



IN PURSUIT OF EQUITY

Environmental Justice on Tribal Lands

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Known for its scenic vistas, Monument Valley in the Navajo Nation on the Utah–Arizona border contains nitrate, sulfate, and uranium contaminants of concern in groundwater. Tribal land has withstood a disproportionate amount of mining or other industrial operations, as well as lingering pollution caused by such land use, but recent legislation paves the way to fairness.

Environmental justice and Native American transportation issues intersect in ways that vary by transportation mode and geographic location and are addressed at different levels of government and by different stakeholders. These challenges make it difficult to ensure that the rights and needs of the tribes are addressed in an ethical way and in accordance with state and federal laws. Adding to the challenges are the number of officially recognized Native American tribes and communities—more than 574—spread out across the United States. There are also tribes recognized by states but not recognized by the federal government.

Environmental justice is the confluence of environmental and civil rights law. It concerns preventing and avoiding adverse environmental and health impacts on people of color and those who live in low-income communities. The environmental justice movement encompasses

- Civil rights and environmental racism;
- The environmental health movement;
- Native American struggles for land, sovereignty, and cultural survival; and
- The labor movement for a safer workplace.

Those professionals involved in environmental justice include legal and scientific environmentalists, as well as academics who have begun investigating the disproportionate contamination of certain communities based on race and class. Environmental justice is important to tribes because every organization that receives federal financial assistance is supposed to pay attention to environmental justice to avoid, prevent, eliminate, or reduce the adverse effects of their activities on protected people. Tribes interact with many federal and state agencies, including transportation departments and the components of the U.S. Department of Transportation (U.S. DOT)—all of

which commonly are referred to as operating administrations. Tribes, like other government entities, depend upon transportation infrastructure—especially roads—for social and economic mobility, goods delivery, and ready movement of customers to tribal revenue resources such as casinos, hotels, and resort areas. For this reason, it is important to understand where and how environmental justice concerns in tribal transportation are addressed administratively.

Federal Orders

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, February 16, 1994) requires federal agencies to identify disproportionately high and adverse human health or environmental effects on minority and low-income populations that may result from federal programs, policies, and activities. Federal agencies must take action to address, reduce, and eliminate such disparities. Some population groups experience higher levels of risk than the general population. Multiple factors, including social, psychosocial, economic, physical, chemical, and biological determinants, may contribute to disproportionately high and adverse human health or environmental impacts.

The U.S. DOT's Environmental Justice Order 5610.2B, Department of Transportation Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, specifically includes coverage of Native Americans and some Native American concerns, including consumption patterns. The U.S. DOT has issued a Tribal Consultation Plan¹ that also covers Alaska Native communities. Tribal consultation is not the same as public involvement. Tribal governments must be formally notified of agency actions and proposals. It is appropriate for tribal governments to be afforded the same courtesies and opportunities for participation and review that are given to other governments.

¹ View at https://www.transportation.gov/sites/dot.gov/files/docs/DOT_Tribal_Consultation_Plan.pdf.

The U.S. DOT order suggests that tribal representation should be sought in traditional public outreach efforts, such as meetings, negotiations, rulemaking efforts, advisory committees, and focus groups. U.S. DOT and state transportation officials are bound by federal law to recognize the rights of tribal governments to represent their interests as governments.

State DOT Environmental Justice Practices

Some states also have enacted environmental justice practices. For example, the writing of one of Michigan's environmental justice policies included tribal representatives. The goal of Michigan's Tribal Consultation Policy is to strengthen the consultation, communication, coordination, and collaboration between tribal governments and the State of Michigan.² Michigan also has a government-to-government accord with the 12 federally recognized Indian tribes in Michigan.³ This accord serves as an acknowledgment by the state of each tribes' sovereignty and right to self-governance and self-determination. The accord also is a commitment by the state to use a process of consultation with the tribes to minimize and avoid disputes. The California Department of Transportation has an Environmental Justice Grant Program that promotes the involvement of low-income communities, minority communities, and tribal governments in planning transportation projects.

Other Legal Foundations

The National Environmental Policy Act (NEPA) and Title 23 of the United States Code, Section 109(h) require that social, economic, and environmental consequences of programs be considered when contemplating any action having federal financial support.

Title VI of the Civil Rights Act of 1964 applies to all planning and project

² See <https://www.michigan.gov/egle/about/organization/environmental-justice/tribal-relations>.

