Brooklyn Law Review

Volume 79
Issue 3 *SYMPOSIUM: When the State Speaks, What Should It Say?*

Article 10

2014

ABA ENVIRONMENTAL JUSTICE WRITING COMPETITION WINNER: "Good Fences Make Good Neighbors": An Environmental Justice Framework to Protect Prohibition Beyond Reservation Borders

Sean J. Wright

ABA ENVIRONMENTAL JUSTICE WRITING COMPETITION WINNER

"Good Fences Make Good Neighbors"

AN ENVIRONMENTAL JUSTICE FRAMEWORK TO PROTECT PROHIBITION BEYOND RESERVATION BORDERS

Sean J. Wright†

INTRODUCTION

> "*My apple trees will never get across*
> *And eat the cones under his pines, I tell him.*
> *He only says, 'Good fences make good neighbors.*'"[1]
>
> - Robert Frost

In Whiteclay, Nebraska, a desolate town of 10 people, four rickety shacks line the main road. On average, 13,000 cans of beer and bottles of malt liquor are sold per day from these shacks.[2] The closest sizeable city is two hours north, but just 240 yards across the state line into South Dakota is the expansive Pine Ridge Indian

---

† J.D., The Ohio State University Moritz College of Law, 2013; M.A. in Public Policy and Management, The Ohio State University John Glenn School of Public Affairs, 2013; B.A. in Political Science and History, Miami University, 2009. I would like to thank Dean Kathy Northern for encouraging me to develop the independent study that led to this piece and Professor Cinnamon Carlarne for her helpful comments and continued support. I must thank my family for always supporting my dreams—the title is in your honor. Finally, a special thanks is due to my wonderful fiancée, Dania Korkor, for reviewing numerous drafts and inspiring me every day.

1 Robert Frost, *Mending Wall*, *in* NORTH OF BOSTON 12 (1914).

2 *See* Timothy Williams, *Indian Beer Bill Stalls*; *Industry Money Flows*, N.Y. TIMES (Apr. 11, 2012), http://www.nytimes.com/2012/04/12/us/nebraska-bill-on-beer-sales-near-reservation-is-stalled.html?pagewanted=all&_r=0 (noting that this amounts to nearly four million cans a year).

Reservation.[3] There, alcohol consumption has been prohibited since 1834.[4] Nearly all the alcohol sold in Whiteclay "winds up on Pine Ridge or is consumed by its residents, tribal officials say."[5] Pine Ridge is home to the Oglala Sioux Tribe and according to 2010 census data is one of the poorest places in the country.[6] Whiteclay's singular purpose is to make alcohol available for consumption across the border. This effectively undermines prohibition and negates the decision of the Oglala Sioux to remain dry.

In 2010, the tribal police made 20,000 alcohol-related arrests.[7] According to the tribal president, 90% of the criminal cases brought in the tribal courts and a similar number of reservation illnesses were caused by alcohol—"the vast majority of which, he said, was brought illegally from Whiteclay."[8] Nationally, excessive alcohol consumption is the leading cause of preventable death among American Indians; affecting that population at twice the rate of the national average.[9] Alcoholism among American Indian populations is well known; thus, the decision to remain dry is based on a legitimate public health concern.

The convoluted history of regulating alcohol in Indian country,[10] the historical harms alcohol has had on indigenous

---

[3] Timothy Williams, *At Tribes Door, A Hub of Beer and Heartache*, N.Y. TIMES (Mar. 5, 2012), http://www.nytimes.com/2012/03/06/us/next-to-tribe-with-alcohol-ban-a-hub-of-beer.html?pagewanted=1&_r=2&.

[4] *See* Act of June 30, 1834, ch. 161, 4 Stat. 729; *see also* Act of July 22, 1790, ch. 33, 1 Stat. 137 (regulating trade with Indian tribes); Act of Mar. 30, 1802, ch. 13, 2 Stat. 139 (same). The Act of 1834 restated "no ardent spirits shall hereafter be introduced, under any pretense, into the Indian country." *Id.* The Pine Ridge Reservation has remained dry except for a brief period in the late 1960s. *See* Pine Ridge Reservation, S. Dak. Ordinance Legalizing Introduction, Sale or Possession of Intoxicants, 34 Fed. Reg. 3701 (Mar. 1, 1969); Pine Ridge Reservation, S. Dak. Ordinance Legalizing Introduction, Sale or Possession of Intoxicants, 35 Fed. Reg. 9219 (June 12, 1970). Quickly, the tribe reverted to prohibition. *See* Phillip May, *Alcohol Beverage Control: A Survey of Tribal Alcohol Statutes*, 5 AM. INDIAN L. REV. 217, 222 (1977).

[5] Williams, *supra* note 3.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Centers for Disease Control & Prevention, *Alcohol-Attributable Deaths and Years of Potential Life Lost Among American Indians and Alaska Natives—United States, 2001–2005*, 57 MORBIDITY & MORTALITY WKLY. REP. 938, 938-39 (Aug. 29, 2008), http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5734a3.htm.

[10] Generally Indian country is defined at 18 U.S.C. § 1151 (2012) as,

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

tribes, and the scope of tribal authority to control activity within reservation borders are well known.[11] What is unclear, however, is the extent to which tribes are able to assert their rights beyond the border of the reservation.[12] Wading into further turbidity, tribal authority to regulate the sale of alcohol in Indian country is not an inherent sovereign power of Indian tribes; rather, Congress has delegated powers of the federal government to "regulate behavior that would otherwise be beyond the reach of their power."[13]

To unpack how and when tribal governments can assert authority outside the boundaries of their reservations, this essay suggests framing the regulation of alcohol flowing into Indian country as an environmental justice concern. In turn, utilizing environmental justice tools and strategies can illuminate how tribes should approach limiting the harmful effects the flow of alcohol has upon their communities. This can be framed as an environmental justice issue because the problem that tribes face is that their decision to remain dry is undermined, which produces an inequitable distribution of environmental hazards. Because tribal governments are limited jurisdictionally and are thus unable to directly limit transboundary activity, tribal communities continue to be exposed to a public health risk.[14]

The purpose of environmental justice is to minimize environmental inequality.[15] Framed as an environmental justice concern, Indian tribes who decide to remain dry should not be undermined by extraterritorial threats. In the context of Indian

---

Federal prohibition policy, however, has narrowed to the definition in 18 U.S.C. § 1154(c) which states:

> The term 'Indian country' as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.

[11] *See* Peggy Anderson, *Yakama's Reservationwide Alcohol Ban Upheld*, SEATTLE TIMES (Dec. 16, 2000, 12:00 AM), http://community.seattletimes.nwsource.com/archive/?date=20001216&slug=TT972LSGL.

[12] *See* Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservation Borders*, 12 LEWIS & CLARK L. REV. 1003, 1004 (2008).

[13] Mark T. Baker, Note, *The Hollow Promise of Tribal Promise of Tribal Power to Control the Flow of Alcohol into Indian Country*, 88 VA. L. REV. 685, 686–87 (2002); *see* United States v. Mazurie, 419 U.S. 544, 557 (1975) ("These same cases, in addition, make clear that when Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter.").

[14] *See* Centers for Disease Control & Prevention, *supra* note 9, at 938–39.

[15] *See generally* Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 HARV. ENVTL. L. REV. 1 (2002).

country, "the concept of environmental justice is not very useful unless it is broader than just the intersection of civil rights and environmental law."[16] Instead, "in Indian country a vision of environmental justice must also include the tribal right of self-government."[17] This promotion of tribal self-government cannot occur without an ability to control and improve their reservation.[18] Without such authority, an injustice occurs.[19] After 179 years of prohibition, the Oglala Sioux are still fighting to stop the flow of alcohol into their reservation. Their inability to do so effectively is an injustice.

Framed as an environmental justice concern, not only does the continued flow of alcohol into Indian country represent an inequitable distribution of environmental risk, but the siting of alcohol distribution centers near reservations is an example of locally undesirable land uses (LULUs).[20] As the environmental justice movement has made clear, "[s]everal major studies have found that hazardous waste sites, solid waste dumps, polluting factories, and other locally undesirable land uses are located in areas that contain, on average, a higher percentage of racial minorities and are poorer than nonhost communities."[21] As of now, the (dry) Pine Ridge Reservation is one of the poorest areas of the country and is exposed to over 4.3

---

[16] Dean B. Suagee, *The Indian Country Environmental Justice Clinic: From Vision to Reality*, 23 VT. L. REV. 567, 572 (1999).

[17] *Id.*

[18] *See* Sarah Krakoff, *Tribal Sovereignty and Environmental Justice*, *in* JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS 161, 163 (Kathryn M. Mutz et al. eds., 2002) ("[E]nvironmental justice for tribes must be consistent with the promotion of tribal self-governance.").

[19] *See* Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1632 (2007).

[20] For a general discussion of LULUs see Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?* 103 YALE L.J. 1383, 1384 (1994). Essentially, the Environmental Justice movement purports that people of color and other minorities are exposed to greater environmental harms than wealthier individuals. Importantly, the siting of "waste dumps, polluting factories, and other locally undesirable land uses (LULUs) have been racist and classist." *Id.* Moreover,

> Examples of LULUs are many. Some are well-known and a source of frequent objections, such as adult use establishments. Other LULUs may include uses that are widely used and needed and are often well-established in their locations, but whose well-known emissions of odor or noise—such as airports, landfills, or asphalt plants—become problematic as new neighbors move toward these uses.

Victor P. Filippini, Jr., *Dealing with Locally Unwanted Land Uses (Lulus): A Municipal Perspective Many Tools Are Available, but in the Long Run the Best Thing to Do Is to Build A Consensus*, PRAC. REAL EST. LAW., Mar. 2010, at 21, 22.

[21] Bradford C. Mank, *Environmental Justice and Discriminatory Siting: Risk-Based Representation and Equitable Compensation*, 56 OHIO ST. L.J. 329, 337 (1995).

million cans of beer and malt liquor a year.[22] Thus, analyzing the application of environmental justice responses to LULUs can elucidate how tribes can and should respond.

