice Brandeis famously elaborated on this idea of experiment explaining:

> There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs . . . . It is one of the happy incidents of the federal system that a single courageous state may, if its citizens chose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[39]

In 1985, Justice Blackmun built on Justice Brandeis' ideas explaining that:

> The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else . . . deems state involvement to be.[40]

In the same case, Justice Powell, in his dissenting opinion, explained that federal regulators are unlikely to understand local realities, and, therefore, federal statutes and regulations may be unresponsive to local needs.[41]

Given these limitations of federal knowledge and understanding, experimentation at the state level may be necessary to respond to the needs of the local citizenry. One modern scholar analogized experimentation in the federal system as being "akin to natural selection" where state experimentation will flourish if its citizenry agrees with such experimentation.[42] Further, in 1999 testimony before Congress, the head of the Council of State Governments stated that states play a role as

---

39. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Scholars have concluded that James Madison was the progenitor of Brandeis' famous statement. *See, e.g.*, Liebman & Garrett, *supra* note 1, at 911.

40. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985). Justice Blackmun goes on to cite Justice Black's concurring opinion in *Helvering v. Gerhardt*, where Justice Black stated that "[t]he genius of our government provides that, within the sphere of constitutional action, the people . . . have the power to determine as conditions demand, what services and functions the public welfare requires." *Id.* (quoting Helvering v. Gerhardt, 304 U.S. 405, 427 (1938) (Black, J., concurring)).

41. *Id.* at 577 (Powell, J., dissenting) ("My point is simply that members of the immense federal bureaucracy are not elected, know less about the services traditionally rendered by States and localities, and are inevitably less responsive to recipients of such services, than are state legislatures, city councils, boards of supervisors, and state and local commissions, boards and agencies. It is at these state and local levels . . . that 'democratic self-government' is best exemplified.").

42. Merritt, *supra* note 27, at 551.

"laboratories of democracy" and are sources of "innovation."[43] In Executive Order No. 13, 132, President Clinton even recognized that states play an important role as "laboratories of democracy," as states can experiment with different regulations and policies.[44] In sum, since the founding of the United States through the modern era, jurists, politicians and scholars have all recognized the importance of regulatory experimentation to the system of federalism.

Related closely to this idea of states as "laboratories" for regulatory "experimentation" is the idea that overlapping state and federal regulatory regimes can result in increased competition between regulators.[45] This theory posits that state and federal regulators will "compete" with one another to develop the best solution to a regulatory problem.[46] Moreover, states and tribes may also compete with each other under certain circumstances.[47] Professor Mendelson proposes the example of climate change as a situation where such competition may be emerging, explaining that "the actions of states of climate change, where the federal government has lagged, have not only helped inform national action, but also have prompted a louder call by the public for such action."[48]

### *D. Tribes' Ability to Act like States in Securing the Benefits of Federalism*

Although states and tribes are different in some regards, such as in the origins of their governing authority and their relationships with the federal

43. *Federalism: Hearing Before the Comm. on Governmental Affairs*, 106th Cong. 4 (199) (statement of Tommy G. Thompson, Governor, State of Wisconsin, and President, Council of State Governments) [hereinafter *Federalism Hearing*] ("For when granted the power and flexibility, states and local governments have proven to be the innovators of the ideas and reforms that are improving the lives of all Americans. Throughout our history, state and local governments have acted as the laboratories of democracy.").

44. Federalism, Exec. Order No. 13132 of Aug. 4, 1999, 64 Fed. Reg. 153 (Aug. 10, 1999).

45. Mendelson, *A Presumption Against Agency Preemption*, *supra* note 24, at 710 ("[A] number of scholars argue that state regulators serve as participants in a national dialogue on appropriate policy, spawning a sort of competition between federal and state governments. By drawing attention to problems missed by national regulators and by choosing solutions different from those of national regulators, state regulators can prompt the public to hold the national government more accountable for its chosen solutions or for inaction.") (citation omitted).

46. *Id.* at 715.

47. *See* Fletcher, *Tribal Disruption and Federalism*, *supra* note 11, at 110–22 (discussing examples where states and tribes were in conflict with each other, but that where such conflict eventually yielded positive results).

48. Mendelson, *A Presumption Against Agency Preemption*, *supra* note 24, at 710.

government, similarities do exist. Some similarities include defined territories, general regulatory authority over citizens and governing power that exists outside of the federal government.[49] Notably, some scholars have argued that, although states fulfill an important role in the federal governing structure, "there is no policy reason why other subdivisions of the nation could not fulfill this function [role within federal structure]."[50] Now, admittedly, tribes are not "subdivisions of the nation" as they are separate sovereigns existing apart from the United States of America, as explained above.[51] But, given the similarity in governmental function between states and tribes, the possibility exists that tribes may serve, within the American governmental regime, functions similar to states in terms of the benefits associated with federalism. Further, empowering multiple sovereigns to solve the same problem has value as it creates "alternative actors to solve important problems."[52] Such empowerment also increases the potential for experiments to emerge.[53] In this way, this article argues that tribes, like states, may serve and are serving as laboratories for regulatory experimentation, just as states do.

Alternatively, even if one were to reject the idea that tribes can function in a manner similar to states for purposes of reaping the benefits of experimentation, tribal experimentation is still valuable. Even if tribes are seen as being more akin to local governments or municipalities,[54] the benefits of their legal experimentation cannot be ignored. First, even laws enacted on a smaller, regional scale are valuable, as similarly situated communities can learn from the tribe's successes and failures. Also, as described below in Section III, the development of soft law can prove incredibly beneficial, and environmental regulators are increasingly looking for innovation in this area. Tribes are certainly developing or have the capacity to develop new forms of soft law, making such developments

---

49. For a general discussion of tribal authority, see COHEN'S HANDBOOK, *supra* note 12, at § 4.

50. Rubin & Feeley, *supra* note 4, at 908–09.

51. In fact, Edward L. Rubin and Malcolm Feeley assert that federalism is not necessarily required to accomplish the goals or benefits of the regime—rather, only a "decentralized regime" is necessary. *Id.* at 909. Accordingly, the fact that tribes are outside of the system of federalism utilized within the United States is not an obstacle to their serving as effective laboratories of regulatory experimentation.

52. Merritt, *supra* note 27, at 542 (quoting Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 1, 40 (1995)).

53. *Id.* at 551.

54. Given most tribes are geographically smaller than states and because of the application of federal plenary power, as discussed above, it is not uncommon for them to be compared to local governments rather than states themselves.

significant. And, finally, norms originally developed on a local scale have the capacity to become binding nationwide. Take for example, smoking bans. Banning smoking in public initially started as a result of local efforts but has become a consistent nationwide phenomenon.[55] Accordingly, regardless of whether one views tribes as being more similar to states or local units of government, their environmental legal innovations are worthy of examination.

Furthermore, the size of the units of government is likely not as important in promoting the benefit of experimentation as is the need for multiple jurisdictions working toward a common goal. Experimentation, after all, is truly only beneficial if there is an agreed upon goal.[56] Assuming such a goal exists, governmental units can adapt to local conditions, in other words—experiment, producing the best results in that particular location.[57] Ultimately, if there is one overarching policy goal, such as the reduction of environmental pollution, rulemaking by several different units of government may potentially yield the benefits typically associated with federalism, whether those governments are part of the federal structure or not.[58]

If this is true—that federalism itself is not necessary to achieve the benefits of experimentation and other benefits—then the fact that tribes exist outside of the federal structure becomes inconsequential. To achieve the benefits of experimentation, it is enough that tribes are empowered to experiment and are working toward a goal in common with the states and the federal government. For purposes of this article, such a goal exists, as the states, federal government and tribes are all working toward the reduction of environmental pollution. Moreover, governments around the world, including the federal government and states as discussed in Section III, are increasingly interested in soft law options to fill regulatory gaps—meaning that the tribal experimentation discussed in Section III is not inconsequential to other governments interested in the same type of legal development.

Additionally, overlapping regulation assists as well, given such overlapping regulation has the potential to create competition between

---

55. COMM. ON SECONDHAND SMOKE EXPOSURE AND ACUTE CORONARY EVENTS, *The Background of Smoking Bans*, *in* SECONDHAND SMOKE EXPOSURE AND CARDIOVASCULAR EFFECTS: MAKING SENSE OF THE EVIDENCE 109, 110 (2010).

56. Rubin & Feeley, *supra* note 4, at 924.

57. *Id.* at 912–13.

58. *Id.* at 914. Furthermore, these authors go on to argue that the other benefits typically associated with federalism, such as public participation, do not uniquely require federalism, but rather can also be achieved through decentralization. *Id.* at 915–24.

regulators.[59] Competition, in turn, has the potential to yield normatively better governmental regulation. Ultimately, "[a]bsent constitutional changes that would lock in a specific allocation of authority, broad, overlapping authority between levels of government may be essential to prompting regulatory activity at the preferred level of government."[60] As summarized at the beginning of Section III and in my other articles,[61] in the field of environmental law, federal and tribal regulations have the potential to overlap as several federal environmental statutes, such as the CAA and Clean Water Act (CWA) apply in Indian country. Such overlapping regulation in turn leads to competition between federal and tribal regulators.

In addition to promoting the "traditional" benefits of federalism, such as increased experimentation, there are several benefits to overlapping jurisdiction itself, such as finding the optimal jurisdiction for regulation, creating a regulatory safety net, allowing regulatory testing, innovation and refinement and avoiding inconclusive jurisdictional line drawing by courts.[62] The first three of these benefits are equally applicable to the relationship between the federal government and tribal governments in terms of environmental regulation.

On the first point, that of optimal jurisdictions, it may be that the federal government will not act until other governments have acted, such as tribal governments. An example of this may be the need to protect cultural resources. As I demonstrated previously, tribes have largely acted to protect cultural resources from environmental contamination, but the federal government has yet to incorporate similar provisions into federal law,[63] despite the fact that there exists a federal desire to protect cultural resources.[64] With increasing tribal environmental regulations designed to protect cultural resources, the federal government may ultimately feel pressured to adopt similar regulations.

---

59. Mendelson, *A Presumption Against Agency Preemption*, *supra* note 24, at 715 ("For example, recent scholars writing on federalism point out the value of having overlapping state and federal regulatory regimes. There, the benefit claimed for federalism includes the overall improvement in policy that can come from state and federal regulators 'competitively' attempting to address a particular problem.") (citation omitted).

60. Engel, *supra* note 29, at 161.

61. *See generally* Warner, *Tribes as Innovative Environmental "Laboratories"*, *supra* note 7, at 791–96.

62. Engel, *supra* note 29, at 177–84.

63. *See generally* Warner, *Tribes as Innovative Environmental "Laboratories"*, *supra* note 7, at 796.

64. *See infra* Section III.C (discussing the National Environmental Policy Act and National Historical Preservation Act).

In terms of a regulatory safety net, Professor Erwin Chemerinsky explained that "[t]he genius in having multiple levels of government is that if one fails to act, another can step in to solve the problem."[65] He goes on to give an environmental example—that "[i]f one level of government fails to clean up nuclear waste, another is there to make sure that it is done."[66] Historically, the federal government served as a "safety net" for states that declined to regulate the environment, regulating in the 1970s through the 1990s when many states had failed to effectively protect the environment.[67] Today, however, the federal government arguably has a "deregulatory and passive approach toward environmental regulation," prompting the need for increased state, tribal and local government leadership in the field of environmental regulation.[68] "The potential for pendulum swings in environmental protectiveness between the federal and the state government highlights the importance of having a compound system of government and calls into question the wisdom of more static allocations of power between the states and the federal government."[69]

Finally, such governing systems potentially promote regulatory testing, innovation and refinement. "Regulatory innovation is especially important with respect to environmental law where the actual object of regulation—the environment—is continually changing, in response to myriad factors, including the effects of regulation itself."[70] When regulating the environment, adaptation and flexibility are crucial to effective regulation. Accordingly, this benefit of dynamic federalism is very much in line with the historical concept of states as laboratories of experimentation as discussed above.[71]

In addition to decentralization and overlapping regulatory regimes, for governmental units to be properly empowered to address the social problems at issue, in this case environmental problems, they must have a

65. Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69, 74 (2005).
66. *Id.*
67. Engel, *supra* note 29, at 179–80.
68. *Id.* at 180.
69. *Id.* at 181.
70. *Id.* at 182 (citation omitted).
71. *Id.*

least a degree of autonomy.[72] As separate sovereign nations from the United States, tribes certainly are autonomous.[73]

Accordingly, for purposes of this article, it is likely that tribal experimentation with environmental regulation can prove just as valuable to state experimentation, given it is not federalism itself that is required to achieve the benefits of such experimentation. Rather, the benefits traditionally associated with federalism, including increased experimentation which is the focus of this article, may be achieved through multiple units of government properly empowered to work toward a common goal. In terms of regulating the environment, tribes are units of government separate from the federal government, yet maintain overlapping regulation with the federal government in the area of tribal environmental law,[74] and, as discussed at the beginning of this section, tribes possess inherent sovereignty separate from the United States. Partnerships between tribes, the federal government and states may ultimately prove fruitful in developing solutions to these modern day environmental challenges.[75]

Although not speaking directly to the helpfulness of tribal environmental laws, EPA Administrator McCarthy, when discussing problems of environmental pollution and climate change, which this article focuses on below, explained that "[o]nly through continued partnership with tribes can we truly achieve a cleaner, healthier and more prosperous America today and in future generations."[76] In sum, the federal government, states, and local governments can benefit from tribal environmental regulatory experimentation just as they would under federalism.

### *E. Tribes as States under Federal Environmental Law*

The proposition that tribes can function in a manner similar to states for purposes of valuable experimentation is buttressed by the fact that, in the

---

72. Merritt, *supra* note 27, at 555.

73. Again, I acknowledge that tribal governments are potentially limited by federal plenary authority. However, unless Congress or the federal courts have limited tribal sovereignty, tribes are free to truly innovate in the area of tribal environmental law.

74. *See generally* Warner, *Tribes as Innovative Environmental "Laboratories"*, *supra* note 7, at 791–96.

75. *See e.g.*, *Federalism Hearing*, *supra* note 43, at 5 ("[A]s we enter a new millennium, we must reinvigorate the partnerships among the federal, state and local governments to ensure the American people are the benefactors of a strong, united effort to address and solve the problems that face our great country.").

76. Memorandum from Gina McCarthy, EPA Administrator, to all EPA employees (Jan. 9, 2014), http://www.lowersioux.com/newsletters/April%20Newsletter%202014.pdf.

environmental arena, the federal government already treats tribes like states. In the environmental context, the federal government regularly uses cooperative federalism to accomplish its environmental regulatory goals.[77] Under this system, the federal government, often through the Environmental Protection Agency (EPA), will authorize the states to administer federal programs or enforce state laws in lieu of federal requirements.[78] "EPA has rarely, if ever, revoked a delegation of responsibility to a state government . . . . In part this is because the agency depends on state governments to carry the burden of administering the air and water pollution and solid waste disposal permitting programs . . . ."[79]

Tribes may participate in a manner similar to states through the tribes as states (TAS) provisions that have been included in several of the major federal environmental statues,[80] such as the CAA,[81] CWA,[82] Safe Drinking Water act (SDWA),[83] Toxic Substances Control Act (TSCA),[84] and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[85] TAS status refers to the ability of EPA to "treat eligible federally-recognized Indian tribes in a similar manner as a state for implementing and managing certain environmental programs."[86] Even if the statute does not specifically include TAS provisions, it may include language suggesting that the tribe should be treated like a state.[87] If a federal environmental statute does not specifically

77. ROBERT V. PERCIVAL, ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 116 (6th ed. 2009).

78. Mendelson, Chevron *and Preemption*, *supra* note 24, at 775; PERCIVAL ET AL., *supra* note 77, at 116 ("Under this model, federal agencies establish national environmental standards and states may opt to assume responsibility for administering them or to leave implementation to federal authorities . . . . Statutes requiring the establishment of minimum federal standards have long been thought to be necessary to prevent regulatory competition among states from undermining environmental quality").