³ Read at <https://www.michigan.gov/egle/-/media/Project/Websites/SOM/Media/SOM-Government-Tribal-Government/2002-Government-to-Government-Accord.pdf>.

development programs, policies, and activities. Environmental justice should be considered in project-development decisions, whether they are processed with environmental impact statements, environmental assessments, categorical exclusions, or records of decision. These are all elements of the transportation planning process. Potential impacts to the human environment should drive a decision as much as potential impacts to the natural environment.

The scoping stage of the NEPA process is the appropriate time to consider Title VI and environmental justice. It is preferable to identify minority and low-income populations as early as possible and to examine and address their concerns during planning. Because the nondiscrimination requirements of Title VI extend to all programs and activities of state DOTs and their respective subrecipients and contractors, environmental justice concepts apply to all state projects, including those that do not involve federal aid funds.

Under federal transportation law, metropolitan planning organizations (MPOs) are responsible for surface transportation planning within their jurisdictions. They are obligated to represent all of the transportation stakeholders in a region, and they cover most of the populated regions of the United States. While some MPOs have successfully integrated tribal participation into their planning processes, others have assumed—incorrectly—that tribal involvement is primarily a federal concern. MPOs need the active participation of both individuals and tribal governments to identify and address the transportation needs of Native Americans. This early involvement will help avoid costly delays and controversies later in the transportation planning and building process.

Environmental Justice Issues of Particular Concern on Tribal Lands

There are specific issues of concern to tribes that involve—either directly or indirectly—transportation and the development of natural resources. These issues involve tensions between the federal regulations and policies designed to protect

the tribes and preservation of tribal sovereignty. Some examples are provided in this section.

MINING OF NATURAL RESOURCES

Use of mineral resources can reveal traditional tensions among economic development, the development of mineral resources, and the need for jobs. Such tensions have been evident in long-term controversies surrounding uranium mining on Navajo Nation lands and nuclear waste storage in the Skull Valley within the Goshute Nation. Natural resources are a transportation issue because the material must be transported by pipeline, truck, or rail—all of which are regulated by U.S. DOT.

A case in the early stages concerns a rail line in Utah's Uinta Basin and the project's impacts on the Ute Indian Tribe.⁴ The Surface Transportation Board approved the proposal in 2021. As part of the final environmental impact statement, the Board's Office of Environmental Analysis considered alternatives to the project as required by NEPA. The Office of Environmental Analysis identified an alternative for the rail line to avoid or minimize major environmental impacts and recommended additional environmental conditions to address environmental justice concerns posed by the rail line. The line would run through the region where the tribe lives, and the petitioners argued that the tribe would be disproportionately and directly harmed by the greenhouse gas emissions in the region due to the construction of the rail line. The Seven County Infrastructure Coalition was seeking board authority to construct and operate this proposed rail line, which would extend approximately 85 miles from two terminus points in the Uinta Basin near South Myton Bench and Leland Bench to an existing Union Pacific Railroad Company rail line near Kyune, Utah. The Office of Environmental Analysis conducted a literature review of previous studies, books, and other materials regarding the ethnography of the



Grant Young, U.S. Fish and Wildlife Service

This Uinta Basin hookless cactus is a threatened species. Similarly, the only Pariette cactus in the world is found nearby. Both can survive on a mere 6 to 9 inches of annual precipitation but non-native cactus hunters may cause their extinction. As oil- and gas-related roads are constructed through their habitat, illegal collection rates have increased.

Ute Indian Tribe of the Uintah and Ouray Reservation and analyzed each document for information relating to the Uinta Basin. Based on government-to-government consultation between the Office of Environmental Analysis and the Ute Indian Tribe, sensitive tribal cultural resources were found outside the project footprint. Examples include the Pariette cactus and the Uinta Basin hookless cactus (both rare and threatened by human activity), historic properties, and archeological sites. To protect tribal confidentiality, the Office of Environmental Analysis did not report the number, locations, or characteristics of these resources.

This case serves as a reminder that companies and investors involved in natural resources (such as oil and gas) and transportation projects should be aware of—and budget for—the potential for citizen suits focused on environmental justice issues. To avoid the expense and delays of such suits, it is to the advantage of all parties to plan and consider these issues in advance.