The benefits of framing the problem within the environmental justice framework are twofold. First, this essay presents a novel approach to conceptualizing environmental justice. As scholars debate the future of environmental poverty lawyering, it is helpful to take stock of the successes the movement has had in addressing the inequitable siting of environmental harm. As this essay will establish, environmental justice strategies can provide a roadmap to address inequity beyond the traditional areas of concern.[23] Second, framing alcohol prohibition within the context of environmental justice will inform the Environmental Protection Agency (EPA) as it develops Plan EJ 2014.[24] As the EPA attempts to integrate environmental justice into agency programs, policies, and activities, this framing will establish alcohol prohibition as a necessary cross-agency focus area.[25]

This essay makes an important and innovative contribution to the scholarly literature on tribal environmental justice,[26] the "good neighbor" principle,[27] and enforcing policy beyond borders. Ultimately, tribal governments must be enabled to ensure their policy decisions are enforceable. This requires enforcement beyond the borders of the reservation. By conceptualizing prohibition under an environmental justice paradigm, tribes have a direct proxy of when and how to enforce their policy decisions outside their border—environmental statutes.[28] Additionally, a significant bulk of scholarly attention has been paid to when and how tribes can exercise jurisdiction over non-members who venture inside

---

[22] Williams, *supra* note 3.

[23] *See infra* Part IV.

[24] In fact, the EPA has specifically sought tribal consultation on "Cross-Agency Focus Areas, Tools Development, and Program Initiatives" through Plan EJ 2014. *See* OFFICE OF ENVTL. JUSTICE, ENVTL. PROT. AGENCY, TRIBAL CONSULTATION AND COORDINATION PLAN: EPA'S PLAN EJA 2014, *available at* http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-tribal-consult.pdf (last visited Feb. 3, 2014).

[25] *Id.*

[26] Krakoff, *supra* note 18.

[27] *See* Janet V. Siegel, *Negotiating for Environmental Justice: Turning Polluters Into "Good Neighbors" Through Collaborative Bargaining*, 10 N.Y.U. ENVTL. L.J. 147 (2002).

[28] "[E]nvironmental justice advocates have sought to use the National Environmental Policy Act (NEPA), the National Historic Protection Act (NHPA), the Fourteenth Amendment of the U.S. Constitution, the Civil Rights Act, the Clean Water Act (CWA) and the Clean Air Act (CAA) to pursue citizen suits to remedy environmental injustice." Melissa O'Connor, *A Failure to Protect: After 13 Years Environmental Justice Never Materializes*, 35 S.U. L. REV. 119, 123 (2007) (citations omitted). Also, grassroots advocacy remains a constant reform strategy. *See* Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 637 (1992).

their borders,[29] and the Supreme Court has restricted this right in significant ways.[30] But the literature has only begun to discuss extraterritorial authority.[31] This essay explores the ability of tribes to reach beyond their borders and limit the flow of pollution under the various environmental statutes—particularly the Clean Air Act (CAA) and Clean Water Act (CWA)—and suggests that environmental law offers a model approach for reenvisioning/remodeling prohibition policy.

Part I of this essay frames prohibition as an environmental justice concern requiring transboundary enforcement, which is frequently observed in international environmental law. Part II reviews the history of federal Indian alcohol policy—in particular how the Pine Ridge Reservation has struggled to maintain prohibition—finding that legislative and judicial outcomes have limited tribal powers delegated to them by Congress. Part III argues that, analytically, tribes have the same authority to reach beyond their borders to protect public health in much the same way that tribes implement environmental laws—through cooperative-federalism. Finally, Part IV proposes three possible approaches based upon environmental justice tools and strategies to effectuate tribal decisions to remain dry.

I. FRAMING TRIBAL PROHIBITION AS AN ENVIRONMENTAL JUSTICE CONCERN

Environmental justice seeks to address the disparate distribution of environmental harms throughout society.[32] Understood in this context, the environment "include[s] the

---

[29] *See, e.g.*, ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 517–628 (2d ed. 2010).

[30] *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008) (holding that the tribe could regulate the actions of non-Indians on the reservation); Nevada v. Hicks, 533 U.S. 353 (2001) (holding that tribal authority over non-members beyond what is necessary to protect tribal self-government is not available without express congressional delegation); Montana v. United States, 450 U.S. 544 (1981) (holding that Indian tribes lack civil authority over the conduct of nonmembers on non-Indian fee land within a reservation, barring limited exceptions); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians).

[31] *See* Patrice H. Kunech, *Borders Beyond Borders—Protecting Essential Tribal Relations Off Reservation Under the Indian Child Welfare Act*, 42 NEW ENG. L. REV. 15, 15-16 (2007); Skibine, *supra* note 12, at 1003.

[32] *See generally* Mariá Ramirez Fisher, *On the Road from Environmental Racism to Environmental Justice*, 5 VILL. ENVTL. L.J. 449, 449-52 (1994); Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10681, 10682 (2000); Clifford Rechtschaffen, *Advancing Environmental Justice Norms*, 37 U.C. DAVIS L. REV. 95, 96 (2003); Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839, 839–40 (1992).

ecological, physical, social, political, aesthetic, and economic environments."[33] Alcohol is a public health threat in Indian country.[34] Framing the continued flow of alcohol into dry Indian country as an environmental justice concern provides a structure to explore various new approaches to this longstanding issue. When facing public health threats from industrialization, pollution, and contamination, several tools and strategies undertaken by the environmental justice movement can shed light on how to respond to targeted siting of environmental harms.[35] However, tribal environmental justice is different from the broader environmental justice movement. Based upon a unique history of subjugation and exclusion, tribal justice requires not only addressing environmental harm but also supporting tribal self-determination. Additionally, some mechanism for tribes to enforce public health concerns beyond the border must be implemented. Looking to international environmental law is illustrative for these purposes.

A. Tribal Environmental Justice

Unfortunately, "whether by conscious design or institutional neglect, communities of color in urban ghettos, in rural 'poverty pockets,' or on economically impoverished Native-American reservations face some of the worst environmental devastation."[36] The Environmental Justice movement has addressed these concerns in a variety of ways.[37] These approaches provide a lodestar toward addressing the harmful effects of alcohol distribution throughout Indian reservations.

Environmental justice is based upon the premise that the underprivileged and people of color bear a disproportionate share of society's environmental burdens.[38] Over the past two

---

[33] Yang, *supra* note 15, at 19.

[34] *See* Centers for Disease Control & Prevention, *supra* note 9, at 938–39; *see also* A. Mercedes Nails et al., *American Indian Youth's Perception of Their Environment and Their Reports of Depressive Symptoms and Alcohol/Marijuana Use*, 44 ADOLESCENCE 965, 968 (2009) (noting that American Indian youths begin drinking earlier than non-Indian peers).

[35] *See* KENNETH A. MANASTER, ENVIRONMENTAL PROTECTION AND JUSTICE: READINGS ON THE PRACTICE AND PURPOSES OF ENVIRONMENTAL LAW 246–315 (3d ed. 2007) (examining legal tools and strategies to resolve inequalities in facility siting).

[36] Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, *in* CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 15, 17–19 (Robert D. Bullard ed., 1993).

[37] *See* MANASTER, *supra* note 35, at 246–315.

[38] ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 1 (3d ed. 2000) (noting that "[a]n abundance of documentation shows blacks, lower-

decades, the movement has sought to address these inequities. The environmental justice movement has established a variety of important findings. First, there are distributional impacts of environmental rules.[39] This means that environmental regulations may have a demonstrable—and harmful—impact on minority communities. Frequently, industrialization takes on a "not in my backyard" (NIMBY) tone. Thus, "because noxious sites are unwanted . . . and because industries tend to take the path of least resistance, communities with little political clout are often targeted for such facilities."[40] Second, lacking political influence, minority communities are unable to organize as effectively as majority communities and this leads to underrepresentation in governing bodies, which in turn leads to further limited access to policymakers.[41]

Environmental justice claims by Native Americans have typically fallen into two camps: "claims for regulatory control over reservation lands,"[42] and "claims by indigenous peoples that they have unique interests and ought to be represented as 'rights-holders' in national or international decision-making that impacts their communities."[43] These claims are intrinsically linked to the fundamental difference between the environmental justice movement generally and tribal environmental justice—tribal sovereignty.[44] While Indian country has been significantly harmed by environmental hazards,[45] tribal leaders advance the belief that unlike other communities of color, Indian communities primarily suffered from the federal government's devaluing of tribal sovereignty and resulting paternalistic management policies.[46] As part of advancing tribal self-government to redress

---

income groups, and working-class persons are subjected to a disproportionately large amount of pollution and other environmental stressors").

[39] Torres, *supra* note 32, at 840.

[40] Bunyan Bryant & Paul Mohai, *Environmental Racism: Reviewing the Evidence*, *in* RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS 164 (Bunyan Bryant & Paul Mohai eds., 1992).

[41] *See id.*

[42] Tsosie, *supra* note 19, at 1627.

[43] *Id.* at 1627-28.

[44] *Id.* at 1631-32; *see also* Judith V. Royster, *Native American Law*, *in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 200 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008).

[45] *See, e.g.*, THADIS BOX ET AL., REHABILITATION POTENTIAL OF WESTERN COAL LANDS 85 (1974) (describing pollution and permanent damage from strip mining in Navajo country); BOYCE RICHARDSON, STRANGERS DEVOUR THE LAND (1976); Jeanette Wolfley, *Tribal Authority to Regulate Air Quality*, 2000A ROCKY MTN. MIN. L. INST. 13B (2000) (describing air quality degradation in Indian country).

[46] Tsosie, *supra* note 19, at 1632; Royster, *supra* note 44, at 199 ("Indian tribes connect to their lands not only on economic and emotional levels, but also on the levels of culture, religion, and sovereignty.").

environmental injustice, Professor Sarah Krakoff believes that environmental justice can be coextensive with recognition of tribal regulatory authority.[47] The federal government's acknowledgment of tribes' treatment as state (TAS) status reinforces self-governance.[48] In fact, "the active exercise of tribal regulatory authority over the reservation environment is seen as an antidote to the perceived victimization of reservation communities by exploitive and environmentally hazardous industries."[49] Thus, resolving any environmental justice dispute—such as the flow of alcohol—through a tribal regulatory framework is the panacea to existing injustice.

Collectively, the environmental justice movement has advanced in fits and starts. The high-point of the Environmental Justice movement came when President Clinton signed Executive Order 12,898. The President required that "each Federal agency . . . make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations, and low-income populations."[50] Since that time, the federal government has become more aware of how decision-making processes impact minority communities. In fact, the EPA has an Advisory Council on Environmental Justice. Part of this council is an Indigenous Peoples Subcommittee tasked with ensuring that Native peoples have a role in environmental decision-making. These advances, however, have not translated to successful legal challenges to unjust siting of environmental harms.

