



Section on Intergovernmental Administration and Management

# NEWSLETTER

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## From the Chair . . .



**Find. Ask. Join.** Simple instructions from ASPA for our campaign to enrich ASPA through new memberships. SIAM has committed the section to its own version of this ASPA campaign. We are including in all tote bags at the Milwaukee conference a recruitment flyer, copies of the SIAM newsletter, and a complimentary copy of *State and Local Government Review*. SIAM members will also get stickers for their badges that reads: "I AM SIAM." This will encourage SIAM members to get a sound bite into various networking conversations taking place at the conference. If there are non-members or non-SIAM-members in the group, ASPA suggests that you tell them how and why you became an ASPA (or SIAM) member.

ASPA makes it easy to join this membership campaign with the classy 2005 ASPA Member-Get-A-Member Campaign application available for download at [www.aspanet.org/scriptcontent/PDFs/05MGMAApp.pdf](http://www.aspanet.org/scriptcontent/PDFs/05MGMAApp.pdf). Recruit enough new ASPA members (non-student) and you will receive a free registration to the 2006 conference.

Attendance at the ASPA Annual Conference in Milwaukee is a guaranteed means to return home enthused about making use of the membership recruitment application. It is with extra personal interest that I am making the trip to the ASPA national conference in Milwaukee. My family roots go back to my mother's grandparents Franz and Amelia Giese and August and Augusta Lipke, all of whom settled in Wisconsin after emigrating from Germany.

SIAM Board members and I hope many of you are joining us at the ASPA conference. If you attend, we

urge you to be at our membership meeting on Sunday, April 3, 3:30 – 5:00 p.m. in the Lakeshore Ballroom A. Yes, it conflicts with other sessions. This is a dilemma every year, as to whether to meet at a reasonable hour with conflicts or to meet very early before the sessions begin. Come to the SIAM meeting this year – we'll put this discussion on the agenda. We are making it a more social occasion with refreshments to smooth the networking process. The highlight of our meeting always is the presentation of the Stone Awards. We have terrific recipients again this year. We would like your ideas and participation in making SIAM of more value. Please come and share them.

*Pat Atkins*



## A Focus on Tribal Governance

In order to provide better coverage of specific issues, the SIAM newsletter will often incorporate both faculty and practitioner viewpoints on select topics. In this issue the focus is on Tribal Governance, and articles include an overview of intergovernmental administration by Steven Light of the University of North Dakota, plus an analysis of relevant environmental issues by Luke Jones, a practitioner with the EPA. If you have any suggestions for future special topics, please email them to the newsletter editor, Kendra Stewart, at [kendra.stewart@eku.edu](mailto:kendra.stewart@eku.edu).



## **Intergovernmental Administration and Tribal Governments: A Brief Overview Steven Andrew Light\***

Native American tribal government is the often-overlooked third sovereign in the American political system. Tribal governments have a unique relationship with federal, state, and local governments, and a special status under federal law that ambivalently recognizes tribal nations as political sovereigns. Although there are more than 560 federally recognized tribes in the United States, the dimensions of tribal government and administration and the dynamics of tribal-local-state-federal intergovernmental relations and interagency cooperation and contestation infrequently are explored in public administration coursework or literature (Light 2004; Aufrecht 1999).

This is an important oversight. Master of Public Administration (MPA) and similar professional degree programs are charged with training personnel of diverse backgrounds to staff and helm the agencies that formulate, implement, execute, and assess public policy affecting tribal populations throughout the nation. Additionally, there are many non-tribal practitioners in the field right now who are responsible for intergovernmental administration related to tribes but may be unfamiliar with the historical context or contemporary political and legal environment in which key jurisdictional questions, regulatory actions, or implementation issues arise. Tribes, too, employ practitioners who may be more familiar with tribal governance and culture, and perhaps federal agencies, than with state law or administrative norms and practices. Roughly thirty states have at least one federally recognized reservation within their borders, and about a dozen others have state-established reservations. In this light, it simply makes good sense to ensure that public employees are well informed and sufficiently prepared to coordinate intergovernmental administration among diverse actors and agencies.

In any area which might be new to us, even a little extra knowledge can go a long way. Perhaps the least understood dimension of tribal nationhood, and a major reason why tribal-state-federal relations are so complex, is tribal sovereignty, which is shaped by tribes as well as by federal Indian law and policy. In the remainder of this (very) short essay I will briefly discuss tribal sovereignty and introduce a number of key policy issues that present challenges of intergovernmental administrative coordination for tribes, states, localities, and the federal government.