TRANSPORTATION OF HAZARDOUS MATERIALS VIA PIPELINE

Pipelines are regulated by U.S. DOT and increasingly carry hazardous materials, such as tar sands oil. Although pipelines are a relatively safe means of transportation, they are subject to aging and spills. For thousands of miles, they pass

through Indian Country. All transportation facilities and infrastructure are potentially liable to terrorism but—due to their length and location—pipelines are relatively unprotected, especially if they are above ground. When spills occur, they can contaminate land and water and create downstream problems that flow into Indian Country.

ADEQUATE ACCESS TO HEALTH CARE

Inadequate transportation infrastructure makes it difficult for tribal community residents to travel to hospitals, stores, schools, and employment centers. Tribal roads and bridges are often in such disrepair that children cannot attend school, sick and injured people are prevented from reaching hospitals or other health care providers, and emergency responders are delayed in providing timely assistance to people in need. The poor condition of roads, bridges, and transit systems jeopardizes the health, safety, security, and economic well-being of tribal members and the traveling public.

Evaluating Railroads of the Future through the Lens of Historical Experience

Typically, in the past, transportation planning has paid too little attention to externalities or the negative effects of transportation. When evaluating the

⁴ For details, visit <https://www.govinfo.gov/app/details/FR-2021-01-08/2021-00175>.

effects of high-speed rail that would likely travel between major cities, sometimes crossing Indian Country but making few-to-no stops there, it makes one question what benefits—if any—will be brought to the tribes by high-speed rail.

High-speed rail is the 21st century manifestation of the transcontinental railroad. As White notes in *Railroaded: The Transcontinentals and the Making of Modern America*, the transcontinental railroads of the 19th century had severe adverse effects on many Indian tribes. Acquiring this historical land and cutting railroads through it brought European settlers and diseases, making it easy for these outsiders to slaughter the buffalo on which the tribes of the Plains Indians depended (7).

Today, there are more protections against taking property; however, the unfortunate history of such takings requires consideration of how future high-speed rail initiatives will avoid adverse effects on low-income communities and Indian Country, including avoiding the creation of physical barriers to integration, movement, and community cohesion. For example, in Southern California, some of the proposed high-speed rail routes run through or next to existing parks and Native American lands.

In California, the High Speed Rail Authority included environmental justice in its environmental analyses (2). In some transportation environmental impact analyses and environmental impact statements, environmental justice has been covered. The coverage is often uneven; in part, because the basis is environmental laws, but civil rights laws provide the actual legal protections. Environmental law generally does not prevent civil rights violations, but government transportation entities and the officials who create environmental assessments and environmental impact statements are responsible for upholding civil rights imperatives.

Technical assistance is available through federal sources such as FHWA. Under Section 106 of the National Historic Preservation Act of 1966, FHWA can help a tribe pay for certain expenses related



California High Speed Rail Authority

California's multibillion-dollar high-speed rail project, envisioned to connect Sacramento and San Diego through hundreds of miles of land, raises environmental and economic issues.

to environmental justice.⁵ When a state requests, FHWA may participate in eligible, project-specific consultation costs and expenses incurred by a tribal historic preservation officer or designated tribal representative.

Cumulative Risks to Community Cohesion

For tribes, multiple and cumulative risks and impacts cannot be separated from the historical legacy of land loss. Indigenous nations in the United States have lost 98.9 percent of their historical land base since European settlers began colonizing the continent. EPA has begun to explore issues of cumulative risks and impacts in the Native American context through what are sometimes called “tribal traditional lifeways.” Tribal traditional lifeways include cultural resources (aquatic and terrestrial), tribal health (physical and cultural), cultural lifeways, and tribal phenology (i.e., the study of cyclic and seasonal natural phenomena, especially in relation to climate and plant and animal life). Tribes have raised concerns that EPA’s programs, risk methodologies,

and regulatory approaches are not sensitive to their way of life and do not give a comprehensive view of the health of the people or their environment. EPA is involved in transportation issues, in part, because of pollution.