Outside of the major environmental statutes, Title VI of the Civil Rights Act of 1964[51] was long seen as the viable vehicle for litigating environmental justice claims. But in 2001, the Supreme Court limited the likely success of these claims. In *Alexander v. Sandoval*, the Court ruled that there is no private right of action to enforce disparate impact regulations under Title VI.[52] This ruling

---

[47] Krakoff, *supra* note 18, at 163.

[48] *See infra* Part III.

[49] Tsosie, *supra* note 19, at 1632.

[50] *See* Exec. Order No. 12,898, 3 C.F.R. § 6-609 (1995); *see also* Bradford C. Mank, *Executive Order 12,898*, *in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS, *supra* note 44, at 142 (("The Order and the accompanying memorandum have already had a major impact on how agencies integrate environmental justice issues into their activities.").

[51] 42 U.S.C. § 2000d (2012) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

[52] Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

was further narrowed by the Third Circuit in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*.[53] The Third Circuit found that not only did the plaintiffs lack standing to bring claims of discrimination under Title VI, but that Title VI did not create freestanding rights enforceable under 42 U.S.C. § 1983.[54] To a large extent, the limitations of disparate impact litigation are in stark contrast with successful challenges raised through environmental statutes.[55] A key takeaway from the nearly two decades of environmental justice litigation is that alternative avenues for remedy are necessary.

B. Preventing Transboundary Harms: The International Environmental Law Framework

Extending a tribe's reach beyond its territorial boundaries is akin to the prerogative of nation-state sovereigns within international environmental law. In fact, prohibiting activity beyond one's border is a cornerstone of this legal regime.[56] The origins of this principle stem from an arbitration between the United States and Canada. The award from the Trail Smelter Arbitration remains one of the modern touchstones of international environmental law because it established the principle that transboundary harms were to be prevented.[57] As a basic overview, "[t]he case involved air pollution that originated in a smelter in Trail, British Columbia, and caused damage to farmlands located south of the Canada–United States border, in Washington State."[58] The United States and Canada twice submitted the dispute for arbitration. However, it was the final decision in 1941 that set forth a cornerstone of international environmental law.

In key part, the arbiters found that "no state has the right to use or permit the use of its territory in such a manner as to

---

[53] South Camden Citizens in Action v. New Jersey Dep't of Envtl. Prot., 274 F.3d 771, 790 (3d Cir. 2001).

[54] *Id.* at 790.

[55] *See* Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523, 526 (1994) (noting that challenges under environmental statutes are the most preferred method of redressing environmental justice concerns); *see also* First Nat'l Bank v. Richardson, 484 F.2d 1369, 1377-78 (7th Cir. 1973).

[56] *See* Corfu Channel Case (Alb. v. U.K.), 1949 I.C.J. 4 (Dec. 15). For other cases that endorse the prohibition of the transboundary injurious use of natural resources as a rule of customary international law, see Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 4 (July 8), and Gabčíkovo-Nagymaros (Hung. v. Slovk.), 1997 I.C.J. 4 (Sept. 25).

[57] *See generally* Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905 (1941), *reprinted in* 35 AM. J. INT'L L. 685 (1941).

[58] Jutta Brunnée, Book Review, *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration*, 102 AM. J. INT'L L. 395, 395 (2008).

cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."[59] This "no harm" rule remains a common conceptual underpinning governing state activity that has been reaffirmed in various international agreements[60] and by the International Court of Justice (ICJ).[61]

There is a strong lesson to be learned from these transboundary environmental conflicts that could have a bearing on Indian prohibition. The general idea that "nations have a responsibility to not allow their territory to be used in ways that cause environmental harm to, or within, the territory of other nations"[62] can be applied to the flow of alcohol. The Oglala Sioux have remained dry since 1834 but have consistently been in conflict with bootleggers and liquor distributers to stop the flow of alcohol into Indian country. Based on the well-known harmful effect alcohol has on Indian communities[63] and the struggles the Oglala Sioux have with illegal alcohol,[64] the town of Whiteclay is violating the "no harm" principle. By setting up four liquor stores in a town of barely 10 residents meant to serve a dry community, the nearly 4.3 million cans of beer and malt liquor sold a year directly harm the territory of another nation. Tribes need to be empowered to prevent their tribal decisions from being undermined by external forces.

II. FIREWATER AND SOVEREIGNTY: AN OVERVIEW OF INDIAN ALCOHOL PROHIBITION

Before addressing the specific parameters of federal tribal prohibition, it is helpful to establish the rights and prerogatives of Indian tribes to dictate activities on reservations and over non-members. Thus, this part will begin by discussing the nature of tribal sovereignty generally and move specifically through the

---

[59] *Trail Smelter Case*, 35 AM. J. INT'L L. at 716 (responding to Question 2).

[60] *See, e.g.*, United Nations Conference on the Human Environment, Declaration of the United Nations Conference on the Human Environment, princ. 21, U.N. Doc. A/CONF.48/14 and Corr.1 (June 16, 1972), *reprinted in* 11 I.L.M. 1416, 1420 (1972); United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, princ. 2, U.N.C.E.D. Doc. A/CONF.151/5/Rev.1 (June 14, 1992), *reprinted in* 31 I.L.M. 874, 876 (1992).

[61] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8).

[62] AARON SCHWABACH, INTERNATIONAL ENVIRONMENTAL DISPUTES: A REFERENCE HANDBOOK 15 (2006).

[63] *See* Centers for Disease Control & Prevention, *supra* note 9, at 938-39.

[64] *See* Williams, *supra* note 3.

changing landscape of tribal authority over the flow of alcohol into Indian country.

A. An Overview of Tribal Sovereignty

Tribal sovereignty is a varied and fluid concept. Attempting to discern the developing nature of this sovereignty, Felix Cohen chronicled three changes or principles that mark the modern day conception of tribal sovereignty. First, "prior to European contact, a tribe possessed 'all the powers of any sovereign state.'"[65] Second, following European conquest, tribes were "subject to the legislative power of the United States" and were stripped of their external sovereign powers.[66] Third, "tribes retain internal sovereignty 'subject to qualification by treaties and by express legislation of Congress.' Thus, tribal powers generally are not 'delegated powers granted by express acts of Congress,' but instead are 'inherent powers of a limited sovereignty which have never been extinguished.'"[67] However, there are instances where Congress delegates authority to tribal governments. In doing so, the tribe receives Congressional authorization to act in a similar manner as states in the federal system. Contemporary prohibition of alcohol is one such example.

B. The Historical Development of Indian Liquor Laws

The prohibition of alcohol on tribal lands has been part of the American experience since the founding. Following the American Revolution, the newly formed government began negotiating directly with Indian tribes to regulate trade and commerce.[68] During these negotiations, tribal leaders implored the federal government to restrict the flow of alcohol to tribes through traders.[69] President Thomas Jefferson is said to have been inspired to limit the flow of alcohol to tribes after hearing from a leading Indian chief about the devastating effects alcohol had on his people.[70] President Jefferson was so moved by this letter that he

---

[65] FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1941).

[66] Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 8 (1999).

[67] *Id.*

[68] Baker, *supra* note 13, at 690. For a more detailed discussion of early prohibition, see Robert J. Miller & Maril Hazlett, *The "Drunken Indian": Myth Distilled into Reality Through Federal Indian Alcohol Policy*, 28 ARIZ. ST. L.J. 223, 239–46 (1996).

[69] LAURENCE ARMAND FRENCH, ADDICTIONS AND NATIVE AMERICANS 18 (2000).

[70] *Id.* In his letter, Chief Little Turtle said:

called upon Congress to end the flow of alcohol into Indian country.[71] Beseeching Congress, the President said, "These people (the Indians) are becoming very sensible of the baneful effects produced on their morals, their health, and existence, by the abuse of ardent spirits: and some of them earnestly desire a prohibition of that article from being carried among them. The Legislature will consider whether"[72] legislative action can be taken.

Congressional response was quick. Under the Act of 1802, the President was authorized to "take such measures, from time to time, as to him may appear expedient to prevent or restrain the vending or distributing of spirituous liquors among all or any of the said Indian tribes."[73] This act was the first in a series of enactments meant at curbing the flow of alcohol to Indians. The negotiations between the federal government and Indian tribes did not cease after the Act of 1802; rather, a series of Trade and Intercourse Acts were passed to address various issues in Indian country.[74] Collectively, "[t]he Acts outlined the authority of the states and national government over Indian affairs, rules regarding land distribution in response to intrusions on Indian land by non-Indian settlers, and the regulation of contact between Indians and non-Indians on the frontier."[75]

The most important Trade and Intercourse Act—for our present purposes—was the Act of 1834. The Act prohibited the introduction of and attempts to introduce alcohol into Indian country. The only exemption was that alcohol could be provided to officers and troops of the United States. Moreover, the Act

---

> But father, nothing can be done to advantage unless the great council of the Sixteen Fires, now assembled, will prohibit any person from selling any spirituous liquors among their red brothers . . . . Father: Your children are not wanting in industry; but it is the introduction of this fatal poison which keeps them poor. Your children have not that command over themselves, which you have, therefore, before anything can be done to advantage, this evil must be remedied. Father: When our white brothers came to this land, our forefathers were numerous and happy; but, since their intercourse with the white people, and owing to the introduction of this fatal poison, we have become less numerous and happy.

7 AMERICAN STATE PAPERS, INDIAN AFFAIRS 653, 655 (Walter Lowrie & Matthew St. Claire Clark eds., 1832).

[71] FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 352 (Robert L. Bennett & Frederick M. Hart eds., Five Rings Press 1986) (1942).

[72] 7 AMERICAN STATE PAPERS, INDIAN AFFAIRS, *supra* note 70, at 653.

[73] Act of Mar. 30, 1802, ch. 13, § 21, 2 Stat. 139, 146; Miller & Hazlett, *supra* note 68, at 240–41.

[74] FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790–1834 at 1–3, 43–50 (1962).

