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People of the Outside: The Environmental Impact of Federal Recognition of American Indian Nations

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PEOPLE OF THE OUTSIDE: THE ENVIRONMENTAL IMPACT OF FEDERAL RECOGNITION OF AMERICAN INDIAN NATIONS

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Abstract: American Indians interact with land and the environment in a manner that is distinct from non-native peoples. They view natural resources as an integral part of their way of life. As a result, Indian tribes desire to implement policies and programs that will protect their natural resources. In order to receive federal assistance for these policies and programs, however, a tribe must be federally recognized. The Duwamish tribe, which resides near Seattle, Washington, is not a federally recognized tribe. Despite years of fighting for recognition, the Duwamish cannot take part in the improvement of their tribal region's air and water quality. Alternatively, the Forest County Potawatomi Community is federally recognized. The tribe has utilized its federal status to redesignate its reservation lands under the Clean Air Act, which brings stricter environmental regulations on and around the reservation. As long as the Bureau of Indian Affairs' criteria for federal recognition continue to be arbitrarily and haphazardly enforced, unrecognized tribes like the Duwamish will continue to lack the power to address the environmental issues in their tribal region, in contravention of their fundamental beliefs and way of life.

INTRODUCTION

Seattle is the only major U.S. city named after a Native American leader.[1] The city's namesake, Chief Seattle, once led the Suquamish and Duwamish people.[2] During the 1850 land transactions in Washington territory,[3] Chief Seattle famously said,

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[1] *Chief Seattle*, VISIT SEATTLE, http://www.visitseattle.org/Visitors/Discover/Heritage/Native-American-Heritage/Chief-Seattle.aspx (last visited Feb. 18, 2015), *archived at* http://perma.cc/7E5E-FFS6.

[2] *Id.*

[3] The Donation Land and Claim Act of 1850 granted applicants in the Oregon and Washington territories free land so long as they "settled in the Territories between 1850 and 1853, resided on the land, and cultivated it for [four] consecutive years." *Land Records in Washington State*, WASH. STATE LIBRARY, http://www.sos.wa.gov/library/landrecords.aspx#donation (last visited Feb. 18, 2015), *archived at* http://perma.cc/583K-CLN7.

> Every part of this soil is sacred in the estimation of my people[,] . . . the very dust upon which you now stand responds more lovingly . . . because it is rich with the blood of our ancestors and our bare feet are conscious of the sympathetic touch.[4]

In 1855, the Duwamish[5] tribe was a party to the Point Elliott Treaty (the "Treaty") and ceded thousands of acres of land to the U.S. Government in exchange for reservation land, fishing rights, and a $64,000 payment.[6]

The federal government, however, never upheld its end of the Treaty.[7] The Duwamish did not receive the money owed to them by the terms of the Treaty until they brought suit against the U.S. Government in 1962, over a century after entering into the Treaty.[8] Around the time the Duwamish filed suit, they were formally stripped of their fishing rights.[9] Further, the tribe's promised reservation land never materialized.[10] Despite the Superintendent of Indian Affairs' submission of a proposal for a Duwamish reservation on the Black River, settlers in King County, Washington petitioned Congress and effectively blocked the allotment of Duwamish reservation land.[11] The settlers successfully argued to Congress that the reservation land was unnecessary for the Duwamish.[12] Following the congressional denial of Duwamish reservation land, the tribe dispersed, moving onto other reservations that the federal government had set up in an effort to clear King County for settlement by the very European-American immigrant settlers who

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[4] WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW IN INDIAN COUNTRY § 1:1 (2014), *available at* Westlaw Envtl. L. Indian Country § 1.1 (2014).

[5] "Duwamish" is the Anglo-Europeanized word for "people of the inside," referring to their place of residence, in the interior of the Black and Cedar rivers. *Culture Today*, DUWAMISH TRIBE, http://www.duwamishtribe.org/culturetoday.html (last visited Feb. 18, 2015), *archived at* http://perma.cc/UZB8-U28Q.

[6] Rosemary Sweeney, *Federal Acknowledgment of Indian Tribes: Current BIA Interpretations of the Federal Criteria for Acknowledgment with Respect to Several Northwest Tribes*, 26 AM. INDIAN L. REV. 203, 228 (2002); *Point Elliott Treaty*, DUWAMISH TRIBE, http://www.duwamishtribe.org/elliottreaty.html (last visited Feb. 18, 2015), *archived at* http://perma.cc/3DXV-TJVU; *Treaty of Point Elliott, 1855*, WASH. GOVERNOR'S OFFICE OF INDIAN AFFAIRS, http://www.goia.wa.gov/treaties/treaties/pointelliot.htm (last visited Feb. 18, 2015), *archived at* http://perma.cc/5LHH-3N68.

[7] *See infra* notes 8–12 and accompanying text.

[8] *See* Sweeney, *supra* note 6, at 228.

[9] United States v. Washington, 641 F.2d 1368, 1371–74 (9th Cir. 1981).

[10] The Duwamish are a "landless" tribe. Sweeney, *supra* note 6, at 214; *see infra* notes 11–12 and accompanying text.

[11] David Wilma, *Seattle Pioneers Petition Against a Reservation on the Black River for the Duwamish Tribe in 1866*, HISTORYLINK.ORG (Jan. 24, 2001), http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file_id=2955, *archived at* http://perma.cc/8BPP-PE97. The settlers argued that they were already providing the tribes with protection and that a large land grant to the tribes would work a "great injustice" against them. *Id.*

[12] *Id.*

blocked the grant of reservation land.[13] The Duwamish people became "refugees in their own homeland," and many who tried to stay close to their traditional homeland were threatened with incarceration.[14]

Today, the Duwamish maintain that promises made by the "[U.S.] [G]overnment over 150 years ago to the [Duwamish] in the Point Elliott Treaty have never been honored."[15] As a result of the government's failure to uphold the terms of the Treaty, and in an effort to gain governmental benefits, in 1970, the tribe submitted its first petition for federal acknowledgment.[16] Nevertheless, and despite its decades-long struggle, the Duwamish tribe remains federally unrecognized today, and thus lacks reservation land and the opportunity to receive federal funding for tribal government, health care, housing, social services, and cultural programs.[17]

Federal recognition refers to the government's recognition of a tribal government as a sovereign entity.[18] It is the means through which tribes receive federal benefits and the advantages that accompany tribal self-determination.[19] For example, recognized tribes are accorded the same treatment as states in certain dealings with the U.S. Government.[20] The Environmental Protection Agency (EPA), in particular, has supported Indian self-determination and encouraged tribal governments to engage with the federal government in matters pertaining to the environment.[21] Federally recognized tribes might also be eligible for treatment-as-states provisions within certain EPA-enforced laws, such as the Clean Air Act ("CAA"),

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[13] LAKW'ALAS (THOMAS R. SPEER), THE LIFE OF SI'AHL, 'CHIEF SEATTLE' (2004), *available at* http://www.duwamishtribe.org/chiefsiahl.html, *archived at* http://perma.cc/9SGQ-S237 (scroll to "Denial of a Reservation and Promised Goods and Services" and follow hyperlink "click here" to download Speer's paper).

[14] *Id.*; Wilma, *supra* note 11.

[15] *Chief Si'ahl and His Family*, DUWAMISH TRIBE, http://www.duwamishtribe.org/chiefsiahl.html (last visited Feb. 18, 2015), *archived at* http://perma.cc/G5F6-28CN.

[16] *See* Sweeney, *supra* note 6, at 228–29; *infra* notes 18–20 and accompanying text.

[17] Sweeney, *supra* note 6, at 228; Paul Shukovsky, *Decision Is Death Knell for Duwamish: Bush Administration Reaffirms Earlier Ruling That Tribe Is Extinct*, SEATTLE POST–INTELLIGENCER REP. (May 10, 2002, 10:00 PM), http://www.seattlepi.com/news/article/Decision-is-death-knell-for-Duwamish-1087076.php, *archived at* http://perma.cc/2LPY-8ZT2.

[18] William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83*, 17 AM. INDIAN L. REV. 37, 39 (1992). Recognition is the process by which the "federal government formally acknowledges a tribe's existence as a 'domestic dependent nation' with tribal sovereignty and deals with the tribe in a special relationship on a government-to-government basis." *Id.*

[19] *Id.*

[20] *See* Clean Air Act, 42 U.S.C. § 7601(d)(1)(A) (2012) (codifying the treatment-as-states provisions within the Clean Air Act); *see also* 26 U.S.C. § 7871 (2012) (codifying treatment-as-states provisions within the Internal Revenue Code).

[21] James M. Grijalva, *The Origins of EPA's Indian Program*, 15 KAN. J.L. & PUB. POL'Y 191, 278 (2006).

which enable the tribes to have a relationship with the federal government identical to that of a state government.[22]

Federally recognized tribes, like the Forest County Potawatomi Community (the "Potawatomi"), have successfully used provisions of the CAA to greatly improve the air quality on their reservation lands.[23] The remaining members of the landless Duwamish tribe, on the other hand, live in a region so plagued by air toxicity[24] that it was recently designated a Superfund site pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[25] Federal recognition might enable the Duwamish tribe to join the EPA in the remediation conversation, which in turn would effectuate positive change for both the land's air quality and the tribe's cultural practices.[26] The specific reasons for the denial of the Duwamish petition call into question the Bureau of Indian Affairs' ("BIA")[27] objectivity in its analysis of the seven mandatory criteria within the federal acknowledgment process.[28] In the absence of a standardized and truly objective means of evaluating a tribe's petition, the process itself loses legitimacy and strays far from its original purpose.[29]

This Note discusses the environmental implications of federal recognition—namely a tribe's ability to make positive changes to the environmental health of the land on which it lives and to use those changes as a means of perpetuating its values and its way of life.[30] Part I discusses the current landscape of general American Indian-U.S. Government affairs, detailing the development of the relationship and the federal recognition process that is at the forefront of the relationship.[31] Part II describes environmental regu-

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[22] 42 U.S.C. § 7601(d)(1)(A).

[23] U.S. ENVTL. PROT. AGENCY, GUIDANCE FOR INDIAN TRIBES SEEKING CLASS I REDESIGNATION OF INDIAN COUNTRY PURSUANT TO SECTION 164(C) OF THE CLEAN AIR ACT 3–4 (2013) [hereinafter U.S. ENVTL. PROT. AGENCY, GUIDANCE FOR INDIAN TRIBES], *available at* http://www.epa.gov/air/tribal/pdfs/GuidanceTribesClassIRedesignationCAA.pdf, *archived at* http://perma.cc/J97Y-EFYW; *see* 42 U.S.C. § 7474(c); *infra* notes 145–155 and accompanying text.

[24] *See infra* notes 179–193 and accompanying text.

[25] *Superfund: Basic Information*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/superfund/about.htm (last updated Dec. 24, 2013), *archived at* http://perma.cc/46FC-FELN. The EPA designates Superfund sites—areas rife with significant environmental hazards—in order to then clean up the sites and compel the responsible parties to participate in the cleanup effort. *Id.*

[26] *See infra* notes 58–61, 110–117, 130–135, 161–160 and accompanying text (describing the benefits of federal recognition).

[27] The BIA is the oldest bureau of the Department of the Interior ("DOI"). *Who We Are*, U.S. DEP'T INTERIOR, BUREAU OF INDIAN AFFAIRS, http://www.bia.gov/WhoWeAre/index.htm (last updated Feb. 20, 2015, 1:21 PM), *archived at* http://perma.cc/9MWQ-34XN.

[28] *See* Mandatory Criteria for Federal Acknowledgment, 25 C.F.R. § 83.7 (2014); *infra* notes 56, 250–256 and accompanying text.

[29] *See infra* notes 71–82 and accompanying text.

[30] *See infra* notes 196–271 and accompanying text.

