# Hold On to Tribal Sovereignty: Establishing Tribal Pesticide Programs That Recognize Inherent Tribal Authority and Promote Federal-Tribal Partnerships

by Jane Kloeckner

Jane Kloeckner is Attorney/Advisor, U.S. Environmental Protection Agency, Office of Regional Counsel, Region VII, Kansas City, Kansas, and Adjunct Professor of Law, University of Missouri, Kansas City School of Law.

*Summary*

The weak tribal/federal partnership in regulating pesticide pollution can be strengthened by building pesticide programs that recognize tribal inherent authority and enhance the opportunities for tribal members and non-members to learn about indigenous knowledge for protecting human health and the environment. A regulatory reinterpretation or congressional amendment of FIFRA that recognizes tribal inherent authority would address the issue of treating tribes as the appropriate authority for implementing FIFRA in Indian country and hopefully, the overwhelming federal role would decrease and the tribal role would increase.

> Hold on to what is good even if it is a handful of earth.
> Hold on to what you believe even if it is a tree, which stands by itself.
> Hold on to what you must do even if it is a long way from here.
> Hold on to life even when it is easier letting go.
> Hold on to my hand even when I have gone away from you.
>
> —*Pueblo Blessing*[1]

The partnership between the United States and American Indian Nations (tribes) in regulating pesticide pollution in Indian country under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[2] is weak, dysfunctional, and dominated by the federal government. The U.S. Environmental Protection Agency (EPA) is authorized to carry out FIFRA and works diligently to protect human health and the environment in Indian country, however, EPA could do more to build tribal pesticide programs and federal/tribal partnerships. EPA needs to acknowledge that strong sovereign tribal partners are the foundation of lasting tribal environmental institutions. Like the Pueblo blessing above, which encourages people to hold on to life even when it is easier letting go, EPA should hold on to tribal sovereignty even when it seems easier to let go and instead dominate its partnership with tribes.

One of the key priorities established by EPA Administrator Lisa Jackson is to strengthen the federal/tribal partnership by supporting tribal capacity with federal oversight to ensure that programs are consistently delivered nationwide.[3] This Article proposes actions to strengthen that partnership by building tribal pesticide programs where

*Author's Note: The views expressed in this Article are solely the author's and do not represent the views of EPA or the University of Missouri, Kansas City School of Law. No official support or endorsement by EPA, UMKC, or any federal or state agency is intended or should be inferred by any statements herein. The author appreciates the advice received from Prof. John W. Ragsdale Jr., UMKC, to whom I am forever grateful for his inspirational and exemplary teaching on federal Indian law and for persuading me to teach environmental law. Special thanks to my family, Bill, Vincent, and Rose, for all your support, understanding, and patience. I dedicate this Article to the memory of my father-in-law, the late Vincent Kloeckner Sr., who inspired me to pursue a dual career working for the federal government and academia by his example at the IRS and the University of Illinois, Urbana-Champaign.*

1. Nancy C. Wood, Many Winters: Prose and Poetry of the Pueblos (1974).
2. 7 U.S.C. §§136-136y, ELR Stat. FIFRA §§2-35.
3. U.S. Environmental Protection Agency (EPA) Blog, Administrator's Seven Priorities for EPA's Future (Jan. 12, 2010), http://blog.epa.gov/administrator/2010/01/12/seven-priorities-for-epas-future (last visited Nov. 29, 2011).

the government grants tribes primary enforcement authority under FIFRA, recognizes tribal inherent authority, and increases the number of EPA-approved tribal certification and training plans for restricted-use pesticide applicators. This Article also proposes that EPA treat tribes in the same manner as states under FIFRA to ensure that pesticide programs are consistently delivered nationwide without gaps in Indian country while recognizing the need for local pesticide control.