[75] Baker, *supra* note 13, at 691.

clarified the definition of Indian country and established penalties for violators of the Act.[76] While the Act sought to bring clarity to the issue of alcohol in Indian country, it caused significant confusion in some areas. For example, an 1854 amendment to the Act, which is no longer in effect, exempted Indians from prosecution—especially when an individual had already been prosecuted under tribal law.[77]

C. Congressional Delegation to Tribes: Contemporary Policy

Contemporary law regulating the flow of alcohol into Indian country was codified during an era in which Congress attempted to abolish tribal sovereign power and assimilate tribal members as full, taxpaying citizens of the United States. Referred to as the Termination Era,[78] Congress began in the 1950s to end the special relationship between the federal government and over 100 Indian tribes.[79] These challenges resulted in a variety of important demographic changes in Indian country. Termination Era policy (1) changed land ownership patterns in and around Indian country; (2) ended tribal sovereignty and the trust obligation owed to tribes by the United States after revoking the special relationship; (3) granted states jurisdiction over Indian country; (4) revoked state taxation exemptions; and (5) curtailed tribes' access to federal programs for tribes.[80]

In keeping with the general trend of terminating tribal recognition and privilege, Congress began to fundamentally reshape federal Indian prohibition. Beginning in 1948, the absolute prohibition of introducing alcohol into Indian country, first adopted by the Act of 1834, was recodified. Under 18 U.S.C. §§ 1154 and 1156, the sale and distribution of alcohol in Indian country was considered criminal activity.[81] Originally, this prohibition applied throughout Indian country regardless of who sold or distributed the alcohol.[82] However, a year later, Congress amended the definition of Indian country to exclude "non-Indian communities or rights-of-

---

[76] Miller & Hazlett, *supra* note 68, at 242–44.

[77] *Id.* at 244. This caused significant conflict between the legislature and the courts. The Act's impact was unclear; traditionally Indians had the sovereign authority to punish their own members, but this needed to be codified 20 years later. Thus, as one author has described, "the Act did more to reduce tribal authority than it did to curb the problems caused by rampant alcohol abuse in Indian country." Baker, *supra* note 13, at n.32.

[78] Baker, *supra* note 13, at 693.

[79] Miller & Hazlett, *supra* note 68, at 262.

[80] *See* DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 210–11 (4th ed. 1998).

[81] Baker, *supra* note 13, at 693.

[82] *Id.*

way through Indian reservations" unless expressly extended by a treaty or statute extending prohibition to these now exempt areas.[83] Additionally, Congress left intact § 3113, which includes broad language permitting *any* Indian to confiscate alcohol brought into Indian country and provides the steps federal officials can take to enforce prohibition.[84]

This severe treatment was reversed by the mid-1950s. By 1953, Congress began to reject the paternalistic nature of Indian prohibition—a belief that Indian communities were unable to cope with alcohol.[85] This longstanding belief, termed the "drunken Indian myth,"[86] had persisted from the Act of 1802. In changing the policy toward prohibition, Congress turned over alcohol regulation in Indian country to the tribes.[87] Overturning nearly 120 years of strict alcohol prohibition, Congress delegated the power to determine and apply policy during an era of significant deterioration in tribal sovereignty. In codifying § 1161, Congress "restored some of the sovereign powers that the [drunken Indian] myth had taken away, while on the other hand, it returned a shell too long eviscerated by prejudice to retain much power."[88] Congress did limit the sale of alcohol in Indian country to the boundaries of state law, but otherwise, the scheme relies upon tribal determination of alcohol policy. If a tribe legalized the flow of alcohol into Indian country, consistent with requisite state laws, federal prohibition would subside. Tribes could also choose to remain dry. This policy change is representative of the federal government's current approach toward Indian tribes—self-determination.[89] The current policy has been to turn control back over to tribes. The prohibition on alcohol is one of many areas in which this occurred.

The tribes' response was mixed. After the first 18 months of passing § 1161, 22 tribes legalized alcohol on their reservations, and by 1974 that number had grown to 115.[90] However, incrementally, tribes began to return to prohibition. By the 1990s, "approximately sixty-nine percent of the nation's 293 reservations either immediately passed, or have since instituted, tribal ordinances ensuring that the blanket federal

---

[83] Act of May 24, 1949, ch. 139, § 28, 63 Stat. 94 (codified at 18 U.S.C. § 1156).

[84] *See* 18 U.S.C. § 3113 (2012).

[85] Miller & Hazlett, *supra* note 68, at 225, 263.

[86] *Id.* at 225.

[87] *See* 18 U.S.C. § 1161.

[88] Miller & Hazlett, *supra* note 68, at 225.

[89] *Id.* at 267.

[90] Phillip May, *Alcohol Beverage Control: A Survey of Tribal Alcohol Statutes*, 5 AM. INDIAN. L. REV. 217, 223-24 (1977).

prohibition stays in place."[91] The most recent national survey reveals that this trend has dipped, but only slightly. As of 2008, 36% of tribes nationally (121 of 334) remain dry.[92] As mentioned by one author, alcohol bans span the country, from the Yakama of Washington, to the Navajo of the Southwest, and the Oglala Sioux in the Dakotas.[93] The effectiveness of this decision faces serious obstacles. Building upon the changes made during the Termination Era, much of the land within the exterior boundaries of the reservation belong to non-tribal members, and sham towns have developed along the borders to provide alcohol a mere feet outside the prohibited zone.

D. The Controversy in Pine Ridge

The Oglala Sioux made the decision to prohibit alcohol on tribal land. But what happens when alcohol distributers establish stores just outside the border of Indian country? For the Oglala Sioux, this has been a lingering question that has vexed the tribe for over a decade.[94] This issue also carries significant national concern. Life expectancy on the reservation is 48 years for men and 52 for women while the national average is 78.[95]

Not only does the illegal flow of alcohol harm public health, it also places a significant burden on the community and law enforcement. Such has been the case on the Pine Ridge Reservation. The County Sheriff's office, responsible for patrolling and monitoring Whiteclay, is 19 miles away.[96] The Sheriff has five deputies. The tribal police department, which lacks jurisdiction in Whiteclay, has 38 officers—down from 101 six years ago.[97] The Pine Ridge Reservation is roughly the size of Connecticut and has a population of approximately 45,000 people including non-tribal

---

[91] Baker, *supra* note 13, at 694–95 (citing *Study Says Tribal Alcohol Ban Increases Other Risks of Death*, MINNEAPOLIS STAR-TRIB., Mar. 11, 1992, at 7A).

[92] Anne E. Kovas et al., *Survey of American Indian Alcohol Statutes, 1975–2006: Evolving Needs and Future Opportunities for Tribal Health*, 63 J. STUD. ALCOHOL & DRUGS 183, 186 (2008).

[93] Robert J. Haupt, *"Never Lay a Salmon on the Ground with His Head Towards the River": State of Washington Sues Yakamas over Alcohol Ban*, 26 AM. INDIAN L. REV. 67, 73 (2002).

[94] *See* THE BATTLE FOR WHITECLAY (Glass Onion 2008), *available at* https://www.youtube.com/watch?v=HDAdhOxuTwk.

[95] *Id.*; *FastStats: Life Expectancy*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/fastats/lifexpec.htm (last visited Apr. 21, 2013) (noting that the national life expectancy is 78.7 years).

[96] Timothy Williams, *At Tribe's Door, a Hub of Beer and Heartache*¸ N.Y. TIMES (Mar. 5, 2012), http://www.nytimes.com/2012/03/06/us/next-to-tribe-with-alcohol-ban-a-hub-of-beer.html?pagewanted=all&_r=0.

[97] THE BATTLE FOR WHITECLAY, *supra* note 94.

members. Beyond that, in the Pine Ridge Reservation, two-thirds of the population resides below the poverty line, and the unemployment rate on the reservation is at 75%.

This subpart will chronicle the history of prohibition in the Pine Ridge Reservation by the Oglala Sioux people to illustrate the difficulties many tribes face in administering prohibition policy. First, the historical challenges in keeping the flow of alcohol out of the Pine Ridge area will establish the long-standing conflict between tribal authorities and distributors of alcohol located just beyond tribal borders. Next, the recent grassroots movements against extra-territorial distribution will demonstrate the difficulty tribes face in enforcing the policy when faced with external threats. Finally, the Oglala Sioux's recent failure in federal district court will establish that the Congressional delegation over alcohol policy is a false promise of greater tribal authority and unenforceable, especially when undermined by external threats to public health—by both legislative and judicial means. Something else is needed to provide redress.

1. The Historical Harms of Alcohol in the Pine Ridge Reservation

Whiteclay is not a recent development. The sham town of at most 10 people "is a successor to the so-called whiskey ranches set up in the 1880s to move alcohol onto what was then called Pine Ridge Agency."[98] Concerned that bootleggers were ushering alcohol to the Sioux and at the urging of the U.S. Indian Agent and Oglala leaders, President Chester A. Arthur established a 50-square mile buffer zone in Nebraska, south of the Pine Ridge Reservation.[99] By 1889, the Oglala Sioux received their own reservation,[100] establishing the Pine Ridge Agency. The Agency occupied entirely within the borders of modern day South Dakota with the 50-mile extension into Nebraska. In both 1889 and 1890, Congress enacted legislation to continue the incorporation of the buffer zone, called the White Clay Extension, into the boundaries of the reservation,

---

[98] Stephanie Woodard, *Liquor and Ethnic Cleansing: Whiteclay, Nebraska*, HUFFINGTON POST (Dec. 31, 2010), http://www.huffingtonpost.com/stephanie-woodard/liquor-and-ethnic-cleansi_b_802536.html.

[99] Jeff Mohr, The Whiteclay Study Guide: A Study Guide to Accompany the Documentary Film *The Battle for Whiteclay* 2, http://www.battleforwhiteclay.org/assets/TBFW_Study_Guide_0812.doc (last visited Feb. 3, 2014).

[100] Act of Mar. 2, 1889, 25 Stat. 888.

but only for "so long as it may be needed for the use and protection of the Indians . . . at the Pine Ridge Agency."[101]

In 1904, President Theodore Roosevelt ceded 49 of the 50 square miles into the public domain by executive orders,[102] despite failing to establish that the need for the buffer zone had ceased to exist. In fact, these executive orders were carried out over the protests of Oglala leaders and the Indian Agent.[103] This caused a land grab by white settlers who used the land to produce bootlegged alcohol, though alcohol consumption was still illegal nationally under the Eighteenth Amendment. Because prohibition still applied on the reservations, skirting prohibition did not cease either. Rather, "[t]he bootleggers who first supplied the liquor were replaced during the second half of the 20th century by bars and later by retail stores that were—and still are—licensed to operate by the state of Nebraska."[104] First, in the mid-1950s, the State of Nebraska licensed two bars in Whiteclay for on-site consumption of alcohol. After two decades, the owners converted their licenses for off-site drinking only. However, two more additional off-site stores were added. Thus, since the 1970s, four permanent off-site (beer only) liquor stores have served the barely 10-person town of Whiteclay, Nebraska.

