

# **ENVIRONMENTAL FEDERALISM AND ENVIRONMENTAL JUSTICE: COMPLEXITIES IN THE OKLAHOMA CONTEXT**

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## **Introduction**

At the dawn of the millennium, it is fashionable to indulge in reflective exercises aimed at discerning broad trends that have brought us to our present position in time and space. If we were to perform such an exercise in the context of environmental policy in the United States, our focus would be on just the last few decades of the 20<sup>th</sup> century. These decades can be characterized succinctly in the following way. The 1960s represent the emergence of environmental awareness and activism. The 1970s represent the translation of environmental concern into policy, particularly through tough, top-down, ambitious legislation and judicial intervention. The 1980s represent conflicts over efforts to attain efficiency in environmental policy and the emergence of environmental federalism. The 1990s represent the emergence of innovative policy instruments – market and information based solutions – and the recognition of the importance of people in the process, particularly through the concept of environmental justice.

Of these broad trends, our focus in this chapter is on environmental federalism and environmental justice because they present interesting challenges in the Oklahoma context. Environmental federalism involves utilizing the federal structure of the American political system to ensure that policy solutions are designed and implemented at the most appropriate level of government. Environmental justice involves paying attention to the socioeconomic aspects of environmental policy and is aimed at ensuring that the burdens of policy do not fall disproportionately on poor or minority communities. These policy thrusts represent moves towards improving environmental policy by making it more efficient and equitable. We discuss some of the complexities presented by the Oklahoma context through a case study of the involvement of Native American tribes – the Sac and Fox Nation and the Tonkawa Tribe – in the federal effort to locate a temporary nuclear waste storage facility.

## **Environmental Federalism**

During the golden age of environmental policy development, principally the 1970s, the consensus in political, academic, and activist circles was that the federal government should be the key driving force for environmental protection efforts. Several dramatic events, including the fire on the Cuyahoga River in Ohio, demonstrated that the existing patchwork of state and local regulations were not sufficient to protect the nation's resources and that state governments were unable and/or unwilling to do the job (Ringquist 1993).

By the late 1980s, however, there was concern that national level policies could not be as responsive to specific environmental problems because of the diversity of ecosystems and environmental threats. Politically, Ronald Reagan's election as president also brought to center stage his ideological inclination towards moving power away from the federal government to the states. By this time, state governments had shown dramatic increases in institutional capacity (Rabe 1997). These features led the U.S. Environmental Protection Agency to begin shifting power to the states and Native American tribes (Kraft and Scheberle 1998).

This shift has led to a debate over whether states will be able to manage this increased responsibility (Rabe 1997; Ringquist 1993). Some argue that states may actually be more innovative in handling environmental policy (John 1994; Adler 1998). Little research has been done, however, to determine how tribal governments will handle this increased environmental authority. One certainty is that there will be more entities involved in setting environmental standards as the federal government relinquishes power. The more entities involved, the greater the potential variation in the levels of environmental protection. Different cultural values and relationships with the land may affect the level of interest in environmental protection as well as understandings of the degree to which the environment should be protected.

Another concern raised by the new trend in environmental federalism is that states and tribes must work more directly with one another in the environmental context. This can lead to new conflicts. States and Native American tribes do not have a good history of working together. The burden of history and the realities of political and economic power imbalances have led to a situation where there is significant distrust and ill will between some state and tribal governments. This lack of trust and goodwill is perpetuated today through questions over taxation and gambling as well as over the management of natural resources and the environment (Egan 1998b).

State and tribal governments often come into conflict because of the fact that the environment does not recognize political boundaries and jurisdictions. Thus, when states and tribal governments are neighbors, each is affected by the manner in which the neighboring entity handles environmental issues. In Wisconsin, for example, the governor has complained that tribes are trying to "stretch their reach off the reservation" by setting strict clean water standards with which the neighboring regions of the state may have to comply (Egan 1998b). In New Mexico, the Isleta Pueblo have used their new powers from EPA to set higher clean water standards as well, which have required the city of Albuquerque to spend \$300 million to clean up the Rio Grande before it flows onto Indian lands (Egan 1998a). In Montana, the Assiniboine and the Gros Ventre tribes held up expansion of a major gold mine by enforcing more stringent standards for land and water protection than those set by the state (Egan 1998a).

While conflicting standards can lead to political conflict, it should also be pointed out that some states are interested in all the help they can get in protecting the environment and welcome the efforts of the tribes. In Minnesota, the same tribal standards that are viewed as intolerable by Wisconsin are actually praised. Minnesota has welcomed the tribal governments efforts to protect the environment (Egan 1998b). The Minnesota response is in line with one of the key points in favor of federalism – that it allows for greater experimentation and policy diversity in tune with local level realities.

