

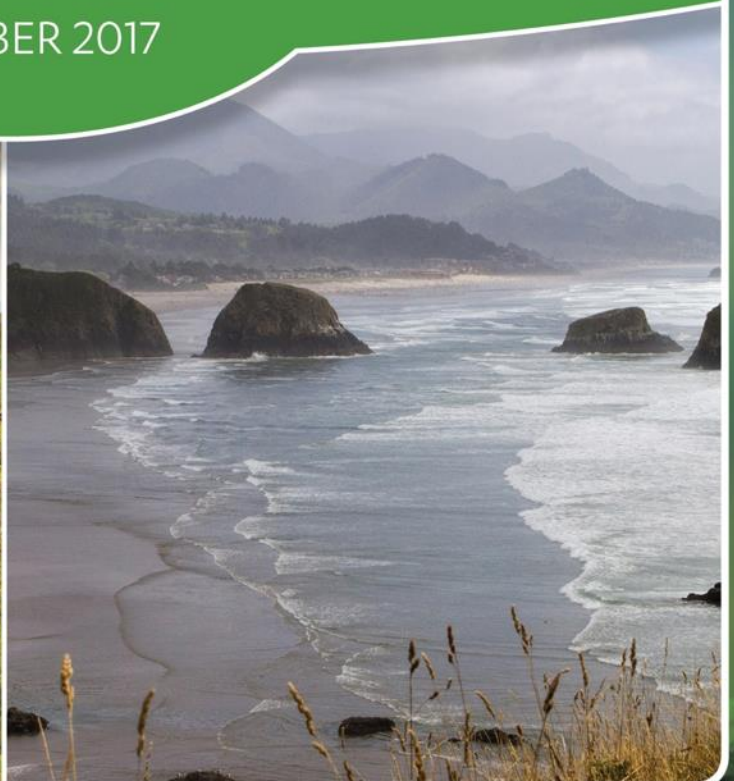
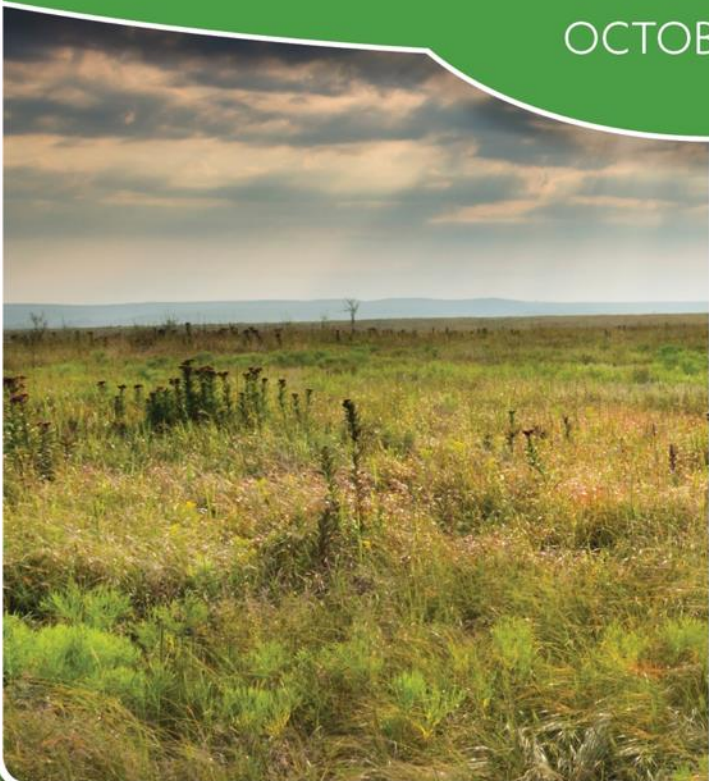


# COOPERATIVE FEDERALISM

Protecting Human Health and the Environment in  
Indian Country

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OCTOBER 2017



## National Tribal Caucus

The National Tribal Caucus (NTC) is a national body of tribal advisors who work to identify and address urgent or emerging tribal environmental issues across Indian country. The NTC's mission is to ensure sovereign tribal nations can protect human health, traditional lifeways, and the environment. This document was developed to respond to the United States Environmental Protection Agency's (EPA) leadership position to direct Agency decisions under a cooperative federalism lens.

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## Introduction

The 567 federally recognized Indian tribes in the United States have a unique perspective and continue to play a unique role in the development of environmental policy in the United States. It is evident that the United States is at a crossroads regarding the implementation of federal environmental policy. At this crossroads, it is appropriate to consider how the tribes can contribute to the conversation in moving this country forward. Given the success of Indian country environmental regulators and policies, and the many robust tribal environmental programs, it is clear that tribal governments are driving innovation in environmental management well beyond the borders of Indian country. Through cooperative federalism, which respects the rights of state and tribal governments to govern their own affairs, EPA can leverage strengths from tribes, as well as states and other partners, to protect public health across the nation.