Cumulative impact analysis can become important in a transportation context when roads either are built through the same corridors repeatedly or create new or repeated pollution and noise. Typically, cumulative impact analysis includes the following factors:

- Cumulative public health risk to an affected populace;
- Historical patterns of exposure to environmental hazards;
- Physical sensitivity of the affected populace;
- Disruption of the community structure associated with the proposed action;
- Nature and degree of the impact on the community’s physical and social structure;
- Proximity of the project site to an EPA Superfund site;
- Percentage of low-income residents, people of color, and indigenous peoples;
- Percentage of children with childhood lead poisoning, asthma, or other

⁵ Visit <https://www.gsa.gov/real-estate/historic-preservation/historic-preservation-policy-tools/legislation-policy-and-reports/section-106-national-historic-preservation-act-of-1966>.

environmentally related health problems;

- Number of air quality alert days for dangerous air quality for sensitive populations;
- Number of heavily trafficked highways and streets;
- Direct and indirect effects of the project on a given resource, ecosystem, and affected populace;
- Affected populace's capacity to accommodate additional effects of a proposed project; and
- Accumulation of similar environmental, socioeconomic, and public health effects on an affected population.

A lack of cumulative impact analysis adversely affected the African-American community in Salisbury, Maryland, where Jersey Heights, a predominantly Black residential neighborhood, would have been directly affected by a proposed US-50 bypass in the 1990s (3). Repeatedly, over the course of several decades, the African-American community was divided by Maryland State Highway Administration road construction.

Gray Areas: Defining Environmental Justice and the Importance of Cultural Artifacts

Any and all tribal environmental justice issues become important in an environmental process, especially when multiple cultural resources or activities are affected or potentially affected. Tribal environmental justice issues are not always well defined, since social, cultural, and spiritual components are not easily assessed and are rarely adequately considered during environmental processes. Road- and bridge-building may uncover archeological sites and artifacts that may be of significant importance to tribes. The historical and archeological sites may be well outside the present boundaries of reservations, rancherías, or Alaskan Native corporations. This can create problems for transportation planners who are focusing directly on areas with tribal jurisdiction. But from the tribal perspective, the whole



Jimmy Emerson, DVM, Flickr, CC BY-NC-ND 2.0

A hand-painted sign conveys the fight against environmental injustice on the Pine Ridge Indian Reservation in South Dakota and Nebraska. Home to the Oglala Lakota tribe, it is the poorest reservation in the United States. Repeated instances of environmental injustices since the 19th century likely contributed to today's 80 percent unemployment, a suicide rate four times the national average, and some of the shortest life expectancies of any group in the Western Hemisphere.

United States was once occupied by tribes, and there are ensuing sensitivities. Additionally, over time, the area inhabited by tribes has changed and largely decreased, and historical research may be necessary to avoid impinging on historical sites not presently occupied. This difficulty occurred when a bridge in Port Angeles, Washington, was inadvertently placed on an Indian burial ground and the site of an ancient village. A map was available in the town library that showed the site from the mid-1800s, but the contractors performing the work had not consulted it.

Generally, there are two kinds of projects where tribal participation, with an emphasis on environmental justice, is most likely to occur. Federal-level executive orders require that transportation projects conducted on Indian-owned or partially owned land should always be conducted with the direct participation of the relevant tribes. Tribal participation is also required when transportation projects have the potential to affect historic,

cultural, or sacred resources on lands used by Native Americans in the past. Because all of the United States was once owned and used by tribes, transportation planners must be ready to consult with the appropriate tribal governments even when tribal historical resources are found far from any present-day tribal settlements. These issues were brought out in the recent litigation over the Dakota Access Pipeline,⁶ where several tribes and many tribal members objected to the location of the pipeline even though it was not passing through a reservation. In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, the court found that the Army Corps of Engineers had to engage in more consultation with the nearby tribe to ascertain and address their concerns. The court stated in part, "the Corps will have to reconsider those sections of its

⁶ See the United States Court of Appeals document at [https://www.cadc.uscourts.gov/internet/opinions.nsf/3FEF9DA2426A19048525866900562121/\\$file/20-5197-1881818.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/3FEF9DA2426A19048525866900562121/$file/20-5197-1881818.pdf).

environmental analysis upon remand by the court.”⁷

Challenges

Environmental justice concerns for tribes encompass more than access to and the use of traditional cultural properties or items of cultural patrimony. It is important for federal and state transportation agencies to be knowledgeable, sensitive, and aware of the needs and heritage of tribes and to incorporate that understanding into their activities.