These bars have gained notoriety. They commonly sell beer to "minors and intoxicated persons, knowingly sell[] to bootleggers who resell the beer on the reservation, permit[] on-premise consumption of beer in violation of restrictions placed on off-sale-only licenses, and exchang[e] beer for sexual favors."[105] Absurdly enough, the vast majority of those who purchase beer in Whiteclay have no *legal* place to consume the beer. The store's permits prohibit on-site consumption of beer and it is illegal to possess or consume alcohol throughout the entire reservation.

2. Grassroots Efforts to Effectuate Prohibition

Over the years, the Oglala Sioux have tried to spotlight the tragedy occurring in Whiteclay and encourage the Nebraska legislature to take action. Largely, they have been unsuccessful. The grassroots movement to prohibit Whiteclay

---

[101] *Id.* at § 1.

[102] Exec. Order, Addition to Pine Ridge Reservation (Jan. 25, 1904), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=69484; Exec. Order, Pine Ridge School Reservation (Feb. 20, 1904), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=69488.

[103] Mohr, *supra* note 99, at 2.

[104] Woodard, *supra* note 98.

[105] Mohr, *supra* note 99, at 2.

from selling alcohol, which undermines the Oglala's ban on alcohol, has faced significant resistance from the Nebraskan government. Over the years, the "Nebraska authorities have repeatedly said it's too 'complicated' to address the issue of Whiteclay and the misery it causes."[106] Though a series of proposed bills have been introduced in the Nebraska legislature, they have either failed, been gutted, or made little impact.

In 2002, State Senator Donald G. Priester introduced a law to prohibit issuing any *future* liquor license within the original White Clay Extension area, or within five miles of Indian country where the tribal council had banned the sale and consumption of alcohol.[107] However, the bill grandfathered in existing liquor licenses, and so the four existing license holders would be able to continue to sell beer unimpaired.[108] Senator Priester's bill did not even make it out of committee. Nor did his identical proposal the next year.[109] The Nebraska legislature only went so far as to pass a bill proposed by Senator Ray Jannsen, which empowered the Nebraska Liquor Control Commission to hesitate in granting new licenses in areas saturated with existing licenses.[110] This bill passed in a modified form and was signed into law in 2006.[111]

During the 2009 session, the Nebraska legislature commissioned an interim study of Whiteclay. This included numerous public hearings before the General Affairs and Judiciary Committees. From this study, two separate bills were proposed to redress the harmful impact selling alcohol in Whiteclay was having on the Pine Ridge Reservation. First, Senator LeRoy Louden introduced a bill that earmarked alcohol sales tax revenue for economic development and healthcare or law enforcement assistance.[112] The bill was quickly gutted. The amended bill made no mention of earmarking alcohol tax revenue, but rather, would establish a meager general assistance fund for Whiteclay. The final version of the bill was signed into law with $25,000 set aside for Whiteclay.[113] Second, a bill introduced by Senator Russ Karpisek would have created the

---

106 Woodard, *supra* note 98.

107 Legis. B. 1306, 97th Leg., 2d Sess. (Neb. 2002).

108 *Id.*

109 Legis. B. 426, 98th Leg., 1st Sess. (Neb. 2003).

110 Legis. B. 530, 99th Leg., 1st Sess. (Neb. 2005).

111 Legis. B. 845, 99th Leg., 2d Sess. (Neb. 2006) (codified at NEB. REV. STAT. § 53-132) (provides that the Nebraska Liquor Commission has leeway to withhold additional licenses based upon new factors).

112 Legis. B. 1002 Introduced Copy, 101st Leg., 2d Sess. (Neb. Jan. 20, 2010).

113 Legis. B. 1002 Slip Law Copy, 101st Leg., 2d Sess. (Neb. 2010).

Substance Abuse Treatment Grant Program under the Native American Public Health Act. Unfortunately, this bill had a worse fate than Louden's and was indefinitely postponed.[114] Senator Louden submitted another proposed bill. As introduced, the bill was designed to empower the Liquor Commission to grant "alcohol impact zone" status on localities to discourage public inebriation.[115] Once an area was designated as an "alcohol impact zone," the Liquor Commission was authorized to "promulgate rules and regulations" of alcohol sales to effectuate this policy.[116] This bill also failed to become law.[117]

Against this backdrop of Nebraskan legislative impotence, the Oglala Sioux tribe has continued to advocate for change. This has included blockages, marches, and public meetings. Specifically, "[a] New Year's Eve protest of beer sales in Whiteclay ended peacefully with three of the Nebraska town's four alcohol stores closing early and making very few late-night sales to Natives."[118] Recently, a new alcohol checkpoint has been set up at the border to try to stop the flow of alcohol into the reservation.[119] Still, all told, the illegal flow of alcohol into Indian country remains a constant environmental problem.

3. The Federal Judiciary: A Dead End

After failing to produce a grassroots legislative resolution to the on-going problem in Whiteclay, the Oglala turned to the federal judiciary. Unfortunately, this too proved to be a dead end. Tribal leaders brought a lawsuit targeting "major beer manufacturers, including Coors, Miller and Anheuser Busch, distributors, and local stores that sell beer."[120] The lawsuit sought over $500 million to help cover the costs of healthcare, law enforcement, and social services resulting from over-consumption

---

[114] Legis. B. 1005, 101st Leg., 2d Sess. (Neb. 2010). The bill was indefinitely postponed. *See id.* (creating the Substance Abuse Treatment Grant Program under the Native American Public Health Act), *available at* http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=10115 (last visited Apr. 27, 2013).

[115] Legis. B. 829, Introduced Copy, 102d Leg., 2d. Sess. (Neb. Jan. 5, 2012).

[116] *Id.* § 5.

[117] *See id.* at 1 (creating "alcohol impact zones"); Williams, *supra* note 2 (noting the substantial sum paid by the "alcohol lobby" as campaign contributions to members of the General Affairs Committee who defeated the alcohol impact zone bill).

[118] Grant Schulte, *Activists: Whiteclay Protest Ended Peacefully*, SIOUX CITY J. (Jan. 1, 2013), http://siouxcityjournal.com/news/state-and-regional/nebraska/activists-whiteclay-protest-ended-peacefully/article_14751ba0-5450-11e2-aaca-001a4bcf887a.html.

[119] *Id.*

[120] *South Dakota Tribe Goes Up Against Big Brewers*, NPR (Feb. 24, 2012), http://www.npr.org/2012/02/24/147348297/south-dakota-tribe-goes-up-against-big-brewers.

of alcohol within the community. Moreover, the tribes sought to restrict the amount of beer sold in Whiteclay—not to permanently prevent the operation of liquor in the area.

The case, *Oglala Sioux Tribe v. Schwarting*, raised three distinct causes of action: conspiracy to distribute alcohol that cannot be legally consumed on the reservation, conspiracy to violate 18 U.S.C. § 1161, and a refusal by the state of Nebraska to enforce its own statutes.[121] The legal argument was premised on the belief that the brewers and store owners knew the alcohol sold would go to individuals with *no* legal place to consume it, and thus knew that individuals were purchasing the alcohol to smuggle it into the reservation for illegal use or resale.

The federal district court in Nebraska dismissed the suit, without prejudice, for lack of jurisdiction. Essentially, the court held that it lacked jurisdiction because "[w]hatever merit the Tribe's claims may have, they are not claims that depend on the resolution of a substantial question of federal law—and therefore, they are not claims that can be decided in federal court."[122] The lawsuit presented a number of jurisdictional challenges on review. At the onset, "it [was] clear that an Indian tribe is not a citizen of any state and cannot sue or be sued in federal court under diversity jurisdiction. Nor [were] Indian tribes foreign states."[123] Thus, as diversity jurisdiction was unavailable, the claim was dependent on a finding of federal question jurisdiction.

While the Oglala cited 18 U.S.C. § 1362, which confers the court with "original jurisdiction of all civil actions brought by any Indian tribe or band," they turned first to the more general federal-question jurisdictional hook—§ 1331.[124] The court moved forward hesitantly, noting that the statutes cited by the tribe failed to create a private right of action, and that their claims' reliance upon "public policy" concerns did not meet the standard by which an issue arising under a federal statute can provide jurisdiction.[125] For the court, "[t]he ultimate import of concluding that there is no federal private cause of action is that it would flout congressional intent to provide a private federal remedy for the violation of the federal statutes."[126]

Next, the court turned to the actual jurisdictional hook cited by the Oglala, § 1362. This too was unavailing. Under

---

121 *See* Oglala Sioux Tribe v. Schwarting, 894 F. Supp. 2d 1195, 1198 (D. Neb. 2012).
122 *Id.* at 1205.
123 *Id.* at 1198–99 (internal citations omitted).
124 *Id.* at 1199 (quoting 28 U.S.C. § 1362).
125 *Id.* at 1200–01.
126 *Id.* at 1201.

Supreme Court precedent, the district court found that the common thread through cases that extended jurisdictional reach under § 1362 is that "they all involved possessory rights of the tribes to tribal lands."[127] The claims alleged by the Oglala Sioux related to conspiracy to flout the prohibition of alcohol, not tribal land. Thus, while the "United States could criminally prosecute anyone suspected of violating §§ 1154 and 1156, there [was] no basis . . . for concluding that the United States could, as a trustee, establish standing to allege the claims that the Tribe [sought] to allege in this case."[128] As a result, § 1362 did not extend jurisdiction. The Oglala Sioux were again stymied from enforcing prohibition within the Pine Ridge Reservation.

III. THE COOPERATIVE-FEDERALISM APPROACH TO TRIBAL PROHIBITION

> "*I am authorized by the great council of the United States to prohibit [sales of liquor]. I will sincerely cooperate with your wise men in any proper measures for this purpose.*"[129]
>
> - President Thomas Jefferson

The ramification of the district court's finding that it lacked jurisdiction to review the Oglala Sioux's challenge, "[regardless of the] merit the Tribe's claims may have,"[130] is dissatisfying. Congress has delegated the choice of remaining dry to the tribes but they have been prevented from enforcing prohibition by transboundary activity. Moreover, neither legislative nor judicial action has stopped the flow of alcohol into Indian country. The federal system has given rise to numerous transboundary environmental disputes that have been litigated in the United State courts. In fact, "[i]n these cases, the Supreme Court is acting as an arbiter between sovereign states, not unlike an international court or arbitration panel"[131] as in the *Trail Smelter Case*. Domestic history of transboundary environmental disputes has involved the harmful effects of

---

[127] *Id.* at 1204.