[31] *See infra* notes 35–83 and accompanying text.

lation in Indian country under the CAA.[32] Part III presents a case study that juxtaposes the degree of environmental control of the Potawatomi, a federally recognized tribe, with the environmental powerlessness of the Duwamish, a federally unrecognized tribe.[33] Part IV concludes that federal recognition of American Indian tribes is a defunct process that nevertheless has environmental significance because the lack of federal recognition not only impacts a tribe's ability to participate in environmental regulation of its home region, but also inhibits the perpetuation of a tribe's value systems and the realization of tribal self-determination.[34]

I. THE CURRENT LANDSCAPE OF AMERICAN INDIAN-U.S. GOVERNMENT RELATIONS

A. History of American Indian-U.S. Government Relations

Article I, Section 8 of the U.S. Constitution vests in Congress the power to regulate commerce with the Indian tribes.[35] In 1831, "U.S. Supreme Court Chief Justice John Marshall articulated the fundamental principle that has guided the evolution of Federal Indian law to the present—*[t]hat tribes possess a nationhood status and retain inherent powers of self-government*."[36] As a result, Indian tribes came to be considered semi-independent sovereigns with complete governmental authority on their lands.[37] In 1834, Congress formally established the BIA for the purpose of assisting Indians, and delegated to the BIA the administrative responsibility for setting federal policies with respect to Indian affairs.[38]

In the past century, federal Indian policy has been defined by several concepts—most notably the federal Indian trust responsibility and Native American self-determination.[39] The federal trust responsibility is chief among the duties delegated to the BIA, and involves the U.S. Government's management of Indian lands and funds.[40] In *Cherokee Nation v. Georgia*, Chief Justice Marshall first discussed the federal Indian trust responsibility,

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[32] *See infra* notes 84–143 and accompanying text.

[33] *See infra* notes 145–195 and accompanying text.

[34] *See infra* notes 196–271 and accompanying text.

[35] Article I, Section 8 of the U.S. Constitution states, "The Congress shall have Power . . . [t]o regulate Commerce with . . . the Indian Tribes." U.S. CONST. art. I, § 8.

[36] *Frequently Asked Questions*, U.S. DEP'T OF THE INTERIOR: INDIAN AFFAIRS, http://www.bia.gov/FAQs/ (last updated Feb. 18, 2015), *archived at* http://perma.cc/72RD-7LSU (emphasis added) (citing Cherokee Nation v. Georgia, 30 U.S. 1, 33–34 (1831)).

[37] Michael C. Walch, Note, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1182 (1983).

[38] Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 4, 5 (2004).

[39] *See infra* notes 40–43, 47–53 and accompanying text.

[40] McCarthy, *supra* note 38, at 19.

and characterized the relationship between the Cherokee Nation and the United States as that of a ward to a guardian.[41] It has since been described as a "moral obligation . . . of the highest responsibility and trust," to which the nation is fully committed.[42] The Indian Reorganization Act of 1934 ("IRA") codifies this trust relationship and authorizes the Secretary of the Interior to acquire land and hold it in trust for the purpose of providing land to Indians.[43] Within the IRA, however, "Indian" is defined as "all persons of Indian descent who are members of any *recognized* Indian tribe now under federal jurisdiction."[44]

In the early twentieth century, U.S.-American Indian relations were defined by a policy that terminated federal recognition of many Indian tribes.[45] In 1966, however, the National Congress of American Indians developed the concept of "self-determination."[46] This concept is made up of a series of tribal goals: tribal self-rule, cultural survival, economic development, and Indian participation "within and without the federal policy-making process."[47] Tribal self-determination implies replacing the historic guardian-to-ward model of federal-tribal relations with a government-to-government model.[48] When viewed as governments, as opposed to wards, tribes can better tailor federal programs to their tribal needs and assume practical responsibility for these programs, as would a state government.[49]

President Richard Nixon helped to usher in the self-determination era of federal Indian policy with the passing of the Indian Self-Determination and Education Assistance Act ("ISDEAA").[50] The ISDEAA represented

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[41] *Cherokee Nation*, 30 U.S. at 17; McCarthy, *supra* note 38, at 19.

[42] United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2324 (2011) (quoting Seminole Nation v. United States, 316 U.S. 286, 297 (1942)); Heckman v. United States, 224 U.S. 413, 437 (1912).

[43] Indian Reorganization Act of 1934, 25 U.S.C. § 465 (2012).

[44] *Id.* § 479 (emphasis added); *see* Carcieri v. Salazar, 555 U.S. 379, 382 (2009).

[45] *See* Walch, *supra* note 37, at 1188. The termination policy that defined the 1940s and 1950s was the result of a series of congressional resolutions and public laws, which in some cases transferred tribal court jurisdiction to the respective state court systems, ended federal recognition of approximately 110 tribes and bands in eight states, and terminated recognition of the Indians involved as Indians. *Id.*

[46] Samuel R. Cook, *What Is Indian Self-Determination?*, 3 RED INK, no. 1, May 1994, *available at* http://faculty.smu.edu/twalker/samrcook.htm, *archived at* http://perma.cc/M2D2-A8R2.

[47] *Id.*

[48] JAMES M. GRIJALVA, CLOSING THE CIRCLE: ENVIRONMENTAL JUSTICE IN INDIAN COUNTRY 19 (2008).

[49] *Id. See generally infra* notes 86–105 and accompanying text (illustrating the notion of cooperative federalism that forms the conceptual basis of the CAA and CERCLA).

[50] S. Bobo Dean & Joseph H. Webster, *Contract Support Funding and the Federal Policy of Indian Tribal Self-Determination*, 36 TULSA L.J. 349, 349 (2000); *see* Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450–458ddd-2 (2012). The ISDEAA definition of "Indian tribe" is, "any Indian tribe . . . which is recognized as eligible for the special programs and

Congress' commitment to the development of an effective Indian self-determination policy and the transition from federal domination of Indian programs and services to "effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services."[51] Within the ISDEAA, Congress expressly recognized that federal domination of Indian service programs had hindered the progress of the Indian people and deprived them of the ability to implement the plans and programs that they themselves were best suited to administer.[52] Congress also pledged itself to support and assist Indian tribes in the development of self-sufficient tribal governments that have the capacity to administer and develop their own economies.[53]

B. Federal Recognition of Indian Tribes

As of January 29, 2014, the federal government recognizes 566 tribal entities, each of which is "eligible for funding and services from the BIA by virtue of their status as Indian tribes."[54] The federal acknowledgment process requires a tribe seeking federal recognition to submit a petition to the BIA with evidence that each of the seven criteria required for recognition has been met.[55] The seven mandatory criteria—established by the BIA in 1978 for federal acknowledgment of unrecognized Indian tribes—of such submissions are:

(1) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900.
(2) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.
(3) The petitioner has maintained political influence over its members as an autonomous entity from historical times until the present.
(4) A copy of the group's present governing document.
(5) The petitioner's membership consists of individuals who descend from a historical Indian tribe.

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services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 450b(e).

[51] 25 U.S.C. § 450a(b).

[52] *Id.* § 450(a)(1).

[53] *Id.* § 450a(b).

[54] Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 79 Fed. Reg. 4748 (Dep't of Interior Bureau of Indian Affairs Jan. 29, 2014) (notices).

[55] Rachael Paschal, Comment, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 WASH. L. REV. 209, 216 (1991).

> (6) The membership of the petitioning group is composed of persons who are not members of any acknowledged Indian tribe.
> (7) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.[56]

Today, many tribes go unrecognized because they fail to meet the seven mandatory criteria.[57]

Going unrecognized is significant because the federal government's recognition of an Indian tribe is a prerequisite to a tribe's receipt of federal protection, services, and benefits.[58] The BIA process accords those tribes that have been acknowledged a significant upturn in their fortunes.[59] In contrast, the decision not to recognize a tribe is "crippling because it denies access to most federal Indian programs and the money, assistance, and opportunities that go with it."[60]

Only federally recognized tribes enjoy the government-to-government relationship with the United States and the federal Indian trust responsibility.[61] Historically, tribes have been recognized by "treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity."[62] The formal process of tribal acknowledgment currently in effect—as administered by the BIA—began alongside other civil rights strug-

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[56] Mandatory Criteria for Federal Acknowledgement, 25 C.F.R. § 83.7 (2015).

[57] BUREAU OF INDIAN AFFAIRS, STATUS SUMMARY OF ACKNOWLEDGMENT CASES 1 (2013), *available at* http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024435.pdf, *archived at* http://perma.cc/RC7T-JW6Z (showing that of the fifty-five petitions for federal recognition that the DOI has resolved since the 1978 promulgation of the criteria, thirty-four have been denied); Paschal, *supra* note 55, at 209 (noting that in 1978, the BIA established an administrative program—the federal acknowledgment process—for federal acknowledgment of unrecognized Indian tribes).

[58] 25 C.F.R. § 83.2 ("Acknowledgement of tribal existence by the [DOI] is a prerequisite to the protection, services, and benefits to the Federal government available to Indian tribes by virtue of their status as tribes.").

[59] Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271, 283 (2001). A tribe in Alabama, for example, "rose from poverty to relative prosperity and prominence" within one decade of being federally recognized. *Id.*; *see History of the Poarch Band of Creek Indians*, POARCH BAND OF CREEK INDIANS, http://www.poarchcreekindians.org/westminster/tribal_history.html (last visited Feb. 18, 2015), *archived at* http://perma.cc/KP9H-HF7M. Before receiving federal recognition in 1984, "the Poarch settlement remained largely ignored and increasingly impoverished. As discrimination increased, the Indian families became poorer and more isolated." *Id.* Following federal recognition, approximately 230 acres were declared a reservation, and at present, there are more than 3000 members of the Poarch Band of Creek Indians. *Id.*

[60] STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 312 (2012).

[61] Roberto Iraola, *The Administrative Tribal Recognition Process and the Courts*, 38 AKRON L. REV. 867, 867 (2005).

[62] Myers, *supra* note 59, at 272.

gles in the 1970s.[63] At this time, the demand for a more formalized process resulted in many unrecognized Indian tribes desiring the rights and resources that federal recognition would afford them.[64] In *United States v. Sandoval*, the Supreme Court described federal recognition as a process for determining when "dependent tribes require . . . the guardianship and protection of the United States."[65] Almost one century later, in *Carcieri v. Salazar*, the Supreme Court expanded this concept by interpreting the language of the IRA to mean that the federal government would hold land in trust for the benefit of a tribe only if that tribe was federally recognized in 1934, when the IRA was enacted.[66]

There are mixed opinions about the legitimacy of the federal recognition process.[67] Some are critical of the process, fearing some petitioning groups are either not composed of genuine Indians or are "merely seeking the benefits of being Indian."[68] These critics applaud the BIA's stringent regulations, and argue that without them, "Indian identity [would disappear] in a puff of New Age smoke . . . and respect for tribal sovereignty [would] crumble . . . ."[69] These conflicting perspectives create a conundrum: although the benefits of federal recognition are tangible and might be essential to an established tribe's survival, there is a legitimate fear that undeserving groups might abuse the process for the sake of pecuniary gain.[70]

The BIA's seven mandatory criteria have been criticized for their inconsistency, their discriminatory nature, and the monetary expense that they place on petitioning tribes.[71] Indeed, "in practice, four of these seven mandatory criteria[—outside identification, distinct community, political influ-

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[63] MARK EDWIN MILLER, FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGMENT PROCESS 3 (2004).

[64] *Id.*; Myers, *supra* note 59, at 273.

[65] United States v. Sandoval, 231 U.S. 28, 46 (1913); *see* Myers, *supra* note 59, at 272.

[66] Carcieri v. Salazar, 555 U.S. 379, 382–83 (2009); *see* Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. REV. 1, 8 (2013).

[67] *See, e.g.*, Margo S. Brownell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 302 (2001) (arguing "[t]he quest to become a federally recognized tribe is a game played by the federal government to divide and conquer," and is dependent on how federal bureaucrats interpret a tribe's evidence); Michael Nelson, *The Quest to Be Called a Tribe*, LEGAL AFF. Sept.–Oct. 2003, at 58, 58 (noting tribal recognition has created a political problem: a "tension between giving long-neglected tribes their due and opening the door to more casinos in places that don't want them"); *see infra* notes 68–83 and accompanying text.

[68] Myers, *supra* note 59, at 275.