79. Mendelson, Chevron *and Preemption*, *supra* note 24, at 775.

80. For a full discussion of the tribal role under federal environmental statutes, see Warner, *Tribes as Innovative Environmental "Laboratories"*, *supra* note 7; Warner, *Examining Tribal Environmental Law*, *supra* note 7.

81. 42 U.S.C. §§ 7401–7431 (1990).

82. 33 U.S.C. §§ 1251–1274 (1987).

83. 42 U.S.C. § 300f (1996).

84. 15 U.S.C. §§ 2601–2629 (1986).

85. 7 U.S.C. § 136 (1996).

86. *Tribal PWSS Program Grants Fact Sheet*, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/grants_funding/pws/allotments_tribal_fs.cfm (last visited Nov. 13, 2015).

87. COHEN'S HANDBOOK, *supra* note 12, at § 10.02[2].

speak to the role of tribes, the EPA may determine whether tribes may be treated similar to states under the statute.[88]

The fact that tribes are already being treated like states under some federal environmental statutes supports the argument above that tribes function in ways like states. Moreover, this reality also supports the assertion that, because of their ability to function like states, tribal environmental regulatory experimentation may be at least as valuable as state regulatory experimentation.

### *F. Increased Value of Tribal Experimentation*

Furthermore, not only does tribal regulatory experimentation have the potential to be as valuable as any experimentation under federalism—but the potential exists for tribal experimentation to be even more robust than experimentation at the state or federal level. First, greater diversity exists between tribal governmental structures than between state governments. As Rubin and Feeley point out, the political structure of most states is nearly identical.[89] "There is one state (Nebraska) with a unicameral legislature, one state (Hawaii) with a unitary finance system, and one state (Minnesota) that refers to the Democratic and Republican Parties by funny names, but that is the limit of variation."[90] In comparison, the political structures of tribal governments can vary significantly, from theocracies to systems utilizing three branches of government, similar to the federal system.[91] Unlike the United States, which is "a heavily homogenized culture with high levels of normative consensus,"[92] real variety exists within tribal political structures. Accordingly, tribes not only may function in a way similar to states when evaluating the benefits of federalism, but, given the heterogeneity of tribal political structures, tribes may be able to experiment with regulation in new and exciting ways unfathomable to state administrators.

Moreover, tribes may be more motivated to innovate and experiment with tribal environmental law given factors potentially rousing tribes that do not have the same impact on states. Although certainly not true in every

88. For example, although both the Emergency Planning and Community Right-to-Know Act and lead-based paint program under the Toxic Substance Control Act are silent as to how tribes are to be treated, the EPA treats tribes as states under both programs. *Id.*

89. Rubin & Feeley, *supra* note 4.

90. *Id.*

91. COHEN'S HANDBOOK, *supra* note 12, at § 4.04.

92. Rubin & Feeley, *supra* note 4.

instance,[93] many tribes and individual Indians possess a strong connection to land and the environment. First, many tribes may have a strong legal connection to the land they inhabit. For example, the federal government holds a significant portion of tribal land in trust for tribal communities.[94] For land that is held in trust, the federal government owns fee simple, but the tribes have the right of beneficial use.[95] The majority of federal Indian law often turns on the legal status of the land at issue.[96] Accordingly, if a tribe were ever to leave land with such special legal status, the tribe would also lose certain legal rights based on the status of the land. Similarly, individual tribal governmental officials and tribal members may have very close connections to the land. As Professor Matthew L.M. Fletcher explains, "Many Indian people stay where they are because their relatives are buried on their lands, and they want the same for themselves. Not only are their relatives buried on these lands, but places of worship and ceremony are there as well."[97]

This legal connection to a singularly defined piece of land becomes important when considering the environmental challenges explored below, especially climate change. For example, in the Arctic, climate change is changing the environment that Arctic indigenous communities have relied on for centuries.[98] However, because of their legal connection to the land,

93. At the time of writing, there are over 566 federally recognized tribes within the United States. Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 79 Fed. Reg. 4748-02 (Jan. 29, 2014). *But c.f.* Vincent Schilling, *DOI Issues Determination: Pamunkey Becomes No. 567; First Federally Recognized Tribe in VA*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 2, 2015), http://indiancountrytodaymedianetwork.com/2015/07/02/doi-issues-determination-pamunkey-becomes-no-567-first-federally-recognized-tribe-va (explaining that, although the Tribe has not yet been added to the federal register list, the Pamunkey Indian Tribe was recognized by the BIA, making it the 567 federally recognized tribe). Given every tribe constitutes a separate and distinct government with its own history and culture, one should avoid generalizing a common Indian experience.

94. COHEN'S HANDBOOK, *supra* note 12, at § 3.04.

95. Johnson v. M'Intosh, 21 U.S. 543, 603 (1823).

96. *See generally* COHEN'S HANDBOOK, *supra* note 12.

97. Fletcher, *Tribal Disruption and Federalism*, *supra* note 11, at 101.

98. Daniel Cordalis & Dean B. Suagee, *The Effects of Climate Change on American Indian and Alaska Native Tribes*, 22 NAT. RESOURCES & ENVTL. 45, 47 (2008) ("Alaska may be experiencing the impacts of global warming more than any other place on Earth, and Alaska Native tribes are among the first American populations to feel the effects of global climate change. Erosion and flooding affect 86 percent of Alaska Native villages to some extent, with the greatest effects felt along the coast.") (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-142, ALASKA VILLAGES: MOST ARE AFFECTED BY FLOODING AND EROSION, BUT FEW QUALIFY FOR FEDERAL ASSISTANCE (2003)); Mark Nuttall et al., *Hunting, Herding, Fishing,*

these indigenous communities cannot relocate to follow the migrating animals or changing weather without risking a loss of their legal rights tied to the land currently occupied.

In addition to this legal connection to the land, many tribes also possess spiritual or cultural connections to the land. Land "is the source of spiritual origins and sustaining myth which in turn provides a landscape of cultural and emotional meaning. The land often determines the values of the human landscape."[99] As the Onondaga Nation explains, "[t]he people are one with the land, and consider themselves stewards of it."[100] Beyond the tribes, many individual Indians possess a spiritual connection with land and the environment.[101] Such individuals may "continue to have a deep relationship with ancestral homelands for sustenance, religious communion and comfort, and to maintain the strength of personal and interfamiliar identities. Through language, songs, and ceremonies, tribal people continue to honor sacred springs, ancestral burial places, and other places where ancestral communities remain alive."[102] Conversely, states, lacking in similar connections to the land and environment, may be less likely to experiment.[103]

In sum, federalism itself is not necessarily required to reap the benefits, such as increased experimentation, often ascribed to it. More likely, it is enough that multiple, autonomous governments are working toward a common goal for the benefits of federalism to occur, and tribal governments fit within these parameters. Tribes are motivated to experiment in ways to

---

*and Gathering: Indigenous Peoples and Renewable Resource Use in the Arctic*, *in* ARCTIC CLIMATE IMPACT ASSESSMENT (2006).

99. Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 250 (1989).

100. *Stewards of the Land*, ONONDAGA NATION, http://www.onondaganation.org/land-rights/stewards-of-the-land/ (last visited Nov. 13, 2015).

101. *Id.* "American Indian tribal religions . . . are located 'spatially,' often around the natural features of a sacred universe. Thus, while indigenous people often do not care when the particular event of significance in their religious tradition occurred, they care very much about where it occurred." Rebecca Tsosie, *Tribal Environmental Law in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 282–83 (1996).

102. Mary Christina Wood & Zachary Welcker, *Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement*, 32 HARV. ENVTL. L. REV. 373, 381 (2008).

103. Rubin & Feeley, *supra* note 4, at 925. ("Experiments are likely to be public goods; once produced, their products are available to all states regardless of each state's investment. As a result, individual states will have no incentive to invest in experiments that involve any substantive or political risk, but will prefer to wait for other states to generate them; this will, of course, produce relatively few experiments.").

best protect their environments, and, for a variety of reasons, they may in fact be better placed than states or the federal government to truly experiment in novel ways with regard to environmental regulation. The tribal environmental laboratory is therefore just as valuable within the United States as state or federal experimentation.

## II. THE MODERN-DAY NECESSITY OF ENVIRONMENTAL EXPERIMENTATION

Having established that tribal environmental law experimentation is equally valuable (if not perhaps more valuable) than that of states and local government, it is helpful to now explore why such experimentation is necessary in the modern era. Despite significant progress in reducing environmental pollution over the last 50 years, significant challenges persist, and new obstacles, such as climate change, have emerged as severe threats to the environment. In order to establish the continuing need for experimentation in the field of environmental law, this section briefly reviews the status of federal environmental law, showing that the federal government is currently stalled in its regulation of the environment and, certainly, in terms of innovative new environmental laws. The section then goes on to highlight some of the existing environmental threats, such as air and water pollution and climate change, threats that tribes are actively combating with their tribal environmental laws. The section ultimately demonstrates that continued environmental regulatory experimentation is necessary to combat these modern environmental stressors.

The period between 1969 and 1980 is often referred to as the environmental decade; it was a time of tremendous innovation in the field of environmental law.[104] During the environmental decade, the federal government was extremely active in regulating the environment, as it passed numerous environmental statutes during the time period, such as the CWA, CAA and National Environmental Policy Act (NEPA).[105] Given the federal government had previously largely deferred to states in terms of regulating the environment, the environmental decade was certainly a time of intense experimentation with environmental law.

---

104. GLICKSMAN ET AL., *supra* note 5, at 71; PERCIVAL ET AL., *supra* note 77, at 1 ("Since the late 1960's, spectacular growth in public concern for the environment has had a profound impact on the development of American law. During this period, U.S. environmental law has grown from a sparse set of common law precedents and local ordinances to encompass a vast body of state and federal legislation").

105. GLICKSMAN ET AL., *supra* note 5, at 71.

Since 1988, however, "there has been little innovation in environmental programs," especially at the federal level.[106] Congress has only truly innovated in a few areas since the late 1980s; some examples include the CAA amendments of the 1990s and hazardous waste and oil spill laws.[107] Many scholars have speculated that the reason for this federal inaction is political partisanship within Congress.[108] In addition to the malaise at the federal level domestically, some scholars have also argued that there has been little development and innovation in terms of regulating environmental pollution and climate change at the international level.[109]

In addition to a lack of federal innovation, many existing federal environmental regulations are not properly designed to handle the nuanced environmental challenges of the current era, given the segmented approach of federal environmental laws.[110] The approach is segmented because, instead of recognizing the interconnected nature of the environment, federal environmental statutes tend to focus on one resource, such as air or water, or one source of contamination, such as solid waste, rather than recognizing the interconnected nature of these elements. As an example of the interconnected nature, pollutants released into the air may ultimately be deposited in water. As a result, "[m]ulti-media, multi-jurisdiction problems strain the limits of the existing statutes" because the federal statutes tend to

106. *Id.* at 72 ("We continue to live off the intellectual capital of the active first 15 years of the modern environmental movement."). *But cf.* EPA, *Clean Power Plan for Existing Power Plants*, http://www2.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants (last visited Oct. 16, 2015).

107. GLICKSMAN ET AL., *supra* note 5, at 72.

108. *Id.* ("Congress has intervened in many specific controversies, but has done little more than reauthorize and make minor adjustments to the main federal laws. A partisan logjam in Congress continues to thwart efforts to amend this nation's environmental laws."); PERCIVAL ET AL., *supra* note 77, at 7 ("Environmental Policy has become a much more partisan political issue than it was in the 1970s, when the major environmental laws passed Congress with wide bipartisan support."); JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 12 (3d ed. 2010) ("Growing partisanship over environmental issues, however, slowed the pace of new federal legislation in the late 1990s and the first years of the 20th century. The result has been legislative stagnation.").

109. *Id.* at 73 ("The major international initiatives centered on the implementation of the 1992 Rio Biodiversity Convention and on finding ways for nations to share the burden of rolling back greenhouse gas emissions to implement the United Nations Framework Convention on Climate Change, but little tangible progress has been made in implementing them since the 1992 Rio Summit. . . . Similarly, a Copenhagen summit held in 2009 to create a new international framework to address climate change, which would have largely supplanted the earlier Kyoto Accord, ended in disarray, with little more than an informal commitment of the world's largest polluters to take steps to reduce emissions of greenhouse gases.").

110. ROBIN KUNDIS CRAIG, ENVIRONMENTAL LAW IN CONTEXT 29 (2d ed. 2005).

focus on only one resource.[111] Accordingly, not only is the federal government failing to innovate in the area of environmental law, but the existing environmental statutory structure may be ill-positioned to address many of the modern environmental challenges.

Despite the fact that the federal government took an active role in regulating the environment during the environmental decade and has had success with those regulations, environmental problems and contamination persist, which may be a result of the current federal stalemate and segmented approach to federal environmental laws. Such challenging contemporary environmental problems include, "climate change and associated greenhouse gases, environmental inequities, ongoing struggles to clean America's many areas plagued by degraded rivers and substandard air quality, as well as widespread failure to enforce existing laws. . . ."[112] As early as 1987, the federal EPA established a laundry list of "unfinished business" in relation to regulating the environment, recognizing that the environmental regulatory structure put in place during the environmental decade was failing to address all of the environmental problems plaguing the country.[113] In relation to the focus of this article, the 1987 list of unfinished business includes: direct and indirect discharges of point sources directly into water systems, nonpoint source discharge into water systems, criteria air pollutants, hazardous air pollutants, other air pollutants, drinking water contamination, and the greenhouse effect.[114] In short, air and water pollution continue to plague the country, and the United States is increasingly threatened by the impacts of climate change.

As explained in more detail below,[115] this article focuses on tribal environmental laws related to environmental pollution and climate change. As demonstrated by the foregoing discussion, the emission of pollution into natural resources, such as air and water continues to be a problem in the United States. In fact, the problem of water pollution is so significant that the Natural Resources Defense Council (NRDC) cautions that "we are heading towards a water crisis," which is due in large part to polluted water and the impacts of climate change.[116] The NRDC goes on to explain that "[d]irty water is the world's biggest health risk, and continues to threaten

111. *Id.*

112. GLICKSMAN ET AL., *supra* note 5, at 76.

113. PERCIVAL ET AL., *supra* note 77, at 6 (citing EPA, UNFINISHED BUSINESS (1987)).

114. *Id.*

115. *See infra* Section III.A (discussing non-code tribal environmental law and climate change adaptation plans).