Tribal pesticide programs are weak because the partnership is overwhelmingly federal. EPA allows only a limited role for tribal governments under FIFRA. EPA conducts FIFRA enforcement actions while tribes conduct outreach, education, and only cooperate in federal enforcement actions. Maybe it is easier for the federal government to enforce, but the lack of tribal enforcement programs undermines tribal sovereignty, weakens tribal environmental protection programs, and contradicts EPA's longstanding principle that tribal governments are the primary parties for managing the reservation environment.[4]

EPA also dominates the certification and training program for restricted-use pesticides (RUPs) applicators in Indian country. RUPs are the most toxic pesticides, and FIFRA requires applicators be trained and certified to use them. RUPs cannot be legally applied in most of Indian country because applicators have no way to obtain training and certification, which is a significant regulatory gap. In May 2011, the Agency proposed a federal plan for certification and training (C&T Plan) of pesticide applicators, which, if finalized, will fill this particular gap and legalize the use of RUPs in Indian country.[5] Nevertheless, this federal C&T Plan prolongs EPA's dominance in Indian country and weakens the federal/tribal partnership under FIFRA because EPA regional offices will issue certifications, not tribes. Although tribes have the option to establish tribal certification and training plans under FIFRA regulations promulgated in 1975, such tribal plans are rare. Only eight Indian reservations have EPA-approved Tribal C&T Plans. Rather than increasing the number of tribes with tribal plans, the proposed federal C&T Plan increases the federal presence in Indian country.

The government should reform the federal pesticide program in Indian country to build strong tribal institutions and promote tribal governments to full partners with the federal government as co-regulators under EPA-approved tribal pesticide programs. The development of strong tribal institutions that include tribal enforcement supports cooperative federalism between EPA and the tribes. Progressive environmental law theory suggests that cooperative environmental federalism enhances protection of human health and the environment by authorizing local governments to implement federal programs with EPA oversight.[6] Based on the principles of cooperative federalism, increasing the number of EPA-approved tribal environmental programs as described in this Article should improve environmental protection in Indian country, assuming that tribes are interested in establishing and implementing such programs.[7] Furthermore, tribal implementation of pesticide programs as co-regulators is consistent with tribal eligibility programs under other federal environmental laws, e.g., the Clean Water Act (CWA),[8] the Safe Drinking Water Act (SDWA),[9] and the Clean Air Act (CAA).[10] In addition, co-regulator pesticide programs with strong federal oversight ensure consistent nationwide environmental protection.

Federal laws and regulations that support environmental institution-building by tribal governments distinguish the multidimensionality of Indian people and cultures compared to non-tribal institutions. Such laws and regulations recognize the traditional values of Indian people for the land without limitations that stereotype individual Indians or tribal life-ways. These things are the hallmark of a genuine federal/tribal partnership. Improving the FIFRA federal/tribal partnership by authorizing more tribal C&T programs for pesticide applicators and primary enforcement authority for tribal governments would incidentally enhance non-Indian cultures by teaching individuals, such as pesticide applicators, about culturally diverse tribal life-ways that would better protect human health, the land, and the environment in Indian country from pesticide exposures.

The Article is organized into three parts in addition to this introduction and the conclusion. Part I presents the background on environmental regulatory programs in Indian country, the diverse tribal cultures and traditions that harmonize well with environmental protection, and the federal and tribal jurisdiction needed to regulate the environment. Part II outlines the general framework of the FIFRA statutory and regulatory scheme, how the law applies in Indian country, and describes policy and guidance on EPA's direct implementation. Part II also looks at whether or not EPA is meeting the federal government trust responsibility[11] to protect human health and the environ-

4. U.S. EPA, *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (Nov. 8, 1984), *available at* http://www.epa.gov/tp/pdf/indian-policy-84.pdf [hereinafter EPA Indian Policy].
5. *Federal Plan for Certification of Applicators of Restricted Use Pesticides Within Indian Country*, 76 Fed. Reg. 28772 (May 18, 2011).
6. *See* Rena I. Steinzor, *Devolution and the Public Health*, 24 Harv. Envtl. L. Rev. 351 (2000); *but cf.* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 Harv. L. Rev. 553 (2001).
7. James M. Grijalva, *Where Are the Tribal Water Quality Standards and TMDL?s*, 18 Nat. Resources & Env't 63 (Fall 2003) (some tribes don't pursue water quality standards because of the time and money involved, and tribes may have other priorities).
8. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
9. 42 U.S.C. §§300f to 300j-26, ELR Stat. SDWA §§1401-1465.
10. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
11. The Trust Relationship Doctrine includes both specific accountability and general trust obligations. Accountability of the federal government under the specific Trust Relationship finds its genesis in the common-law trust doctrine; the general Trust Relationship stems from the "Old Promises" made during treaty days, which ended in 1871 by an Act of Congress, 25 U.S.C. §71 (1871). The Trust Relationship Doctrine includes tribes even if they have no treaty with the United States. Tribes and the United States made mutual promises, treaties, becoming the supreme law of the land; the federal government has the highest moral duty to live by its promises. The Trust Relationship Doctrine is clarified in the *Mitchell* cases. *See United States v. Mitchell*, 445 U.S. 535, 542-43 (1980) (*Mitchell I*) (the Court held