[69] J. Anthony Paredes, *In Defense of the BIA and the NPS: Federal Acknowledgment, Native American Consultation, and Some Issues in the Implementation of the Native American Graves Protection and Repatriation Act in the Southeastern United States*, 10 ST. THOMAS L. REV. 35, 38 (1997).

[70] *See supra* notes 65–69 and accompanying text.

[71] PEVAR, *supra* note 60, at 310; Paschal, *supra* note 55, at 221.

ence, and descent from a historical tribe—]have proven difficult for petitioning groups to meet under the [BIA Office of Federal Acknowledgment's] interpretations."[72] This process can impose rigorous research and documentation requirements on petitioning entities.[73] For example, in order to meet the "substantially continuous" requirement of the first criterion, a petitioner must document its existence from initial contact with non-Indians, through each subsequent generation, up until present day.[74] Further complicating matters, the BIA has been inconsistent in its interpretation of what constitutes an inappropriate interval between documentation, such that a tribe might be unable to satisfy the "substantially continuous" requirement even if it had engaged in periodic documentation.[75]

The process can also cost up to $150,000 per petition, and take an average of four and one-half years, not including the amount of time a tribe will need to invest in research and preparation prior to submission of the petition.[76] In an extreme example, the DOI did not issue a final determination on the Duwamish tribe's petition for federal acknowledgment until more than twenty years after the tribe first sought acknowledgment.[77]

Some are especially critical of the fact that certain tribes cannot meet the continuous political or geographic existence requirements in light of "what the federal government has done to displace, disrupt, disorganize, scatter, and assimilate so many tribes."[78] In addition, for those landless tribes, particularly those whose land was taken by the federal government, the carrying out of government functions becomes exceedingly difficult, resulting in a failure to meet the political influence requirement.[79] The BIA does not provide definitions for key terms, such as "substantially continuous Indian identity," and only gives examples of evidence that is acceptable as proof of these terms, a type of proof that is inconsistent and vague.[80] On the whole, "[i]ll-defined terms and inconsistent application frustrate the petitioners' efforts to understand and provide the information necessary to

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[72] Lorinda Riley, *Shifting Foundation: The Problem with Inconsistent Implementation of Federal Recognition Regulations*, 37 N.Y.U. REV. L. & SOC. CHANGE 629, 640 (2013).

[73] *See infra* notes 74–82 and accompanying text.

[74] 25 C.F.R. pt. 83 (2015); *see* Paschal, *supra* note 55, at 218. Furthermore, the DOI's final determination as to a petition for recognition is only reviewable under the Administrative Procedure Act's stringent arbitrary and capricious standard. Administrative Procedure Act, 5 U.S.C. § 706(2)(a) (2012); *see* Iraola, *supra* note 61, at 891–92.

[75] Paschal, *supra* note 55, at 218–19.

[76] *Id.* at 219.

[77] Final Determination Against Federal Acknowledgment of the Duwamish Tribal Organization, 66 Fed. Reg. 49,966 (Dep't of Interior Bureau of Indian Affairs Oct. 1, 2001) (notices).

[78] PEVAR, *supra* note 60, at 311.

[79] Myers, *supra* note 59, at 282.

[80] Paschal, *supra* note 55, at 220–21.

meet the acknowledgment criteria."[81] The existence of an "indeterminate quantum of proof" compounds these problems and results in tribes being unsure of exactly the amount of evidence that is required of their petitions.[82] The difficulty that tribes face in their attempt to gain federal recognition impacts the debate around environmental protection in Indian country.[83]

II. Environmental Regulation on Indian Reservations

A. Overview of the Clean Air Act

In its first month of the Environmental Protection Agency's (EPA) operation, Congress passed the Clean Air Act ("CAA") for the purpose of protecting and enhancing the quality of national air resources.[84] Pursuant to its mandate under the CAA, the EPA has passed regulations that experiment with cooperative federalism, a system envisioning a federal-state partnership that acknowledges "both the national interest in environmental management, as well as states' historic responsibility over public health and welfare."[85] The concept underlying cooperative federalism is the delegation to states of the responsibility to implement environmental programs that adhere to federal implementation standards while also adjusting them to local conditions.[86]

The CAA requires the EPA to set National Ambient Air Quality Standards ("NAAQS") for six common air pollutants—called criteria pollutants[87]—and regulate these six pollutants by developing human health based primary standards and environmentally based secondary standards.[88] States are then given the "primary responsibility" for enforcing air quality within their borders by submitting a state implementation plan ("SIP") for each of

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[81] *Id.* at 221.

[82] *Id.*

[83] *See supra* notes 58–82 and accompanying text; *infra* notes 111–155 and accompanying text.

[84] Grijalva, *supra* note 21, at 197–98; *see* Clean Air Act, 42 U.S.C. § 7401(b)(1) (2012).

[85] Grijalva, *supra* note 21, at 198.

[86] *Id.*

[87] *Six Common Air Pollutants*, U.S. Envtl. Prot. Agency, http://www.epa.gov/air/urbanair/ (last updated Dec. 22, 2014), *archived at* http://perma.cc/RV2A-G5VE (listing the six criteria pollutants: ozone, particulate matter, carbon monoxide, nitrogen oxides, sulfur dioxide, and lead).

[88] 42 U.S.C. § 7409(b); *see National Ambient Air Quality Standards (NAAQS)*, U.S. Envtl. Prot. Agency, http://www.epa.gov/air/criteria.html (last updated Oct. 21, 2014), *archived at* http://perma.cc/TXP2-3Y8M ("Primary standards provide public health protection, including protecting the health of 'sensitive' populations . . . [, whereas] [s]econdary standards provide public welfare protection, including protection against decreased visibility and damage to animals, crops, vegetation, and buildings.").

the six NAAQS.[89] If a SIP provides that a particular area is not meeting the NAAQS, that area is designated "nonattainment" and is required to implement specified air pollution control measures.[90] Conversely, "attainment" areas—where the air quality meets that required by NAAQS—must ascribe to the Prevention of Significant Deterioration of air quality ("PSD") program.[91]

Toxic air pollutants, or air toxics, are hazardous air pollutants that can cause birth defects and other serious health problems, but are nonetheless not regulated under the NAAQS.[92] Air toxics, such as mercury or polychlorinated biphenyls, degrade in the atmosphere slowly, or not at all, and can persist in the environment for a long time.[93] The 1990 Amendments to the CAA require that the EPA regulate the emissions of 188 hazardous air pollutants through the use of Maximum Achievable Control Technology ("MACT") standards.[94]

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[89] 42 U.S.C. § 7407(a). If the EPA finds that a state has either failed to submit a SIP or that a state's SIP is inadequate, then the EPA will implement a federal implementation plan ("FIP"). *Id.* § 7410(c)(1).

[90] 42 U.S.C. § 7501(1)(A) (2012).

[91] *Id.* §§ 7407, 7471. The PSD program applies to new sources of criteria pollutants or major modifications at existing sources in attainment areas. *Id.*; *New Source Review: Prevention of Significant Deterioration (PSD) Basic Information*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/NSR/psd.html (last updated Oct. 8, 2014), *archived at* http://perma.cc/D8RQ-544G. It requires the use of Best Available Control Technology ("BACT"), air quality analysis, additional impacts analysis, and public involvement, in the hopes that economic growth will not stymie the preservation of existing clean air resources. 42 U.S.C. §§ 7470–7492 (codifying the PSD program); *New Source Review: Prevention of Significant Deterioration (PSD) Basic Information*, *supra*. Under the PSD program, any decision to allow increased air pollution at new sources or at the site of major modifications to existing sources is made only after careful consideration of the consequences of such an action and following a public comment period. *New Source Review: Prevention of Significant Deterioration (PSD) Basic Information*, *supra*.

[92] OFFICE OF AIR, WASTE & TOXICS, U.S. ENVTL. PROT. AGENCY REGION 10, AIR TRIBAL STRATEGIC PLAN 5 (2009), *available at* http://yosemite.epa.gov/R10/TRIBAL.NSF/programs/1e921ea9876ccdfc882575ec006916f4/$FILE/tribalair_strategicplan_032409.pdf, *archived at* http://perma.cc/Y5GE-2LW6.

[93] *Reducing Toxic Air Pollutants*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/airquality/peg_caa/toxics.html (last updated Oct. 28, 2014), *archived at* http://perma.cc/N7RZ-XXE5. As a result, air toxics affect living systems and people who eat contaminated food. *Id.* The EPA expressly acknowledges that "[t]his can be particularly important for American Indians or other communities where cultural practices or subsistence life styles are prevalent." *Id.* As such, the EPA works alongside state, local, and tribal governments to reduce air toxics exposure to the environment. *About Air Toxics*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/oar/toxicair/newtoxics.html#progress (last updated June 21, 2012), *archived at* http://perma.cc/Y4TN-XLM6.

[94] Clean Air Act Amendments of 1990, Pub. L. No. 101-549, sec. 301, § 112(d), 104 Stat. 2399 (codified at 42 U.S.C. § 7412(d) (2012)); *Taking Toxics Out of the Air*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/airquality/takingtoxics/p1.html#8 (last updated Aug. 19, 2011), *archived at* http://perma.cc/7CN9-BN74.

The CAA "divides clean air areas into three classes and specifies the increments of [criteria pollutants] in each."[95] Class I areas are the most stringently regulated, requiring "near-pristine air quality;" they include national parks and national wilderness and memorial parks of a certain size.[96] Class I areas also have an additional protection: the EPA will decline to issue a PSD permit to an emissions source that will have an adverse impact on any defined Air Quality Related Value ("AQRV") for the region.[97] An AQRV is a resource as identified by the EPA Federal Land Manager, including the state or Indian governing body, where applicable, "that may be adversely affected by a change in air quality."[98] Specific scenic, biological, cultural, ecological, physical, or recreational resources have been identified as AQRVs in the past.[99] Class II areas include all attainment and unclassifiable areas that are not established as Class I areas; the regulation of new pollution sources in Class II areas is intermediate.[100] Class III areas are those a state may designate for development, which allow for large increments of new pollution, though new pollution still cannot exceed the NAAQS.[101]

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[95] JAMES E. MCCARTHY ET AL., CONG. RESEARCH SERV., CLEAN AIR ACT: A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS 12 (2011), *available at* http://www.fas.org/sgp/crs/misc/RL30853.pdf, *archived at* http://perma.cc/TH38-CR9V.

[96] 42 U.S.C. § 7472(a) (2012); Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 298 (1996).

[97] U.S. ENVTL. PROT. AGENCY, GUIDANCE FOR INDIAN TRIBES, *supra* note 23, at 6. An AQRV is a "resource as identified by the Federal Land Manager for one or more federal areas, that [might] be adversely affected by a change in air quality," and so the EPA will refuse to issue this permit if it is determined that a source is adversely impacting a designated AQRV. *Id.*

[98] *Id.*; *see AQRV Definition*, NAT'L PARK SERV., http://nature.nps.gov/air/permits/aris/aqrv.cfm (last updated June 2, 2005), *archived at* http://perma.cc/Z7QP-GV77; *New Source Review: Prevention of Significant Deterioration (PSD) Basic Information*, *supra* note 91.

> Federal Land Managers have been directed by Congress, through various mandates[, including the Wilderness Act, and the Clean Air Act,] to preserve and protect air quality related values. Congress directed the Federal Land Managers to: "assume an aggressive role in protecting the air quality values of land areas under their jurisdiction. In cases of doubt the land manager should err on the side of protecting the air quality related values for future generations."

AQRV Definition, *supra*.

[99] *See AQRV Definition*, *supra* note 98.

[100] 42 U.S.C. § 7472(b); MCCARTHY ET AL., *supra* note 95, at 12; NAT'L PARKS CONSERVATION ASS'N, FACT SHEET: EPA RULE WILL ALLOW MORE POLLUTION IN OUR NATIONAL PARKS & WILDERNESS AREAS 1 (n.d.), *available at* http://www.npca.org/protecting-our-parks/air-land-water/clean-air/dark-horizons-map/pdf/NPCA_factsheet_EPA_PSD_modeling_rule.pdf, *archived at* http://perma.cc/V46H-GT5E. New pollution increments in Class II areas are about four to twenty times higher than pollution increments allowed in Class I areas. *Id.* Moreover, the CAA grants states the authority and discretion to redesignate areas from Class II to Class I, the result of which requires greater air quality regulation in redesignated areas. 42 U.S.C. § 7474.