Furthermore, states are occasionally on the side of seeking higher levels of protection for the environment. In Washington, the Muckleshoots have sought to build an amphitheater on land that some view as a sensitive wetlands area. The tribe seeks economic growth and views the criticism of its efforts as attacks against its sovereignty. Similarly, the Goshutes in Utah have tried to locate a temporary storage facility for civilian nuclear waste on part of their reservation. Representatives of the state government have expressed concern over the possible environmental impacts of such a facility and have sought to block it through aggressive efforts including the establishment of an Office of High Level Nuclear Waste Opposition (Egan 1998a).

Another concern over the devolution of power out to state and tribal governments arises out of the question of whether these governments are capable of discharging these new responsibilities. Part of this concern has to do with the notion of unfunded mandates whereby more responsibilities are passed on to state and tribal governments without a corresponding increase in funding. In the specific case of tribes, critics are concerned that because of higher rates of unemployment and poverty than other segments of the population, tribal governments will forego environmental protection in favor of economic opportunity. This is the criticism that has been leveled against the Goshutes' nuclear waste storage facility and the Muckleshoots' amphitheater and is among the fundamental challenges that the success of environmental federalism faces in the tribal context.

## **Environmental Justice**

A second of concern regarding Native American tribes and the environment comes from the realm of environmental justice. Environmental justice concerns were first raised by research looking at how black communities suffered from significant environmental degradation. Extensive research has now shown

that communities of color suffer disproportionately from environmental hazards. Blacks have more hazardous waste disposal facilities and landfills in their communities (Bullard 1990; Collin & Harris 1993; White 1992), are exposed to higher levels of lead contamination (Phoenix 1993), breathe more polluted air in the inner cities (Wright 1995), and are more often subject to environmental exploitation (Bryant 1995; Bullard 1993; Hamilton 1993). While there is a lively debate over whether the disproportionate impact on minority communities has to do with racism on the part of decision makers or whether is the inadvertent result of market forces (Been 1994), that there is disproportionate environmental impact on poor and minority communities is now broadly accepted in policy circles.

Other minority groups have been affected in similar ways. Mexican-Americans suffer from environmental inequities ranging from lack of control of pesticide exposure for predominantly Hispanic farm workers (Moses 1993; Pena and Gallegos 1993; Perfecto 1992). Native Americans are faced with high levels of toxins in the fish that they heavily rely upon (West 1992) and acute pollution in their living environment (Tomsho 1990). In response to these and similar concerns, President Clinton established a new Office for Environmental Equity within the Environmental Protection Agency. Further, through an executive order, President Clinton made it mandatory for all government projects to consider socioeconomic impacts along with their cost-benefit and environmental impact assessments.

While the modest steps that have been taken may be helpful, there are concerns on a more fundamental level. Some environmental justice activists argue that part of the problem arises from exclusive reliance on science by government agencies in setting environmental priorities. Some groups simply do not have the money to hire scientists to produce the "evidence" of environmental hazards and thus are not able to participate in the process (Bailey, Alley, Faupel, and Solheim 1995). Native American communities are more likely to be poor than other communities (Egan 1998a) and are therefore not as likely to have the money to support extensive research on an issue they think is a problem and may not be able to get the attention of environmental priority setters (Wright 1995). Thus, it becomes critical for agencies such as the Environmental Protection Agency to provide grants and technical assistance to affected poor or minority groups to ensure a level playing field in terms of access to scientific expertise and meaningful participation in the priority setting process.

Critics raise another concern related to the exclusive reliance on science in environmental protection. To participate in the process of setting environmental priorities, one must be able to use scientifically verifiable estimates to quantify health and ecological concerns, the critics argue. Because Native American communities have different understandings of nature and environmental problems, however, they may not be able to voice their concerns in terms that fit in the rationalistic, quantitative process of defining problems. Hajer (1995) writes that in the scientific, rationalistic approach to defining problems "understanding has ceased to be a matter of direct experience, but is a matter of complex scientific extrapolations" and "consequently, it is a limited group of experts who define the key problems, who assess the urgency of one problem vis-à-vis other possible problems, and who implicitly conceptualize the solutions to the problems they put forward" (Hajer 1995:10). The result is that non-scientists are not allowed into the process and the concerns of groups such as Native American communities may not be given as much weight in a scientifically based assessment of the risk.