ment in Indian country as specified in FIFRA and identifies ambiguity in the statutory language, i.e., whether the statute authorizes a delegation of federal authority or recognition of inherent tribal authority. Part III proposes actions EPA and the U.S. Congress could take to reform and fully implement FIFRA in Indian country, enhance the role of tribal governments in regulating pesticides, and strengthen the federal/tribal partnership in environmental protection. The conclusion summarizes that tribal pesticide programs can be built as solid tribal institutions for the purpose of protecting human health and the environment in Indian country, holding on to tribal sovereignty, and supporting a genuinely strong tribal/federal partnership.

## I. Environmental Regulatory Jurisdiction in Indian Country

### A. *Background*

Environmental regulatory control in Indian country[12] by the federal and tribal governments is complex. It is governed at the crossroads of two intricate bodies of federal law—environmental and Indian law. Many legal scholars have written about the intersection of federal Indian law and other environmental laws, such as the CWA, the CAA, the Resource Conservation and Recovery Act (RCRA),[13] and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[14] FIFRA has not been studied as much.[15] FIFRA is especially important in Indian country because many Indians reside in rural agricultural areas where pesticide use and abuse may present exposure risks.[16]

The federal government[17] and tribal sovereigns[18] exercise power and jurisdiction to protect human health and the environment from pesticide pollution by using command-and-control regulatory programs to mitigate pollution. On the other hand, state governments lack authority over environmental regulatory matters in Indian country, absent an express grant from Congress.[19] In general, EPA purged state

that the General Allotment Act "created only a limited trust relationship . . . that does not impose any duty on the Government to manage timber resources"); and *United States v. Mitchell,* 463 U.S. 206 (1983) *(Mitchell II)* ("[I]n contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.").