[101] MCCARTHY ET AL., *supra* note 95, at 12.

Although the CAA expressly delineates the roles of the federal and state governments, it was entirely silent on the issue of the status of tribal involvement in air quality regulation on Indian lands until 1974.[102] In the 1974 regulatory action that implemented the PSD program, the EPA decided that "Indian Governing Bodies" could take part in the implementation of the CAA's PSD program alongside states.[103] In fact, multiple aspects of the Rule implied an equivalency between the governments of tribes and of states.[104] It was one of the first times that the federal government experimented with the "treatment-as-states" policy, and in the 1977 CAA Amendments, Congress codified the PSD program, including its treatment of tribes as states, into federal law.[105]

B. The Clean Air Act on Indian Reservations

In accordance with the EPA's formal adoption of treatment-as-states policies towards tribal lands, in 1990, Congress amended the CAA to explicitly include such a provision.[106] The EPA promulgated the Tribal Authority Rule ("TAR") in 1998 to implement the CAA treatment-as-states

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[102] Grijalva, *supra* note 21, at 203. "Nothing in this section is intended to convey authority to the States over Indian Reservations where States have not assumed such authority under other laws . . . ." Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. 42,510, 42,515 (Dec. 5, 1974) (codified at 40 C.F.R. § 52).

[103] Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. at 42,510, 42,515 ("Redesignation may be proposed by the respective States, Federal Land Managers, or Indian Governing Bodies.").

[104] Grijalva, *supra* note 21, at 210; *see* 39 Fed. Reg. at 42,510, 42,515.

[105] Clean Air Act Amendments of 1977, Pub. L. No. 95-95, tit. I, sec. 127(a), 91 Stat. 685 (codified at 42 U.S.C. § 7474(c) (2012)), *available at* http://history.nih.gov/research/downloads/PL95-95.pdf, *archived at* http://perma.cc/DK2E-WBJJ; Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. at 42,510, 42,515; Grijalva, *supra* note 21, at 217–18 n.168. Other environmental statutes include treatment-as-states provisions that grant tribes regulatory authority on their lands. For example, Section 126 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") affords tribes substantially the same treatment-as-states in a variety of response actions, including "notification of releases, consultation or remedial action, access to information, and roles and responsibilities under the National Contingency Plan." 42 U.S.C. §§ 9603–9605, 9626 (2012); *see OSWER Tribal Programs: Laws and Regulations*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/oswer/tribal/laws.htm (last updated Feb. 6, 2013), *archived at* http://perma.cc/9B4F-4WX6. Section 104 of CERCLA, codified at 42 U.S.C § 9604(d), also "allows EPA to enter into cooperative agreements with eligible tribes to perform or participate in Superfund-eligible site response activities." *OSWER Tribal Programs: Laws and Regulations*, *supra*. Moreover, within the Clean Water Act, tribes may be treated the same as states in the following programs: water quality standards and 401 certifications, National Pollution Discharge Elimination System Permits, 404 Dredge and Fill Permits, and the Sewage Sludge Management Program. *Treatment in the Same Manner as a State*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/tribalportal/laws/tas.htm (last updated Sept. 25, 2013), *archived at* http://perma.cc/VJ4E-FD9K.

[106] 42 U.S.C. § 7601 ("[T]he Administrator . . . is authorized to treat Indian tribes as States under this chapter . . . .").

provisions.[107] The TAR provides tribes with the authority to develop a Tribal Implementation Plan ("TIP"), a tribe's equivalent of a SIP, and to "seek full authority to monitor and enforce the . . . NAAQS within their reservation."[108] Thus, the federally recognized tribes can administer CAA programs in the same manner as states and are granted the ability to make more stringent regulations not inconsistent with the Act.[109] In order to be eligible for the treatment-as-states provisions of the CAA, however, a federally recognized Indian tribe must satisfy additional requirements.[110]

Pursuant to their authority under the treatment-as-states provisions, eligible tribes have worked with the EPA to control air pollution originating in Indian Country.[111] For example, as a result of its ability to administer the CAA on its lands, the St. Regis Mohawk Tribe of New York developed its own environmental management capabilities in response to growing concerns about its reservation's air resources due to an adjacent Superfund site and nearby aluminum smelters.[112] The tribe has submitted a TIP to the EPA, in which it has developed a tribe-specific Air Quality Code that includes "tribal air standards for fluorides and six toxic metals that are of concern due to the off-reservation metals processing."[113] In addition, the tribe's Code provides that the tribe may review state permits for facilities located in contiguous jurisdictions.[114] Indeed, the tribe now operates an open burning permit program and is planning to administer its own minor source permit program.[115] Other federally recognized tribal communities, such as the Gila River Indian Community and the Shoshone-Bannock Tribe, have developed TIPs in order to control their reservation air quality, and specifically, to develop operating permit programs under the CAA.[116] The Navajo Nation, a tribe of more than 250,000 members, employs its own Air Quality

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[107] Tribal Authority, 40 C.F.R. pt. 49, sub. A (2015); Jana B. Milford, *Tribal Authority Under the Clean Air Act: How Is It Working?*, 44 NAT. RESOURCES J. 213, 220 (2004).

[108] Milford, *supra* note 107, at 221; *see* 40 C.F.R. § 49.11(a).

[109] 40 C.F.R. § 49.1.

[110] 42 U.S.C. §§ 7601(d)(2)(A)–(C), 7602(r). The other requirements are: the Indian tribe must have a governing body that carries out substantial governmental duties and powers; the functions to be exercised pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and the Indian tribe is reasonably expected to be capable of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the CAA. *Id.* § 7601(d)(2)(A)–(C). CAA Section 7602, the definitions section of the chapter, provides, "'Indian tribe' means any Indian tribe . . . which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *Id.* § 7602(r).

[111] *See infra* notes 112–117 and accompanying text.

[112] Milford, *supra* note 107, at 223.

[113] *Id.* at 224.

[114] *Id.*

[115] *Id.*

[116] *Id.* at 224–25.

Control Program with staff members who work on development of the program, monitoring of air quality, and compliance inspections for sources operating on the reservation.[117]

C. Tribal Redesignations Under the Clean Air Act

All U.S. land belongs to a "class" within the CAA, and a redesignation allows for a party to implement more stringent air regulation standards by redesignating those lands as a higher class—typically Class I.[118] According to a 2013 EPA Guidance document, redesignation to Class I provides a tribe the opportunity to "[e]xercise certain controls over protection of reservation air resources[,] [a]ssert tribal sovereignty[,] [p]rotect the reservation from certain air quality impacts arising from emission sources off reservation[,] [and] [b]uild tribal capacity in the implementation of the Act."[119] Tribes seeking redesignation must abide by statutorily prescribed procedures[120] that are significant because the EPA may only disapprove a redesignation if it finds that the redesignation in question does not meet these procedural requirements.[121] This narrow role reflects the congressional desire to eliminate agency second-guessing of a tribe's decision to redesignate its reservation lands.[122] Should a state or tribe disagree with a tribe's substantive request for redesignation, they may take advantage of a dispute resolution mechanism within the CAA wherein the parties can resolve the issues themselves, request that the EPA make a recommendation of resolution, or have the EPA resolve the dispute.[123]

To date, six Native American tribes have obtained Class I redesignations.[124] Historically, tribes have been the only entities to request redesigna-

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[117] *Id.* at 225; *History*, WELCOME TO THE NAVAJO NATION GOV'T, http://www.navajo-nsn.gov/history.htm (last visited Feb. 19, 2015), *archived at* http://perma.cc/H6EX-QXZ7.

[118] U.S. ENVTL. PROT. AGENCY, GUIDANCE FOR INDIAN TRIBES, *supra* note 23, at 3–4.

[119] *Id.* at 4.

[120] 40 C.F.R. § 51.166(g)(2) (2015). These procedures require the tribe to: (1) hold a public hearing; (2) notify any states, tribes, and other entities that might be affected by the redesignation; (3) consult with other local governments; (4) prepare a description and analysis of the health, environmental, economic, social, and energy effects of the proposed reclassification; and (5) finally, consult with any states the reservation is located within and that border the reservation. *Id.*

[121] 42 U.S.C. § 7474(b)(2) (2012); *see* Michigan v. U.S. Envtl. Prot. Agency, 581 F.3d 524, 526 (7th Cir. 2009) ("If the . . . procedural requirements are met, the EPA has little discretion in denying a redesignation."); Arizona v. U.S. Envtl. Prot. Agency, 151 F.3d 1205, 1211 (9th Cir. 1998) ("Congress has established a narrow role for EPA in reviewing State or Tribal requests for redesignation.").

[122] *Arizona*, 151 F.3d at 1212.

[123] 42 U.S.C. § 7474(e).

[124] John-Mark Stensvaag, *Preventing Significant Deterioration Under the Clean Air Act: Area Classification, Initial Allocation, and Redesignation*, 41 ENVTL. L. REP. NEWS & ANALYSIS 10008, 10020 (2011).

tion, although states have the ability to make similar requests.[125] One factor that may explain the tribal primacy in redesignation requests is that Indian communities are fixed geographically—members of one tribe will live on the same land as long as the tribe remains in existence.[126] As a result, Indian tribes are "permanently integrated into regional environments."[127] This creates what one historian has called the philosophy of permanence—a perspective "that commits the people to a permanent existence in harmony with everything around them."[128]

Despite the lack of a formal Indian policy until 1980, the 1974 PSD Rule granted certain Indian governing bodies the authority to propose redesignations to the EPA.[129] The Northern Cheyenne of Montana took advantage of this newfound authority and submitted the nation's first application for redesignation of its reservation from Class II to the highly regulated Class I.[130] The Northern Cheyenne proposed the redesignation to preserve the lifestyle and culture of the reservation without disruption caused by further air quality deterioration from a nearby coal-fired power plant.[131] In 1977, the EPA approved the Class I status of the Northern Cheyenne lands.[132] Furthermore, after several energy firms challenged the Northern Cheyenne redesignation, a court rejected these challenges and held, "[j]ust as a tribe has the authority to prevent the entrance of non-members onto the reservation . . . a tribe may exercise control, in conjunction with the EPA, over the entrance of pollutants onto the reservation."[133] When the Northern Cheyenne redesignation went into effect, it caused off-reservation changes.[134] For example, the EPA forced Montana Power Company, located thir-

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[125] *Id.*

[126] *See* RODGERS, *supra* note 4, § 1:1. The Native American people are also guided by the notion of a "seventh generation," which describes that each decision made today must consider the effect that decision will have on both present well-being and the well-being of those who will live on that same land seven generations from now. *Id.*

[127] *Id.*

[128] *Id.*

[129] Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. 42,510, 42,515 (Dec. 5, 1974) (codified at 40 C.F.R. § 52); *see* GRIJALVA, *supra* note 48, at 230.

[130] GRIJALVA, *supra* note 48, at 21; *see* Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. at 42,515.

[131] Montana; Redesignation of Northern Cheyenne Indian Reservation for Prevention of Significant Deterioration, 42 Fed. Reg. 40,695, 40,695 (Aug. 5, 1977); *Class 1 for Tribes*, FOREST CNTY. POTAWATOMI, http://www.fcpotawatomi.com/government/natural-resources/air-resource-program/class-i-redesignation/class-i-for-tribes/ (last visited Feb. 19, 2015), *archived at* http://perma.cc/3HKE-Q8Y5.

[132] Montana; Redesignation of Northern Cheyenne Indian Reservation for Prevention of Significant Deterioration, 42 Fed. Reg. at 40,697; Stensvaag, *supra* note 124, at 10021.

[133] Nance v. U.S. Envtl. Prot. Agency, 645 F.2d 701, 715 (9th Cir. 1981).