These are but some of the many challenges that arise for federalism and environmental justice specifically. Now we shall turn to looking at the challenges that exist in the Oklahoma context.

### **Environmental Federalism, Native Americans, and Oklahoma**

The fundamental reason why the issue of environmental federalism assumes importance in Native American contexts is that American Indian tribes retain inherent sovereignty that can be diminished only by specific acts of Congress (Cohen 1942). Indians had treaty relations with the U.S. government until 1871 and unless abrogated, these treaties remain in force and provide the basis for much of the federal government's legal and political relationship with Indian tribes.

The relationship with tribal governments is further clouded by the Constitutional provision granting Congress the power to "regulate trade with the Indian tribes" (Article I Section 8 - the Indian Commerce Clause). This has resulted in Congressional "plenary power" over Indians (Newton 1984) and the federal government acting as trustee for tribal assets such as land and natural resources, as well as for some assets of individual Indians living in Indian Country.

Since the Johnson Administration, federal policy toward Native American tribes has stressed “self-help, self-development, self-determination” (Johnson 1970:336). This policy has been consistently followed under later administrations. Most recently, President Clinton directed the heads of all Executive Branch departments and agencies to ensure that they operate “within a government-to-government relationship with federally recognized tribal governments,” including prior consultation before taking action affecting tribes (Clinton 1994).

The Environmental Protection Agency conforms to this policy and many federal environmental statutes recognize a role for tribal governments consistent with self-determination. Several federal laws have been amended to allow tribes under certain circumstances to be treated as states: the Safe Drinking Water Act (1986), the Clean Water Act (1987), and the Clean Air Act (1990). The Superfund Act and the Oil Pollution Act also treat tribes as states.

Because Oklahoma is home to 37 of the 554 federally recognized tribes (CFR 1993), the sovereignty issue takes on special importance. It is further complicated, however, by the fact that most of these tribes are not indigenous to Oklahoma; they were resettled there when it was Indian Territory (Strickland 1980; Wright 1986). Indian Territory was repeatedly reduced by federal acts and by the opening of the Oklahoma and Indian Territories to white settlement in the late 1800s and early 1900s (Debo 1970). A later allotment policy favored by the federal government transferred tribal land to individual Indians (Cohen 1982) and much of this was later lost due to quirks in the law and the acts of unscrupulous land speculators (Debo 1989). The result is a checkerboard pattern of Indian land ownership in Oklahoma and widely dispersed tribal populations intermingled with non-tribal members.

These issues form the background for a number structural and management challenges to environmental federalism in Oklahoma.

#### *Population Jurisdiction Challenges*

The first challenge for environmental federalism is determining what laws apply to non-Indians living on tribal land and vice versa. Due to “checkerboard” land ownership patterns, much of Indian country is occupied by non-Indians. For example, while the entire Osage County in Oklahoma is Indian Country under federal law, only 6,088 of the county’s 41,229 residents, i.e., 14.7%, are Indian (Census 1992:12). Such situations lead to conflicts over the extent of tribal and state jurisdiction over non-Indians on Indian land and can pose thorny problems for enforcement of environmental protection efforts.

The Supreme Court has addressed these issues on a case-by-case basis, and in a recent ruling has restricted the ability of tribes to apply tribal zoning ordinances to non-Indian owned businesses on fee land within Indian country (*Berndale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 1989). While some have argued that *Berndale* invalidates tribal regulation, EPA regulators rejected that contention in 1991, stating that the Agency “will...continue to recognize inherent tribal civil regulatory authority to the full extent permitted under Federal Indian law...” (CFR 1991, 64880).

#### *Geographic Jurisdiction Challenges*

A second challenge comes from the difficulty of knowing what is Indian land and what is not. It is very difficult to design and enforce environmental regulatory policy when the affected “environment” is unclear. This issue is particularly complicated in Oklahoma where tribes may not have a substantial or contiguous geographic land base over which they have authority. States have attempted to enforce state law in Indian country and conflict and confusion over functional jurisdiction has resulted. Diane E. Austin attributes the considerable tension between Indian tribes and the state of Oklahoma to the state’s history and land base question and notes that “tribes in Oklahoma have historically had difficulty asserting complete authority because their lands are dispersed” Austin (1993:138). This issue can complicate and hinder efforts at managing ecosystems that cross political boundaries.

#### *Tribal Capacity Challenges*

Tribal capacity to regulate and manage the environment is the third challenge for federalism in Oklahoma. Various federal environmental statutes provide mechanisms for treating tribes as states and define a kind of tribal capacity that requires tribes to have the governing and administrative capabilities necessary for program implementation. Any given tribe may or may not be deemed to have the capacity to be treated as a state.

