

# CLOSING THE CIRCLE



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## Environmental Justice in Indian Country

James M. Grijalva

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*For Theresa, Rosa, Louis and Carmen*



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# PREFACE

Though I wasn't aware of it at the time, my first exposure to the concept of Indian country environmental justice was in 1972 and, odd as it sounds, occurred because of a baseball bat. My father, soon to become a career Indian Health Service dentist, was assigned to the Colorado River Indian Tribes' reservation near Parker, Arizona for the summer. It was hot. Daytime temperatures frequently exceeded 112°. One of those days I was looking for shade along the irrigation ditch that ran near our government house and came across an old wooden baseball bat sticking out of a heap of discarded garbage. As any eight-year old American boy would, I immediately recognized the bat for the treasure it was and took it home, not realizing that I had just scavenged in an Indian country open dump.

Many years later, after spending the rest of my childhood living in and near Indian country in New Mexico, Arizona, South Dakota and Alaska, I enrolled in the environmental law program at Lewis & Clark law school in Oregon. I was fortunate to be there when Michael Blumm taught one of the nation's first Indian country environmental law courses, using materials compiled by Judy Royster, who was at that time a natural resource fellow at the school. Judy later became one of the country's leading authorities on natural resource and environmental law in Indian country, coauthoring with Mike the only casebook on those subjects. Coincidentally, as a member of the law review at Lewis & Clark, I worked on an article<sup>1</sup> analyzing one of the cases we studied—a federal decision out of Washington on hazardous waste management in Indian country—authored by Richard DuBey, a Seattle attorney who represented multiple Indian tribes in filing an amicus brief in the case.

Upon graduation, my spouse Theresa and I headed south to paddle our kayaks down the mighty Colorado River through Grand Canyon with a dozen friends. After 225 miles of huge whitewater rapids, dramatic canyon walls, serene beach camps, and wondrous side hikes, none of us were happy to see the commercial shuttle driver parked at the river takeout on the Peach Springs Indian Reservation. We loaded our gear, took a group photo, and the driver took us up the slow rocky road out of the canyon, stopping near the top to

throw the trash and waste we generated during the eighteen-day trip into the Hualapai Tribe's unsupervised community dump. A month earlier a federal court in South Dakota had held the federal government and an Indian tribe liable for operating dumps very similar to that one. On the long ride back to Flagstaff I couldn't help thinking about the baseball bat I found seventeen years earlier in a pile of garbage on the Colorado River Tribes' reservation a few hundred miles downstream.

I began my law practice in the litigation department of a Seattle law firm that wanted to build an environmental law practice group. Six months later the firm hired an experienced environmental lawyer to chair the group, Richard DuBey, who wrote the Indian country hazardous waste article I helped edit in law school. Richard brought his client the Puyallup Tribe of Indians, and soon I was spending most of my time developing tribal environmental programs and negotiating federal claims for damages to tribal natural resources from hazardous substance releases in the Commencement Bay Superfund site near Tacoma, Washington. In 1992, the *National Law Journal* published a special investigation on environmental justice and focused part of its attention on the Puyallup Tribe, quoting Bill Sullivan, the Tribe's environmental director and my primary contact, as saying that the Tribe acted as the conscience for the U.S. Environmental Protection Agency (EPA) in the slow, grinding process of the Superfund cleanup. I thought those words rang true, and they have stuck with me over the years. Michael O'Connell, former general counsel to the Hopi Tribe, later joined us and we built a vibrant Indian country environmental law subcomponent to the firm's more traditional environmental law practice.

When the opportunity arose to realize my passion for teaching, I left the firm for the University of North Dakota, in the heart of Indian country on the northern plains. Silas Ironheart, environmental director of the nearby Spirit Lake Nation, soon asked if I would speak with the Tribal Council about the opportunities for tribal governmental roles within federal environmental law programs. Shortly thereafter, I started the Tribal Environmental Law Project as a component of the University's Northern Plains Indian Law Center, and my students and I helped Si and the Spirit Lake Nation prepare a successful application for treatment-as-a-state under the Clean Water Act. Since that time the Project has worked with some twenty-five tribes across the country in various capacities on multiple environmental law issues.

Those experiences have driven home for me Bill Sullivan's comment that Indian tribes can act as EPA's conscience. In a larger sense tribes also bring a measure of human humility and respect for the natural world modern Amer-

ican environmental law seemingly lacks but, I think, desperately needs. The presence of tribes at the table helps remind federal and state bureaucrats why environmental management programs exist in the first place, and contributes unique perspectives on the challenges of achieving the shared goals of reducing and eliminating harmful environmental pollution risks.