[134] *See* GRIJALVA, *supra* note 48, at 22.

teen miles away from the reservation, to redesign a proposed coal-fired energy facility.[135]

From 1977 to 1993, the EPA received and approved four more redesignation requests.[136] Some requests have been motivated by health and environmental reasons.[137] The Assiniboine and Sioux tribes of the Fort Peck Reservation sought, for example, to redesignate their lands when a Canadian coal-fired power plant and several proposed synthetic plants threatened to increase the area's sulfur dioxide and nitrogen oxide densities.[138] Similarly, the Spokane Reservation requested redesignation out of fear of the effects of nearby uranium mining.[139] Other requests, however, have been uniquely culturally driven.[140] The Confederated Salish and Kootenai Tribes of the Flathead Reservation requested Class I redesignation in order to protect their ability to see sacred sites.[141] Still other tribes who pursued redesignation, such as the Yavapai-Apache, were motivated by some combination of the aforementioned factors.[142] As can be seen, each tribe's decision to redesignate its reservation under the CAA derived at least in part from the values that the tribe placed on its natural resources, demonstrating that these ideas play a strong role in tribal environmental decision-making.[143]

III. A Case Study: Federal Recognition and a Tribe's Environmental Authority

A. The Forest County Potawatomi Community Redesignation: Success and Effects on Environment

In 1995, the Forest County Potawatomi Community (the "Potawatomi")—a tribe that can trace its lineage back to the 1600s[144]—submitted its formal redesignation request to the Environmental Protection Agency (EPA).[145] This redesignation request resulted in fifteen years of administra-

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[135] *Id.*

[136] *Class 1 for Tribes*, *supra* note 131; *see infra* notes 138–148 and accompanying text.

[137] Joseph Kreye, Note, *The Forest County Potawatomi Request Redesignation Under the Clean Air Act*, 4 Wis. Envtl. L.J. 87, 93–94 (1997); *Class 1 for Tribes*, *supra* note 131.

[138] Kreye, *supra* note 137, at 93–94; *Class 1 for Tribes*, *supra* note 131.

[139] Kreye, *supra* note 137, at 97.

[140] *See Class 1 for Tribes*, *supra* note 130.

[141] *Class 1 for Tribes*, *supra* note 131. The tribes desired to prevent reduced visibility due to pollution, as it hindered members' ability to communicate with their ancestors. *Id.*

[142] Arizona v. U.S. Envtl. Prot. Agency, 151 F.3d 1205, 1209 (9th Cir. 1998). The Yavapai-Apache pursued redesignation of their tribal lands in order to both "ensure the protection of its resources for future generations," and to reduce the effects of the emissions from a nearby Phoenix Cement Plant. *Id.*

[143] *See supra* notes 131–142 and accompanying text.

[144] Al Murray et al., 3 Forest County Potawatomi Visitor & Business Guide 3 (2013), *archived at* http://perma.cc/W37F-KT7Y.

[145] Michigan v. U.S. Envtl. Prot. Agency, 581 F.3d 524, 527 (7th Cir. 2009).

tive proceedings and dispute resolution between the states of Wisconsin and Michigan.[146] In 1937, after three generations of existence as "straying bands," and as a result of the passage of the Indian Reorganization Act ("IRA"), the tribe became federally recognized.[147] "[T]he [Potawatomi] Community's belief system requires that plants and animals that are used for medicines and religious ceremonies be obtained in a pure form from a clean environment," and the Tribe submitted a formal proposal for redesignation in 1995 in order to protect this tradition from impending pollution.[148]

As a result of its recognized status, its treatment as a state under the Clean Air Act ("CAA"), and subsequently its redesignation, the Potawatomi tribe has experienced an increased role in the management of the air quality regulation on its reservation.[149] In 1999, the Potawatomi reached a Final Agreement (the "Agreement") providing the framework for the state, tribal, and federal implementation of the tribe's Class I status.[150] The Agreement represents a compromise between the State of Wisconsin and the Potawatomi, and outlines each party's responsibilities for Prevention of Significant Deterioration ("PSD") Class I Increments, Notification, Air Quality Related Values ("AQRVs"), Best Available Control Technology ("BACT"), Most Achievable Control Technology ("MACT") Review, Scientific Review Panel and Dispute Resolution Procedures, and Tribal Authority Rule, among others.[151] With the Agreement, the Potawatomi were given the opportunity to make changes to AQRVs and establish threshold effects levels for AQRVs every ten years.[152] Since 1999, the Potawatomi have listed four new AQRVs: water quality; aquatic systems; visibility impacts; and vegetation impacts.[153]

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[146] *Id.* at 525.

[147] MURRAY ET AL., *supra* note 144.

[148] *Michigan*, 581 F.3d at 527.

[149] *See infra* notes 152–155 and accompanying text.

[150] FOREST CNTY. POTAWATOMI & STATE OF WIS., CLASS I FINAL AGREEMENT BETWEEN THE STATE OF WISCONSIN AND THE FOREST COUNTY POTAWATOMI COMMUNITY 1 (1999), *archived at* http://perma.cc/P4DH-AL5D.

[151] *Id.*

[152] ALLEN S. LEFOHN & ROBERT C. MUSSELMAN, DEVELOPMENT OF OZONE THRESHOLDS FOR VEGETATION AIR QUALITY RELATED VALUE (AQRV) 1 (2012), *archived at* http://perma.cc/S33X-E8H5.

[153] LEFOHN & MUSSELMAN, *supra* note 152, at 1. It listed water quality because tribal members depend on fish to maintain their traditional subsistence way of life, because pure water is vital to the tribe's medicinal, cultural, and religious practices, and because their tourism industry relies on recreational fishing. TIMOTHY J. SULLIVAN, E&S ENVTL. CHEMISTRY, ESTABLISHMENT OF THRESHOLD EFFECTS FOR THE FOREST COUNTY POTAWATOMI COMMUNITY (FCPC) CLASS I AIR QUALITY RELATED VALUES (AQRV), at v (2013), *archived at* http://perma.cc/R4HS-LANZ. Aquatic systems were listed because the tribe is especially concerned with maintaining the acid levels of Devils Lake, "a critical source of pure natural resources, which form the basis of the Potawatomi belief system." FOREST CNTY. POTAWATOMI, PORTION OF FCPC 2007 LETTER RE: EPAS FCPC CLASS I RULEMAKING WITH UPDATED INFORMATION ON AREA ECONOMICS AND HISTORIC AND CULTURAL DESIGNATIONS 5–6 (2007), *archived at* http://perma.cc/XMJ5-9P3J.

Outside of the natural resources context, following a study examining the economic growth of three Class I areas, the Potawatomi found that "all three Class I areas [in Wisconsin, Michigan, and Minnesota] have grown faster in terms of employment over recent years than the states in which they are located."[154] Since notifying the EPA of its intention to apply for a redesignation in 1993, the Potawatomi has implemented its own Natural Resources Department and engaged in numerous monitoring programs to establish baseline information and habitat improvement.[155] None of this would have been feasible without federal recognition.[156]

B. The Duwamish Tribe

The Duwamish describe themselves as the people of Chief Seattle, and "the First People of the City of Seattle."[157] They live by the motto: "Nature is our life force, which without, we could not survive."[158] According to the Bureau of Indian Affairs ("BIA"), in the 1850s, the first federal officials and American settlers in the western Washington Territory *clearly* identified the Duwamish Indians as a historical tribe.[159] Shortly thereafter, however, Congress denied the Duwamish reservation land near the city of Seattle.[160] The Duwamish tribe of Washington is federally unrecognized.[161] In the absence of recognition, the Duwamish Tribal Services Organization has struggled for the past twenty-five years to provide important services to its members, including educational, health, social, and cultural programs.[162] Without federal recognition, former members left the tribe and enrolled in federally

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The establishment of threshold effects levels for visibility arose out of a desire to preserve important tribal and cultural resources such as flora and fauna. AIR RESOURCE SPECIALISTS, FOREST COUNTY POTAWATOMI COMMUNITY AQRV PROJECT–VISIBILITY REPORT 1 (2012), *archived at* http://perma.cc/6GNM-2PXT.

[154] FOREST CNTY. POTAWATOMI, *supra* note 153, at 15.

[155] *See id.* at 16–17.

[156] *See id.*

[157] *Culture and History*, DUWAMISH TRIBE, http://www.duwamishtribe.org/culture.html (last visited Feb. 20, 2015), *archived at* http://perma.cc/8NDL-A383.

[158] *Culture Today*, *supra* note 5.

[159] BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR PROPOSED FINDING AGAINST ACKNOWLEDGMENT OF THE DUWAMISH TRIBAL ORGANIZATION 2 (1996), *available at* http://www.bia.gov/cs/groups/xofa/documents/text/idc-001381.pdf, *archived at* http://perma.cc/E5VS-W24F.

[160] *Chief Si'ahl and His Family*, *supra* note 15. Congress' denial of its grant of reservation land was a result of congressman Arthur Denny's submission of a petition protesting the grant of land, arguing that the promised reservation would be "of little value to the Indians." *Id.*

[161] *Duwamish Tribe*, DUWAMISH TRIBE, http://www.duwamishtribe.org/ (last visited Feb. 20, 2015), *archived at* http://perma.cc/9WA6-3THC; Liz Jones, *Seattle's Fragmented Duwamish Tribe Struggles for Identity*, KUOW.ORG (May 21, 2013), http://kuow.org/post/seattles-fragmented-duwamish-tribe-struggles-identity, *archived at* http://perma.cc/6PJ7-K859.

[162] *Duwamish Tribe*, *supra* note 161.

recognized tribes; the Duwamish now only have approximately 600 members.[163]

In 1981, in *United States v. Washington*, the U.S. Court of Appeals for the Ninth Circuit divested the Duwamish and eight other tribes of their treaty rights under the Point Elliot Treaty,[164] affirming the district court's decision that the tribe today was not the same tribe that signed the treaty.[165] As a result of *Washington*, these nine tribes lack "both land and access to treaty fisheries."[166] Despite its acknowledgment of the Point Elliott Treaty, the BIA denied the Duwamish's petition for federal recognition in 1996, finding the Duwamish tribe had failed to establish that: (1) it was an entity identified as Indian from historical times until the present; (2) that the petitioners were not a continuation of the historical Duwamish tribe; and (3) that they were unable to demonstrate authority over members throughout history.[167] Following the comment and response period, the Department of Interior ("DOI") published its final determination against federal acknowledgment.[168] In 2001, President Bill Clinton approved the Duwamish's petition, but it was denied days later by the ascending President, George W. Bush, Jr.[169] To this day, the Duwamish people continue their fight for federal recognition.[170]

C. The Duwamish Region's Environmental Troubles

The air quality of the South Seattle Duwamish region[171] suffers from the presence of air toxics,[172] such as diesel exhaust[173] and smoke from burn-

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[163] Jones, *supra* note 161; Richard Walker, *New Board for Duwamish Tribal Services; Raising Money to Support 600 Members*, INDIAN COUNTRY TODAY MEDIA NETWORK (Aug. 3, 2005), http://indiancountrytodaymedianetwork.com/2005/08/03/new-board-duwamish-tribal-services-raising-money-support-600-members-97765, *archived at* http://perma.cc/MQS6-FLB4 ("Many more [than 600] people have Duwamish ancestry but have chosen to enroll with federally recognized tribes in order to obtain essential health and other human services.").

[164] *See supra* note 6 and accompanying text.

[165] United States v. Washington, 641 F.2d 1368, 1371 (9th Cir. 1981) (holding the tribe had become "merely [a] social club . . . not entitled to exercise treaty fishing rights"); *see* Paschal, *supra* note 55, at 214.

[166] Paschal, *supra* note 55, at 215.

[167] Final Determination Against Federal Acknowledgment of the Duwamish Tribal Organization, 66 Fed. Reg. 49,966, 49,967 (Oct. 1, 2001).

[168] *Id.*

[169] Jones, *supra* note 161.

[170] *Duwamish Tribe*, *supra* note 161.