116. *Water*, NAT. RES. DEF. COUNCIL, http://www.nrdc.org/water/ (last visited Oct. 14, 2015).

both quality of life and public health in the United States."[117] In the United States, water has a tendency to become polluted one of two ways – either through pollution picked up when water runs off of surfaces, such as roads, roofs or soil, or through discharges into the water body itself.[118]

The EPA agrees with the NRDC that waters of the United States continue to be polluted. The EPA keeps a list of all of the impaired waterways in the country. "Impaired waters" are "waters that are too polluted or otherwise degraded to meet the water quality standards set by states, territories, or authorized tribes."[119] Overall, the EPA estimates that approximately 42,709 waters in the United States are impaired.[120] Every state has at least 35 impaired water bodies, and Pennsylvania has the most at approximately 6,957 impaired water bodies.[121] One of the most significant contributions to water pollution is nonpoint source pollution.[122] Nonpoint source pollution is water pollution that does not fall under the definition of "point source" pollution under section 502(14) of the CWA.[123] Accordingly, nonpoint source water pollution, a significant if not primary contributor to the existing water pollution problems of the day, is largely not regulated under the CWA. Given the modern realities, this regulatory vacuum creates a need for increased environmental legal experimentation to address this ongoing harm. Given this vacuum, states and local governments are indeed experimenting with environmental law, developing "creative local and regional ad hoc environmental conservation and ecosystem restoration experiments."[124]

Water pollution, however, is not the only significant environmental harm threatening the United States. Some scholars argue that climate change is

---

117. *Id.*

118. *Id.*

119. *Impaired Waters and Total Maximum Daily Loads*, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/index.cfm (last visited Oct. 14, 2015).

120. *Impaired Waters Listed by States*, U.S. ENVTL. PROT. AGENCY, http://iaspub.epa.gov/waters10/attains_nation_cy.control?p_report_type=T (last visited Oct. 14, 2015).

121. *Id.*

122. *What is Nonpoint Source Pollution?*, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/polwaste/nps/whatis.cfm (last visited Oct. 14, 2015) ("States report that nonpoint source pollution is the leading remaining cause of water quality problems.").

123. *Id.* The Clean Water Act defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture."

124. GLICKSMAN ET AL., *supra* note 5, at 72.

the largest environmental threat facing the modern world.[125] The federal government has generally struggled to effectively regulate the causes of climate change, as the phenomenon presents significant regulatory challenges to the existing federal structure.[126] As mentioned above, the existing federal environmental regulatory structure is segmented and ill-equipped to deal with multi-media and jurisdictional problems. Climate change particularly stresses these weaknesses as the greenhouse gas emissions contributing to climate change may be emitted anywhere in the world. As a result of the limited federal environmental scheme, the federal government lags far behind state, tribal and local governments.[127] Because the federal government has failed to take action on climate change for so long, the states, tribes and local governments have taken the lead in climate change-related regulation.[128]

In fact, states are already amply engaged in experimenting with mitigation and adaptation policies to address the impacts of climate change. For example, in the northeast, seven states initially formed the Regional Greenhouse Gas Initiative in an effort to combat carbon dioxide emissions from power plants.[129] At one point, California attempted to regulate the greenhouse gas emissions of cars.[130] And, as discussed below,[131] several tribes have adopted adaptation plans enabling them to increase their resiliency in the face of climate change. Given that both tribes and states are experimenting with climate change adaptation planning, this is fertile ground for a laboratories of experimentation to emerge.

---

125. CRAIG, *supra* note 110, at 29.

126. *Id.* (explaining that such problems include how agencies evaluate the environmental effects of their actions and procedural challenges for citizens looking to challenge actions).

127. Mendelson, *A Presumption Against Agency Preemption*, *supra* note 24, at 709.

128. Engel, *supra* note 29, at 160; GLICKSMAN ET AL., *supra* note 5, at 72 ("In dealing with the risks of greenhouse gases and climate change, several states have taken the lead.").

129. Mendelson, *A Presumption Against Agency Preemption*, *supra* note 24, at 709 (citing Lucy Kafanov, *Climate: Deluge of Comments Delays Release of RGGI Rule*, GREENWIRE, July 24, 2006). The states involved were Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York, and Vermont.

130. *Id.* (citing Dan Berman, *Supreme Court "Pre-Emption" Cases Cast Shadow over Enviro Regs*, GREENWIRE, Oct. 5, 2007). However, Professor Mendelson goes on to explain that "the Environmental Protection Agency denied California the required waiver for its motor vehicle greenhouse gas emissions standards under the Clean Air Act." *Id.* at n. 76 (citing California State Motor Vehicle Pollution Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156-01 (Envtl. Prot. Agency Mar. 6, 2008)).

131. *See infra* Section III.B (discussing tribal adaptation plans).

## III. TRIBAL ENVIRONMENTAL INNOVATIONS

Given the value of tribal environmental experimentation and the ongoing need for such experimentation in light of federal inaction and continuing environmental challenges, this section of the article looks at how tribes are actually innovating in the field of environmental law. For purposes of this section, a tribal innovation is something that is new or departs significantly from its federal counterpart.

The discussion below builds on my previous work in two ways. First, my past articles examining tribal environmental law focused on tribes located within the states of Arizona, Montana, New York and Oklahoma.[132] There are: 21 federally recognized tribal nations/reservations located within Arizona;[133] 7 federally recognized tribal nations/reservations located within Montana;[134] 8 federally recognized tribal nations/reservations located within

---

132. Warner, *supra* note 1, at 789; Warner, *Examining Tribal Environmental Law*, *supra* note 7, at 42.

133. *List of Tribes in Region 9*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/tribal/whereyoulive/region9.htm (last visited Oct. 14, 2015). These tribal nations include: Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Cocopah Indian Tribe, Colorado River Indian Tribes of the Colorado River Indian Reservation, Fort McDowell Yavapai Nation, Fort Mojave Indian Tribe, Gila River Indian Community of the Gila River Indian Reservation, Havasupai Tribe of the Havasupai Reservation, Hopi Tribe, Hualapai Indian Tribe of the Hualapai Indian Reservation, Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, Navajo Nation, Pascua Yaqui Tribe, Quechan Tribe of the Fort Yuma Indian Reservation, Salt River Pima-Maricopa Indian Community of the Salt River Reservation, San Carlos Apache Tribe of the San Carlos Reservation, San Juan Southern Paiute Tribe, Tohono O'odham Nation, Tonto Apache Tribe, White Mountain Apache Tribe of the Fort Apache Reservation, Yavapai-Apache Nation of the Camp Verde Indian Reservation, and Yavapai-Prescott Tribe of the Yavapai Reservation. *Id.*

134. *List of Tribes in Region 8*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/tribal/whereyoulive/region8.htm (last visited Oct. 14, 2015). These tribal nations include: Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Blackfeet Tribe of the Blackfeet Indian Reservation, Chippewa-Cree Indians of the Rocky Boy's Reservation, Confederated Salish & Kootenai Tribes of the Flathead Reservation, Crow Tribe, Fort Belknap Indian Community of the Fort Belknap Reservation, and the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation. *Id.* Notably, although the federal government officially recognizes seven tribes in Montana, the number is actually greater as several tribes are located within one reservation. For example, the Confederated Salish and Kootenai Tribes of the Flathead Reservation are counted as one tribe on the federal list. However, the Flathead Reservation is home to three tribes: the Salish, the Kootenai and the Pend d'Oreille. CONFEDERATED SALISH & KOOTENAI TRIBES, http://www.cskt.org/ (last visited Oct. 14, 2015). This phenomenon is not limited to Montana and is true of other tribes surveyed in this article. However, for purposes of counting the number of tribes surveyed, the federal numbers are used in this article.

New York;[135] and 38 federally recognized tribal nations/reservations located within Oklahoma.[136] Accordingly, a total of 74 federally recognized tribal nations were surveyed,[137] or approximately 13% of the total number of federally recognized tribes located within the United States.[138]

Further, the states, within which the tribes are located, represent a significant portion of the population of American Indians and Alaskan Natives within the United States. Of the states surveyed, two, Arizona and Oklahoma, are in the top three states in terms of largest American Indian populations.[139] Overall, approximately 29% of the entire population of American Indians and Alaskan Natives within the United States is located within the four states surveyed. Moreover, the survey includes the two

---

135. *List of Tribes in Region 2*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/tribal/whereyoulive/region2.htm (last visited Oct. 14, 2015). These tribal nations include: Cayuga Nation, Oneida Nation, Onondaga Nation, Saint Regis Mohawk Tribe , Seneca Nation, Shinnecock Indian Nation, Tonawanda Band of Seneca Indians NY, and the Tuscarora Nation. *Id.*

136. *List of Tribes in Region 6*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/tribal/whereyoulive/region6.htm (last visited Oct. 14, 2015). These tribal nations include: Absentee-Shawnee Tribe of Indians, Alabama-Quassarte Tribal Town, Apache Tribe, Caddo Nation, Cherokee Nation, Cheyenne-Arapaho Tribes, Chickasaw Nation, Choctaw Nation, Citizen Band Potawatomi Tribe, Comanche Nation, Delaware Nation, Delaware Tribes of Indians, Eastern Shawnee Tribe, Fort Still Apache Tribe, Iowa Tribe, Kaw Nation, Kialegee Tribal Town, Kickapoo Tribe, Kiowa Indian Tribe, Miami Tribe, Modoc Tribe, Muscogee (Creek) Nation, Osage Tribe, Ottawa Tribe, Otoe-Missouria Tribe of Indians, Pawnee Nation, Peoria Tribe of Indians, Ponca Tribe of Indians, Quapaw Tribe of Indians, Sac & Fox Nation, Seminole Nation, Seneca-Cayuga Tribe, Shawnee Tribe, Thlopthlocco Tribal Town, Tonkawa Tribe of Indians, United Keetoowah Band of Cherokee Indians, Wichita and Affiliated Tribes, and Wyandotte Nation. *Id.*

137. The survey, however, is incomplete. Tribal environmental law materials for the tribes in the identified regions were gathered using publically available resources, such as library databases and online materials.

138. At the time of writing, there were 566 federally recognized tribes located within the United States. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 79 Fed. Reg. 4748-02 (Jan. 29, 2014). *But*, *c.f.* Vincent Schilling, *DOI Issues Determination: Pamunkey Becomes No. 567; First Federally Recoignized Tribe in VA*, INDIAN COUNTRY TODAY MEDIA NETWORK (July 2, 2015), http://indiancountrytodaymedianetwork.com/2015/07/02/doi-issues-determination-pamunkey-becomes-no-567-first-federally-recognized-tribe-va (explaining that, although the Tribe has not yet been added to the federal register list, the Pamunkey Indian Tribe was recognized by the BIA, making it the 567th federally recognized tribe).

139. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 79 Fed. Reg. 4748-02 (Jan. 29, 2014). For purposes of this article, these population statistics are over inclusive in that they include American Indians located outside of Indian country, and, therefore not subject to tribal environmental laws. However, the statistics are helpful for explaining how the various territories were selected.

largest tribes within the United States by population, the Navajo Nation and Cherokee Nation.[140]

Beyond focusing on the tribes discussed in my previous articles,[141] this article also builds my past work by considering forms of tribal environmental law other than tribal code provisions. My first article on tribal environmental code provisions laid the foundation for future articles, as it described the types of tribal environmental code provisions currently in place.[142] The article focused on tribal environmental code provisions related to air pollution, water pollution, solid waste and environmental quality generally. Following my survey of the laws of the 74 federally recognized tribes identified, I determined that four nations enacted tribal code provisions related to air pollution;[143] twenty-three of the tribes enacted code provisions related to water pollution;[144] twenty-seven tribes enacted code provisions related to solid waste;[145] and nine of the tribes enacted code provisions related to environmental quality.[146] Overall, I concluded that a slim majority of the tribes studied, 51%, have not enacted tribal environmental code provisions related to the categories examined.[147] Based on this past work, it would appear that many of the federally recognized tribes studied are not enacting code provisions, or "hard law", to protect against environmental pollution.

My second article on tribal environmental law kept the focus on tribal environmental code provisions, but looked more closely at what authority tribes were utilizing (i.e. their inherent tribal sovereignty versus federal delegations) to enact these code provisions.[148] In regard to tribes enacting code provisions under federal delegations of authority, I concluded that only 28 federally recognized tribes, or approximately 5% of the then 566

---

140. *Ten Largest American Indian Tribes*, U.S. CENSUS BUREAU, http://www.infoplease.com/ipa/A0767349.html (last visited Oct. 14, 2015). The survey also includes several of the tribal nations listed as among the top ten largest American Indian tribes. These tribes include the Chippewa, Choctaw, Apache, Iroquois, Creek, and Blackfeet.

141. I focus on the same tribes in these articles in the hopes of developing an established record. This record, in turn, will ultimately be used to make normative judgments regarding the development of tribal environmental law.

142. Warner, *Examining Tribal Environmental Law*, *supra* note 7, at 42.

143. *Id.* at 68.

144. *Id.* at 69.

145. *Id.* at 70.

146. *Id.* at 71.

147. *Id.* at 72.

148. Warner, *Tribes as Innovative Environmental "Laboratories"*, *supra* note 7, at 789.

federally recognized tribes,[149] have TAS approval for at least one provision of the federal CAA.[150] In comparison, 48 federally recognized tribes, or approximately 8% of all federally recognized tribes, have TAS approval under section 303 of the CWA.[151] Even assuming that there is no overlap between these tribes (which is not the case (e.g. the Navajo Nation)), at

149. At the time of writing, there were 566 federally recognized tribes. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 79 Fed. Reg. 4748-02 (Dep't of the Interior, Bureau of Indian Affairs Jan. 29, 2014). Accordingly, percentages were obtained by dividing the number of tribes with the requisite status by 566, the number of federally recognized tribes at the time.

150. Letter from JoAnne K. Chase, Dir. of the Am. Indian Envtl. Office within the U.S. EPA, to author (Jan. 24, 2014) (on file with author). These tribes include: the Arapahoo Tribe of the Wind River Reservation; Bad River Band of the Lake Superior Tribes of Chippewa Indians; Cherokee Nation; Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians; Confederated Tribes of the Umatilla Reservation; Forest County Potawatomi Community; Gila River Indian Community; Kaw Nation; Mashantucket Pequot Tribe; Minnesota Chippewa Tribe, Fond du Lac Band; Minnesota Chippewa Tribe, Leech Lake Band; Mohegan Indian Tribe of Connecticut; Navajo Nation; Paiute-Shoshone Indians of the Lone Pine Community; Pala Band of Luiseno Mission Indians; Pechanga Band of Luiseno Mission Indians; Pueblo of Laguna; Prairie Band of Potawatomi Nation; Puyallup Tribe; Robinson Rancheria of Pomo Indians; Saint Regis Mohawk Tribe; Salt-River Pima-Maricopa Indian Community; Santee Sioux Tribe; Shoshone-Bannock Tribes of the Fort Hall Reservation; Shoshone Tribe of the Wind River Reservation; Southern Ute Indian Tribe; Swinomish Indians of the Swinomish Reservation; and, the Yurok Tribe. *Id.* Although only a relatively small percentage of tribes have applied for TAS status, the interest in developing tribal air quality programs may be more expansive. For example, "the number of tribes receiving federal grants to initiate or operate air programs has grown from about 200 in 1995 to more . . . in 2002." Jana B. Milford, *Tribal Authority Under the Clean Air Act: How is it Working?*, 44 NAT. RESOURCES J. 213, 213–14 (2004).