While the required government-to-government relationship between recognized tribes and federal, state, and local transportation entities is long-standing, some practitioners have not fully implemented these requirements. An example is the recent litigation about the Dakota Access Pipeline, where the federal courts ruled that the U.S. Army Corps of Engineers had not adequately considered tribal concerns and remanded the case for that consideration. Tribal concerns included possible downstream effects of pipeline leaks that would flow into the tribe’s reservation and foul its drinking water. As sovereign governmental entities, federally recognized tribes have a range of interests that can extend to sacred sites, cultural practices, upstream effects, and traditional lands outside the borders of reservations.

Proactive tribal participation in state-wide transportation planning is being successfully promoted in some states but has not been a priority in others. Examples of successes include Arizona, California, and Washington. Efforts to involve tribes in the early stages of transportation planning have sometimes been hampered by a lack of interest—sometimes on the part of agencies, sometimes on the part of tribes—knowledge, resources, or trust. Many tribes, especially smaller ones, do not have the resources or the administrative infrastructure needed to be effective partners in the transportation planning process. Programs, such as the



Pax Ahimsa Gethen, Wikimedia, CC BY-SA 4.0

The Dakota Access Pipeline has created concerns that groundwater could be contaminated if leaks in the pipeline occur near groundwater sources. Protests like this 2016 march before City Hall in San Francisco, California, have been held across the United States.

Tribal Governance Program at Evergreen State College in Olympia, Washington, have been created to help fill this knowledge gap.

Even if a state has no tribal reservations within its borders or a reservation is far from a project location, there may still be historic resources—such as traditional cultural properties—associated with a tribe. It is the federal and state agencies’ responsibility to identify and contact such tribes.

Steps Forward

How can tribes and other interested parties fruitfully advance these interests in the transportation aspects of environmental justice? The Biden Administration is pursuing some of these issues under its Justice40 Initiative, led by the Council on Environmental Quality. The Justice40 Initiative is a part of the administration’s whole-of-government approach to advancing environmental justice. The Biden Administration has promised that 40 percent of all benefits from infrastructure investment will go to vulnerable and marginalized communities. Efforts include development of a screening tool to

determine which communities are most in need of investment.

Many social justice and environmental advocacy groups now include environmental justice as part of their mission. Some advocacy organizations are pursuing a litigation strategy by filing lawsuits under NEPA. Recently, a housing advocacy group in Berkeley, California, used the California Environmental Quality Act for a housing issue involving the University of California at Berkeley. Several states have state versions of the federal NEPA and a few have explicit environmental justice protections and statutes. Interested parties can file administrative civil rights complaints alleging environmental justice discrimination under Title VI of the Civil Rights Act of 1964 with U.S. DOT, EPA, and other involved federal agencies.

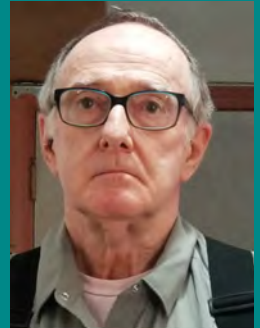
Title VI covers recipients of federal financial assistance, which includes many entities in the transportation sector. Tribes can ask for involvement in transportation planning processes under executive orders and federal and state public participation directives. Research

⁷ For details, see <https://www.govinfo.gov/app/details/USCOURTS-dcd-16-cv-01534>.

and tools are currently being developed by academics, advocacy groups, states, and federal agencies. These tools include EPA's EJScreen, which uses data, mapping, geographic information systems, and demographics to help determine what areas and demographic groups may be adversely affected by transportation and other infrastructure projects. These screening tools are expected to help prevent new and continued adverse impacts on vulnerable and marginalized groups. Future projects will need to address environmental justice concerns more directly and broadly than previously, plan on early community engagement, consult with legal and technical advisors, and use screening tools (such as EJScreen) to find creative, productive, and protective solutions for project approval and implementation, while meeting the needs and concerns of tribes. Major steps in this direction include transportation planners' advance knowledge of tribes in their service area, tribal contacts, and tribal concerns.

About the Author

Marc Brenman is a former senior policy advisor for civil rights in the Office of the U.S. Secretary of Transportation, former executive director of the Washington State Human Rights Commission, and co-author, with Tom Sanchez, of books including *The Right to Transportation: Moving to Equity*, and *Planning As If People Matter: Governing for Social Equity*. He helped create an Indian Civil Rights Commission in Washington State; taught in the Tribal Governance Program at The Evergreen State College in Olympia, Washington; and served on the Federal Interagency Working Group on Indian Education.



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