[171] Although the Duwamish are a landless people, many of the approximately 600 members continue to reside in the tribe's aboriginal territory, which includes Seattle, Burien, Tukwila, Renton, and Redmond. *About Us*, DUWAMISH TRIBE, http://www.duwamishtribe.org/about.html (last visited Feb. 20, 2015), *archived at* http://perma.cc/5NHW-BRE9.

[172] *Reducing Toxic Air Pollutants*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/air/caa/peg/toxics.html (last updated Oct. 28, 2014), *archived at* http://perma.cc/6RBG-5FF6. According

ing wood, at levels that pose a health risk to residents.[174] In 1996, the EPA "placed the Puget Sound region in the top five percent of the nation for potential cancer risk from air toxics in their nationwide study."[175] Under the CAA, air toxics are not assigned federal ambient air quality standards, and thus are reduced through other tools, such as national regulations on industrial sources that require emission-reducing technology.[176] According to a recent study, residents of the Duwamish River Valley "face an onslaught of toxic airborne pollutants," and a risk level that is 300 times what is acceptable for individual air toxics cleanup levels at hazardous waste sites.[177] Although federal and regional strategies to reduce the emission of air toxics emissions have been implemented, diesel and wood smoke emissions still pervade the air.[178]

Throughout the Pacific Northwest, in partnership with the EPA, federally recognized tribes have prioritized air toxics as a "focus area" in which they hope to make progress.[179] These tribes are completing emissions in-

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to the EPA, air toxics can persist and bioaccumulate in the environment, which is of particular importance for communities, such as American Indian communities, where subsistence lifestyles are prevalent. *Id.*

[173] PUGET SOUND CLEAN AIR AGENCY, AIR TOXICS 2 (2011), *available at* http://www.pscleanair.org/library/Documents/Air%20Toxics%20Fact%20Sheet%201-31-11.pdf, *archived at* http://perma.cc/Q85V-TV6V.

[174] *Air Toxics*, PUGET SOUND CLEAN AIR AGENCY, http://www.pscleanair.org/airquality/airqualitybasics/airtoxics/Pages/default.aspx (last visited Feb. 20, 2015), *archived at* http://perma.cc/GE8F-GUFG; *see* U.S. ENVTL. PROT. AGENCY, LOWER DUWAMISH WATERWAY RECORD OF DECISION FACT SHEET 6 (2014), *available at* http://www.epa.gov/region10/pdf/sites/ldw/duwamish_rod_long_fact_sheet.pdf, *archived at* http://perma.cc/GHQ6-KTGQ.

> The cleanup of the Duwamish is a part of a larger effort to restore Puget Sound, ... The . . . ecosystem and wildlife that depends on [Puget Sound], such as orcas and salmon, are under environmental pressure because of polluted stormwater, habitat loss, shoreline development, toxic chemicals, and polluted tributaries . . . such as the Duwamish.

U.S. ENVTL. PROT. AGENCY, LOWER DUWAMISH WATERWAY RECORD OF DECISION FACT SHEET, *supra*, at 6.

[175] PUGET SOUND CLEAN AIR AGENCY, AIR TOXICS, *supra* note 173, at 1.

[176] WASH. DEP'T OF HEALTH SERVS., OFFICE OF ENVTL. & OCCUPATIONAL TOXICOLOGY, HEALTH CONSULTATION: SUMMARY OF RESULTS OF THE DUWAMISH VALLEY REGIONAL MODELING AND HEALTH RISK ASSESSMENT 8 (2008), *available at* http://www.atsdr.cdc.gov/HAC/pha/Duwamish_Valley/Duwamish_Valley_%20HC%207-14-2008.pdf, *archived at* http://perma.cc/9DZV-YNPP.

[177] Robert McClure & Jenny Cunningham, *Breathing Uneasy: Air Pollution Crisis in South Seattle*, INVESTIGATE WEST, http://www.invw.org/breathing-uneasy-air-pollution-crisis-in-south-seattle (last visited Feb. 20, 2015), *archived at* http://perma.cc/CH9E-Q5VZ; *see* PUGET SOUND CLEAN AIR AGENCY, 2005 NATIONAL AIR TOXICS ASSESSMENT (2011), *available at* http://www.pscleanair.org/library/Documents/3-10-11%202005%20NATA%20info%20sheet.pdf, *archived at* http://perma.cc/N852-JCZD.

[178] PUGET SOUND CLEAN AIR AGENCY, AIR TOXICS, *supra* note 173, at 4.

[179] OFFICE OF AIR, WASTE & TOXICS, *supra* note 92, at 5.

ventories of air pollution sources in order to gain a better understanding of the significant sources of pollution affecting their region.[180] They also consult with the EPA on its issuance of Title V permits for major stationary sources[181] in Indian country or that might affect Indian country.[182] Further, these tribes have actively assisted in the development of a region-wide Mercury Strategy, which has provided monitoring support, "implemented a Tribal outreach strategy regarding mercury contamination and health effects associated with mercury-contaminated fish consumption," and facilitated collection and disposal programs.[183]

In 2001, the Lower Duwamish Waterway ("LDW")[184] was designated as a Superfund site under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[185] "A century of heavy industrial use has left the waterway contaminated with toxic chemicals from many sources," such as stormwater pipes, industries along its banks, and runoff from upland activities, streets, and roads.[186] In addition, various contaminants pollute the water and the resident fish and shellfish, thereby requiring that state and local health departments warn against consumption.[187]

In its Proposed CERCLA Plan for the Duwamish River Waterway, the EPA addresses the involvement of federally recognized tribes who, "as sovereign nations, have engaged in government-to-government consultations with [the] EPA on the cleanup process."[188] Specifically, the Proposed Plan explains that the federally recognized Muckleshoot and Suquamish tribes regularly use the LDW for fishing.[189] Therefore, the Plan describes: "[c]onsideration of how Tribal members [might] be exposed to contaminants in

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[180] *Id.* at 18.

[181] *Air Permits*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/region9/air/permit/title-v-permits.html (last updated Nov. 7, 2013), *archived at* http://perma.cc/CN38-4FEM ("Title V operating permits are legally enforceable documents issued to air pollution sources after the source has begun to operate.").

[182] OFFICE OF AIR, WASTE & TOXICS, *supra* note 92, at 33.

[183] *Id.* at 59.

[184] The Lower Duwamish Waterway is a five-mile stretch of the Duwamish River that flows into Elliot Bay in Seattle, Washington, and is surrounded by industrial corridors and the South Park and Georgetown neighborhoods. *Lower Duwamish Waterway Superfund Site*, U.S. ENVTL. PROT. AGENCY, http://yosemite.epa.gov/r10/cleanup.nsf/sites/lduwamish (last updated Feb. 20, 2015), *archived at* http://perma.cc/N3XL-ZEYD.

[185] *And the Resolution Passed!*, DUWAMISH RIVER CLEANUP COAL., http://duwamishcleanup.org/ (last visited Feb. 20, 2015), *archived at* http://perma.cc/KS7P-K6VF; *Lower Duwamish Waterway Superfund Site*, *supra* note 184; *see Superfund: Basic Information*, *supra* note 25.

[186] *Lower Duwamish Waterway Superfund Site*, *supra* note 184.

[187] *Id.*

[188] U.S. ENVTL. PROT. AGENCY, PROPOSED PLAN: LOWER DUWAMISH WATERWAY SUPERFUND SITE 11 (2013) [hereinafter U.S. ENVTL. PROT. AGENCY, PROPOSED PLAN], *available at* http://www.epa.gov/region10/pdf/sites/ldw/pp/ldw_pp_022513.pdf, *archived at* http://perma.cc/LMN7-SQFD.

[189] *Id.*

the LDW while engaging in seafood harvest activities has been a primary factor shaping the assessment of human health risks."[190] In its cleanup of the LDW, these federally recognized tribes have played an active role.[191]

Although the EPA's Superfund efforts have centered largely on the cleanup of the Duwamish waterway, Duwamish valley residents also experience pollution from other environmental causes.[192] According to a recent survey of 185 Duwamish Valley residents and workers, the most common health concern about living and working in the Duwamish Valley is air quality, and specifically air pollution from diesel and vehicle exhaust and industrial air emissions, and about asthma.[193] Disproportionate burdens,[194] such as "socioeconomic factors, sensitive populations, environmental exposures and effects, and public health effects," justify characterizing the Duwamish Valley as a community with environmental injustices.[195]

IV. ANALYSIS: PEOPLE OF THE OUTSIDE

A. Federal Recognition and the Redesignation of Indian Lands

Tribal recognition is "one of the most ambiguous, acrimonious, and controversial methods for defining and measuring Indian identity and tribalism in modern America."[196] Federal recognition of Indian tribes is a "bright

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[190] *Id.*

[191] *Id.* They have participated in meetings that discuss the course of the cleanup and provided input in the form of review and comment on sampling plans and human health and ecological risk assessments. *Id.*

[192] *See* TECHNICAL ADVISORY GRP., DUWAMISH RIVER CLEANUP COAL., DUWAMISH VALLEY HEALTHY COMMUNITIES PROJECT: FACT SHEET 1, at 1 (2012), *available at* http://duwamishcleanup.org/wp-content/uploads/2012/05/PrioritizationFactSheet.pdf, *archived at* http://perma.cc/N5VH-PGK7; *Lower Duwamish Waterway Superfund Site*, *supra* note 184.

[193] TECHNICAL ADVISORY GRP., *supra* note 192, at 1.

[194] Rose Egge, *Study: Duwamish Residents Have Short Life Expectancy*, KOMONEWS.COM (Mar. 27, 2013, 2:41 PM), http://www.komonews.com/living/health/Study-says-Duwamish-residents-have-shortest-lifespan-in-Seattle--200298561.html, *archived at* http://perma.cc/5HKM-DJ3L. Linn Gould of Just Health Action, one of the nonprofit organizations responsible for the "Duwamish Valley Cumulative Health Impacts Analysis," notes, "Duwamish Valley residents are disproportionately and unfairly burdened by multiple stressors outside of their control." *Id.*

[195] LINN GOULD & BJ CUMMINGS, DUWAMISH VALLEY CUMULATIVE HEALTH IMPACTS ANALYSIS: SEATTLE, WASHINGTON 40 (2013), *available at* http://duwamishcleanup.org/wp-content/uploads/2013/03/CHIA_low_res.pdf, *archived at* http://perma.cc/QE2P-FSBX. The Duwamish Valley is comprised largely of low-income and minority neighborhoods. Robert McClure, *EPA Grant to Help Duwamish Valley Residents, Businesses Prioritize Health Needs*, INVESTIGATE WEST (Nov. 2, 2011), http://www.invw.org/content/epa-grant-to-help-duwamish-valley-residents-businesses-prioritize-health-needs, *archived at* http://perma.cc/S8ZW-YEV9. A March 2013 study—in conjunction with the EPA's Superfund efforts—demonstrated that the average life expectancy in the Georgetown and South Park neighborhoods of Seattle, Washington is eight years shorter than the Seattle average. GOULD & CUMMINGS, *supra* , at 37; Egge, *supra* note 194.

[196] MILLER, *supra* note 63, at 256.

line . . . rule,"[197] and the absence of federal acknowledgment deprives a tribe of eligibility for scarce U.S. Government resources.[198] The notion of tribal self-determination is a fiction for those tribes that are not federally recognized.[199] Federal recognition grants important benefits, such as limited sovereign immunity and self-government, on those tribes able to obtain it, and so the federal acknowledgment process has the potential to significantly influence the livelihood of many Indian tribes.[200]

Meanwhile, "[u]nrecognized Indian tribes are forced to live outside the boundaries of federal law, rendering them completely unprotected and completely without rights as Indian tribes."[201] These unrecognized tribes can be characterized as truly "in-between," fitting neither the societal view of Native Americans nor non-native American society.[202] Understandably, certain federally recognized Indian tribes laud the Bureau of Indian Affairs' ("BIA") stringent criteria, because they prevent the ability of "fake" Indian tribes to manipulate the system to their advantage and "appropriate . . . [tribal] sovereignty."[203] As a result, the BIA criteria need not be made more lax, but a consequence of the rules' exacting nature is a tribe's potential inability to make environmental improvements to its home region in furtherance of its value systems.[204]

The BIA's definition of Indian tribe excludes unrecognized tribes from the receipt of its services.[205] This limiting definition extends further because many agencies hinge eligibility for their services on membership in federally recognized tribes.[206] The Environmental Protection Agency (EPA) is one

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[197] *See* Fletcher, *supra* note 66, at 7.