151. These tribes include: Assiniboine and Sioux Tribes; Bad River Band of the Lake Superior Tribe of Chippewa Indians; Big Pine Band of Owens Valley Paiute Shoshone Indians; Blackfeet Tribe; Confederated Salish and Kootenai Tribes; Confederated Tribes of the Chehalis Reservation; Confederated Tribes of the Umatilla Reservation; Confederated Tribes of the Warm Spring Reservation; Coeur D'Alene Tribe; Dry Creek Rancheria of Pomo Indians; Havasupai Tribe; Hoopa Valley Tribe; Hopi Tribe; Hualapai Indian Tribe; Kalispel Indian Community; Lac du Flambeau Band of Lake Superior Chippewa Indians; Lummi Tribe; Makah Indian Tribe; Miccosukee Tribe of Indians; Minnesota Tribe, Fond du Lac Band; Minnesota Chippewa Tribe, Grand Portage Band; Navajo Nation; Northern Cheyenne Tribe; Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony; Pawnee Nation; Port Gamble Indian Community; Pueblo of Acoma; Pueblo of Isleta; Pueblo of Nambe; Pueblo of Picuris; Pueblo of Pojoaque; Pueblo of San Juan; Pueblo of Sandia; Pueblo of Santa Clara; Pueblo of Taos; Pueblo of Tesque; Puyallup Tribe; Pyramid Lake Paiute Tribe; Saint Regis Mohawk Tribe; Seminole Tribe of Florida; Shoshone-Bannock Tribes of the Fort Hall Reservation; Sokaogon Chippewa Community; Spokane Tribe; Swinomish Indians; Tulalip Tribes of the Tulalip Reservation; Twenty-Nine Palms Band of Mission Indians; Ute Mountain Tribe; and, White Mountain Apache Tribe. *Indian Tribal Approvals*, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/scitech/swguidance/standards/wqslibrary/approvtable.cfm (last visited Oct. 14, 2015).

most, that would mean that only 76 tribes, or 13% of federally recognized tribes, have TAS status under either the CAA or CWA. In other words, these numbers would seem to suggest that either the majority of tribes are not regulating the environment or that those who are regulating are doing so under their inherent authority.

Taken together, my previous two articles demonstrate that tribes (or at least the 74 tribes I studied) are not overwhelmingly adopting tribal environmental code provisions. Accordingly, having now closely examined code provisions in these previous two articles, this article looks at sources of tribal environmental law other than tribal code provisions, both hard and soft law, to consider other sources of tribal innovation beyond codes.

This look at forms of tribal environmental laws other than codes is helpful not only because it complements and completes the previous work in the field, but it also considers tribal innovations in an increasingly important realm of environmental law – the non-code, or "soft law" realm of environmental law. "'Soft' law is a paradoxical term for defining an ambiguous phenomenon. Paradoxical because . . . the rule of law is usually considered 'hard,' *i.e.,* compulsory . . . . Ambiguous because the reality thus designated, considering its legal effects as well as its manifestations, is often difficult to identify clearly."[152] For my purposes, I use the term "soft law" to refer to environmental laws that are not necessarily binding. For example, the vision statements discussed below are examples of soft law.

Soft law may be a powerful tool in addressing the modern environmental challenges threatening tribal governments and others, as such tools can sometimes encourage actors to do the socially desirable thing while not creating the conflict sometimes associated with traditional regulatory structures.[153] Further, because "[r]egulatory gaps exist in all governance

---

152. Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 420 (1991). In international law, "soft law" is a term typically used to distinguish between enforceable law, such as treaties, where states have consented to be bound (i.e. "hard law"), versus laws where such consent has not necessarily been given. *See, e.g.*, Jon Birger Skjærseth et al., *Soft Law, Hard Law, and Effective Implementation of International Environmental Norms*, GLOBAL ENVTL. POL., Aug. 2006, at 104 (discussing the difference between hard law and soft law as primarily reflected by how parties are bound by agreements). Similarly, the term "soft law" is used to refer to types of environmental law that are not necessarily binding on the tribe itself or third parties.

153. MATTHEW POTOSKI & ASEEM PRAKASH, *Voluntary Clubs: An Introduction*, *in* VOLUNTARY PROGRAMS: A CLUB THEORY PERSPECTIVE 1–13 (Matthew Potoski & Aseem Prakash eds., 2009). Moreover, "[v]oluntary programs' policy potential is to stimulate the creation of positive externalities and mitigate the production of negative ones." *Id.* at 3. Although this collection of essays specifically discusses clubs and voluntary programs, much of the research presented is generally attributed to soft law, as it is presented in this paper.

systems,"[154] soft law tools may be used to fill these gaps, thereby stabilizing the overall regulatory scheme and bringing increased credibility to it. Currently, there is a "need for developing broader systems of environmental governance."[155] Another advantage of this type of law is that it allows governments to encourage actors to take preventative measures, rather than taking only "after-the-fact" steps typically associated with traditional regulation.[156]

Because of their attractiveness and relative ease of implementation, governments are increasingly looking to soft law tools, such as voluntary programs, to fill gaps left in existing regulation.[157] For example, scholars "report that about three hundred voluntary programs have been negotiated between firms and national governments in Europe, and more than eighty-seven voluntary agreements have been sponsored by the U.S. Environmental Protection Agency (EPA)."[158] In the United States, twenty-two states have adopted voluntary programs.[159] Further, scholars have demonstrated that these types of laws have the ability to influence the development of similar laws elsewhere and, ultimately, the "hard" regulatory laws.[160] This means that soft law is well positioned to be transferred to other sovereigns through the regulatory laboratory model.[161] Accordingly, now is a particularly important time to look at innovations within the field of environmental soft law, such as those explored below, because such law plays an important role in filling regulatory gaps and innovations are easily transmuted to other jurisdictions.

With these caveats and clarifications in place, the section begins with an examination of tribal environmental laws other than code provisions that address environmental pollution. The article then looks at tribal innovations related to climate change. The article focuses on these two areas, as

---

154. *Id.* at 6.

155. Fiorino, *supra* note 9, at 211. In response to this need within the environmental realm, many governments are increasingly looking to the formation of voluntary organizations. *Id.* at 213.

156. *Id.* at 213.

157. POTOSKI & PRAKASH, *supra* note 153, at 2.

158. *Id.* Since the 1980s, governments in general have been moving away from traditional solely regulatory structures and incorporating other types of legal schemes, such as informational schemes and voluntary programs. Fiorino, *supra* note 9, at 209. Ultimately, these non-regulatory options are "a way to respond flexibly and collaboratively to problems for which no established legal mechanisms apply." *Id.*

159. Fiorino, *supra* note 9, at 217.

160. POTOSKI & PRAKASH, *supra* note 153, at 7.

161. Fiorino, *supra* note 9, at 220 (explaining that there has been a "diffusion of innovation" in relation to green voluntary programs).

pollution and climate change remain significant environmental threats in the modern era. The section then presents some thoughts on trends emerging in sources of tribal environmental law other than code provisions. The section concludes with a call for additional tribal innovation in the field.

### *A. Tribal Regulation of Environmental Pollution Outside of Code Provisions*[162]

Law exists in several different forms: from "soft" law that may describe community norms but not necessarily be enforceable to "hard" law that includes clearly identified enforcement procedures. As mentioned above, my prior research looked exclusively at hard law tribal environmental code provisions. The research represented below is broader, recognizing that the applicable law governing tribal communities expands beyond the tribal code. Accordingly, this section examines other sources of tribal environmental law, such as tribal constitutions, vision statements, customary law, court decisions, regulatory guidance and guidance originating with intertribal organizations.

#### 1. Tribal Constitutions

Some tribes take regulation of the environment and protecting the tribal health and welfare as so crucial to the tribe that such commitment is incorporated into the tribe's constitution. For example the Cheyenne and Arapaho Tribe, which is located within Oklahoma, includes the following passage in its Constitution:

> We, the People of the Cheyenne and Arapaho Tribes, in order to sustain and promote our cultures, languages, and way of life, protect our religious rights, establish and promote justice for all

162. The following discussion is admittedly incomplete. I relied solely on material that was publically available, largely through the internet. Accordingly, if a tribe has not made information on its tribal environmental laws public, especially online, it is unlikely to be captured in the research leading up to this article. Also, some tribes are still in the process of developing their environmental laws. *See, e.g.*, *Tribal Departments: Environmental Division*, SHINNECOCK INDIAN NATION, http://www.shinnecocknation.org/trustees-corner (last visited Oct. 14, 2015) ("The Shinnecock Environmental Division currently has a work plan that with the expertise of consultants, support of the Natural Resource Committee and participation of tribal members will begin to create environmentally centered and culturally viable programs for the preservation of the Nation's land base, health, and environment."). Interestingly, even though the Shinnecock Nation is still in the initial planning phases of its environmental regulatory structure, it still mentions that the ultimate structure will be "culturally viable."

> People, promote education, establish guidance and direction for our government, *respect and protect our natural environment and resources*, and advance the general welfare for ourselves and our posterity, do establish this Constitution.[163]

Similarly, the Hualapai Constitution includes a provision stating that the Hualapai Tribal Council shall have the power to "protect and preserve the wildlife and natural resources of the Tribe."[164] The Constitution of the Pascua Yaqui provides that the Tribal Council shall have the power to "protect all historic, religious, sacred, archeological and other sites of scenic or scientific or *cultural* interest on the Pascua Yaqui Reservation and on land where the title or an interest therein is owned by or held in trust for the tribe."[165] The Pascua Yaqui Constitution also provides that the Tribal Council has the authority "to manage, protect and preserve all lands, minerals, water, wildlife and other natural resources on the reservation and other land subject to the jurisdiction of the tribe."[166] Both the San Carlos Apache Constitution[167] and White Mountain Apache Constitution[168] empower their Tribal Councils with very similar powers.

Protection of the environment and the Tribes' natural resources are therefore one of the primary purposes of the Tribes' Constitution. In some instances, tribes have also incorporated the protection of cultural resources into their tribal constitutions. In comparison, the Constitution of the United States does not reference protection of the natural environment. Such an absence in the federal Constitution suggests that protection of the environment does not play as central a role in federal law as it does under the laws of some tribes. This is certainly an area where tribal environmental law departs from federal environmental law. But, interestingly, many states

---

163. CONST. OF THE CHEYENNE AND ARAPAHO TRIBES, http://www.c-a-tribes.org/cheyenne-arapaho-tribes-constitution (last visited Oct. 14, 2015) (emphasis added).

164. AMENDED CONST. AND BY-LAWS OF THE HUALAPAI TRIBE OF THE HUALAPAI RESERVATION, art. VI, http://thorpe.ou.edu/IRA/amhuacons.html (last visited Oct. 14, 2015).

165. PASQUA YAQUI CONST., art. VI, http://www.pascuayaqui-nsn.gov/_static_pages/tribalcodes/index.php (last visited Oct. 14, 2015).

166. *Id.*

167. AMENDED CONST. AND BY-LAWS OF THE SAN CARLOS APACHE TRIBE OF ARIZONA, art. V, http://thorpe.ou.edu/IRA/amsancarcons.html (last visited Oct. 14, 2015) (empowering the Tribal Council "to protect and preserve the wildlife and natural resources of the Tribe; to regulate hunting and fishing on the reservation").

168. CONST. OF THE WHITE MOUNTAIN APACHE TRIBE OF THE FORT APACHE INDIAN RESERVATION ARIZONA, art. IV, http://wmat.us/Legal/Constitution.html (last visited Oct. 14, 2015) (granting the Tribal Council the power "[t]o protect and preserve the wildlife, plant life, forests, natural resources and water rights of the Tribe, and to regulate hunting and fishing on the reservation").

also have provisions related to the environment incorporated into their state constitutions.[169] Accordingly, even though the potential that the federal government would amend the U.S. Constitution to incorporate provisions related to the environment is exceptionally low, experimentation and collaboration in this area would be helpful to states, which may possess similar constitutional provisions as tribes.

### 2. Tribal Court Decisions

Another source of tribal environmental law separate from tribal code provisions is tribal court decisions. Overall, finding tribal court decisions discussing the application of tribal environmental law for federally recognized tribes within Arizona, Montana, New York and Oklahoma proved difficult. This could be for a variety of reasons. For example, tribal court decisions may not be publically or electronically available. However, even where tribal court decisions themselves may not have been available, it does appear that environmental matters fall within the purview of tribal courts.[170]

A decision of the Fort McDowell Yavapai Nation's Supreme Court, however, is helpful in providing some insight into how tribal courts handle cases involving tribal environmental law. In *Doka v. Fort McDowell Yavapai Nation*, the defendant was convicted of illegal dumping in violation of the Nation's criminal laws.[171] The defendant appealed his conviction, arguing that the Nation failed to follow the procedural requirements of its Environmental Code in charging and convicting him of illegal dumping. However, the Nation's Supreme Court disagreed, explaining that, while the Nation's Environmental Code normally applied, the Code did allow for criminal prosecutions in certain circumstances. Accordingly, it may be that tribes are utilizing their criminal laws to address environmental pollution, such as illegal dumping.

---

169. *See* Bret Adams et al., *Environmental and Natural Resources Provisions in State Constitutions*, 22 J. LAND RESOURCES & ENVTL. L. 73, 74 (2002) ("In total, our research has uncovered 207 state constitutional provisions relating to natural resources and the environment in 46 state constitutions.").

170. *See, e.g.*, *Peacemaker's Court*, SENECA NATION OF INDIANS, https://sni.org/government/peacemakers-court/ (last visited Oct. 14, 2015) (explaining that the courts are empowered to hear all civil actions involving "Senecas, their families and other residents in our community," including "environmental issues").

171. Doka v. Fort McDowell Yavapai Nation, 5 Am. Tribal Law 132, 132–33 (Fort McDowell Yavapai Nation 2004) (per curiam).

Unlike tribal constitutional provisions, this does not appear to be an area where tribes are necessarily innovating in ways that depart from the states and federal government. State and federal courts certainly handle environmental cases, and it is not uncommon for there to be criminal penalties for actions related to polluting the environment.

However, this is certainly an area where tribes are capable of greater innovation and may want to actively consider what form such innovations should take. As discussed below in relation to tribal customary law, tribal courts have the ability to consider a wide array of laws, including regulatory provisions and customary laws.[172] Taking into consideration the suggestions made by Professor Fletcher as to how tribal courts may incorporate customary law into decisions,[173] the often explicit ability to do so empowers tribal courts to develop the law in new and novel ways. Accordingly, this is an area of tremendous potential in terms of environmental innovation.

### 3. Regulatory Guidance

Tribes may also be in a position to enact regulatory guidance to assist in regulation of pollution within their jurisdictions, just as federal agencies do. The Saint Regis Mohawk Tribe, which is located within New York, adopted a solid waste handbook to assist in the regulation of solid waste disposal on the reservation,[174] as solid waste disposal can be a problem in Indian country leading to adverse health effects.[175] The purpose of the handbook is two-fold. First, it provides guidance on how to collect information necessary to develop a successful solid waste disposal program.[176] Second, it provides examples of successful solid waste management procedures.[177] Notably, the second chapter of the handbook starts with a discussion of traditional and cultural beliefs, recognizing that culture and traditions play

---

172. For a complete discussion of the different types of laws that tribal judges may be called upon to consider, see Wenona Singel, *Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule*, 15 KAN. J.L. & PUB. POL'Y 357 (2006). This article also contemplates the potential dangers tribes should consider in adopting transplanted law.

173. Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57, 63–71 (2007) [hereinafter Fletcher, *Customary Law*].

174. LAURA J. WEBER, SOLID WASTE HANDBOOK (2002), http://www.srmtenv.org/pdf_files/swhandbk.pdf.

175. *Id.* at 1 (explaining that there is a problem with open dumping and burning of solid wastes in Indian country, speculating that this could be a result of convenience/habit and/or non-Indians illegally dumping within Indian country, and noting that the EPA has determined that there are substantial health risks associated with such practices.).

176. *Id.* at 1–5.