The result of this unequal capacity among Indian tribes is at least twofold. First, environmental protection among Indian tribes may vary widely, which raises questions of equal protection of the law and environmental justice. Second, the efficacy and consistency of environmental policy itself is brought into question. For example, the EPA is required under the Superfund law to deny cleanup monies to states that have not been able to set up licensed hazardous waste management facilities in their jurisdictions (Lazarus 1993). Such a requirement may run counter to EPA's initiatives to treat tribes as states and delay cleanup on tribal lands.

#### *Functional Jurisdiction Challenges*

A final challenge for environmental federalism in Oklahoma is that the mix of responsible governments and agencies can make it difficult to determine who bears responsibility for environmental protection efforts in Indian Country. In a recent case (*Blue Legs v. EPA*, 668 F. Supp. 1329 (D.C.S.D. 1987)) members of the Oglala Sioux tribe sued the EPA, the Bureau of Indian Affairs, the Indian Health Service, and the Oglala Sioux tribe alleging non-compliance with the Resource Conservation and Recovery Act and the Indian Health Care Facilities Act (Cole 1992). The conflation of responsible parties suggests fractured responsibility and accountability – a potential barrier to adequate environmental protection. In Oklahoma, this is particularly salient given the number of tribes and the fractured nature of Indian Country.

### **Environmental Justice, Native Americans, and the Oklahoma Context**

As noted above, justice is a major challenge to environmental protection in the United States. As agencies such as the Environmental Protection Agency attempt to work with Native American groups in a manner that ensures environmental justice, they need to consider and address the following specific issues that affect the perception and reality of justice.

#### *Trust in Risk Managing Institutions and the Historical Record*

With respect to the federal government, the Native American experience has been complex and often bitter. The government's attitudes and policies toward Native Americans have fluctuated over the years, marked by idealism in the post-revolutionary periods, the forcible relocation of numerous tribes under the Presidency of Andrew Jackson, positive efforts in the 1930s aimed at tribal government revival, and the dissolution of the federal-tribal relationships and land annexations in the 1950s. Thus, Native American attitudes toward potentially legitimated processes may be hostile as long as the federal government is a party to them and may affect their expectations about risk mitigation efforts. This is particularly true in Oklahoma because most of the tribes that are here were relocated here largely against their wills. Furthermore, the land they were given upon arrival in Oklahoma was reduced over the years by a number of federal actions. The result of this long history of federal government mistreatment and betrayal of Native American tribes has been significant distrust.

#### *Cultural Perspectives on the Environment*

Another factor that must be considered in a discussion on environmental justice in the Native American context has to do with cultural attitudes toward the land and the environment. Jorgensen (1984) differentiates between the cultural concept of land with deep symbolic associations that prevails among Native Americans and the mainstream western concept of land as a commodity – something alienable that can be bought and sold. These cultural perspectives on land result in attitudes opposed to land degradation and more attuned toward land stewardship.

Native American attachments to land for cultural reasons could be strong enough to motivate refusal of substantial compensation in exchange for their expropriation. Jorgensen (1984) points to the Sioux of South Dakota who have rejected offers of \$145 million to relinquish their claims to the Black Hills area which they hold sacred, in spite of the tribe's depressed economic condition. Similarly, interviews conducted by Fowler *et al.* (1991) in the context of the Yucca Mountain nuclear waste repository showed that human-environment relations were of deep concern for local Native Americans.

This unique human-environment relationship implicit in Native American attitudes about environmental management indeed vary among the many tribes and typically reach far beyond the overly simplistic idea of "being one with nature" (Allen 1979). However, Momaday's (1976) umbrella concept of "reciprocal

appropriation" is useful in understanding the Native American relationship with nature. Native Americans typically "invest" themselves in the environment while simultaneously "incorporating" the environment into personal fundamental experience. Such attitudes toward the environment normally are not incorporated into federal regulations.

#### *Attitudes toward Economics-driven Decisions and Tradeoffs*

Native Americans often reject the economic notion of prioritization of resources and are often absolute in their denial of projects, making arguments of the form: "this land is ours, it should be left alone." Stoffle and Evans (1990) refer to this way of thinking as "holistic conservation." Cultural triage is the term they use to describe a forced choice situation wherein negative impacts of a proposed project are prioritized in importance and decisions are made to protect some cultural or environmental resources more than others. The use of the word triage indicates the extent to which the choice situation conflicts with traditional values and ways of decision-making. Stoffle and Evans (1990) present evidence that Native Americans are usually forced to shift from holistic to triage arguments when confronted with a project imposed from the outside.