[128] *Id.*

[129] THOMAS JEFFERSON, THE JEFFERSONIAN CYCLOPEDIA: A COMPREHENSIVE COLLECTION OF THE VIEWS OF THOMAS JEFFERSON 944 (John P. Foley ed., 1900) (responding to a letter from Seneca leader Brother Handsome Lake who complained of the effect alcohol from traders had on his people).

[130] *Schwarting*, 894 F. Supp. 2d at 1205.

[131] Noah D. Hall, *Transboundary Pollution: Harmonizing International and Domestic Law*, 40 U. MICH. J. L. REFORM 681, 686 (2007).

smelter pollution settling upon a down-wind state,[132] and sewage disposal traveling downstream to another urban setting.[133]

In the context of our modern domestic environmental regulations, states are given significant authority to establish the methods of achieving nationally determined public health goals. This has been termed a "cooperative-federalism model"[134] of regulation. Part of this cooperative approach is federally allowed state implementation of various quality standards. Recently, Congress delegated similar authority to Indian tribes. This has advanced tribal self-government and addressed environmental justice concerns in Indian country. There are a variety of well-known examples,[135] but this essay will specifically review Congressional delegation under the CAA and CWA. In turn, understanding these processes by which tribes can enforce Congressional delegation will elucidate the cooperative-federalism nature of federal Indian prohibition.

A. The Clean Air Act

The purpose of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[136] The Clean Air Act covers various forms of air emissions,[137] applying to both aging and decrepit power plants as well as ones to be built in the future.[138] To fulfill this broad regulatory mandate, the Clean

---

[132] Georgia v. Tenn. Copper Co. (Georgia II), 237 U.S. 474 (1915); Georgia v. Tenn. Copper Co. (Georgia I), 206 U.S. 230 (1907) (Georgia sought to enjoin Tennessee copper plants from polluting property located in Georgia).

[133] Missouri v. Illinois (Missouri II), 200 U.S. 496 (1906); Missouri v. Illinois (Missouri I), 180 U.S. 208 (1901) (City of Chicago disposing sewage into the Mississippi that impacted St. Louis).

[134] Jonathan H. Adler, *When Is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67, 87 (2007); *see also* New York v. United States, 505 U.S. 144, 167–68 (1992) ("[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation . . . . This arrangement . . . has been termed 'a program of cooperative federalism.'" (internal citations omitted)).

[135] *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act § 126, 42 U.S.C. § 9626 (2012); Clean Air Act § 301(d), 42 U.S.C. § 7601(d) (2012); Clean Water Act § 518, 33 U.S.C. § 1377 (2012); *see also* Water Quality Standards, 40 C.F.R. § 131.8 (2013) (allowing tribes to exercise regulatory power without express congressional authorization as long as certain criteria are met).

[136] Clean Air Act, 42 U.S.C. § 7401(b)(1).

[137] *See id.* § 7408(a)(1) (criteria pollutants); *see also id.* § 7412(b) (initial list of hazardous air pollutants).

[138] Todd B. Adams, *New Source Review Under the Clean Air Act: Time for More Market-Based Incentives?*, 8 BUFF. ENVTL. L.J. 1, 6 (2000).

Air Act attempts to preserve air quality through interlaced health-based and technology-based standards. The National Ambient Air Quality Standard (NAAQS), defined under the Clean Air Act, establishes a cap of specified levels of emission for six criteria of air pollutants. The NAAQS emission caps are designed to reflect an adequate degree of safety necessary to protect public health.[139] The areas of the country that do not meet the NAAQS for one or more of the six criteria pollutants are characterized as "nonattainment" zones for that pollutant[140] because they have not "attained" the proper levels of each criteria pollutant. Likewise, those areas meeting NAAQS for criteria pollutants are considered "attainment" zones. While major stationary sources in both attainment and nonattainment zones must obtain a permit before new development or modification of the source,[141] designation as nonattainment could significantly impact economic development.[142] The distinction also obligates pollution-emitting entities to meet more aggressive regulatory obligations.

Moreover, the NAAQS regime operates on the basis of a "cooperative-federalism model."[143] Part of this cooperative approach is federally allowed state implementation of air quality standards. The Clean Air Act encourages states to submit State Implementation Plans (SIPs) to ensure compliance with the NAAQS.[144] A state's SIP must include a number of specific pollution control measures. Failure to submit an adequate SIP by the appropriate deadline subjects the state to various federal sanctions, such as the loss of federal highway funds or the imposition of an EPA-enforced Federal Implementation Plan (FIP).[145]

The process of ensuring that new sources, or modifications made to existing sources, meet statutory obligations has become known as New Source Review (NSR). NSR is an essential component of the efforts to maintain air quality. At the same

---

[139] 42 U.S.C. § 7409(b)(1).

[140] *Id.* at §§ 7501(2), 7407(d)(1)(A)(i).

[141] *Id.* at § 7503(a).

[142] *See, e.g.*, *Attainment v. Nonattainment*, IDAHO DEP'T OF ENVTL. QUALITY, http://www.deq.idaho.gov/air-quality/monitoring/attainment-v-nonattainment.aspx (last visited Feb. 7, 2013) ("[I]t is costly and time-consuming to develop and implement plans to reattain attainment status."); Air Quality Div., Neb. Dep't of Envtl. Quality, *FAQs About Attainment and Nonattainment*, AIR WAVES, http://deq.ne.gov/AirWaves.nsf/cf7e4bdd49c643bf8625747f005a1515/3b00b887a2bae40b8625748e005ffbf5?OpenDocument (last visited Feb. 7, 2013) ("[T]here could be indirect, costly consequences due to the designation.").

[143] *See supra* note 134 and accompanying text.

[144] 42 U.S.C. § 7410(a)(1).

[145] *Id.* § 7410(c)(1)(B).

time, the NSR program has been a cause of contention between the EPA, state air quality agencies, and existing facilities.[146] From its inception, the CAA has required new sources to install advanced pollution control technology.[147] This policy decision established two different regulatory regimes—those for new and old sources. While many old sources were "grandfathered" in such that they were able to continue operating subject to few restrictions, new sources that produce air pollution "which may reasonably be anticipated to endanger public health or welfare" are required to install federally established new source performance standards (NSPS).[148] The NSR program thus adds another layer of regulation to facilities that may already be subject to NSPS standards.

Permitting under NSR is divided into three programs. First, the prevention of serious deterioration (PSD) program applies to new major sources or sources making major modifications to existing sources in attainment zones.[149] Second, the Nonattainment NSR (NNSR) program is designed to promote air quality in areas that are out of compliance with one or more of the NAAQS.[150] "NSR requires the most stringent emission limits and also requires sources to offset increased emissions by reducing emissions elsewhere at the facility, or by obtaining Emission Reduction Credits (ERCs) from nearby facilities."[151] Finally, the Minor Source NSR program provides permits for sources not covered by PSD or NNSR. "The purpose of minor NSR permits is to prevent the construction of sources that would interfere with attainment or maintenance of a[n] [NAAQS] or violate the control strategy in nonattainment areas."[152] Together

---

[146] The friction between the EPA and state air quality agencies will be highlighted *infra*.

[147] *See* 42 U.S.C. § 7411(b).

[148] *Id.* § 7411(b)(1)(A) (requiring the Agency to set emission performance standards for stationary sources that "cause[] or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare").

[149] 40 C.F.R. § 52.21 (2013).

[150] 40 C.F.R. pt. 51, App. S(I).

[151] U.S. Envtl. Prot. Agency, Clean Air Act Requirements for Air Pollution Sources in Indian Country 2, May 2008, *available at* http://www.epa.gov/region9/air/tribal/pdf/DetailedAirComplianceRequirements.pdf; *see also* U.S. Envtl. Prot. Agency, *Nonattainment NSR Basic Information*, EPA.GOV http://www.epa.gov/NSR/naa.html (last visited Feb. 7, 2013) ("Nonattainment NSR requirements are customized for the nonattainment area. All nonattainment NSR programs have to require (1) the installation of the lowest achievable emission rate (LAER), (2) emission offsets, and (3) opportunity for public involvement.").

[152] U.S. Envtl. Prot. Agency, *Minor NSR Basic Information*, EPA.GOV, http://www.epa.gov/NSR/minor.html (last visited Feb. 7, 2013).

these permitting requirements clarify the law governing new sources of modification to sources throughout the United States.

The last 40 years in federal Indian law have been marked as a time of tribal self-determination.[153] Throughout this period, the EPA has reinforced this self-determination model. In 1984, the EPA became the first federal agency to formally adopt an "Indian policy" governing its interactions with tribes.[154] The policy noted that tribal governments are "sovereign entities with *primary* authority and responsibility for the reservation populace."[155] Accordingly, the policy assumes tribal regulatory responsibility but is premised upon a default model where the EPA retains responsibility *until* a tribe assumes responsibility.[156] Further, the EPA, with tribal assistance, secured amendments inserting general "treatment as state" (TAS) provisions[157] in most of the major environmental statutes.[158] Specifically, for the purposes of administering air programs, tribes have been granted TAS status under the CAA.[159]

Next, to implement CAA's "treatment as states" provision, the EPA promulgated the Tribal Authority Rule (TAR) in 1998.[160] Under 42 U.S.C. § 7410, tribes can develop TIPs, the tribal equivalent of State Implementation Plan (SIPs), to regulate air quality on reservations.[161] TIPs are

---

[153] *See, e.g.*, Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 816–23 (2012) (describing the era of self-determination and the contemporary federal policy in supporting self-governance).

[154] William D. Ruckelshaus, U.S. Envtl. Prot. Agency, EPA Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984), *available at* http://www.epa.gov/tp/pdf/indian-policy-84.pdf.

[155] *Id.* (emphasis added).

[156] Jana B. Milford, *Tribal Authority Under the Clean Air Act: How Is It Working?*, 44 NAT. RESOURCES J. 213, 219–20 (2004).

[157] James M. Grijalva & Daniel E. Gogal, *The Evolving Path Toward Achieving Environmental Justice for Native America*, 40 ENVTL. L. REP. 10905 n.46 (2010) ("[TAS] eligibility criteria vary among the statutory programs but require generally that the tribe be federally recognized by the U.S. Department of the Interior, have a governing body carrying out substantial duties and powers, and demonstrate technical capability and legal authority to manage and protect the Indian country environment.").

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

[159] Clean Air Act of 1990, 42 U.S.C. § 7601(d)(1)(B) (2012); *see id.* § 7474(c) (stating that re-designation of reservation air quality standards can only be done by "the appropriate Indian governing body").