177. *Id.* at 6–11.

an important role in many tribal communities. The handbook concludes that the solid waste management practices advanced in the chapter are consistent with such cultures and traditions, and, therefore "will help instill community ownership of the program and will lead to good community decisions with respect to management of solid waste."[178] Such cultural considerations therefore increase the likelihood of success for tribal programs seeking to regulate environmental pollution.

Located within Montana, the Northern Cheyenne Tribe has created a Nonpoint Source Pollution (NSP) Program that aims to decrease water pollution from nonpoint sources through projects, such as water quality monitoring, and increased education.[179] As part of its NSP Program, the Nation provides guidance on how to decrease the amount of pollution entering tribal waters through non-point sources. For example, the Nation encourages tribal members to dispose of chemicals properly and limit and control livestock access to tribal water sources.[180]

Similarly, the Confederated Salish and Kootenai Tribes, also located within Montana, have developed a Non Point Source Pollution Program.[181] Because the Flathead Reservation, where the Tribes are located, is largely rural in character, non-point source, versus traditional point source pollution, presents a significant challenge to the tribal water environment.[182] To combat this problem, the Tribes have implemented several non-point source restoration projects.[183] Additionally, the Tribes provide guidance on how to reduce non-point source pollution, such as using lawn and garden chemicals sparingly and to reduce erosion.[184]

Similarly, the White Mountain Apache Nation, located within Arizona, has produced guidance on illegal dumping and proper waste disposal.[185] The Navajo Nation, also located partially within Arizona, has developed substantial regulatory guidance to aid in the interpretation of its tribal environmental code provisions. Relevant for the focus of this article, the

178. *Id.* at 6.

179. *Nonpoint Source Pollution Prevent Program*, N. CHEYENNE TRIBE ENVTL. PROT. DEP'T, http://nps.cheyennenation.com/index.html (last visited Oct. 14, 2015).

180. *Id.*

181. *Non-Point Source Program*, CONFEDERATED SALISH & KOOTENAI TRIBES ENVTL. PROT. DIV., http://nrd.csktribes.org/ep/non-point-source (last visited Oct. 14, 2015).

182. *Id.*

183. *Id.*

184. *Id.*

185. U.S. ENVTL. PROT. AGENCY, *Respect our Resources: Prevent Illegal Dumping*, EPA530-N-02-001, TRIBAL WASTE J., 5–9 (2002), http://archive.epa.gov/wastes/wyl/web/pdf/twj-1.pdf.

Nation provides guidance on air quality,[186] water quality,[187] and solid waste.[188] In addition to this specific guidance on different types of pollution, the Nation also provides general guidance on permit review, administrative enforcement orders, hearings and rulemakings undertaken as a result of the application of the Nation's environmental acts.[189]

The purpose of the air quality regulations is to establish the permitting requirements under the Navajo Nation's Air Pollution Prevention and Control Act,[190] and, as a result, the regulations provide guidance on air permitting requirements and who may apply for such permits. The Navajo Nation's water quality regulations were enacted in order to:

> Protect, maintain, and improve the quality of Navajo Nation surface waters for public and private drinking water supplies; to promote the habitation, growth, and propagation of native and other desirable aquatic plant and animal life; to protect existing, and future, domestic, cultural, agricultural, recreational and industrial uses; and to protect any other existing and future beneficial uses of Navajo Nation surface waters. These standards provide the water quality goals for each body of surface water within the Navajo Nation and provide the basis for establishing treatment controls and strategies through regulation.[191]

As demonstrated by the foregoing, protection of the Nation's culture is one of the stated goals of the water quality regulations. The regulations also

---

186. NAVAJO NATION ENVTL. PROT. AGENCY, NAVAJO NATION AIR QUALITY CONTROL PROGRAM OPERATING PERMIT REGULATIONS (July 8, 2004), http://www.navajonationepa.org/Pdf%20files/NNAQCP-OperatingPermitRegs-Final.pdf [hereinafter NAVAJO NATION AIR QUALITY PERMIT REGULATIONS].

187. NAVAJO NATION ENVTL. PROT. AGENCY, NAVAJO NATION SURFACE WATER QUALITY STANDARDS (July 30, 2004), http://www.navajonationepa.org/Pdf%20files/NNSurfaceWaterQualityStan.pdf [hereinafter NAVAJO NATION SURFACE WATER QUALITY STANDARDS].

188. NAVAJO NATION ENVTL. PROT. AGENCY, NAVAJO NATION SOLID WASTE REGULATIONS, http://www.navajonationepa.org/Pdf%20files/Solid%20Waste2.pdf (last visited Oct. 14, 2015) [hereinafter NAVAJO NATION SOLID WASTE REGULATIONS]. It appears that the Nation also provides guidance on its pollution discharge elimination system program. NAVAJO NATION ENVTL. PROT. AGENCY, NAVAJO NATION POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM REGULATIONS (Dec. 4, 2003), http://www.navajonationepa.org/Pdf%20files/NNPDESTC.pdf.

189. Uniform Regulations for permit review, administrative enforcement orders, hearings, and rulemakings under NAVAJO NATION ENVTL. PROT. AGENCY, NAVAJO NATION ENVIRONMENTAL ACTS, http://www.navajonationepa.org/Pdf%20files/Uniform.pdf (last visited Sept. 16, 2015).

190. NAVAJO NATION AIR QUALITY PERMIT REGULATIONS, *supra* note 186.

191. NAVAJO NATION SURFACE WATER QUALITY STANDARDS, *supra* note 187 (emphasis added).

go on to provide detailed information on the Nation's antidegradation policy, implementation, narrative surface water quality standards, designated use classification system for the Nation's surface waters, numeric standards, and variances.[192]

And, finally, the Nation has also adopted regulations for the disposal of solid waste. The purpose of these regulations "is to protect the health and welfare of present and future citizens of the Navajo Nation by providing for the prevention and abatement of air, land, and water pollution and other public health and environmental hazards related to solid waste management."[193] The regulations provide guidance on prohibited acts, standards for solid waste landfill facilities, financial liability, and composting.[194]

Guidance such as the Navajo Nation's is a perfect example of innovation that may be attractive to states. The regulatory guidance discussed above was adopted following the Nation's obtaining TAS status under the federal CWA and CAA.[195] Because states will also enact statutes and regulations designed to implement the federal CWA and CAA, this is an area where states can directly learn from the tribe, as the governments are doing the same thing—adopting regulations related to the implementation of the federal law. Accordingly, the states may want to learn from the Navajo example of how to directly incorporate the protection of culture into environmental law.

Some tribes, on the other hand, may not have such fully developed regulatory guidance and, yet, still provide their members some guidance on reducing environmental pollution. For example, the Kaibab Paiute Indian Tribe, located within Arizona, developed a recycling and composting program to help abate the solid waste program on the Tribe's reservation.[196] To assist in this program, the Tribe provides guidance on how tribal members can compost.[197]

Other governmental agencies aside from tribal agencies certainly enact regulations to aid in the interpretation and enforcement of environmental statutes. Where tribal regulations depart, on occasion, however, is in the incorporation of provisions explicitly calling for protection of cultural

---

192. *Id.* at 1–16.

193. NAVAJO NATION SOLID WASTE REGULATIONS, *supra* note 188.

194. *Id.* at 1–67.

195. *See* Warner, *Examining Tribal Environmental Law*, *supra* note 7, at 75–93 (discussing the statutes adopted by the Navajo Nation under the TAS provisions of the federal acts).

196. *Small Recycling Project*, ENVTL. DEP'T KAIBAB PAIUTE INDIAN TRIBE, http://www.kaibabpaiute-nsn.gov/environmental/Recycling.html (last visited Oct. 16, 2015).

197. *Id.*

resources. At least at the federal level, the federal government aspires to protect cultural resources, but does not require their protection.[198]

4. Tribal Vision Statements

For various reasons, some tribes may not currently be in a position to enact "hard" tribal environmental laws, such as tribal constitutions.[199] Some tribes may therefore work to codify the tribal community's environmental ethic without developing a full environmental code or other sources of binding tribal environmental law. Professor Rebecca Tsosie, for example, has written on the important role that defining tribal environmental ethics can play for tribal communities, as such ethical values inform tribal sovereignty as well as protection of the land and environment.[200] Such environmental ethics statements are helpful because 1) they are a codification of the community's environmental ethic, and 2) they may be used in the future as the basis for the development of "hard" environmental law. As described above, it is not uncommon for soft law, such as vision statements, to ultimately influence the development of hard law.

Of the 74 federally recognized tribes studied, several tribes have developed vision or mission statements representative of their tribal environmental ethics. For example, the Muscogee (Creek) Nation, which is located within Oklahoma, includes the following statement in its Nation's Vision Statement: "The Muscogee Nation will protect and preserve the environment and be accountable to the people."[201] Similarly, it is the mission of the Osage Nation's Congress to "[p]reserve and protect the Nation's environment."[202]

The same is true for tribes located within New York. The Onondaga Nation, for example, adopted the *Vision for a Clean Onondaga Lake*.[203] Not only is the *Vision for a Clean Onondaga Lake* a statement of the Nation's

198. *See infra* Section III.C (discussing NEPA and National Historic Preservation Act as examples of this failure to provide absolute protection for cultural resources).

199. Warner, *Examining Tribal Environmental Law*, *supra* note 7, at 73 n.156.

200. Tsosie, *supra* note 101.

201. *Muscogee (Creek) Nation Vision*, MUSCOGEE (CREEK) NATION, http://www.muscogeenation-nsn.gov/Pages/Articles/13April/visionstatement.html (last visited Oct. 16, 2015).

202. *Legislative Branch Mission Statement*, THE OSAGE NATION, http://www.osagenation-nsn.gov/who-we-are/congress-legislative-branch (last visited Oct. 16, 2015). The Osage Nation is located within Oklahoma.

203. *Onondaga Nation's Vision for a Clean Onondaga Lake*, ONONDAGA NATION, http://www.onondaganation.org/land-rights/onondaga-nations-vision-for-a-clean-onondaga-lake/ (last visited Oct. 16, 2015).

ethical values related to Onondaga Lake, but it also includes references to the Nation's customs and traditions, which suggests that it incorporates elements of customary law as well. The *Vision for a Clean Onondaga Lake* articulates the Nation's goals for Onondaga Lake, which includes "water which should be safe for drinking", the ability for animals to "make their home in and around the Lake," the ability of people to hunt around the lake, "a place for children to play and swim and learn", and a place where food and medicinal plants are available.[204] In addition to broadly describing the vision of the Nation for Onondaga Lake, the *Vision for a Clean Onondaga Lake* also makes reference to protecting against environmental pollution and climate change.[205] For example, in terms of regulating air pollution, the *Vision for a Clean Onondaga Lake* says that the Nation "will continue to monitor the winds and empower ourselves to clean up all the other areas that add contamination to our Lake."[206] By restoring the Onondaga Lake, the Nation hopes to "strengthen our culture" and the statement goes on to make numerous explicit statements referencing the culture and traditions of the Nation.[207]

Furthermore, the tribal environmental programs/departments of numerous tribes have enacted mission statements calling on the program/department to protect and preserve the tribal environment.[208]

---

204. *Id.*

205. *Id.* In terms of climate change, the *Vision for a Clean Onondaga Lake* states "[d]ue to global warming, the sun's rays are reaching the earth in ways that are harmful to all of us. Global warming and the sun's rays affect the life cycles of fish within Onondaga Lake and will change the habitat so that different plants and animals will thrive along its shores. We will work to lessen the impacts of global warming." *Id.*

206. *Id.* In reference to solid waste, the *Vision for a Clean Onondaga Lake* states "[w]e will remove the waste material that was deposited in and around the Lake." *Id*. And, of course, because the statement focuses on restoring the waters of the Onondaga Lake itself, it certainly envisions limiting or eliminating "both non-point-source pollution from runoff as well as point source pollution from combined sewer overflows." *Id.*

207. *Id.* Although specific to land and therefore beyond this article's focus on environmental pollution and climate change, the Onondaga Nation also explicitly references the importance of culture in its vision statement on land. *Stewards of the Land*. *Stewards of the Land*, ONONDAGA NATION, http://www.onondaganation.org/land-rights/stewards-of-the-land/ (last visited Oct. 16, 2015) ("The Nation and its people have a unique spiritual, cultural, and historic relationship with the land, which is embodied in Gayanashagowa, the Great Law of Peace.").

208. *Iowa Tribe of Oklahoma Office of Environmental Services*, BAH KHO-JE (PEOPLE OF THE GREY SNOW), http://bahkhoje.com/office-of-enviromental-services/ (last visited Oct. 16, 2015); *Office of Environmental Services Vision*, SAC & FOX NATION, http://www.sacandfoxnation-nsn.gov/departments/office-of-environmental-services/ (last visited Oct. 16, 2015); *CRIT Environmental Protection Office*, COLO. RIVER INDIAN TRIBES, http://www.crit-nsn.gov/critepo/ (last visited Oct. 16, 2015); *Environmental Department*, GROS

Interestingly, many of these same vision statements recognizing the importance of protecting the environment also connect such protection to the history, culture, and traditions of the tribe.[209]

A review of the U.S. EPA's mission statement, however, yields no reference to history, culture, or traditions of the United States.[210] Similarly, to my knowledge, neither the federal government nor the states have enacted vision or mission statements purporting to express the environmental ethics of the governments. This is therefore an area where tribes truly are innovating.

### 5. Tribal Customs and Traditions

Tribal customs and traditions, sometimes called customary law,[211] traditional law, or tribal common law,[212] can prove constructive in resolving modern legal matters. As Justice Raymond D. Austin, a retired Associate Justice of the Navajo Nation's Supreme Court, explained, "[e]mbedded in American Indian cultures, languages, religious practices, lore, and sense-of-

---

VENTRE ASSINIBOINE FORT BELKNAP INDIAN COMMUNITY, http://www.ftbelknap.org/environmental.html (last visited Oct. 16, 2015); *Natural Resources*, CONFEDERATED SALISH & KOOTENAI TRIBES, http://www.cskt.org/ (last visited Oct. 16, 2015); *Environmental Protection Program*, PUEBLO OF ZUNI, http://www.ashiwi.org/Programs.aspx#EP (last visited Oct. 16, 2015).

209. *Iowa Tribe of Oklahoma Office of Environmental Services*, BAH KHO-JE (PEOPLE OF THE GREY SNOW), http://bahkhoje.com/office-of-enviromental-services/ (last visited Oct. 16, 2015); *Office of Environmental Services Vision*, SAC & FOX NATION, http://www.sacandfoxnation-nsn.gov/departments/office-of-environmental-services/ (last visited Oct. 16, 2015); *Environmental Department*, GROS VENTRE ASSINIBOINE FORT BELKNAP INDIAN COMMUNITY, http://www.ftbelknap.org/environmental.html (last visited Oct. 16, 2015); *Natural Resources*, CONFEDERATED SALISH & KOOTENAI TRIBES, http://www.cskt.org/ (last visited Oct. 16, 2015). A good example of this is found in the Objectives of the Mission of the Iowa Tribe of Oklahoma Office of Environmental Services, which explains that the Tribe's "codes and regulations to protect air and water quality and other natural resources" should "incorporate[e] cultural and traditional values to the extent possible." *Iowa Tribe of Oklahoma Office of Environmental Service*, BAH KHO-JE, http://bahkhoje.com/office-of-enviromental-services/ (last visited Oct. 16, 2015).

210. *Our Mission and What We Do*, U.S. ENVTL. PROT. AGENCY, http://www2.epa.gov/aboutepa/our-mission-and-what-we-do (last visited Oct. 16, 2015).