Mainstream Americans are significantly individualistic in their worldview (Fitchen 1987) and this can have an impact on how they characterize societal problems and regard potential solutions (Wildavsky and Dake 1990). Native Americans may not share these worldviews. For example, Austin (1993) points out that cultural attitudes of Native Americans orient them toward communal rather than individual land development. Such attitudes present significant challenges to the standard economic notions used in policymaking settings.

Further, Native Americans may bring a different set of attitudes to bear on economic questions such as discounting. Native Americans may factor in future generations differently than the white American population. For example, Onondaga Chief Lyons (1980) and Cherokee Principal Chief Mankiller (1992) have both stressed the importance of thinking in terms of the well being of descendants as far into the future as seven generations. In the Native American view, this frame of mind is a responsibility they have no choice but to inherit.

On the issue of economic compensation, Native Americans may view this in a hostile manner as evidenced in the work of LaDuke and Churchill (1985). There may be resentment that tribes have been put in a situation where they need compensation and that programs exploit their poverty. Susan Shown Harjo, president of the Morning Star Foundation, a Native American advocacy group in Washington, says: "Five hundred years of colonization has done a real job on us. It makes us targets of cash and poverty politics" (Schneider 1992).

#### *Attitudes toward Decision Making Processes or Procedural Equity*

LaDuke and Churchill (1985) point to the imposition of alien forms of government supplanting indigenous governing structures, i.e., the formation of tribal council governments under the Indian Reorganization Act of 1934, and the mandate of the newly constituted governments to pursue economic development as a step toward creating dependency. They contend that aspects of reorganization such as the recognition of nuclear family ownership rather than the traditional community ownership destroyed traditional organizational structures and traditional resource management patterns.

Austin (1993) also notes that some forms of development require a willingness on the part of Native American tribes to participate in an adversarial or conflictual process of decision-making rather than the unitary or consensual methods that have traditionally been in place. She contrasts the vesting of authority in American government in *political office* with Native America where authority typically is vested in *persons*.

These differences between Native American perspectives and mainstream perspectives on environmental decision-making call for serious examination of the operationalization of environmental justice in the Native American context. Each of these issues is particularly important in the Oklahoma context because of the large number of tribes, the diversity of cultural values among the different tribes, and the different ways the tribes arrived in Oklahoma. The following case study shows how these concerns of environmental justice and the complexities of federalism play out in the federal government's effort to locate a temporary nuclear waste storage facility and the role that two Oklahoma tribes played.

## The Federal Effort to Site a Monitored Retrievable Storage Facility for Nuclear Waste

The United States government's efforts to site a temporary Monitored Retrievable Storage (MRS) facility on lands belonging to Native American tribes was one of the more interesting twists and turns in its quest to establish a storage site for high-level nuclear wastes. In this section, we will explore the Oklahoma angle to this intriguing set of developments by drawing on the experiences of two tribes: the Sac and Fox and the Tonkawa, which demonstrated contrasting reactions to the U.S. government invitation to the tribes to consider serving as host of the temporary MRS facility for nuclear wastes. Our analysis draws on a set of structured interviews with sixteen opponents of the siting proposal among the Sac and Fox Nation (and one telephone interview) and on media reports and U.S. government sources in the case of the Tonkawa tribe. We also draw substantially on a fuller treatment of many of these issues in Gowda and Easterling (1998).

### *Policy Background*

As part of its efforts to support the growth of the nuclear energy industry, the U.S. government took on the responsibility of establishing a storage site for high-level nuclear wastes by January 1998. The government has been trying for many years to site both a permanent geologic repository and an above-ground Monitored Retrievable Storage facility (MRS) for the interim storage. During the 1970s, the Atomic Energy Commission and the Department of Energy employed traditional "decide-announce-defend" siting procedures to locate a permanent repository. This strategy was revised in 1982 when Congress passed the Nuclear Waste Policy Act (NWPA) that provided a comprehensive policy for dealing with the nuclear waste problem, including "science-based" approaches to siting both a repository and an MRS.

However, strong public and political opposition limited the practical viability of NWPA (Carter 1987; Easterling and Kunreuther 1995; Sigmon 1987; McCabe and Fitzgerald 1992). In response, Congress amended the NWPA in 1987 to create a bifurcated approach out of the siting impasse: The permanent repository was to be sited by Congressional fiat (i.e., Yucca Mountain, Nevada, was designated as the only site to be considered), while a voluntary process was stipulated for the MRS.