### **Tribal Sovereignty and Federal Indian Law and Policy**

As reinforced by the U.S. Supreme Court, tribes today maintain a special status in relation to the American political system that is defined and circumscribed by the legal doctrine of tribal sovereignty. Essentially, the doctrine means the United States recognizes tribes as preconstitutional and extraconstitutional independent sovereign nations. A tribe's location within the boundaries of a state does not subject it to the application of state law, yet the tribe is subject to Congress's asserted plenary power and bound by the trust relationship between the federal government and tribes. Tribes are recognized as possessing powers of self-governance – yet those powers may be circumscribed by federal law (Wilkins and Lomawaima 2001; Wilkins 2002).

Tribal members and Indian law scholars posit that tribal sovereignty also has cultural and spiritual dimensions that may be equally if not more important to tribes. Indigenous perspectives on tribal sovereignty focus on tribal self-determination, or the inherent

power of a tribe to determine its own culture, identity, and destiny. The limitations of the legal doctrine of tribal sovereignty may be transcended by this sense of a tribe's freedom to choose the values and norms that best reflect both its present and its desired future (see Wilkins 2002). The legal doctrine of tribal sovereignty is what most people refer to when they speak of "tribal sovereignty." This reflects an incomplete picture of tribal sovereignty, however, since it does not necessarily incorporate indigenous perspectives on self-determination.

In part reflecting changing conceptions of the legal doctrine of tribal sovereignty, the history of federal-tribal relations is marked by a number of distinct periods of federal Indian law and policy (Wilkins 2002). After the adoption of the U.S. Constitution, the hallmarks of early federal Indian policy were forced relocation and land cessions. During this same era, the Supreme Court established the foundations of the legal doctrine of tribal sovereignty in the infamous "Marshall trilogy" (*Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 20 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)). Although recognizing their preconstitutional and extraconstitutional status, the Court held that all tribes were incorporated into the United States through the "doctrine of discovery," under which Europeans had claimed title to Indian nation lands. Tribes thus were "domestic dependent nations," possessing only limited sovereignty subject to Congress's plenary power to deal with them – and at times, to exert authority over them (see Wilkins and Lomawaima 2001).

After halting treaty making with the tribes in 1871, the United States adopted a policy of forced assimilation designed to eradicate Native traditions and culture. From the 1920s through the middle of the century, federal Indian policy reflected the termination and allotment era, in which tribal lands were sold to non-Natives and Native Americans were provided incentives to move off-reservation. Following the Civil Rights Movement, the federal government promulgated a new policy of tribal self-determination. By the 1970s and 1980s, this policy prompted cuts in federal assistance to the tribes in the name of promoting tribal economic self-sufficiency. Despite stated federal policy goals of promoting tribal self-governance, self-determination, and economic self-sufficiency, tribes have found it extremely difficult to leverage limited reservation resources to promote economic growth and development. To this day, many tribes face crushing poverty and other social ills that tribal governments lack the institutional or economic capacity to overcome. The environment for government-to-government relations has continued to shift due to changing federal priorities as well as the increasing interaction of tribes and states and a myriad of policy issues.

### **Policy Issues and Intergovernmental Administration**

One of the foremost policy issues facing tribal governments today is Indian gaming, as many tribes own and operate casinos and make decisions about revenue distribution that affect their members. Tribal gaming has become a multi-billion-dollar industry, transforming tribal government administration and presenting numerous challenges of intergovernmental administration, including tribal-state compacting, the relationship among tribal, state, and federal regulatory authorities, and revenue-sharing agreements (see Light and Rand, forthcoming; Rand and Light, forthcoming). Elsewhere I explore the administration of Indian gaming, and describe how tribal gaming provides an opportunity to incorporate topics related to Native American tribes into public administration courses. I provide a case study with which to introduce students to crosscutting public governance and policy issues associated with tribal administration and intergovernmental relations among tribal and non-tribal actors (Light 2004).

Yet Indian gaming is far from the only important and complex issue of intergovernmental administration today.

Jurisdictional cooperation is a necessity, but it is not always smooth going. Ongoing controversies over federal tribal recognition and land trust administration frustrate officials and highlight the ambivalent at best relationship between tribes and the Bureau of Indian Affairs. At times disputes arise between states and tribes over water, hunting and fishing, and other treaty rights. Environmental policy on reservation lands is another emerging resource issue. As tribes pursue new economic development strategies, tribal-federal, tribal-state, and tribal-local relations must accommodate tribal ownership and management while equitably determining and implementing regulatory and taxation policy. States frequently explore the legality of taxing gasoline or cigarette sales revenue on reservations. The administration of justice presents multijurisdictional matters related to law enforcement by tribal, state, and federal officials. The patchwork of statutes governing criminal jurisdiction also complicates the relationship between tribal, state, and federal courts.