Administrator Scott Pruitt identified a couple of fundamental precepts when he assumed leadership of EPA. First, he identified a "back to basics" agenda that focuses on the core mission of EPA to protect land, air, and water. Second, he affirmed the importance of EPA's adherence to the rule of law and expressed his unequivocal support for cooperative federalism as the basis for structuring the relationships between the federal government, tribes, and states. Tribal authority varies from one tribe to another for a variety of reasons, but all tribes share a right to self-governance and a desire to make decisions they believe are best for their own people. The following principles and implementation objectives support and recognize the critical path forward for EPA. Under a model of cooperative federalism, there is room for tribes and states to govern in ways that respect their individual cultures and reflect their own priorities.

## Background

The U.S. Constitution, case law, and federal policy have long recognized the sovereign authority and responsibility of tribal governments to manage and regulate the environment and resources on tribal lands, while excluding the regulatory authority of state and local governments over tribal lands and resources. Many of these authorities confirm the duty of trust and special government-to-government relationship owed by the federal government to federally recognized Indian tribes. Tribal governments are primarily responsible for implementing tribal priorities, as well as delegable federal programs, should they choose to do so, to protect water, air, land, and other resources in Indian country. Tribal environmental program activities protect human health and the environment within and around Indian country, and like state environmental programs, they depend on the support of EPA.

The federal Indian trust responsibility is a legal obligation of the United States to protect tribal lands, resources, and tribal treaty rights. The Supreme Court has ruled in cases indicating legal and moral obligations to honor this responsibility with American Indian tribes and Alaska Native villages.<sup>1</sup> Furthermore, these responsibilities carry forward to each generation of American Indian and Alaska Native, along with understandings and expectations developed over the entire course of the relationship between the United States and federally recognized tribes.

EPA was one of the first federal agencies to document its acknowledgement of the special status of tribal governments through the adoption of its *Policy for the Administration of Environmental Programs on Indian Reservations* (Indian Policy) in 1984. The policy enunciated EPA's intent "to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands." This approach is consistent with the federal trust responsibility and underscores the importance of government-to-government relationships between EPA and tribes.

EPA's 2011 *Policy on Consultation and Coordination with Indian Tribes* underpins the recognition of tribes as sovereign entities with authority and responsibility over their citizens and acknowledgement that tribal communities are best served when the tribes themselves are encouraged to assume regulatory authority and program management responsibility over their lands. These views remain consistent with a cooperative federalism model of environmental management.

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<sup>1</sup> (*Seminole Nation v. United States*, 1942 and *Cherokee Nation v. Georgia*, 1831)

## Part I: Principles of EPA's Indian Policy

The 1984 Indian Policy articulates nine principles that are central to protecting human health and the environment on tribal lands. Every EPA Administrator since 1984 has re-affirmed the Indian Policy. Administrator Pruitt's re-affirmation of the policy demonstrates EPA's dedication to continue to honor its context and spirit and, in particular, EPA's intent to protect tribal sovereignty through the implementation of the guiding principles. Further, it demonstrates that EPA takes seriously the importance of including tribal governments in ongoing dialogue, similar to current communication underway between EPA and state governments to define and implement the concept of cooperative federalism.

The Indian Policy embodies and is intended to uphold the federal trust responsibility. By practicing each principle, the federal trust responsibility is honored. An earnest application of cooperative federalism would recognize tribal governments in parity with the states and align with the principles embodied within the Indian Policy. The policy is an effective, efficient reference point for EPA's ongoing work with tribal governments and the cooperative federalism model. The descriptions in Table 1 correspond to each policy's principles that promote cooperative federalism and uphold the tenets of the policy.