211. "Customary law" often refers to situations where "the unique traditions and customs of different Native American tribes are cited by their tribal courts as authoritative and binding law." Ezra Rosser, *Customary Law: The Way Things Were, Codified*, 8 TRIBAL L.J. 18, 18 (2008).

212. The question of what constitutes such law and how it should be used in tribal courts is a relatively new question that is still subject to some debate. The question of how such law should be used is beyond the scope of this article. However, for a discussion of the role of tribal custom and tradition in tribal courts, see Fletcher, *Customary Law*, *supra* note 173.

place are useable values, norms, and mores that can help American Indian peoples overcome reservation problems and improve their living standards."[213] Given their value in legal proceedings, tribal courts are increasingly looking to such tribal customs and traditions as guiding legal concepts.[214] Identifying customs and traditions applicable in legal matters, however, can prove difficult depending on the individual tribal community and its use of such customs and traditions previously.[215] Also, tribal customs and traditions may be unwritten.[216] Accordingly, it can be challenging to identify tribal customs and traditions or customary law applicable in tribal environmental law.

One example of tribal customary law is the Haudenosaunee Environmental Protection Process (HEPP). The Haudenosaunee Environmental Task Force (HETF) was created by the Haudenosaunee Confederacy (also known as Iroquois or Six Nations) to assist the Mohawk, Oneida, Onondaga, Cayuga, Seneca and Tuscarora nations "in exercising their rights and responsibilities with regard to their environmental concerns."[217] The HEPP "is designed to incorporate the traditional teachings of the Haudenosaunee as a guide in creating a process that protects the natural world. The HEPP also applies Haudenosaunee values to the environment, using Haudenosaunee knowledge to identify the consequences

---

213. Justice Raymond D. Austin, *American Indian Customary Law in the Modern Courts of American Indian Nations*, 11 WYO. L. REV. 351, 372–73 (2011).

214. Fletcher, *Customary Law*, *supra* note 173, at 60–61; Austin, *supra* note 213, at 353. Professor Ezra Rosser explains that "[t]he role of customary law depends upon the place of customary law relative to other sources—tribal, state, and federal—of law considered by tribal courts and the consequent level of authority customary law is granted." Rosser, *supra* note 211, at 21. Interestingly, the use of customs and traditions is not limited to tribal courts, as state and federal courts will sometimes rely on common law from English and Norman courts. Fletcher, *Customary Law*, *supra* note 173, at 61–62.

215. As Professor Fletcher explains, "customary law is more easily discovered, understood, and applied in [an] insular tribal community where there are few outsiders and the tribal language is widely spoken. Conversely, in tribal communities that are (for lack of a better word) assimilated, where the few members are surrounded and outnumbered by nonmembers, and where the tribal language is all but dead, customary law is extremely difficult to discover, understand, and apply." Fletcher, *Customary Law*, *supra* note 173, at 59–60. Justice Austin also explains that "[t]ribes left with little of their traditional culture or language are not known to use customary law." Austin, *supra* note 213, at 363.

216. Austin, *supra* note 213, at 364.

217. Brenda E. LaFrance & James E. Costello, *The Haudenosaunee Environmental Protection Process (HEPP): Reinforcing the Three Principles of Goodmindedness, Peacefulness and Strength to Protect the Natural World*, *in* PRESERVING TRADITION AND UNDERSTANDING THE PAST: PAPERS FROM THE CONFERENCE ON IROQUOIS RESEARCH 61, 61 (Christine Sternberg Patrick ed., 2010), http://www.nysm.nysed.gov/publications/record/vol_01/pdfs/CH06LaFrance.Costello.pdf.

for violating natural law and to develop culturally based enforcement processes."[218] The HEPP incorporates five traditional Haudenosaunee concepts into its environmental guidance: the Thanksgiving Address; Haudenosaunee Cosmology; Kaienerekowa (Great Law of Peace) with the One Dish, One Spoon Principle; the Code of Handsome Lake; and the Kaswentha (Two Row Wampum) in accordance with the Silver Covenant Chain of Friendship.[219] This Haudenosaunee customary law is incorporated into tribal environmental law, as the traditions form the narrative factors, criteria, and indicators within the tribal environmental regulatory structure.[220] As such the HEPP is an example of the incorporation of tribal customs and traditional law into tribal environmental law. Relatedly, the HEPP also strives to incorporate traditional environmental knowledge as well.[221] Interestingly, the HEPP envisions cooperating with foreign (i.e. non-Haudenosaunee) governments to arrive at the best possible environmental regulations.[222] This vision is consistent with the concept of tribes as innovative environmental laboratories, as discussed above.

### 6. Intertribal Organizations

The HEPP is also an example of an intertribal environmental organization, as it is a result of the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora tribes coming together on tribal environmental regulation. Also, the Inter-Tribal Environmental Council (ITEC) represents many tribes located within Oklahoma.[223] The ITEC operates both a clean air program and a solid waste program. Although specific legal documents do not appear to be available through the ITEC website, the ITEC clean air program "operates one of the largest tribal air monitoring networks in the

218. *Id.* at 61.
219. *Id.* at 62–64 (describing various sources of tribal customary law).
220. *Id.* at 64.
221. *Id.* at 62.
222. *Id.* at 62–64.
223. Member tribes of the Inter-Tribal Environmental Council include: Absentee-Shawnee Tribe, Alabama-Quassarte Tribal Town, Apache Tribe, Caddo Nation, Cherokee Nation, Cheyenne/Arapaho Tribes, Citizen Potawatomi Nation, Comanche Nation, Delaware Tribe of Indians, Delaware Nation, Fort Sill Apache Tribe, Iowa Tribe, Kaw Nation, Kialegee Tribal Town, Kickapoo Tribe, Kiowa Tribe, Miami Tribe, Modoc Tribe, Muscogee "Creek" Nation, Osage Nation, Otoe-Missouria Tribe, Ottawa Tribe, Pawnee Nation, Peoria Tribe, Ponca Tribe, Quapaw Tribe, Sac & Fox Nation, Seminole Nation, Seneca Cayuga Tribe, Shawnee Tribe, Thlopthlocco Tribal Town, Tonkawa Tribe, and Wichita & Affiliated Tribes. Wyandotte Nation. *Member Tribes*, INTER-TRIBAL ENVTL. COUNCIL, http://www.itecmembers.org/Member-Tribes (last visited Oct. 16, 2015).

country," and, "[p]ast program initiatives have included GIS mapping of tribal trust land, creating an inventory of major and minor sources . . ., reviewing new and/or modified major source permits that have been issued by the state, and providing technical assistance and training to the member tribes related to air quality monitoring."[224] Under the ITEC solid waste program, the Council has, in relevant part, distributed a "model Tribal integrated solid waste management plan and model solid waste codes and ordinances."[225]

In Arizona, there is the Inter Tribal Council of Arizona (ITCA), which has 21 tribal members most of whom have territory within Arizona.[226] ITCA operates a number of programs that work to build the capacity of tribal environmental programs.[227] In relation to regulating environmental pollution, the ITCA operates a Tribal Solid Waste Management Program,[228] Tribal Water Systems program,[229] and Tribal Air Quality program.[230] Although information on tribal environmental law development does not

---

224. *Clean Air Program*, INTER-TRIBAL ENVTL. COUNCIL, http://www.itecmembers.org/Programs/Overview-of-ITEC-Clean-Air-Program (last visited Oct. 16, 2015).

225. *Solid Waste Program*, INTER-TRIBAL ENVTL. COUNCIL, http://www.itecmembers.org/Programs/Solid-Waste-Program (last visited Oct. 16, 2015).

226. *Member Tribes*, INTER-TRIBAL COUNCIL OF ARIZ., http://itcaonline.com/?page_id=8 (last visited Oct. 16, 2015). The member tribes include: Ak-Chin Indian Community, Cocopah Indian Tribe, Colorado River Indian Tribes, Fort McDowell Yavapai Nation, Fort Mojave Tribe, Gila River Indian Community, Havasupai Tribe, Hopi Tribe, Hualapai Tribe, Kaibab-Paiute Tribe, Pascua Yaqui Tribe, Pueblo of Zuni, Quechan Tribe, Salt River Pima-Maricopa Indian Community, San Carlos Apache Tribe, San Juan Southern Paiute, Tohono O'odham Nation, Tonto Apache Tribe, White Mountain Apache Tribe, Yavapai-Apache Nation, and Yavapai-Prescott Indian Tribe. *Id.*

227. *Environmental Quality Programs*, INTER-TRIBAL COUNCIL OF ARIZ., http://itcaonline.com/?page_id=48 (last visited Oct. 16, 2015).

228. *Tribal Solid Waste Management Program*, INTER-TRIBAL COUNCIL OF ARIZ., http://itcaonline.com/?page_id=102 (last visited Oct. 16, 2015) ("The purpose of the Tribal Solid Waste Management Program is to provide assistance to Tribes in order to increase their capacity to manage their solid waste programs and any relevant solid waste issues on tribal lands.").

229. *Tribal Water Systems*, INTER-TRIBAL COUNCIL OF ARIZ., http://itcaonline.com/?page_id=116 (last visited Oct. 16, 2015) ("The Tribal Water Systems program (TWS) is a Tribally-based drinking water and wastewater training and assistance program initiated and operated by the Inter Tribal Council of Arizona, Inc. to help address the specific needs of tribes.").

230. *Tribal Air Quality*, INTER-TRIBAL COUNCIL OF ARIZ., http://itcaonline.com/?page_id=114 (last visited Oct. 16, 2015) ("The goal of the Tribal Air Quality Program (TAQP) is to support tribal clean air initiatives at the local-community, regional and national levels. . . .The TAQP assists tribal environmental staff as they build their air quality programs by providing staff support and direct technical assistance.").

appear to be posted on the ITCA's website, the Council does assist in the development of tribal environmental law. For example, the ITCA Tribal Solid Waste Management Program "plans and facilitates workshops on" developing environmental codes and ordinances.[231] Also, the ITCA contemplates coordinating with other governments, such as Arizona and the federal government, to develop the most efficient environmental management practices.[232]

Although not solely intertribal in nature, another intergovernmental organization impacting environmental regulation within the tribal environment is the Western Regional Air Partnership (WRAP). The WRAP is "a voluntary partnership of states, tribes, federal land managers, local air agencies and the US EPA whose purpose is to understand current and evolving regional air quality issues in the West."[233] The WRAP is involved in several issues related to air quality, such as emissions of air pollution and climate change and it assists member governments by providing data and guidance related to air emissions.[234] Several of the tribes looked at for purposes of this article are members of the WRAP, including the Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, Hopi Tribe, Hualapai Tribe, and Northern Cheyenne Tribe.[235] To support the efforts of member tribes, WRAP created a draft technical document addressing tribal air quality capacity and tribal implementation plan development.[236] The objectives of WRAP's work in this regard are two-fold: 1) to improve "the ability of tribes to assess their air quality conditions and to develop strategies to address air quality issues as part of the larger regional planning process," and, 2) to increase "the ability of tribes to

231. *Tribal Solid Waste Management Program*, *supra* note 228.

232. *See, e.g.*, *id* (explaining that the ITCA hosts a Tribal Solid Waste Working Group in part to provide networking opportunities for tribes and other local governments); *Tribal Air Quality*, *supra* note 230 (explaining that the TAQP brings together air quality experts from several governments).

233. *Welcome to the WRAP*, W. REG'L AIR P'SHIP, http://www.wrapair2.org (last visited Oct. 16, 2015).

234. *Id.*

235. *WRAP Membership*, W. REG'L AIR P'SHIP, http://www.wrapair2.org/membership.aspx (last visited Oct. 14, 2015). "The WRAP's vision is to be the leading technical and planning information source for air quality management in the western United States." *Executive Summary outline*, W. REG'L AIR P'SHIP, http://www.wrapair2.org/pdf/WRAP%20Work%20Plan_ExecSummary%20Aug13_V2.pdf (last visited Oct. 14, 2015).

236. *Appendix A. Support of Tribal Air Quality Capacity and Tribal Implementation Plan (TIP) Development*, W. REG'L AIR P'SHIP, http://www.wrapair2.org/pdf/WRAP%20Work%20Plan%20-%20Appendix%20A%20-%20Aug13%20draft.pdf (last visited Oct. 14, 2015).

protect and manage their natural resources and communities."[237] Given the mission of WRAP and its support of tribal air quality programs, there is a high probability that member tribes will incorporate information gained from WRAP into their tribal environmental provisions.

In addition to these organizations that tend to be more regional in nature, there is also the National Tribal Air Association (NTAA), which operates on a nation-wide scale.[238] The mission of the NTAA is "to advance air quality management policies and programs, consistent with the needs, interests, and unique legal status of American Indian Tribes and Alaska Natives."[239] In addition to promoting consultation and collaboration between tribal governments and other governments, another goal of the NTAA is to "[a]dvocate and advance tribal environmental, *cultural*, and economic interests in the development of air policy at all levels of government (tribal, federal, state, local, and international)."[240] The NTAA therefore works on a nationwide level to improve tribal air policy, while also promoting tribal culture and collaboration with other governments.

Based on the foregoing, it appears that intertribal organizations may play a significant role in the development of tribal environmental law. Unfortunately, the actual legal documents being created by such organizations do not appear to be publically available, so it is difficult to ascertain the extent of the influence of these organizations. At the very least, however, it does appear that tribes are becoming increasingly collaborative to address their environmental problems. This is not unique to tribes. As mentioned above, many states and local governments are also participating in similar organizations, such as the Regional Greenhouse Gas Initiative and even WRAP, to address significant environmental challenges, such as climate change. Although it is not uncommon for the EPA to participate in

---

237. *Id.*

238. Despite its nationwide focus, several of the tribes included in this article are members of the NTAA, including: Seneca Nation of Indians, Saint Regis Band of Mohawk Indians, Cherokee Nation of Oklahoma, Citizen Potawatomi Nation, Delaware Nation of Oklahoma, Fort Sill Apache Tribe of Oklahoma, Iowa Tribe of Oklahoma, Modoc Tribe of Oklahoma, Quapaw Tribe of Oklahoma, Seminole Nation of Oklahoma, Confederated Salish & Kootenai Tribes, Fort Belknap Indian Community, Fort Peck Tribes of Assiniboine & Sioux Tribe, Northern Cheyenne Tribe, Colorado River Indian Tribes, Gila River Indian Community, Hualapai Tribe, and White Mountain Apache Tribe. *96 Member Tribes Roster by EPA Region*, NAT'L TRIBAL AIR ASSOC., http://www7.nau.edu/itep/main/ntaa/docs/About/NTAAMemberTribesRoster-2015.pdf (last visited Oct. 14, 2015).

239. *About Us*, NAT'L TRIBAL AIR ASSOC., http://www7.nau.edu/itep/main/ntaa/about/ (last visited Oct. 14, 2015).

240. *Id.* (emphasis added).

meetings of such intergovernmental organizations, the federal government may look to the actions of tribes and states as evidence that collaboration is important to beginning to address these modern day challenges, such as pollution and climate change. Moreover, the foregoing discussion also demonstrates that many tribes are very much open to collaborating with other governments. And, such collaboration is key to a successful exchange of ideas through environmental regulatory laboratories.