[198] Brownell, *supra* note 67, at 304.

[199] *See supra* notes 47–48 and accompanying text.

[200] Paschal, *supra* note 55, at 213.

[201] Matthew L.M. Fletcher, *Sawnawgezewog: "The Indian Problem" and the Lost Art of Survival*, 28 AM. INDIAN L. REV. 35, 38 (2004).

[202] MILLER, *supra* note 63, at 22.

[203] *See* Mandatory Criteria for Federal Acknowledgement, 25 C.F.R. § 83.7 (2015). For example, the federally recognized Cherokee and Suquamish tribes, in response to the BIA's request for public comment on changes that it recently proposed to federal acknowledgement regulations, came out in favor of the rules maintaining their stringent nature. *See* Letter from Bill John Baker, Principal Chief of Cherokee Nation, to Elizabeth Appel, Office of Regulatory Affairs & Collaborative Action (Sept. 25, 2013), *available at* http://bia.gov/cs/groups/xraca/documents/text/idc1-023619.pdf, *archived at* http://perma.cc/6S9U-ASZA; Letter from Leonard Forsman, Chair of Suquamish Tribe, to Honorable Kevin K. Washburn, Assistant Sec'y of Indian Affairs (Sept. 24, 2013), *available at* http://bia.gov/cs/groups/xraca/documents/text/idc1-023406.pdf, *archived at* http://perma.cc/8LCB-9D3G.

[204] *See* 25 C.F.R. § 83.7; Letter from Bill John Baker, *supra* note 203; *supra* notes 129–155 and accompanying text.

[205] Paschal, *supra* note 55, at 213; *see supra* note 69 and accompanying text.

[206] *Id.*

such agency,[207] and the "federally-recognized" stamp of government approval has significant environmental advantages and simultaneous disadvantages for those without such a label.[208] The EPA program establishes a government-to-government relationship with federally recognized tribes, emphasizing tribal involvement in the development and implementation of effective Indian country environmental programs.[209] Therefore, the treatment-as-states provisions of the Clean Air Act ("CAA") grant only those eligible federally recognized tribes the ability to implement and manage the Act's programs on their lands.[210] It follows then that tribal redesignation requests can only be accomplished by those tribes that are federally recognized and within the general purview of the EPA.[211] Though the CAA gives both tribes and states the authority to request land redesignation, historically only tribes have done so, and their requests have increased the standards under which air quality is regulated.[212]

On the fortieth anniversary of the CAA, then EPA Administrator Lisa P. Jackson spoke of the Act's resounding success, noting, "[t]he total benefits of the [CAA] amount to more than [forty] times the costs of regulation."[213] In the CAA's first twenty years, reports show that more than eighteen million cases of child respiratory illness and two hundred thousand premature deaths were prevented.[214] As a result of the implementation of treatment-as-states provisions within the CAA, Indian tribes have become a part of the movement towards the active realization of cleaner air.[215] In fact,

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[207] *American Indian Environmental Office Tribal Portal*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/tribalportal/ (last updated Feb. 11, 2015), *archived at* http://perma.cc/8M3D-MJ24 ("[The American Indian Environmental Office] leads EPA's efforts to protect human health and the environment of federally recognized tribes by supporting implementation of federal environmental laws consistent with the federal trust responsibility, the government-to-government relationship, and EPA's 1984 Indian Policy.").

[208] *See supra* notes 111–119, 124–155 and accompanying text.

[209] *See* James M. Grijalva & Daniel E. Gogal, *The Evolving Path Toward Achieving Environmental Justice for Native America*, 40 ENVTL. L. REP. 10905, 10913 (2010).

[210] *Treatment in the Same Manner as a State*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/tribalportal/laws/tas.htm (last updated Sept. 25, 2013), *archived at* http://perma.cc/X7YB-5VKQ.

[211] *See supra* note 110 and accompanying text.

[212] *See* U.S. ENVTL. PROT. AGENCY, FACT SHEET: PROPOSED FEDERAL IMPLEMENTATION PLAN UNDER THE CLEAN AIR ACT FOR CERTAIN TRUST LANDS OF THE FOREST COUNTY POTAWATOMI COMMUNITY RESERVATION (n.d.), *available at* http://www.epa.gov/NSR/documents/20061211fact_sheet.pdf, *archived at* http://perma.cc/6BMD-YJCW; *supra* note 125 and accompanying text.

[213] *A Success Story, with Many Chapters Still to Come*, EARTHJUSTICE, http://earthjustice.org/features/campaigns/a-success-story-with-many-chapters-still-to-come (last visited Feb. 20, 2015), *archived at* http://perma.cc/22VK-4SBB.

[214] *Id.*

[215] *See supra* notes 112–117 and accompanying text.

within the CAA, federal recognition has accorded Indian tribes the opportunity to effectuate positive change.[216]

At the heart of the intersection between environmental and Native American law in the United States is the recognition that most native peoples view and interact with nature quite differently from Western societies.[217] They do not think of nature in exclusively economic terms, a notion that has created conflict with non-native peoples over land and resource management.[218] One of the ways in which federally recognized Native Americans have been able to express and incorporate their values into environmental decision-making has been through the redesignation of their tribal lands to more stringent air quality standards under the CAA.[219] A tribe's decision to redesignate its reservation under the CAA is likely evidence of its "value judgments about the proper balance between development and environmental protection."[220] This is especially significant considering that Native Americans "survived on the American continents for thousands of years based on a pervasive set of cultural values integrating human life with other forms of life."[221] Historians have suggested that American Indians have had to adapt to a changing world in which their value systems are threatened.[222] Without the authority granted to them by the EPA, however, these environmental ideals may not find expression, as American Indians would not possess the type of authority needed to regulate their land and its natural resources.[223]

Past decisions to redesignate Indian lands have been rooted in the value that Native American peoples assign to the land and its resources.[224] The

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[216] *See id.*

[217] *See* Eve Darian-Smith, *Environmental Law and Native American Law*, 6 ANN. REV. L. SOC. SCI. 359, 361 (2010); Interview by PBS.org with Donald Fixico, Thomas Bowlus Distinguished Professor of Am. Indian History & Dir. of Ctr. for Indigenous Nations Studies, Univ. of Kan. (n.d.), *available at* http://www.pbs.org/wgbh/americanexperience/features/interview/tcrr-interview/?flavour=mobile, *archived at* http://perma.cc/DDM8-DRFS.

[218] *See* Darian-Smith, *supra* note 217, at 361; Interview by PBS.org with Donald Fixico, *supra* note 217.

[219] *See supra* notes 131–142, 148 and accompanying text.

[220] Montana; Redesignation of Northern Cheyenne Indian Reservation for Prevention of Significant Deterioration, 42 Fed. Reg. 40,695, 40,695 (Aug. 11, 1977) ("The regulations allow States, Federal Land Managers, and Indian Governing Bodies to reclassify areas under their jurisdiction to accommodate the social, economic, and environmental needs and the desires of the local population."); Grijalva, *supra* note 21, at 211.

[221] *See* David H. Getches, *A Philosophy of Permanence: The Indians' Legacy for the West*, 29 J. WEST, no. 3, July 1990, at 54, 54 (noting that a significant aspect of the Indian's dependence on nature was an awareness of that dependence and a great respect for the natural environment).

[222] *See id.* at 54–55.

[223] *See supra* notes 162–163, 171–195 and accompanying text (describing the lack of power and resources available to the unrecognized Duwamish), 218–222 and accompanying text (describing generally Native American environmental attitudes).

[224] *See supra* notes 131–135, 138–142, 148 and accompanying text.

treatment-as-states approach represents "EPA's and Congress' . . . unparalleled respect for tribal value judgments on reservation environmental quality."[225] Accordingly, it is possible that a contributing factor to tribes being the only entities to request redesignation is that their value systems are such a driving force.[226] Despite the lengthy and arduous process that comes along with a request for redesignation, six tribes have decided that their air quality is worth the trouble.[227]

In addition to protecting reservation air from off-reservation sources of pollution, the redesignation system allows for tribes to account for specific individual wishes.[228] The Forest County Potawatomi Community (the "Potawatomi") sought to redesignate its lands in order to maintain the purity of its on-reservation plants and animals, each of which played a strong role in both its manufacturing of medicines and its religious ceremonies.[229] Following the EPA's approval of the Potawatomi redesignation, and the U.S. Court of Appeals for the Seventh Circuit's denial of the state of Michigan's challenge to that approval, the Potawatomi entered into a Class I agreement with the state of Wisconsin.[230] In the Agreement, the Potawatomi is designated as the Class I land manager—able to identify air quality related values ("AQRVs") that it must then analyze and monitor.[231] By virtue of being able to identify and study its own AQRVs, the Potawatomi can take responsibility for the preservation of their resources to maintain their subsistence cultural, medicinal and religious practices, and the region's tourism industry.[232]

The Potawatomi exemplify the strides that a tribe can make when given the power to regulate its reservation's environment.[233] This power comes in two forms: the grant of authority from the federal government through the treatment-as-states provisions of the CAA and the ability to impute the land ethic and tribe-specific value systems into environmental decision-

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[225] GRIJALVA, *supra* note 48, at 22. It is probable that other entities have not requested redesignation due to their desire not to deter industry from their surrounding areas. *See supra* note 135 and accompanying text (noting that Northern Cheyenne redesignation caused off-reservation changes for industry in the area).

[226] *See supra* notes 131–142, 148 and accompanying text.

[227] *See supra* notes 130–142, 148 and accompanying text.

[228] *See infra* note 229 and accompanying text.

[229] *See supra* note 153 and accompanying text. The Confederated Salish and Kootenai tribes of the Flathead Reservation cited protection of the ability to see sacred sites in an effort to communicate with ancestors. *See supra* notes 140, 148 and accompanying text; *infra* note 230 and accompanying text.

[230] Michigan v. U.S. Envtl. Prot. Agency, 581 F.3d 524, 526 (7th Cir. 2009); FOREST CNTY. POTAWATOMI & STATE OF WIS., *supra* note 150, at 1.

[231] *See* FOREST CNTY. POTAWATOMI & STATE OF WIS., *supra* note 150, at 3.

[232] *See supra* notes 153–155 and accompanying text.

[233] *See supra* notes 153–155 and accompanying text.

making.[234] This is especially true given the fact that the "EPA has consistently taken the position that it must approve a redesignation request by a Native American tribe unless the tribe has failed to follow the procedural requirements of the [Prevention of Significant Deterioration] program."[235] Neither the opportunity to redesignate, nor the "respect" accorded to those that undertake redesignation are available for federally unrecognized tribes.[236]

B. An Unrecognized Tribe: The Duwamish

"[Unrecognized] communities' struggles to gain recognition expose the complex legal issues involved in federal acknowledgment while revealing the extreme burdens that groups face in proving their identity using non-indigenous historical and anthropological evidence."[237] In the continued absence of federal recognition even today, the Duwamish—the "people of Chief Seattle"—are deprived of the ability to undertake the sort of expansive environmental protection efforts that have characterized the light footprint of other, federally recognized tribes.[238]

Just as the Potawatomi exemplify the power granted to federally recognized tribes to monitor, preserve, and control their natural resources and value systems, the Duwamish provide a contrasting example of the relative

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[234] *See supra* notes 153–155 and accompanying text.

[235] *See* Stensvaag, *supra* note 124, at 10021; *supra* notes 153–155 and accompanying text. The EPA has said that not approving a tribe's request for redesignation actually deprives that tribe of "its congressionally authorized power to make value judgments for reservation air quality." GRIJALVA, *supra* note 48, at 119. Efforts to quash the six tribal redesignations to date have been unsuccessful. Stensvaag, *supra* note 124, at 10022.