In theory, a voluntary siting approach holds much promise. Ideally, a developer would not unilaterally select a site but rather invite all communities with technically suitable locations to enter into negotiations. When a community decided it was interested (e.g., through a referendum), its designated representatives would work with the developer to craft a mutually acceptable facility proposal. This proposal would stipulate a site for the facility, the conditions under which the facility would operate, and the nature of the benefits to be awarded to the host community. If more than one community were interested, the developer would select the site that was most attractive on some grounds (e.g., lowest cost, minimal risk). The voluntary approach was thus expected to satisfy the criterion of economic efficiency. More importantly in the siting context, it was also expected to address the main non-economic obstacles to the siting of noxious facilities – adverse perceptions of the risks involved (heightened due to a perceived lack of control), lack of community participation, lack of trust in the managers of the facilities, and concerns over the fairness of both the procedures utilized to choose sites and the eventual outcomes (Rabe 1994; Munton 1996). The voluntary approach was also expected to address concerns about environmental justice because siting was not imposed on poor or minority groups. To obtain informed consent, funds were provided to enable communities to obtain scientific expertise to study the issues involved in the siting.

The voluntary siting process for the MRS was to be implemented by the Office of the Nuclear Waste Negotiator that was specially created by the 1987 amendments to NWPA. The Negotiator was authorized to seek states, counties, or Indian tribes that might be interested in hosting such a facility in return for monetary and other compensation. As a baseline, Congress authorized the host state or tribe to receive \$5 million per year before the shipment of waste and \$10 million per year during the operational phase of the MRS facility [Section 171 of NWPA, as amended]. The Negotiator was free to negotiate a benefits package well in excess of these figures. Grants could be obtained for such purposes as infrastructure improvement, cleanup of environmental problems, educational assistance programs, economic development, and recreational facilities. The first Negotiator, David Leroy worked hard to ensure that "affected stakeholders [satisfied] themselves on all conceivable issues of safety, control, technology, and



acceptability" (Leroy 1991a:10); that communities could freely withdraw from the process at any time; and that community participation would occur only after a referendum within the community agreeing to decisions taken by elected community officials. The siting process and study grants involved different stages designed to gradually step up the involvement of interested communities and to move toward eventual siting.

Leroy's efforts were met with resounding silence on the part of the nation's governors. The political, environmental, and ideological connotations associated with hosting a nuclear waste storage facility overshadowed whatever economic benefits might be possible under the Negotiator's program. The lack of receptivity on the part of the nation's governors severely compromised whatever hopes for success might have been associated with the Negotiator's voluntary siting process. Not only were the governors unwilling to enter into any communication with the Negotiator, they also thwarted any meaningful participation on the part of those counties that expressed even a preliminary interest in hosting an MRS. Faced with this situation, the only entities left for the Negotiator to approach were Native American tribes. Although governors had the statutory authority to veto counties' participation in the Negotiator's program, Native American tribes enjoyed a level of sovereignty that precluded interference from state-level officials. While avoiding any obvious overtures to "target" Native Americans for an MRS, the Negotiator's Office spent much of its time responding to the interest that various tribal councils showed in acquiring economic benefits in return for hosting the facility.

A total of 24 tribes applied for study grants, with 20 coming into the process during Stage I (including the Sac and Fox) and four others during Stage II-A of the siting process. However, only a fraction of these represented serious interest on the part of the applicant tribes. For example, among the 20 applications for Stage I grants, three were rejected by the Negotiator, four others were withdrawn by the tribe before funds were disbursed, and eight others dropped out of the process shortly after receiving their Phase I funds. This left only five of the initial 20 applicants to move onto Stage II-A (although four others entered into the process at that point). In the end, only four tribes – the Mescalero Apache of New Mexico, the Skull Valley Goshute of Utah, the Tonkawa of Oklahoma, and the Fort McDermitt Tribe of Oregon and Nevada – remained committed to the MRS as they explored the opportunity in greater depth. In August 1993, the Mescalero Apache Tribe submitted an application for a Phase II-B grant stating that it was ready to begin "credible, formal discussions" regarding hosting the MRS. A second application for a Phase II-B grant was submitted by the Skull Valley Goshutes who wanted to volunteer a site near the Dugway Proving Grounds in Utah, a much-contaminated and test-bombed piece of land with little development potential.