### 7. Conclusions Regarding Non-Code Tribal Environmental Laws Related to the Regulation of Pollution

What the foregoing discussion demonstrates in totality is that the tribal use of forms of environmental law other than code provisions is not insubstantial as over a quarter of the tribes studied are utilizing such laws. Overall, 20 of the 74 federally recognized tribes studied, or approximately 27%, have enacted at least one form of non-code tribal environmental law related to the regulation of pollution.[241] Interestingly, of these 20 tribes, 9, or approximately half of the tribes with non-code tribal environmental laws, are located within Arizona.[242]

While recognizing this is not insubstantial, however, it is notable that the majority of the tribes studied fail to utilize forms of environmental law other than code provisions.[243] This result is consistent with my previous research demonstrating that the tribes studied generally did not appear to be using tribal environmental code provisions to regulate air pollution, water pollution and solid wastes.[244] Having now studied both the code and non-

241. As discussed above, these tribes are: Cheyenne and Arapaho, Muscogee (Creek) Nation, Osage Nation, Caddo Nation, Iowa Tribe, Sac & Fox Nation, Hualapai Nation, Pascua Yaqui Tribe, San Carlos Apache Tribe, White Mountain Apache Nation, Fort McDowell Yavapai Nation, Navajo Nation, Colorado River Indian Tribes, Pueblo of Zuni, Kaibab Paiute Indian Tribe, St. Regis Mohawk Tribe, Onondaga Nation, Northern Cheyenne, Confederated Salish and Kootenai Tribes, and Gros Ventre Assiniboine of the Fort Belknap.

242. These tribes are: Hualapai Nation, Pascua Yaqui Nation, San Carlos Apache Tribe, White Mountain Apache Nation, Fort McDowell Yavapai Nation, Navajo Nation, Colorado River Indian Tribes, Pueblo of Zuni, and the Kaibab Paiute Indian Tribe. Warner, *Examining Tribal Environmental Law*, *supra* note 7, at 67–73. This result is consistent with my previous research on tribal environmental code provisions, which found that tribes located within Arizona (and Montana—the Mountain West) were more likely to have enacted tribal environmental code provisions. *Id.*

243. Admittedly, this research is incomplete as it relies on publically available information. However, given the disparity between those utilizing this form of law and those that appear not to be, some conclusions can be reached even if the research is incomplete.

244. Warner, *Tribes as Innovative Environmental "Laboratories"*, *supra* note 7, at 68–70.

code forms of tribal environmental law for these 74 federally recognized tribes, I can conclude that most of these tribes appear not to have publicly available laws related to the regulation of pollution within their tribal environment.

Despite this conclusion, however, those tribes that are enacting tribal environmental laws seem to be innovating in new and interesting ways. As discussed above, several of the tribes are being truly novel in their tribal environmental law, as opposed to most states[245] and the federal government, by including the protection of the environment and culture in their constitutions and vision statements. Also, although states and the federal government utilize regulations and customary law, tribal regulations and customary law generally include provisions, such as those calling for the protection of tribal cultural resources, that are absent in their federal and state counterparts. It would therefore appear that other governments have much to learn from tribal environmental law.

### *B. Tribal Regulation Related to Climate Change*

In addition to addressing the regulation of pollution, as discussed above, several tribes have also developed tribal environmental laws dealing with climate change. For example, the Onondaga Nation's *Vision for a Clean Onondaga Lake*, which was also discussed above, acknowledges that climate change is impacting the tribal environment and that the Nation must work to combat the impacts of climate change.[246] Some tribes, however, have gone even further, developing tribal adaptation plans to specifically combat the negative impacts of climate change impacting their tribal environment. The federal government does not have a comprehensive climate change adaptation plan. Accordingly, climate change adaptation planning is happening in the absence of federal regulation, which suggests that such regulations are truly innovative. Accordingly, each of the plans detailed below represents an experiment in adaptation planning that other local units of governments could learn from, or, that even the federal government may potentially adopt.

---

245. Some states, such as Montana, do reference protection of the environment within the state constitution. MONT. CONST. art. IX.

246. ONONDAGA NATION, *supra* note 203.

1. Confederated Salish and Kootenai Tribes[247]

The Confederated Salish and Kootenai Tribes (CSKT), located within Montana, have adopted an adaptation plan titled the "Climate Change Strategic Plan."[248] Initial work on the Strategic Plan began in November 29, 2012, when the CSKT adopted Resolution No. 13-52 which acknowledged the impact of climate change and vowed to reduce such impacts on the CSKT tribal environment.[249] Moreover, the Resolution contemplates the incorporation of Traditional Ecological Knowledge into work related to climate change,[250] as well as acknowledging that climate change may result in cultural impacts.[251]

In relation to culture, the Strategic Plan focuses on nine sectors that may be affected by climate change, including culture.[252] The Plan prioritizes each

247. For purposes of this article, the discussion of the CSKT Strategic Plan is limited to its focus on Traditional Ecological Knowledge and culture. For a complete discussion of the CSKT Strategic Plan, see Warner, *Tribes as Innovative Environmental "Laboratories"*, *supra* note 7, at 826–46.

248. CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, CLIMATE CHANGE STRATEGIC PLAN 3 (2013), http://ndep.nv.gov/tribe/docs/env_mgr_ref_docs/Climate%20Change/CSKT%20Climate%20Change%20Adaptation%20Plan%20FINAL%2009%2010%202013.pdf ("The Confederated Salish and Kootenai Tribes (CSKT) include the Salish, Kootenai, and Pend d'Oreilles Tribes. As the first to organize a tribal government under the Indian Reorganization Act of 1934, the Tribes are governed by a tribal council. The Tribal Council has ten members. The council elects from within a Chairman, Vice Chairman, Secretary and Treasurer. The Tribal Council represents the Arlee, Dixon, Elmo, Hot Springs, Pablo, Polson, Ronan, and St. Ignatius districts in Montana. CSKT employs nearly 1,400 people. As of 2012, there were about 7,900 enrolled tribal members. Approximately 5,300 tribal members live on the Flathead Reservation and 2,600 tribal members live off the Reservation. The 2010 population of the Reservation was 28,324, and eight percent increase over the 2000 census, but non-Indians outnumbered Indians by two-to-one."). (internal citations omitted).

249. *Id.* at i.

250. The Climate Change Strategic Plan defines "Traditional Ecological Knowledge" as "considerations related to your planning areas (Forestry, Water, Air, etc.) concerning climate change. TEK refers to the evolving knowledge acquired by indigenous and local peoples over hundreds of thousands of years through direct contact with the environment. This knowledge is specific to a location and includes the relationships between plants, animals, natural phenomena, landscapes and timing of events that are used for lifeway's, including but not limited to hunting, fishing, trapping, agriculture, and forestry." *Id.* at xi. The Tribes' Strategic Plan incorporates Traditional Ecological Knowledge by including elder observations, which "indicate that the climate has noticeably changed within their lifetime and as stated prior, the knowledge they gained from parents, grandparents, and great grandparents goes back at least three generations." *Id.* at 36.

251. *Id.* at i–ii.

252. *Id.* at 36.

section, and culture is rated at the highest level.[253] The Plan explains that such a high ranking relative to other sectors is appropriate, as "[p]rotecting land-based cultural resources is essential if the Tribes are to sustain Tribal cultures."[254]

### 2. Jamestown S'Klallam Tribe[255]

The Jamestown S'Klallam (JSK) Tribe and its ancestors have occupied the Olympic Peninsula of Washington State for centuries.[256] As with other communities throughout the United States, climate change is negatively impacting the JSK Tribe. As a result, the Tribe has engaged in adaptation planning "[t]o protect and preserve culturally important resources and assets; ensure continued economic growth; and promote long-term community vitality . . . ."[257] The Tribe adopted its Climate Vulnerability Assessment and Adaptation Plan (JSK Adaptation Plan) in August 2013.[258]

In its Plan, the Tribe details numerous impacts of climate change on human health,[259] and, in relation to human health, the JSK Adaptation Plan concludes that "population-wide changes to tribally valued plants and animals have the potential to disrupt cultural, spiritual, socioeconomic, and nutritional health."[260] Accordingly, the Plan acknowledges the potential impacts of climate change on the Tribe's culture.

Having acknowledged the potential impact of climate change on the Tribe's culture, the Plan goes on to assess the vulnerability of certain elements of the tribal environment.[261] Out of the things considered to be most vulnerable to climate change, such as: salmon, clams & oysters, shellfish biotoxins, wildfire, and cedar harvests,[262] "[m]ost of these areas of

253. *Id.*
254. *Id.* at 18.
255. The Jamestown S'Klallam Tribe, Nez Perce Tribe, and Swinomish Indian Tribal Community are not located within one of the four states that are the focus of this article.
256. JAMESTOWN S'KLALLAM TRIBE, CLIMATE VULNERABILITY ASSESSMENT AND ADAPTATION PLAN 7 (2013), http://www.jamestowntribe.org/programs/nrs/climchg/JSK_Climate_Change_Adaptation_Report_Final_Aug_2013s.pdf (last visited Oct. 14, 2015) [hereinafter JSK Adaptation Plan].
257. *Id.*
258. *Id.*
259. *Id.* at 24–25.
260. *Id.* at 24.
261. *Id.* at 20.
262. *Id.*

concern ranked particularly high in cultural importance."[263] Salmon is an example as:

> [s]almon species are an iconic cultural resource for many coastal tribes of the Pacific Northwest. Traditionally, salmon provided the foundation for almost all aspects of cultural life for the Jamestown S'Klallam Tribe and was an important trade good with more interior tribes of the Pacific Northwest. Salmon continue to represent an important tribal cultural connection to the waters of the Usual & Accustomed area and also provide a valuable economic and nutritional resource for the tribe.[264]

Because the climate change-related stressors negatively impacting salmon are not limited to tribal territory, the JSK Adaptation Plan calls on the Tribe to coordinate with the federal government, state government, private industry and private land owners to try to increase the resiliency of salmon.[265] Such coordination is consistent with the idea that tribes can be laboratories of environmental experimentation, as the hope expressed in the Plan is that these governments can learn from each other to achieve the best possible environmental laws to protect salmon.

At the end of the JSK Adaptation Plan, the Tribe identifies next steps to help the Tribe increase its preparedness for climate change.[266] In moving forward, the Tribe wishes for cultural considerations to be incorporated into any potential response to the impacts of climate change.[267]

### 3. Nez Perce Tribe

The Nez Perce Tribe (NPT) adopted its Clearwater River Subbasin Climate Change Adaptation Plan in 2011.[268] The NPT Plan focuses on the

---

263. *Id.* at 29.

264. *Id.* at 30. The JSK Adaption Plan goes on to detail the cultural significance of other areas of concern identified in Group 1, such as clams and oysters, shellfish biotoxins, wildfire and cedar harvests. *Id.* at 30–42.

265. *Id.* at 33.

266. *Id.* at 52–53.

267. *Id.* at 52–53. "Culture" is specifically a value listed that the Tribe should consider when determining value to the Tribe. *Id.*

268. NEZ PERCE TRIBE WATER RES. DIV., CLEARWATER RIVER SUBBASIN CLIMATE CHANGE ADAPTATION PLAN 2 (2011), http://www.mfpp.org/wp-content/uploads/2012/03/ClearwaterRiver-Subbasin_ID_Forest-and-Water-Climate-Adaptation-Plan_2011.pdf (last visited Nov. 4, 2015). The Tribe's Adaptation Plan focuses on the Clearwater River Subbasin, which is "approximately 9,350 square miles in size and extends 100 miles from north to south and 120 miles from west to east (Idaho/Washington border to Idaho/Montana border)." *Id.* at 13. The plan focuses on this region because "[t]he Clearwater

Tribe's history, explaining that "[h]istorically, the Nez Perce people were hunters and gathers and thrived on abundant salmon, elk and deer, camas and other roots and berries. The protection of these resources is a fundamental mission of the Nez Perce Tribe."[269]

As with other tribal adaptation plans, the NPT Plan also contemplates close coordination and learning opportunities with other local governments.[270] This goal is mirrored in the stated major goals of the Plan, as NPT hopes to foster close relationships with other governments and develop "ecologically connected" public and private lands.[271] As previously explained, this is consistent with the concept of tribes being valuable laboratories for regulatory experimentation.

### 4. Saint Regis Mohawk Tribe

The St. Regis Mohawk Reservation is located within New York.[272] On August 30, 2013, the Tribe released a Climate Change Adaptation Plan for Akwesasne. Following introductions to the Plan and climate change generally, the Plan discusses the impacts on people, Mother Earth,[273] water, fish, small plants and grasses, berries, Three Sisters,[274] medicine herbs, animals, trees, birds, the Four Winds,[275] the Thunderers,[276] Grand Mother Moon,[277] the sun, the stars, the Four Beings,[278] and the Creator.[279] The Tribe

---

River Subbasin comprises much of the original homeland of the Nez Perce Tribe (Tribe) and still is the largest population center for the Tribe." *Id.* at 9.

269. *Id.*

270. *Id.* at 15.

271. *Id.* at 10.

272. The traditional Mohawk Nation Territory (Akwesasne), however, is located in New York, Ontario, and Quebec. ST. REGIS MOHAWK TRIBE, CLIMATE CHANGE ADAPTATION PLAN FOR AKWESASNE 1 (draft Aug. 30, 2013), http://www.srmt-nsn.gov/_uploads/site_files/ClimateChange.pdf (last visited Oct. 14, 2015).

273. *Id.* at 9 ("We are all thankful to our Mother, the Earth, for she gives us all that we need for life.").

274. *Id.* at 23 ("The Three Sisters, Corn, Beans, and Squash, continue to follow their original instructions and continue to provide food to the people for survival. The Three Sisters are the foundation of the Haudenosaunee culture.").

275. *Id.* at 39 ("The four winds bring the change of the four seasons. The winds carry pollen and seeds and are dispersed to be reproduced. The winds carry vapor in the form of water, snow, rain, hail and ice. The four winds carry the smoke from tobacco burnings with the messages that are directed upward to the medicine spirits and the Creator.").

276. "The Thunder Beings, known as the Grandfathers, carry out their original instructions and continue to bring lightning and water to replenish and renew our water supply." *Id.* at 41.

277. "She is the leader of women all over the world, and she governs the movement of the ocean tides." *Id.* at 43.

possesses a significant cultural connection with each of the foregoing, and, as a result, consideration of how climate change impacts culture pervades the Adaptation Plan.[280] Each section begins with a discussion of the cultural significance of the resource or entity, then discusses how climate change is impacting the same and concludes with recommended adaptation actions to protect the resource[281] or to better align with the cultural teachings.[282]

As an initial starting point, the Plan explains that the Mohawk people have maintained and preserved their unique culture and traditions for thousands of years, and that "[t]he values of their historical culture still remain present in their daily life."[283] This statement is certainly consistent with the Plan's overall focus on culture, as explained above.[284] Several of the resources examined in the Plan, such as fish, animals and berries, relate to food. The Plan explains that there is a significant connection between the Tribe's culture and its traditional foods:

> "[T]he indigenous relationship between food and people is intimately tied to the cultural, physical, emotional, psychological and spiritual health of tribal communities." The impact of climate change on food species and ecological processes thus has a multifaceted impact on tribal culture and life, and the threat climate change poses to traditional food use can worsen already existing declines in health due to issues like obesity, diabetes and cancer. Reductions in the availability of traditional food due to

278. "The Four Beings continue to carry out their original instructions by watching and caring for humankind as long as the people lie in harmony, and continue our original instructions." *Id.* at 49.

279. "The Creator has given us everything we need to survive here on Mother Earth." *Id.* at 51.

280. *Id.* at 4–52.