[160] Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254 (Feb. 12, 1998).

[161] 42 U.S.C. § 7410(o) ("Indian tribes. If an Indian tribe submits an implementation plan to the Administrator pursuant to section 7601(d) of this title, the

created to implement a regime to regulate air quality to meet the air quality standards required under the NAAQS,[162] and TIPs must neither interfere with PSD nor hinder the air quality of neighboring states or tribal areas.[163] Unlike SIPs, TIPs can allow joint tribal and EPA management.[164] Finally, Indian tribes have the same authority as states to petition the EPA to enforce Clean Air Act requirements on surrounding states or tribes.[165]

This regulatory framework has provided tribes authority to control air quality management decisions affecting their jurisdiction. Since the 1990 amendments, 32 tribes have received TAS under the TAR.[166] Three separate tribes have successfully petitioned the EPA for approval of TIPs to implement and enforce tribally-designed air quality standards.[167] Finally, "one tribe has received a delegation (under Clean Air Act Part 71) to implement a Title V operating permit program for their reservation."[168] Such steps have furthered the model articulated through the EPA's Indian policy. This program is "based on initial federal implementation where feasible, with aspirations for later program assumption by Indian tribal governments."[169] To date, this pattern has largely been followed. "[T]ribes have demonstrated increasing interest in developing and administering their own air programs. As one illustration, the number of tribes receiving federal grants to initiate or operate air programs has

---

plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.").

162 *See, e.g.*, 40 C.F.R. § 49 subparts D–M (2013).

163 42 U.S.C. § 7410(a)(2)(D).

164 U.S. ENVTL. PROT. AGENCY, DEVELOPING A TRIBAL IMPLEMENTATION PLAN 23–24 (2002).

165 *See* 42 U.S.C. § 7426 (explaining state's authority to petition the EPA to exercise its enforcement powers).

166 U.S. Envtl. Prot. Agency, *Tribal Air: Basic Information*, EPA.GOV, http://www.epa.gov/oar/tribal/backgrnd.html (last visited Jan. 27, 2013).

167 U.S. Envtl. Prot. Agency, *EPA Approves First Ever Clean Air Act Plan for Reducing Air Pollution Developed by a Tribe*, EPA.GOV (Oct. 30, 2007), http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/d649e3e21e89eeba85257384006f9422!OpenDocument; U.S. Envtl. Prot. Agency, *EPA Approves Nation's Most Comprehensive Tribal Air Quality Plan*, EPA.GOV (Jan. 19, 2011), http://yosemite.epa.gov/opa/admpress.nsf/0/A8A51A1313914FD78525781D0068721B; U.S. Envtl. Prot. Agency, *Tribal Air News*, EPA.GOV (Nov. 13, 2007), http://www.epa.gov/air/tribal/pdfs/Nov%202007%20Publication.pdf.

168 U.S. Envtl. Prot. Agency, *supra* note 166.

169 Grijalva & Gogal, *supra* note 157, at 10905.

grown from about 20 in 1995 to more than 120 in 2002."[170] Tribes have exercised the power to develop permitting programs for new or modified stationary source polluters,[171] craft and implement CAA air quality standards,[172] and potentially influence neighboring states' air policies.[173]

Air pollution has a distinctly extraterritorial nature. So too, it seems, does the flow of alcohol. Both programs are permitting tribes additional authority that Congress has delegated to address specific public health concerns.

B. The Clean Water Act

Like the concerns that inspired the passage of CAA, Congress has recognized the threat that unclean water posed to public health and welfare. In response, Congress enacted the Federal Water Pollution Control Act (FWPCA) in 1948 to "establish a national policy for the prevention, control and abatement of water pollution."[174] The FWPCA was amended and eventually codified as the Clean Water Act (CWA) that included the objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the nation's waters."[175] The CWA also operates under a cooperative-federalism regime. Thus, "[w]hile the EPA is responsible for setting minimum WQSs [Water Quality Standards] for certain pollutants that all states must meet, states are free to set standards that are more stringent than the EPA requires."[176]

Like the CAA, the CWA also treats tribes like states for specific regulation. The "'Treatment as a State' or 'TAS' provision was a 'prequalification' requirement that, once satisfied, allowed the qualifying tribe to become eligible to apply for these grants and program approvals."[177] Importantly, tribes are permitted to address up-stream pollution.[178] To do so,

---

[170] Milford, *supra* note 156, at 213–14.

[171] 42 U.S.C. § 7502(c)(5) (2012).

[172] *Id.* § 7410.

[173] Vanessa Baehr-Jones & Christina Cheung, *An Exercise of Sovereignty: Attaining Attainment for Indian Tribes Under the Clean Air Act*, 34 ENVIRONS ENVTL. L. & POL'Y J. 189, 191 (2011).

[174] 33 U.S.C. § 1151 (1948), *superseded by* Pub. L. No. 92-500 § 2, 88 Stat. 816 (1972).

[175] 33 U.S.C. § 1377(e) (2012).

[176] Marren Sanders, *Clean Water in Indian Country: The Risks (and Rewards) of Being Treated in the Same Manner as a State*, 36 WM. MITCHELL L. REV. 533, 536 (2010).

[177] *Id.* at 537; *see also* Royster, *supra* note 44, at 206.

[178] Royster, *supra* note 44, at 206 ("[A]ny [National Pollution Discharge Elimination System] permit issued for a point source upstream of the tribe's territory, whether the permit issued by the EPA or the state pursuant to a delegated NPDES

they must petition the EPA—who may grant approval—which is then used by the tribe to limit pollution that can impact their local water quality.

This ability to enforce water quality beyond Indian country is similar to the needs of tribes to enforce prohibition beyond the reaches of Indian country. Because both of these models fit within a cooperative-federalism scheme, this process could serve as a model for reform.

IV. ENVIRONMENTAL JUSTICE RESPONSES TO TRIBAL PROHIBITION

A. Identifying a Private Right of Action

While the Oglala Sioux were foiled in the district court, this does not need to be the end of their legal challenges. To begin, the case was dismissed without prejudice.[179] There is a chance to replay this challenge. Nationally, tribes concerned about similar transboundary harms should consider raising these challenges in different federal courts. This is much like federal agencies defending their statutory interpretation in different circuit courts.[180]

Additionally, raising a statutory claim is a classic strategy in the environmental justice toolbox. As Luke Cole has noted, environmental law claims are preferred over all other strategies.[181] However, before challenges are raised, additional thinking about how to articulate a private right of action is necessary. As the district court expressed in *Schwarting*, "none of the statutes cited create a private right of action" that can be alleged by the tribe.[182] Without a right of action, there is no jurisdiction, and without jurisdiction, the claims will be dismissed. Stating that Congress implied a right of action[183] is in many ways a long-shot. Generally, a private citizen cannot file suit under a federal statute unless Congress has

---

program, must include conditions to ensure compliance with the downstream tribe's [Water Quality Standards].").

[179] *Schwarting*, 894 F. Supp. 2d at 1205.

[180] Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 735-36 (1989) ("Given the lack of intercircuit stare decisis, and the reasons underlying our system of intercircuit dialogue, an agency's ability to engage in intercircuit nonacquiescence should not be constrained.").

[181] Cole, *supra* note 55, at 526 (discussing the litigation hierarchy).

[182] *Schwarting*, 894 F. Supp. 2d at 1200.

[183] An implied right of action allows private individuals to file lawsuits under a federal statute that does not explicitly provide for such a right.

manifested its intent for such suit.[184] In cases involving implied rights of action, federal courts look at the statutory language and legislative intent (solely to clarify the text).[185]

By delegating the power to tribal governments to regulate alcohol throughout their reservations, the tribes are in fact acting as agents of the federal government.[186] From this perspective, the language of both §§ 3113 and 1161 suggest that a right of action *does* exist to enforce prohibition beyond the reservation's border. First, under § 3113, the language of the statute indicates congressional intent for tribes to enforce prohibition. The section specifically provides that "any Indian may take and destroy any ardent spirits or wine found in the Indian country."[187] Next, the section permits *any* Indian to seize and destroy alcohol found on fee land—land belonging to the Reservation.[188] Thus, "the grant to 'any Indian' would be construed as also authorizing the organized efforts of the tribal government to make effective use of this power."[189] This empowered tribal members to take actions in furtherance of prohibition against non-members. Undercutting this argument, however, is that, following the reauthorization of § 3113, Congress narrowed the authority of tribes in §§ 1154 and 1156 to exclude non-members and pass-through roads from regulation. A court may view these subsequent enactments as constricting broad power of tribes to enforce prohibition.

Second, under § 1161, Congress gave Indian tribes the authority to maintain prohibition in Indian country. Few federal courts have reviewed the full extent of this delegation. In *City of Timber Lake v. Cheyenne River Sioux Tribe*, the Eighth Circuit held that § 1161 provided tribes the authority to regulate alcohol throughout land within the boundaries of the reservation—including non-member communities.[190] Importantly, the court

---

[184] *See e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677, 732-34 (1979) (Powell, J., dissenting) (reviewing history of Supreme Court decisions implying or prohibiting a private right of action).

[185] JOHN C. JEFFRIES ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 283 (2000). *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 286 (2001); Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 15 (1979). Without proof of intent, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 286–87.

[186] Baker, *supra* note 13, at 714.

[187] 18 U.S.C. § 3113 (2012).

[188] *Id.*

[189] Baker, *supra* note 13, at 716.

[190] 10 F.3d 554, 558 (8th Cir. 1993).

viewed tribal jurisdiction over the flow of alcohol as spanning the "reservation's four corners."[191]

Asserting enforcement *beyond* the four corners of the reservation is a leap. The Supreme Court has been cautious when permitting extraterritorial enforcement. Historically, however, "the United States can, through treaties with Indian tribes, preempt state regulations affecting off-reservation treaty rights."[192] For example, in *United States v. Forty-Three Gallons of Whiskey*, the Court held that the United States and the Red Lake and Pembina Band of Chippewa Indians could agree by treaty to extend federal prohibition to lands ceded by the tribe in treaty agreements.[193] Like Whiteclay, Nebraska, the ceded lands were organized into a county in Minnesota but the Court held that this was within Congress's treaty power. Also, in *United States v. Holliday*,[194] the Court held that Congress could enact a statute preempting state law to prohibit the sale of liquor to individual Indians in a county where there was no Indian reservation. Finally, the Court has more recently described the limits of congressional power. In *Perrin v. United States*,[195] the Court held that "the power [to control the flow of alcohol] is incident only to the presence of the Indians and their status as wards of the Government, [and thus] it must be conceded that it does not go beyond what is reasonably essential to their protection."[196] Moreover, "to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis."[197] Ultimately, the test settles upon wide discretion for Congress to act.[198]

While it helps to view the prohibition delegation to tribes as akin to delegation to tribes to enforce environmental regulations, there are clear distinctions. Unlike *Forty-Three Gallons of Whiskey*, enforcement of prohibition in Pine Ridge is not based upon treaty obligations. In fact, it should be remembered that President Roosevelt specifically sold off the buffer zone created around the reservation. Additionally, unlike the CAA and CWA, Congress did not provide a concrete mechanism to enforce these regulations

---

191 *Id.*

192 Skibine, *supra* note 12, at 1031.

193 93 U.S. 188, 189 (1876).