Whether in the classroom or in the context of policymaking or public administration, an exclusive focus on federal, state, and local actors obscures the role of tribes in the American political system and overlooks important interjurisdictional features of public administration and policy implementation. The responsibilities and capacities of tribal governmental institutions continue to evolve, and tribes' increasing desire to incorporate cultural norms and values into tribal administration means that non-tribal administrators and policymakers must be aware of how indigenous conceptions of tribal sovereignty and self-determination may shape the practicalities of interjurisdictional administration. Increased awareness of and knowledge about Native American tribal governance and the relationship of tribes to non-tribal governments can lead to more efficient, effective, and responsive intergovernmental administration.

### References

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### SIAM Endorsed Panels

The Section on Intergovernmental Administration and Management endorses the following panels at this year's ASPA conference:

- 1-8. The entire intergovernmental, intersectoral, and international relations track – which is actually the SIAM track!
9. Budgeting and Financial Management Track - The Government Performance Project
10. Budgeting and Financial Management Track - Current Issues in Local Government Budgeting & Finance
11. Education for the Public Services - Creative Linkages
12. Environment, Science, and Technology - Implementing Sustainable Energy Technologies
13. Founder's Forum - Public Management Networks
14. Founder's Forum - Cooperation Among Local Government Officials
15. Founder's Forum - Innovations in Policy Change Research
16. Health Care and Health Policy - Health and Social Welfare Collaborative Service Delivery
17. Health Care and Health Policy - Creating Healthier Communities Through Collaboration
18. PA Theory - Expanding Public Administration

### Membership Meeting

All SIAM members are encouraged to attend our annual membership meeting. As a little extra encouragement, we will feed you if you come! At this meeting, members will receive an update on the SIAM budget, journal, elections, and other activities. In addition, the Donald Stone Awards will be presented to the winning practitioner and academic at this time. This event will take place on **Sunday April 3, 2005, 3:30-5:00 p.m.** in Lakeshore Ballroom A of the Hyatt Regency. We hope to see you there!

### Board Meeting

The annual SIAM board meeting will be held Sunday, **April 3, 2005, 7:00-8:15 a.m.** in the Lakeshore Ballroom A of the Hyatt Regency. All Board members attending ASPA are encouraged to come join us for the meeting and breakfast.

# Confronting Misconceptions to Improve Cooperation Between States and Tribes

By: M. Luke Jones\*

“Environmental Protection of land is an important concern of American Indian tribes. A recent Congressional trend is to allow delegation of environmental programs - previously only accorded to states - to Indian tribes. The U.S. Environmental Protection Agency’s support of tribes is increasing and this authority has caused some jurisdictional, economic and political concerns for states with tribal lands.”

- From the National Conference of State Legislatures web site (Updated February 2004)  
<http://www.ncsl.org/programs/statetribe/envirprot.htm>

## INTRODUCTION

The above quote from the National Conference of State Legislatures (NCSL) exemplifies widely held misconceptions that stand in the way of improved public sector governance. While the statement is not patently false, it is misleading for several reasons. Perhaps most obviously, the statement feeds into the common belief that the development of a Tribe’s capacity to implement governmental programs necessarily diminishes State authority.\*\*

This short article analyzes the NCSL quote to reveal potential misunderstandings about Tribal governance and to clarify the position Tribes hold within the intergovernmental experiment of U.S. federalism. As political entities distinct from States, Tribes play a critical role in the successful implementation of federally mandated environmental protection programs.

As practitioners and scholars dedicated to promoting effectiveness in public sector government, cooperation between governmental institutions, and a greater understanding of intergovernmental systems, we are obliged to directly confront these misconceptions and help clarify the role Tribal governments play in our complex Federal system.

### **MISCONCEPTION #1: EPA’s authority to delegate environmental programs to Tribes is a recent Congressional trend**

Congress, the Executive branch, the Courts, and Tribes all recognize that States have primary responsibility for the implementation of environmental programs within their respective jurisdictions. For example, in 1972 Congress identified States as the appropriate governmental authority for achieving the goals described in the Clean Water Act. However, this authority did not extend State jurisdiction to include areas defined as “Indian country.” In fact, the limitations of State authority in Indian country, while contested, remain long standing legal and policy pillars of our Federal system.

As EPA worked to develop State environmental program implementation capacity, starting in the 1970’s, Congress

remained silent on the question of who was responsible for program implementation in Indian country. Then, as the major environmental statutes came up for re-authorization, Congress clarified its intent that EPA should treat Tribes in a manner similar to a State. These “treatment as a state” provisions were included in the Safe Drinking Water Act (1986), the Comprehensive Environmental Recovery, Compensation, and Liability Act (1986), the Clean Water Act (1987), the Clean Air Act (1990), and Federal Insecticide, Fungicide, and Rodenticide Act.