281. Interestingly, as part of the Plan's recommended adaptation actions, the Tribe proposes a well-developed waste management program, which, if enacted, would be evidence of tribal environmental law related to solid waste disposal, as discussed above. *Id.* at 11. Similarly related to the discussion above, the Plan also contemplates the development of an air emissions reduction program as part of its adaptation planning. *Id.* at 40.

282. *Id.* at 4–52.

283. *Id.* at 5.

284. The Plan also concludes by explaining the connection between adaptation planning and culture: "Through its effects on Akwesasne's forests, plants, rivers, streams, wetlands and wildlife, climate change has the potential to impact a number of the Saint Regis Mohawk Tribe's traditional ways, including hunting, fishing, and plant-gathering. These changes will require adaptive approaches to resource management to ensure that the Tribe's traditional cultural practices can continue into the future. The Saint Regis Mohawk Tribe already possesses significant adaptive capacity in the form of its environmental and educational programs, institutions, partnerships, community members, and commitment to its culture and environment." *Id.* at 52.

> climate change thus results in . . . "a denial of [tribal] rights to have access to a steady supply of nutritionally balanced, culturally relevant foods," and can also erode traditional practices and knowledge associated with these activities.[285]

In addition to the Plan's focus on culture, the Plan also calls for increased collaboration with other governments at numerous places throughout the document.[286] Relatedly, the Plan also contemplates the Tribe becoming involved in a framework similar to the Columbia River Inter-Tribal Fish Commission, an intertribal organization that works to protect fisheries in the Pacific Northwest.[287]

### 5. Swinomish Indian Tribal Community

The Swinomish Indian Tribal Community is located within the state of Washington.[288] Initial work on the Tribe's climate change adaptation plan began in 2007, when the Swinomish Indian Senate passed a Proclamation authorizing the study of the impacts of climate change on the lands, resources and community of the Swinomish Indian Reservation.[289] The Tribe adopted the Swinomish Climate Change Initiative Climate Adaptation Action Plan (Swinomish Adaptation Plan) in October 2010.[290]

The Swinomish Adaptation Plan is broken down into five categories and every impact of climate change on the tribal community is organized into at least one category. The fifth category, "Cultural Traditions and Community Health," is focused entirely on the impacts of climate change on the tribal community's culture.[291] The Tribe values culture so highly that the entirety of Chapter 4 of the plan is dedicated to culture. The Plan explains that the Tribe's culture is significantly intertwined with natural resources.[292] The Tribe states that "the projected impacts [of climate change] are expected to

---

285. *Id.* at 21–22.

286. *See, e.g.*, *id.* at 18, 22, 30, 38.

287. *Id.* at 18.

288. "The Swinomish Indian Reservation is located on the southeastern peninsula of Fidalgo Island, west of the Swinomish Channel and adjacent to low-lying mainland areas of western Skagit County, in western Washington." SWINOMISH INDIAN TRIBAL COMMUNITY, SWINOMISH CLIMATE CHANGE INITIATIVE CLIMATE ADAPTATION ACTION PLAN 7 (Oct. 2010), http://www.swinomish.org/climate_change/Docs/SITC_CC_AdaptationActionPlan_complete.pdf. Approximately 3,000 people live on the Reservation. *Id.*

289. *Id.* at v.

290. *Id.*

291. *Id.* at 13.

292. *Id.*

affect long-standing traditions of tribal members, including shellfish harvesting, salmon fishing, hunting, gathering of native plants, and use of cedar and other species."[293] The Plan sums up this connection by stating that:

> Given the potential threats to a way of life that has been at the core of tribal culture for countless generations, the significance of these issues and long traditions merits special focus. This chapter [Chapter 4] describes the connection between these tribal traditions and issues of community resilience and cultural sovereignty that are vital to preparing for significant changes, issues based on a foundation of community wellness that encompasses more than the physical health actions listed in this report. . . . The adaptive responses described in this report are intended to be dynamic, and they are consistent with local traditions, while drawing from and contributing to neighboring tribes, regional compacts, and international bodies.[294]

Relatedly, the Plan also considers how tribal culture may increase resiliency to climate change. For example, the Tribe suggests creating a repository of indigenous plants, which would become a place for traditional teaching and healing.[295]

The Swinomish Adaptation Plan also discusses the anticipated impacts of climate change on cultural resources. For example:

> Cultural resources may be impacted both positively and negatively by tidal inundation. Gradual sea level rise will increasingly submerge nearshore or low-lying buried artifacts and sites, both protecting them and making investigation more difficult, while strong storm surges may uncover some sites or artifacts, rendering them vulnerable to weathering and tampering. Cultural use areas may be impacted by either inundation in near-shore or low-lying areas or by wildfire in forested areas, rendering them unusable in either case for some extended period of time.[296]

### *C. Trends in Tribal Non-Code Environmental Regulation*

Having reviewed available forms of tribal environmental law other than code provisions, two trends clearly emerge. First, in many instances, tribes

---

293. *Id.*
294. *Id.* (emphasis in original).
295. *Id.* at 23.
296. *Id.* at 31.

already contemplate increased collaboration and consultation with other governments, such as states and the federal government. Given the transboundary nature of pollution and the negative causes and effects of climate change, such collaboration is often crucial to fully protect the tribal environment, which is usually bounded by the territories of other governments. Regardless of the reason, however, the fact that much of tribal environmental law already contemplates the need for collaboration only serves to promote the concept of tribes as potential laboratories for experimentation. Pathways and networks already exist allowing for diffusion of regulatory experiments—diffusion which is crucial for governmental units to benefit from experiments of other governmental units. Tribes are therefore well placed to be valuable laboratories of environmental regulatory experimentation as the infrastructure necessary to communicate the results of such experimentation presently exist, in addition to the other reasons explained above.

A second trend that emerges following an examination on non-code tribal environmental law is the importance and role of tribal culture. Incorporating tribal customs and traditions into tribal environmental law promotes tribal sovereignty, as "[i]t is a process of Indian peoples 'doing sovereignty' the Indian way, by relying on their own traditional values to map out and control their futures."[297] Such incorporation of tribal customs and traditions is also important "in linking justice with community values."[298] Accordingly, the incorporation of tribal culture into tribal environmental law certainly benefits the tribe itself.

Moreover, given the limitations of federal laws designed to protect cultural resources, protecting such resources via tribal environmental law may prove particularly important. For example, some tribes have tried to use the National Historic Preservation Act (NHPA) and/or the NEPA to protect cultural resources from environmental degradation.[299] While both statutes may require discussion about and consultation on cultural resources, neither necessarily acts as an absolute barrier to the

297. Austin, *supra* note 213, at 373. The connection between sovereignty and tribal customs and traditions is also considered in the HEPP. LaFrance & Costello, *supra* note 217, at 62 ("It is important, therefore, to incorporate our traditional Haudenosaunee knowledge and laws into the HEPP as an expression of our sovereignty and thus for the protection of our society. . . . By creating culturally based environmental protection processes within their own territories, tribal governments assert their sovereignty.").

298. Rosser, *supra* note 211, at 19.

299. *See, e.g.*, N. Cheyenne Tribe v. Norton, 503 F.3d 836, 839–42 (9th Cir. 2007).

environmental degradation of cultural resources.[300] Under the NHPA, places of "traditional religious and cultural importance" may be eligible for listing on the National Register of Historic Places,[301] but such a listing does not guarantee protection of the property.[302] Moreover, there are several reasons why tribes may not want a cultural property to be listed under the NHPA.[303] Section 106 of the NHPA requires consultation on any "undertakings" by a federal agency (or assisted or licensed by a federal agency) that may have an effect on "any district, site, building, structure, or object" that is on or eligible for listing on the National Register.[304] Accordingly, federal agencies must consult tribes when the proposed action may impact a tribal cultural resource eligible for listing on the National Register. However, such "protection" of tribal cultural resources is limited.[305] First, the NHPA only applies to physical sites; it does not apply to natural resources which in and of themselves may be valuable to tribes, such as water. Second, as mentioned above, there may be reasons why a tribe may not want to make the federal government aware of a site so that it may be listed on the National Register. And, finally, Section 106 only requires consultation; it does not require that the federal agency in question act in a manner protective of the tribal cultural resource.

NEPA is similarly limited. NEPA is triggered when there are "major Federal actions significantly affecting the quality of the human environment" and requires the preparation of an environmental assessment of the potential environmental impacts, in addition to other requirements.[306] Like the NHPA, however, NEPA is purely procedural and does not require the federal government to act in a manner that is protective of tribal cultural resources or environment.

---

300. For a general discussion of the use of federal laws to protect cultural property, see JUDITH V. ROYSTER, MICHAEL C. BLUMM & ELIZABETH ANN KRONK, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS 37–40 (3d ed. 2013).

301. 54 U.S.C. § 302706 (2014).

302. ROYSTER ET AL., *supra* note 300, at 39.

303. *Id.*

304. 54 U.S.C. § 100734 (2014).

305. Admittedly, tribes, under Section 101(d) of the NHPA, may petition to create a Tribal Historic Preservation Office (THPO) within the tribe. 54 U.S.C. § 302703 (2014). For example, the Saint Regis Mohawk Tribe established a THPO within the Nation "to preserve the historic and cultural heritage of the Akwesasne Mohawk people for several generations that will follow in our footsteps." *Tribal Historic Preservation Office*, ST. REGIS MOHAWK TRIBE, http://www.srmt-nsn.gov/divisions/administration/tribal_historic_preservation_office/ (last visited Oct. 12, 2015). Even though such a THPO would likely be more responsive to the needs of the tribal community, such an officer, however, is still limited by the NHPA, as discussed in the text.

306. 42 U.S.C. § 4332(C) (2006).

It therefore appears that existing federal laws are ill-suited to protect valuable tribal cultural resources which may be degraded by environmental harms.[307] Given the limitation on the ability of existing federal laws to adequately protect tribal cultural resources, explicit protection of such resources in tribal environmental laws fills a regulatory hole within the federal scheme. It therefore is quite logical that tribes wanting to protect their cultural resources would develop innovative tribal environmental laws doing exactly that.

Tribes, however, are not the only governments within the United States interested in protecting cultural resources. Interestingly, the NHPA states that the historical and *cultural* foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people.[308] Similarly, NEPA states, as part of the congressional declaration of national environmental policy, that the federal government may "preserve important historic, *cultural*, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice. . . ."[309] Through the NHPA and the NEPA (and perhaps elsewhere as well), the federal government expresses a desire to protect the cultural resources of the nation. Yet, as discussed above, both the NHPA and NEPA fail to provide absolute protections for such resources. In the case of the NHPA, significant protection is really limited to those physical sites listed on the National Register, beyond which the Act only requires consultation. Also, NEPA is purely procedural, and, while the Act requires the federal government to take into consideration the potential environmental effects of its major actions, it does not require the federal government to act in a way that best protects the environment.

In short, it appears that the federal government aspires to the protection of its cultural resources, just as tribes do, but it has failed to date to enact laws that provide concrete protection for such resources. In this way, the federal government may learn from innovative tribal environmental law. Incorporation of cultural protections directly into federal environmental

---

307. Admittedly, there may be reasons why the federal government has failed to take stringent steps to protect its culture. For example, the federal government may decline defining American "culture" for fear of focusing on the dominant culture to the exclusion of others or to remain agnostic, allowing others to imbue the meaning of culture for themselves. Also, as discussed in Section II, it is often easier for smaller, more homogenous communities to establish their cultural norms than large governments, such as the federal government.

308. *See* 54 U.S.C. § 302701 (2014).

309. 42 U.S.C. § 4331(b)(4) (2006) (emphasis added).

laws, just as tribes have done, may take the federal government from merely aspiring to protect cultural resources to actually protecting them.

The prevalence of tribal culture is not unique to non-code tribal environmental law. In my previous research on tribal environmental code provisions, I discovered numerous references to the protection of tribal culture in tribal codes as well.[310] Given its pervasiveness in both tribal environmental codes and non-code law, one can conclude that the protection of tribal culture places highly for many tribes in combination with the protection of their environment.

### *D. A Call for Increased Tribal Innovation*

Despite these significant and fascinating developments in tribal environmental law, the reality appears to be that the majority of tribes studied are not utilizing their full potential in this area. As summarized at the start of this section, a slim majority of the 74 federally recognized tribes studied currently have no tribal environmental code provisions in place. Similarly, of all 566 federally recognized tribes then existing within the United States, only 76 tribes, or 13% of federally recognized tribes, have TAS status under either the CAA or CWA. This section further demonstrated that only approximately a quarter of the tribes studied have enacted some form of tribal environmental law other than code provisions. On the whole, it would appear that a substantial number of tribes are not enacting environmental law of any kind.

Despite this trend, however, substantial capacity exists. For example, as explained above, tribal court decisions are an area where tribes can truly innovate in new and interesting ways because of their ability to consider the laws of various sovereigns, in addition to customary law. Another example from above is tribal regulatory guidance. In some instances, states may be working to implement the same federal laws as tribes are implementing, and, as a result, tribal innovation related to such regulatory guidance is directly relevant to work being done by states. Accordingly, given the tribal capacity for innovation and the important role that such developments can play, increased tribal experimentation in the field of environmental law would certainly be welcome.

---

310. *See, e.g.*, Warner, *Tribes as Innovative Environmental "Laboratories"*, *supra* note 7, at 791–96.

## CONCLUSIONS

Tribal environmental innovations are breathing new life into environmental law development, which has largely gone stale at the federal level. Utilizing a wide array of forms of environmental law, both hard and soft— constitutions, vision statements, regulations, court decisions, intertribal organizations and climate change adaptation plans—tribes are doing things with their tribal environmental laws that no other sovereigns within the United States are doing. In this regard, tribal experimentation may prove helpful to both tribes and other governments.

Moreover, aside from the benefits to other governments, tribes themselves benefit from such experimentation, as the development of tribal environmental law, if done in a manner that comports with individual tribal community identity, promotes tribal sovereignty.[311] "[A]n indigenous nation's sovereignty is strengthened if its law is based upon its own internalized values and norms."[312] As demonstrated above, this is what many tribes are doing with their tribal environmental law—they are adapting such laws to include tribal norms and values, especially those related to tribal culture.

Such benefits, however, are not limited to tribal governments. The other two sovereigns of the United States, states and the federal government, also stand to benefit from such innovation. American environmental law on the whole needs to evolve to better address emerging environmental threats, such as climate change, and fill "gaps" left by existing environmental regulation, as exemplified by the CWA's failure to regulate non-point source pollution or the federal government's failure to regulate climate change on a nationwide basis.[313] Tribal environmental innovations present opportunities to address some of these challenges or at least to think in new directions.[314]

---

311. *C.f.* Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions into Tribal Law*, 1 TRIBAL L.J. 2 (2000), http://lawschool.unm.edu/tlj/tribal-law-journal/articles/volume_1/zuni_cruz/index.php ("[N]ot every sovereign act undertaken by an indigenous nation necessarily promotes the sovereignty of the people. . . . Adoption of western law can create a gap between the adopted law and the people to whom it is applied. . . . In this respect, an Indian nation's government can participate in the alienation of its own people.").

312. *Id.*; *see also* Singel, *supra* note 172, at 358–59.

313. JAMES GUSTAVE SPETH, THE BRIDGE AT THE END OF THE WORLD 8–9 (2008); PERCIVAL ET AL., *supra* note 77, at 2–6.

314. Given the wealth of potential innovation associated with tribal environmental law, future articles will examine enforcement of such environmental laws and normative judgments as to which tribal environmental laws appear to be functioning well.