*Table 1. 1984 Indian Policy principles and the federal government's role and function*

Principles of the 1984 Indian Policy	Descriptions of the Federal Role and Function
<b>1. Honoring the government-to-government relationship</b>	Working directly with tribal governments on a government-to-government basis, rather than as subdivisions of other governments
<b>2. Recognizing tribes as primary decision-makers</b>	Recognizing tribal governments as the primary parties for setting standards, making environmental policy decisions, and managing programs and resources on tribal lands
<b>3. Encouraging tribal regulation of environmental programs</b>	Taking affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities on tribal lands, while encouraging tribal participation in policy-making and other roles in management of tribal programs where EPA retains regulatory authority
<b>4. Removing obstacles to collaboration</b>	Removing existing legal and procedural impediments to working directly and effectively with tribal governments on tribal programs

Principles of the 1984 Indian Policy	Descriptions of the Federal Role and Function
<b>5. Implementing meaningful consultation with tribes</b>	In keeping with its federal trust responsibility, assuring that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect tribal lands and the surrounding environments.
<b>6. Promoting intergovernmental cooperation</b>	Encouraging cooperation between tribal, state, and local governments to resolve environmental problems of mutual concern
<b>7. Engaging with federal partners</b>	Enlisting other federal agencies that have related responsibilities to support in cooperative efforts that help tribes assume environmental program responsibilities for tribal lands
<b>8. Ensuring compliance</b>	Working cooperatively with tribal governments to assure compliance with environmental statutes and regulations
<b>9. Implementing the principles of the Indian Policy</b>	Incorporating the above principles into EPA's planning and management activities, including budget, operating guidance, legislative initiatives, management accountability system, and ongoing policy and regulation development processes

## Part II: The Implementation of Cooperative Federalism in Indian Country

Since 1984, EPA has taken progressive steps to implement the Indian Policy and its guiding principles. EPA and tribes can strive to protect tribal communities and the environments on tribal lands under a cooperative federalism model in Indian country. Table 2 describes key implementation objectives that indicate policy areas requiring focus as a cooperative federalism approach is undertaken.

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## Protecting Human Health and the Environment in Indian Country

Table 2. Cooperative federalism objectives and policy areas that will require focus

Cooperative Federalism Implementation Objectives	Policy Areas That Will Require Focus
<p><b>Adequate resources to operate tribal environmental programs</b></p>	<p>The federal policy defining the special status of tribal governments and the “treatment as a state” provisions in many federal environmental statutes require that EPA demonstrate parity in its dealings with states and tribes, with respect to decision-making processes, funding, grant management, and oversight. The unique federal-tribal relationship imposes an even higher standard on EPA’s dealings with tribal governments. However, disparities persist in funding for tribal environmental programs and tribal involvement in decision-making.</p>
<p><b>Identify intended outcomes by EPA and tribes for all federal programs, standards, or policies</b></p>	<p>Tribal environmental program activities protect public health and the environment within and around Indian country. Like state environmental programs, tribal programs depend on EPA’s support. Ensuring resources are benefiting communities through programmatic activities would best be met by seeking tribal input in developing or reviewing programs to ensure outcomes align with tribal priorities.</p>
<p><b>Building relationships between EPA and tribes to overcome environmental challenges</b></p>	<p>Relationships with tribes can best be achieved by ensuring EPA program managers at all levels engage in appropriate consultation before undertaking any EPA policy, funding, or other action with the potential to impact tribal interests. As set forth in EPA’s <i>2011 Policy on Consultation and Coordination with Indian Tribes</i>, effective tribal consultation engages tribal leadership in a timely and meaningful manner and demonstrates that tribal input is considered before decisions are made.</p>
<p><b>Flexibility to meet federal program standards to reflect each tribe’s varying cultural, geophysical, ecological, social, and economic environments</b></p>	<p>To most effectively increase flexibility, EPA program manager acknowledgement and support of tribal priorities is critical. This acknowledgement and support includes ensuring that: (1) EPA performance measures reflect tribal input and priorities across all programs, (2) all media programs provide adequate funding to enable tribal governments to achieve their environmental protection goals, (3) and grant programs are minimally burdensome to allow tribal environmental programs to achieve the greatest human health and environmental protection benefits.</p>



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## Protecting Human Health and the Environment in Indian Country

Cooperative Federalism Implementation Objectives	Policy Areas That Will Require Focus
<b>Support all tribal communities to build and improve sustainable programs</b>	Tribal communities continue to experience significant disparities with respect to human health and environmental and economic conditions. Decreasing the continued disparity between states and tribes would support tribal communities to build and improve sustainable programs.
<b>Use Traditional Ecological Knowledge (TEK) as a guiding resource for increasingly complex environmental realities</b>	Tribes and Alaska Native villages have resided on their lands and surrounding areas for centuries, passing along knowledge through generations. TEK is shared wisdom about the local environment. Each tribe and village has this knowledge about their lands and surrounding areas, and they use TEK to respond to climate change. The Nonpoint Source Program is an example of how TEK could benefit an environmental program.

## Conclusion

The NTC looks forward to working with EPA to preserve the integrity of tribal environmental programs. Through the guiding principles of the Indian Policy, and effective implementation of those principles, a cooperative federalism approach will harbor government-to-government relationships that protect human health and the environment.