194 70 U.S. (3 Wall.) 407, 419 (1865).

195 232 U.S. 478 (1914).

196 *Id.* at 482, 486.

197 *Id.* at 486.

198 *Id.* ("[I]t must also be conceded that, in determining what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the courts.").

beyond the border. In fact, many scholars have even found the *City of Timber Lake*'s hold to be an overly broad application of the statute and Supreme Court precedent.[199] However, while the history of alcohol prohibition has trended toward restricting the ability of tribes to make decisions concerning alcohol—based upon the drunken Indian myth—the best indication of congressional intent is the delegation of authority to the tribes. If this delegation is to mean anything, tribes must be able to assert prohibition beyond their borders.

B. File a Public Nuisance Suit

If the door to the courts remains closed to statutory challenges, tribes should seek to file a public nuisance suit. Importantly, "public nuisance law provides the broadest potential for raising environmental justice claims."[200] Public nuisance claims are premised on the notion that someone's actions are "unreasonable given the circumstances and could cause injury to someone exercising a common, societal right."[201] Other types of public nuisance include interfering with public health and safety.[202]

Admittedly, public nuisance suits face an uphill battle in court, and the likelihood of obtaining a positive ruling in a public nuisance suit is attenuated at best. To begin, the special injury rule/different-in-kind doctrine limits the type of plaintiff who can bring this tort action. In particular, "[o]nly those who can first prove some injury that is 'special,' 'particular,' or 'peculiar,' defined as 'different-in-kind' and not just 'different-in-degree' from the general public who might also be affected by the nuisance, be it a house of prostitution or a polluting factory, may bring an action."[203] Few state courts have shifted away from the traditional different-in-kind standard.[204] This makes it difficult to raise environmental justice claims through public nuisance.

---

[199] *See, e.g.*, Baker, *supra* note 13, at 719-21.

[200] Mandy Garrells, *Raising Environmental Justice Claims Through the Law of Public Nuisance*, 20 VILL. EVNTL. L.J. 163, 163 (2009).

[201] Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541 (2012).

[202] *See* Friends of the Sakonnet v. Dutra, 738 F. Supp. 623, 635-36 (D.R.I. 1990). Examples include storing explosives within the city, interfering with reasonable noise levels at night, or interfering with breathable air, such as through emitting noxious odors into the public domain. *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (1979).

[203] Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 761 (2001); *see also* Garrells, *supra* note 200, at 163–64.

[204] *See, e.g.*, Akau v. Olohana Corp., 652 P.2d 1130, 1133-35 (Haw. 1982) (articulating federal injury-in-fact criteria).

In the context of climate change litigation, advocates for climate justice raising tort claims have also been stymied in the federal courts.[205] First, in *American Electric Power Co. v. Connecticut* (*AEP*),[206] the Supreme Court held that the Clean Air Act (CAA) displaced any federal common law claims against carbon-dioxide emissions.[207] Second, in *Native Village of Kivalina v. ExxonMobil Corp.*,[208] the Ninth Circuit held that the CAA displaced all federal public nuisance claims.[209] These decisions effectively close the door to the use of tort-based claims to address climate change. However, tort litigation in state courts may provide an area for successful litigation.[210]

Notwithstanding the high bar of proving negligence, duty, and causality, courts are hesitant for three additional reasons. First, courts might be hesitant to regulate conduct of an industry because regulation is not a core competency of the judiciary. Second, judges may fear criticism for stretching the boundaries of tort law to cover conduct that is attenuated to the plaintiff's injury. Finally, there is a concern about developing "slippery slope" precedent.[211]

As a result of these constrictions on public nuisance claims, while tribes like the Oglala Sioux could utilize public nuisance theory to effectuate prohibition, the bar will be high. They will need to establish that the conduct is the type covered by nuisance theory. Factually, they will be required to establish a linkage between the distribution of alcohol outside their reservation and the significant health effects that result. Doing so will require development of a detailed record and could be quite costly. This limits the overall effectiveness of public nuisance suits as an environmental justice tool.

---

[205] *See* Sean J. Wright, Response, *Shifting Tides: Moving Climate Change Litigation Beyond Business as Usual*, 64 FLA. L. REV. 15 (2012), http://www.floridalawreview.com/wp-content/uploads/Wright_Forum.pdf (discussing the failings of climate based public nuisance suits).

[206] 131 S. Ct. 2527 (2011).

[207] *Id.* at 2537 ("[T]he Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.").

[208] 696 F.3d 849 (9th Cir. 2012), *petition for cert. filed*, 2013 WL 794333 (Feb. 25, 2013) (No. 12-1072).

[209] *Id.* at 858 (extending the rule established in *AEP*).

[210] *See* Bonser-Lain v. Tex. Comm'n on Envtl. Quality, No. D-1-GN-11-002194 (Tex. Dist. Ct. Aug. 2, 2012); Wright, *supra* note 205.

[211] Eric L. Kintner, Note, *Bad Apples and Smoking Barrels: Private Actions for Public Nuisance Against the Gun Industry*, 90 IOWA L. REV. 1163, 1231 (2005).

C. Amend Title 18 to Empower the Tribes to Effectuate Prohibition

If the preceding challenges are unsuccessful, tribal members should strongly consider lobbying Congress to provide tribes the ability to truly enforce prohibition. Delegating this responsibility to tribes is only a half-measure. Tribes must also be given the ability to enforce prohibition beyond reservation borders. In this respect, prohibition policy is like environmental policy. In both the CAA and CWA, tribes are treated like states and are provided a method to enforce these statutes outside their jurisdiction. To prevent transboundary harms, Congress should expand tribal power beyond reservation boundaries.[212] Specifically, amending Title 18 to mirror congressional delegations under the CAA and CWA will empower tribes to actually enforce prohibition—a choice they are permitted to make within the cooperative-federalism scheme.

A possible amendment would establish a petition authority permitting tribes to petition the EPA to find that a site endangers public health beyond the requisite threshold and would have serious, harmful impacts upon the nearby states.[213] As applied, tribes would retain the ability to enforce prohibition and would be permitted to petition the EPA to gain approval to enforce this policy in federal court.[214] This approach is similar to that codified in the CAA and CWA which permits tribes to extraterritorially enforce CWA after receiving EPA approval. While both processes require federal approval—thus undercutting tribal prerogatives—this is consistent with the conceptualization of prohibition as cooperative-federalism. As Sarah Krakoff has noted, tribal environmental justice utilizes regulatory authority as a means of furthering self-government.[215] Because tribes do not retain absolute sovereignty in this context, unlike many others where tribal authority is significant, this scheme is understandable. Just as states are forced to seek federal approval of myriad programs, tribes would be too. This scheme would permit tribes to fulfill their decision to remain dry by garnering federal support of

---

[212] I am not the only scholar to suggest empowering the tribes is a logical and necessary step to protect public health. *See* Cody McBride, Note, *Making Pollution Inefficient Through Empowerment*, 39 ECOLOGY L.Q. 405, 436–37 (2012).

[213] *See* 42 U.S.C. § 7426(b) (2012) (explaining state's authority to petition the EPA to exercise its enforcement powers).

[214] Tribes should petition the EPA over other agencies within this proposed reconfiguration of prohibition policy because alcohol is to be understood as an environmental harm.

[215] *See supra* note 18.

extraterritorial enforcement of prohibition. This would promote environmental justice in Indian country.

* * *

The story of the Oglala Sioux's fight against the flow of alcohol on the Pine Ridge reservation has undergone a recent, significant change. Bowing to growing pressure to legalize the sale of alcohol, hopeful for the opportunity to regulate its use, and frankly exhausted from decades of conflict, the tribe voted to end prohibition.[216] In a close election—1,871 for legalization and 1,679 against it—the lasting sentiment of those supporting the end of prohibition was that the history of the Pine Ridge reservation showed that "prohibition didn't work."[217] Under the new law, "the tribe will own and operate stores on the reservation, and profits will be used for education and detoxification and treatment centers, for which there is currently little to no funding."[218] Opponents of the law fear that the change will, at best, begin reducing dependence on alcohol, but that alcohol-related crime and violence will spike.[219] At bottom, "[b]oth sides in the debate do agree something must be done to limit the scourge of alcohol on the Lakota people. They also share a goal of putting out of business the current main suppliers of booze—four stores in Whiteclay, Neb[raska]."[220]

CONCLUSION

The flow of alcohol into Indian country is a serious public health concern. New ideas are needed to address its harmful consequences. This essay has framed prohibition policy in an environmental justice context. This illustrates how sham towns, such as Whiteclay, are located near poor communities just as polluting facilities are located in or around poor communities. Both establish inequitable distributions of environmental hazards. Moreover, the siting of alcohol distribution centers can be considered LULUs just as local smelting plants are. But tribal governments have limited jurisdiction to assert their rights. This raises the question, does "tribal sovereignty . . . end at the reservation border[?]"[221] This essay has suggested a variety of new

---

[216] Carson Walker, *South Dakota Indian Reservation Legalizes Alcohol, Ends Prohibition*, HUFFINGTON POST (Aug. 15, 2013, 1:54 AM), http://www.huffingtonpost.com/2013/08/15/indian-reservation-legalizes-alcohol_n_3759346.html.

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] Skibine, *supra* note 12, 1004.

approaches based upon concrete environmental justice strategies to address this problem. Conceptualizing prohibition as an environmental justice concern—for the first time—highlights the breadth of tools available to the environmental poverty lawyer. Tribal governments can reassert statutory authorization of a private cause of action, bring a public nuisance suit, or lobby Congress to amend Title 18 to further empower tribes. Any of these strategies, if successful, would be ideal. Regardless, until change occurs, tribal communities will continue to struggle against an increasing threat from the flow of alcohol. This is an injustice.