The interest being expressed by Native American tribes, particularly the Mescalero Apache, raised significant concern on the part of New Mexico officials. The prospect of an MRS facility in central New Mexico was extremely unpopular among the non-Native American population of the state, especially since New Mexico was already the host of another nuclear waste repository – the Waste Isolation Pilot Project for transuranic waste near Carlsbad (for military waste). Because state officials had no authority to intervene in the negotiations, they sought another approach to block the Mescaleros from pursuing an MRS facility – namely, U.S. Senator Jeff Bingaman (D-NM). Senator Bingaman sponsored legislation that would have required interested tribes to gain the cooperation of state and local officials before receiving study grant funds. Congress went further and voted to cancel the entire study-grant program in October 1993 (*Western Energy Update* 1993), and, ultimately, the Office of the Nuclear Waste Negotiator in January 1995 (Fedarko 2000).

### **The Sac and Fox Reaction**

The Sac and Fox Nation's application for a study grant from the Office of the Nuclear Waste Negotiator had been submitted by the elected officials of the tribe who are recognized as the legitimate decision-makers under the Indian Reorganization Act. These actions were in accordance with the procedures prescribed by the tribal constitution. In spite of this, there was concern among tribal members that the tribe's participation in the MRS siting process had not been discussed openly in order to obtain the consent of the entire tribe. This concern crystallized in the form of a petition for a special tribal meeting initiated by Grace Thorpe, a tribal member (and daughter of the renowned Olympian Jim Thorpe). This meeting was held in January 1992 after the petition received the number of signatures required by the tribal constitution. At this meeting, the tribal chairman announced that the business council had only



decided to accept an MRS Phase I study grant and that the tribe would withdraw from the MRS facility siting process thereafter. After some discussion on the issue, Grace Thorpe moved a resolution to the effect that the tribe withdraw from the MRS facility siting process altogether. With support from other opponents of the proposal, this resolution carried by a substantial margin, thus ending the Sac and Fox's involvement with the MRS (personal interviews).

There were several factors cited by Sac and Fox opponents of the MRS facility to justify their opposition. One central feature was their lack of trust in the federal government and in the study grants. Sac and Fox opponents argued that it was unthinkable that the federal government would "give away" \$100,000 for a study grant with no strings attached. They referred to the federal government having recently upgraded the highway that ran through their tribal headquarters as a sign that they were potentially going to be faced with a fait accompli. Opponents were also concerned that the MRS would not be a temporary facility, the process would not be truly voluntary, and the federal government would ultimately abdicate responsibility for the nuclear waste to the tribe (personal interviews).

In terms of risks and their management, opponents questioned the federal government even considering nuclear waste siting on tribal lands, especially when tribes typically did not have strong internal regulations, expertise, or enforcement mechanisms. Further, while opponents acknowledged that tribal members faced serious economic hardships and that the MRS represented one of the few economic-development opportunities available to the tribe, they also attributed a number of substantial risks and other costs to the MRS facility, including risks to the health of tribal members, future generations, and even the very existence of the tribe. Opponents therefore asserted that proceeding with the MRS would not be in the interests of the tribe. These opponents suggested that, in general, a "noxious" facility would be much more acceptable if the facility had a purpose that directly served the needs of the tribe. Since the nuclear waste was not generated by the tribe, these opponents believed there were no *intrinsic* benefits or responsibility for hosting the MRS.

Some tribal opponents of the MRS facility explicitly pointed to the fragmented nature of the tribal land holdings and how these were interspersed with non-tribal lands. They were concerned about being stigmatized by their mostly non-white neighbors and about putting these people at risk when they gained no benefit from the facility. Opponents were also concerned that while the tribal management did use appropriate procedures in applying for the study grant – given the importance of the siting issue – the entire tribe should have been included in decision-making process from the beginning. Opponents then led a move to reform the tribe's decision-making procedures to avoid similar situations in the future.

### **The Tonkawa Reaction**

The Tonkawa involvement in the nuclear waste-siting saga may have arisen more from the entrepreneurial efforts of non-tribal consultants than from an inherent interest on the part of the tribal leadership. The *Daily Oklahoman* reported that differences with the Ponca tribe caused a consultant to withdraw from his association with the Poncas and to instead work with the Tonkawas to prepare and submit a new application on their behalf (McNutt 1993a). This may have been an instance of a tribe taking advantage of the nonbinding nature of the study grant and treating it potentially as a source of revenue. Regardless of motive, the Tonkawa tribe applied for and was awarded a Stage II study grant of \$200,000 to investigate the feasibility of hosting the MRS on land owned by the tribe near the former Chilocco Indian School in northern Oklahoma. The application was argued by the tribal chairman as being justified because of its potential economic benefits for a tribe with a significant unemployment rate. Initially, the tribal chairman was also reported to have stated that the nuclear waste may not be located on tribal lands in Oklahoma but instead on already contaminated land bought for the tribe by the federal government in Nevada or Colorado (McNutt 1993b).