Of course, tribes have to be at the table for that to happen. Regrettably, too often they are not, or if present they lack the leverage necessary for garnering genuine respect from the other players. One of the main premises of this book is that tribes' absence from the national dialogue and implementation of federal environmental programs is largely responsible for creating environmental injustice in Indian country, the concept that some minority communities suffer disproportionately higher environmental risks than many white communities. The several reasons and explanations for tribes' limited influence trace their roots to an anomalous confluence of federal environmental, administrative and Indian law creating the perception if not the reality of a regulatory void in Indian country.

The overall thesis I put forward here is that the most potent available solution for realizing Indian country environmental justice derives from the same combination of factors that caused it. Courts have fairly consistently deferred to EPA's administrative discretion and expertise in reconciling environmental law and policy with Indian law and policy. The Agency has repeatedly exercised its substantial authority under the modern environmental laws to link Congress' preference for local program implementation with federal Indian law's doctrine of retained tribal sovereignty in a legal and administrative framework effectively offering tribes a coequal seat at the table. The seat comes with an unparalleled opportunity for translating tribal environmental value judgments into federally enforceable requirements constraining Indian and non-Indian polluters inside and outside Indian country. It offers a genuine chance for tribes to protect and preserve the health and welfare of their citizens, the quality of the Indian country environment, and most importantly, their land-based indigenous culture.

The book begins by describing the similarities and differences between the environmental justice issues facing Indian country and other communities, notes the generally unrecognized presence of Indian issues and indigenous peoples in the development of the environmental justice movement, and highlights the literature's more fundamental omission of the government's first programmatic environmental justice actions, taken in Indian country. The second chapter continues the foundation by examining the origins of EPA's Indian program that derived from its recognition long before the movement

began that Indian people faced unacceptable disproportionate environmental risks requiring strategic federal attention. Chapters three through six identify the primary themes of the Indian program through detailed but accessible accounts of how particular media-specific regulatory programs have been or can be applied to Indian country, and the unique challenges they presented and continue to present. The book concludes with my belief that, at least for the moment, the most effective opportunity for achieving environmental justice in Indian country is the development of tribal environmental management programs within the rubric of federal environmental law, allowing tribes to reconcile for themselves the cultural dissonance between western tolerance for environmental degradation and sacred indigenous obligations to all their relations.

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My personal and professional associations with many people contributed greatly to the writing of this book. I simply could not have completed it without the love and support my spouse Theresa Grijalva has bestowed on me for over twenty years. My children, Rosa, Louis and Carmen, don't understand why the book has no pictures, but their smiles and encouragement and the original artwork that adorns my home office kept me going on many occasions. My mother Jane Welch-Sprague's longstanding work with non-profit charitable organizations of every sort, and my father Michael Grijalva's devotion to a career in Indian health, helped instill in me a strong social justice ethic that has found its outlet in the subject of this book.

Numerous tribal and federal environmental lawyers have generously shared their insights, advice and experience with me over the years, including Richard DuBey, Michael O'Connell, Dean Suagee, Tom Schlosser, Kayln Free, Kevin Washburn, Elizabeth Bell, Rich McAllister, and the late Leigh Price who wrote EPA's Indian Policy. Several key EPA environmental staff have also freely shared their knowledge, patiently answered my many questions, and labored to locate obscure documents, including Ella Mulford, Casey Ambutas, and Danny Gogal. I'm indebted to the many tribal council members and tribal environmental agency staff that gave me the opportunity to work with them, and wish particularly to recognize Bill Sullivan at the Puyallup Tribe and Silas Ironheart at the Spirit Lake Nation. Members of several indigenous environmental justice groups have helped me see new angles on these topics, especially Tom Goldtooth of the Indigenous Environmental Network, Lori Goodman and Anna Frazier of Diné CARE, Enei Begay of the Black Mesa Water Coalition, and Jolene Catron of the Indigenous Waters Network.

Most of the ideas presented in this book were developed, tested and refined over the course of ten years teaching in the summer environmental law program at Vermont Law School. I am grateful to two consecutive directors of the School's Environmental Law Center, Patrick Parenteau and Karin Sheldon, for continuing to invite me back year after year.

At the University of North Dakota I received significant research support from a cadre of fine law students, including Betsy Spain-Elsberry, Joe Vacek, John Hoff, Crystal Ovsak, and Tim Richards. Rhonda Schwartz and Kaaren Pupino in the Thormodsgard Law Library were relentless in their search for supporting material and never once showed dismay in the face of repeated requests for ancient congressional reports. I also benefited from institutional research support graciously provided by two law deans, Candace Zierdt and Paul LeBel.