> The following arguments . . . have all proven futile: (1) the lands being redesignated are too small or too scattered to justify redesignation; (2) the statutorily mandated "description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation" is somehow inadequate; (3) the tribe has failed to give sufficient weight to this or that factor (or EPA has failed in an alleged obligation to reweigh those factors); (4) the tribe (or EPA) has failed adequately to consider and apply an alleged obligation to address 'air quality related values; or (5) EPA's approval was arbitrary or capricious.

Id. This suggests that not only are CAA redesignations an opportunity for tribes to address quality concerns within their borders, but also that they an example of the federal government's respect for the inherent sovereignty of Indian nations. *See id.*; *supra* notes 130–148 and accompanying text.

[236] *See supra* notes 161–163, 201–211 and accompanying text.

[237] MILLER, *supra* note 63, at 3.

[238] *See supra* notes 130–142, 148–155 and accompanying text (suggesting redesignation requests will lead to increased air quality regulation of redesignated areas), 161–163 and accompanying text (demonstrating the powerlessness of the unrecognized Duwamish).

powerlessness of unrecognized tribes.[239] In addition to living near significantly polluted waterways, the Duwamish tribe also lives in a region plagued by poor air quality.[240] A region's lack of environmental health is not a problem that can be remedied by just one entity; it is a systemic and far-reaching issue in both its causes and effects.[241] As a federally unrecognized tribe, however, the Duwamish are left out of this conversation entirely, and are thus unable to work alongside the EPA in its Superfund clean-up efforts in the Lower Duwamish Waterway ("LDW").[242]

As their motto implies, the Duwamish value their natural resources greatly, and yet seem powerless to stop them from becoming "impure" as a result of their inability to play a meaningful role in the regulation of the region's air quality.[243] This is particularly pertinent in light of the fact that the South Seattle Duwamish region suffers from air toxics pollution, a source of pollution that the EPA has not assigned federal ambient air quality standards to.[244] Although the Duwamish tribe may not be able to redesignate the air quality of the region,[245] should the tribe be federally recognized, its role in the improvement of the region's environmental health may be substantial.[246] First, multiple sections within the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") grant tribes the same treatment as states and the Proposed Plan for the LDW Superfund site expressly discusses the active participation of federally recognized LDW tribes in the cleanup of the region.[247] Moreover, as has been done by other Pacific Northwest tribes, the Duwamish could work with the EPA to reduce air toxic emissions through AQRV listings.[248]

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[239] *Compare supra* notes 130–142, 148–155 and accompanying text (describing redesignation abilities of federally recognized tribes), *with supra* notes 171–195 and accompanying text (describing the Duwamish's inability to participate in its region's cleanup efforts).

[240] *See supra* notes 171–178, 184–187, 192–195 and accompanying text.

[241] *See* ENVTL. PROT. AGENCY, PROPOSED PLAN, *supra* note 188, at 10–11 (illustrating the vast extent of the Lower Duwamish Superfund Cleanup Effort).

[242] *See id.* at 11.

[243] *See supra* notes 157–158, 171–178, 184–187, 192–195 and accompanying text (describing the region's air quality troubles).

[244] *See supra* notes 92–94, 172–178 and accompanying text.

[245] *See supra* notes 10, 87–94 and accompanying text (describing how air toxics are not regulated by the National Ambient Air Quality Standards ("NAAQS"), and thus the attainment and non-attainment designations cannot apply, especially because the Duwamish tribe does not currently own reservation land).

[246] *See infra* notes 247–248 and accompanying text.

[247] *See supra* notes 179–183, 188–191 and accompanying text.

[248] *See supra* notes 179–183 and accompanying text.

C. A Defunct System: Federal Acknowledgment Analysis Proposal

The federal acknowledgment process—despite assuaging concerns that fake Indian tribes will gain undeserved federal benefits—has drawn considerable criticism for taking too long, being too expensive, and producing inconsistent results.[249] In fact, "[t]he criteria under which petitions [for federal acknowledgment] are evaluated are ones that a real Indian tribe, either modern or historic, might well fail to meet."[250] In the Duwamish's case, the BIA's 1996 decision to deny federal recognition cited the tribe's failure to demonstrate its existence from historical times, its continuity, and its authority over tribal members.[251] With regards to the regulatory requirement, that a petitioning entity be able to identify itself as Indian from historical times to the present,[252] the BIA found that the petitioning tribe was descended from the historic Duwamish tribe, but was not the historic Duwamish tribe that signed the Point Elliott Treaty in 1855.[253] The Branch of Acknowledgment and Research ("BAR") of the BIA is supposed to take historical circumstances into consideration when evaluating petitions, and the Duwamish submitted evidence that they were "repeatedly driven, starved, and burned off land by white settlers and the U.S. military."[254] Similarly, the BIA Final Determination concluded that despite being descended from the historic Duwamish tribe, the petitioner did not present evidence of extensive intermarriage or organized social and cultural activities, and so it failed to meet the regulatory criteria.[255] Finally, the Department of the Interior ("DOI") felt that minutes for annual meetings dating back to 1939 were an insufficient basis upon which the tribe could establish political influence over its members.[256]

The existence of a formal and stringent acknowledgment process is significant in that it epitomizes the belief that the special relationship between a Native American tribe and the federal government is one that is not granted lightly and thus deserves respect.[257] This respect is significantly belittled, however, when the very tribes that the process was meant to serve are unable to determine what they need to prepare and submit in order to

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[249] Hansen v. Salazar, No. C08-0717-JCC, 2013 WL 1192607, at *3 (D. Wash. Mar. 22, 2013); *see supra* notes 68–69, 73–82 and accompanying text.

[250] Sweeney, *supra* note 6, at 231.

[251] *See supra* note 167 and accompanying text; *infra* notes 252–256 and accompanying text.

[252] Mandatory Criteria for Federal Acknowledgement, 25 C.F.R. § 83.7(a) (2015).

[253] *Hansen*, 2013 WL 1192607, at *6.

[254] Sweeney, *supra* note 6, at 230.

[255] *Hansen*, 2013 WL 1192607, at *6; 25 C.F.R § 83.7(b).

[256] *Hansen*, 2013 WL 1192607, at *6; 25 C.F.R § 83.7(c).

[257] *See supra* notes 55–66 and accompanying text (noting the extensive requirements of the formal acknowledgment process and the benefits that come from acknowledgement).

meet the BIA's wavering requirements.[258] The BIA's rationale for denial of the Duwamish petition reveals significant lacunae in the federal acknowledgment criteria.[259] For all intents and purposes, the system is broken.[260] The criteria themselves might not need to be revisited,[261] but for the sake of the integrity of the process, petitioning tribes deserve transparent and predictable guidance on how to meet the extant criteria.[262] This guidance should remove all vague and ambiguous terms and should define all key terms, such as "substantially continuous Indian identity," such that a petitioning tribe cannot be required to submit a petition without the knowledge that they have done all that they could to obtain federal recognition.[263]

An objective, formalized, and transparent process would benefit both petitioners and the BIA, by informing tribes of exactly what they need to submit, and the BIA of the standard by which they must review petitions.[264] BIA reviews and findings would be legitimized and subject to less criticism.[265] Additionally, from a substantive perspective—of its evaluation of individual petitions—the BIA should take into account the federal government's role in termination, tribal displacement, or denial of treaty rights.[266] If a reason for a tribe's gap in existence and a subsequent failure to meet the requirement of continuity involves an act on part of the federal government,

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[258] *See supra* notes 67–82 and accompanying text (describing the numerous criticisms of the current BIA criteria).

[259] *See Hansen*, 2013 WL 1192607, at *6 (listing the reasons for the denial of the Duwamish petition); *supra* notes 56, 169 and accompanying text. This is particularly apparent in light of the fact that, in the Duwamish's case, at least one administration—the Clinton administration—believed the tribe was eligible for formal recognition. *See Hansen*, 2013 WL 1192607, at *6.

[260] *See* MILLER, *supra* note 63, at 257.

[261] On May 29, 2014, the BIA published a proposed set of changes to the current Federal Acknowledgment Rule. Federal Acknowledgment of American Indian Tribes, 79 Fed. Reg. 30,766 (Dep't of Interior Bureau of Indian Affairs May 29, 2014) (notice). Of the four criteria that have consistently created problems for petitioning tribes, the proposed rules suggest that the outside identification criteria would no longer require external identifications, but rather "a brief narrative that petitioner existed at some point in time during the historical period." *See* BUREAU OF INDIAN AFFAIRS, COMPARISON CHART: CURRENT FEDERAL ACKNOWLEDGMENT RULE (25 CFR 83) VS. PROPOSED FEDERAL ACKNOWLEDGMENT RULE (25 CFR 83), at 1–6 (2014), *available at* http://www.bia.gov/cs/groups/xopa/documents/text/idc1-026770.pdf, *archived at* http://perma.cc/CT6T-QVKH. The changes also seek to amend the distinct community and political authority criteria by establishing 1934 as the starting year for evaluation, and defining "substantial interruption" by "generally" more than twenty years. *See id.*

[262] *See supra* notes 67–82 and accompanying text (describing the numerous criticisms of the current BIA criteria).

[263] *See* Paschal, *supra* note 55, at 220–21 (noting the vague and ill-defined nature of the criteria for acknowledgment).

[264] *See supra* notes 54–82 and accompanying text.

[265] *See supra* notes 67–82 and accompanying text (describing the numerous criticisms of the current BIA criteria).

[266] *See* PEVAR, *supra* note 60, at 311.

it would be "cruel" for the government to deny its recognition on that basis alone.[267]

Redesignation provides a mere example of the type of environmental authority that tribes can exercise with federal imprimatur.[268] Although it has no reservation land over which it can exercise authority, the Duwamish are denied the opportunity to substantively participate in the regulation and cleanup of the air and water in and over their region, through cooperation with the EPA and the implementation of quality control mechanisms.[269] Other, federally recognized tribes in the Duwamish-Pacific Northwest region have partnered with the EPA in the cleanup of the Superfund site and in the effort to reduce air toxics emissions.[270] Without federal acknowledgment, the Duwamish are precluded from this process, and cannot use their sovereign status for the good of both their cultural survival, and their surrounding environment.[271]

CONCLUSION

Federal recognition of American Indian tribes is a defunct process that nevertheless has environmental significance. Federally unrecognized tribes lack the ability to participate in federal environmental regulation of their home regions, and are thus unable to affect the perpetuation of their value systems and the realization of tribal self-determination. Historians have suggested that, "American society could save itself by listening to tribal people who have a unique understanding of the world." This unique understanding is a "philosophy of permanence," and reflects the American Indian desire to preserve and protect resources as an integral part of their way of life. The U.S. Government, however, only listens to tribes that are federally recognized. Within the confines of environmental law and the treatment-as-states strategies of many environmental statutes, depriving a tribe of federal recognition means the tribe is unable to exercise the "inherent sovereignty" that the federal government has expressly acknowledged as belonging to American Indians.

The Forest County Potawatomi Community and the Duwamish are similar tribes from similar regions, and yet they lead drastically different existences. The Potawatomi are federally recognized, but the Duwamish are not. The stark contrast in the power of the otherwise similar tribes—to con-

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[267] *Id.*

[268] *See* Paschal, *supra* note 55, at 209 (referring to federal recognition as being in receipt of the federal imprimatur); *supra* note 119 and accompanying text (introducing redesignation as a means through which air quality can be regulated).

[269] *See supra* notes 10, 87–94, 247–248 and accompanying text.

[270] *See supra* notes 179–183, 188–191 and accompanying text.

[271] *See supra* notes 179–183, 188–191 and accompanying text.

trol their environment and natural resources—is evocative of the far-reaching consequences of being deprived of federal recognition. From an environmental perspective, federal recognition has potentially profound effects on a tribes' ability to exercise not only its sovereignty, but also its way of life. The Clean Air Act, or CAA, is just one federal statute under which a federally recognized tribe is able to exercise its inherent sovereignty. Redesignation under the CAA is an example of the type of authority that tribes can, and have, exercised, in response to fears about preservation and protection of land and natural resources. This tool, however, is unavailable to federally unrecognized tribes, who are the people of the outside.