So, this “Congressional trend” of allowing delegation of environmental programs to Tribes was simply a clarification of the long standing Federal policy that State authority in Indian country is severely limited. Taking the Clean Water Act as an example, Congress expressly granted States primary responsibility in 1972 (CWA Section 101(b)) and Tribes in 1987 – hardly a “recent trend.”

### **MISCONCEPTION #2: Implementation of environmental programs by Tribal governments diminishes State jurisdiction and authority**

While the NCSL quote does not expressly assert that environmental program delegation to Tribes constitutes a diminishment of State jurisdiction, its implication is unavoidable. NCSL emphasizes that the delegation of environmental programs was “previously only accorded to states.” NCSL seems to promote the idea that Federal recognition of Tribal governmental authority over Indian country is a new phenomena and that EPA delegations remove from State regulatory jurisdiction authorities it exercised at some point in the past. Fortunately, this is simply not the case.

Within the area referred to as Indian country, only Federal and tribal laws generally apply and state laws generally have no effect. Congress codified the definition of Indian country in 1948:

“Indian country” . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. (18 U.S.C. § 1151. 69)

Granting program approvals to State governments does not extend the States jurisdiction over Indian country. Therefore, a Tribe implementing environmental regulatory programs within Indian country should not be viewed as a threat to State sovereignty. In fact, EPA’s authority to delegate programs to

Tribes is limited by the following “treatment in the same manner as a State” criteria:

- the tribe must be federally-recognized;
- the tribe must have or be able to exercise substantial governmental powers;
- *the tribe must have or have been delegated jurisdiction over the area in question*; and
- the tribe must be reasonably expected to have the financial, physical, and human resource capability to effectively implement a program.

EPA works with Tribes to meet these eligibility requirements and continues to support State governments as they implement delegated programs within State jurisdiction. However, prior to delegating program authority to a Tribe, the EPA itself is responsible for implementing environmental regulatory programs in Indian country – not the State. As EPA stated in its 1984 Indian Policy:

“In keeping with the principle of Indian self-government, the Agency will view Tribal governments as the appropriate non-federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA’s deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.”

This policy has been re-affirmed by every EPA administrator since it was signed by William D. Ruckelshaus in 1984 – Republican and Democrat alike.

**MISCONCEPTION #3: Implementation of environmental programs by Tribes necessarily reduces the effectiveness of State governance and undermines State sovereignty**

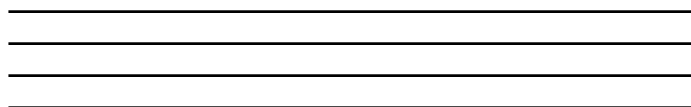
While many challenges stand in the way of achieving mutually beneficial institutional relationships between State and Tribes, the protection of human health and the environment remains a vital public policy priority with the American public. Economically feasible multi-jurisdictional approaches to improving the quality of our Nation’s environment are required, and an appreciation for the vital role Tribes play in our Federal system will help us avoid conflict and identify practical solutions.

Congress, the EPA, and those subject to Federal regulation have pursued ever more decentralized implementation of federally mandated environmental protection programs. Starting most notably in the 1980’s under Ronald Reagan, the era of “devolution” has continued to the present day. One example of this approach to governance is found in the Clean Water Act (CWA). Congress and EPA require States and authorized Tribes to hold public hearings at least once every three years as they develop water quality standards under the Act. Public hearings provide an opportunity for citizens to influence these water quality standards and reflects an

approach to environmental program implementation that values local control over Federal implementation.

While not appropriate in all matters affecting the national interests, devolution can bring government institutions closer to those they serve. In keeping with this governance trend, it is appropriate that EPA would promote the development of Tribal environmental program capacity and support the delegation of program implementation authority to Tribes.

As Tribes build their capacity to effectively implement environmental protection programs within their jurisdiction, examples of successful State-Tribal cooperation and collaboration have increased. These examples are demonstrating that the benefits of stronger tribal governance for both Tribes and States far outweigh the costs. It is now clear that enhancing Tribal governance is a critical factor in the provision of stable, effective public sector programs that benefit both Tribes and States. A robust tribal government exercising clear regulatory authorities within a well-defined political jurisdiction serves to lessen, not increase, jurisdictional, economic, and political conflicts.



\* M. Luke Jones is an employee of the U.S. Environmental Protection Agency’s American Indian Environmental Office. The views expressed in this paper are solely the author’s and do not represent the views of EPA. Mr. Jones holds a Master of Public Affairs degree from Indiana University’s School of Public and Environmental Affairs (1996) and a BA in Political Science from Rutgers College (1991). Fields of specialization include: Federal Indian policy; environmental equity/justice; consensus-oriented policy development & implementation; and program performance measurement.

\*\* The quote from the NCSL web site does not represent official NCSL policy regarding the role of Tribes. Please see, “States and

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