These initiatives of the Tonkawa tribal leadership ran into significant opposition over time, within the tribe, from other Native American tribes, from environmental groups in Oklahoma, from state representatives, and from the Governor of the state (McNutt 1994c). Opponents within the tribe were concerned that the leadership had not discussed the proposal within the tribe before pursuing the MRS (McNutt 1994d; 1994e). Earl Hatley of the Oklahoma Toxics Campaign cited technical reasons – the site's unsuitability to even support a solid waste dump by state standards – as among the leading reasons for his organization's opposition (McNutt 1994f). The site was opposed by all communities in Kay County and

also by residents across the Kansas border. The local state legislators, the governor of Oklahoma, and a member of Congress also openly expressed their opposition to the site (McNutt 1994b). Finally, other Native American tribes, including the Ponca, Kaw, and Cherokee who possessed land in the region or shared the land around the Chilocco Indian school expressed opposition to the siting proposal and declared their lands “nuclear-free zones” (*Daily Oklahoman* 1994; McNutt 1994a).

Virginia Combrink, the chairman of the Tonkawa tribe, combatively responded to the opposition by stating: “We will pursue this anyway, independently, even if the Department of Energy does not give us the (facility). Chilocco is our land, and we will do what we want with it” (*Daily Oklahoman* 1994). Ultimately, in August 1994, the tribal government put the issue of participation in the MRS program to a vote of the entire tribe. By a vote of 44-58 (more than half of the tribe’s 181 members participating), the motion to continue with nuclear waste siting was defeated. The tribal chairman reacted to the defeat by stating her intention of moving on to the next economic development opportunity – siting a federal prison on the same land earmarked for the MRS facility (McNutt 1994f).

### **Implications of the Case Study for Environmental Federalism and Environmental Justice in Oklahoma**

Many of the concerns raised in the environmental justice and federalism contexts are exemplified by the Oklahoma tribes’ involvement in the temporary MRS siting process. Conflict arose relating to federalism with both tribes’ actions. There was conflict across jurisdictions, in part because of the potential for nuclear wastes to cross jurisdictional boundaries. The state, county, and neighboring tribes and communities all weighed in against the Tonkawa involvement in the process. Yet, the Native American tribes continued to assert their sovereignty as was shown by strong statements by the Tonkawa leadership. These are among the most basic issues in environmental federalism as mentioned above.

The case exemplifies other issues related to federalism as well. Lack of clarity about specific land ownership and the patchwork ownership patterns that characterize Indian Country in Oklahoma proved troublesome. The opponents to the Sac and Fox involvement specifically mentioned concerns about the patterns of land ownership that have non-Indians living in Indian Country and the ways those non-Indians would be affected by the decision to accept nuclear wastes without having been involved in making it. Concerns for tribal capacity (based on perceived weak internal regulations, expertise, and enforcement mechanisms) to manage such high level environmental contaminants were also raised. Functional jurisdictional issues became important as well with the Sac and Fox when concerns arose over what entity would have ultimate long-term responsibility for the nuclear wastes.

Concerns in the context of environmental justice are equally as troubling in this case. Perhaps the most basic concern is that tribes that faced significant economic hardships may have been lured by the financial incentives offered to prospective hosts of these nuclear wastes. It is not a just or equitable procedure, however, that preys upon the weaknesses of groups or communities to get them to accept a facility they might not approve of under better economic circumstances.

Other complexities within the environmental justice context arose as well. In both the Sac and Fox and the Tonkawa tribes, there was a concern voiced over procedural equity. In both tribes, there were those who argued that the entire tribe needed to be involved in making the decision about whether or not to apply for a MRS facility. In the Sac and Fox tribe, the concern led tribal members to seek and obtain procedural changes to increase input from members in the decision-making process. Communal processes were viewed as being of utmost importance.

The way that economic tradeoffs were considered was also telling in this case. The tribes, though interested in the economic benefits that could be provided by the MRS facility, showed concern for the impacts of the MRS on future generations and the long-term survival of the tribe. Rather than focusing on immediate profits, long-term considerations ultimately prevailed.

Based on the above case studies and the preceding discussions, we can conclude that environmental federalism and environmental justice are extremely complex in the Oklahoma context, particularly when Native American tribes are involved. Ultimately, the large number and diversity of tribes in Oklahoma; the interactions between tribes, states, and the national government; and concerns for environmental justice present fundamental challenges to the inherent fairness of a siting procedure that is ostensibly equitable.

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