12. The term "Indian country" is used herein as EPA uses the term in the *Guidance on Basic Elements of an EPA-Funded Tribal Pesticide Program*, Mar. 11, 2002, http://www.epa.gov/oppfead1/tribes/guidance.htm#contents (last visited Nov. 29, 2011) [hereinafter BE Guidance]. Indian country is given essentially the same meaning as found in the U.S. Code, 18 U.S.C. §1151.
13. 42 U.S.C. §§6901-6992k, ELR Stat. RCRA §§1001-11011.
14. David Coursen, *EPA's New Tribal Strategy*, 38 ELR 10634 (Sept. 2008); Paul M. Drucker, Wisconsin v. EPA: *Tribal Empowerment and State Powerlessness Under Section 518(e) of the CWA*, 5 U. Denv. Water L. Rev. 323 (2002); Grijalva, *supra* note 7; Fred E. Breedlove, *Implementing the RCRA in Indian Country and Approaches for Amending RCRA to Better Serve Tribal Interests*, 26 Vt. L. Rev. 881 (Summer 2002); Jessica Owley, *Tribal Sovereignty Over Water Quality*, 20 J. Land Use & Env't 61 (2004); Ann E. Tweedy, *Using Plenary Power as a Sword: Tribal Civil Regulatory Jurisdiction Under the Clean Water Act After* United States v. Lara, 35 Envtl. L. 471 (2005); and Kristina M. Reader, *Empowering Tribes—The D.C. Circuit Upholds Tribal Authority to Regulate Air Quality Throughout Reservation Lands in* Az. Pub. Serv. Co. v. EPA, 12 Vill. Envtl. L.J. 295 (2001).
15. > In fact, very few scholarly efforts have been made to analyze FIFRA in any comprehensive way at all. For one of the more comprehensive scholarly works, see Donald T. Hornstein, *Lessons From Federal Pesticide Regulation on the Paradigms and Politics of Environmental Law Reform,* 10 Yale J. L. Ref. 369 (1993).
>
> Mary Jane Angelo, *Embracing Uncertainty, Complexity and Change: An Eco-Pragmatic Reinvention of a First Generation Environmental Law*, at 3, note 9 (Aug. 23, 2005), *available at* http://ssrn.com/abstract=788504 (July 22, 2011).
16. Office of Pesticide Programs, *The National Pesticide Tribal Program: Achieving Public Health and Environmental Protection in Indian Country and Alaska Native Villages*, EPA-735-F-09-007 (Oct. 2009) at 2:
    > American Indian farm operators are more likely than their counterparts nationwide to report farming as their primary occupation, to derive a larger portion of their overall income from farming, and to own all of the land that they operate, rather than renting or leasing land. Farm workers and their families have a high potential for exposure to pesticides.
17. It is well established that federal laws can apply to Indians and Indian country. Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960). Federal environmental laws acknowledge tribal sovereignty, e.g., FIFRA 7 U.S.C. §136u, CWA 33 U.S.C. §1377(e), SDWA 42 U.S.C. §300j-11, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405, and CAA 42 U.S.C. §§7474 and 7601. The CWA, the SDWA, the CAA, and CERCLA clearly authorize EPA to treat Indian tribes in a manner similar to states [hereinafter TAS]. See also the dissent in *Tuscarora* by Justice Hugo Black: "Great nations, like great men, should keep their word," *id.* at 142. *See also* Menominee Tribe of Indians v. United States, 391 U.S. 404, 88 S. Ct. 1705 (1968) (The Court held that the intent to abrogate or modify a treaty is not to be lightly imputed to the Congress.). In general, federal environmental laws are consistent with perfect good faith toward the Indians.
18. The sovereignty of Indian tribes is an established principle in federal statutes and common-law precedents. Tribes have the "inherent powers of a limited sovereignty which has never been extinguished." Felix Cohen, Handbook of Federal Indian Law 122 (U.S. Government Printing Office 1945). For common-law precedents supporting tribal sovereignty, see *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (tribes are domestic-dependent nations); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832):
    > [T]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial . . . The words "treaty" and "nation" are words of our own language . . . We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

    *See also* David Getches et al., Federal Indian Law 125 (4th ed., 1998), where the authors mention that "[M]odern courts have continued to rely on *Worcester* but, as the Supreme Court explained in a 1973 decision, 'the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward a reliance on federal preemption.'" "Eschewing 'platonic notions of Indian sovereignty,' the Court sees the sovereignty doctrine today as 'a backdrop against which the applicable treaties and federal statutes must be read.'" *Id.* Nevertheless, the modern cases on tribal sovereign immunity support sovereignty; if tribes have sovereign immunity, they must be sovereign. *See* Okalahoma Tax Commission v. Potawatomi Tribe, 111 S. Ct. 905, 12 L. Ed. 2d 1112 (1991).
19. The role of state governments in environmental regulatory programs in Indian country is essentially a very limited one. State environmental regulatory programs are not valid in Indian country, whether aimed at Indians or non-Indians, on tribal lands or fee lands, absent an explicit authorization from Congress granting a state regulatory authority, which rarely occurs. *See* Judith V. Royster & Rory Snow Arrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 Wash. L. Rev. 581, 613-59 (July 1989). *See also* EPA Indian Policy, *supra* note 4. EPA's Indian Policy encourages tribal self-determination: "work directly with Indian Tribal Governments on a one-to-one basis," recognize "Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace," and "until Tribal Governments are willing and able to assume full responsibility for delegable pro-

environmental regulatory programs inside Indian country in 1984, when the Agency adopted its national Indian Policy.[20] Absent explicit congressional action, EPA does not authorize states to implement federal environmental programs, such as FIFRA, inside Indian country.[21]

An analysis of state authority to regulate pesticides is beyond the scope of this Article. However, non-members residing in Indian country may prefer state regulatory control, which sometimes makes for uneasy neighbors.[22] Confrontations between Indians and non-Indians can be callous and threatening in rural agricultural areas where pesticide use is tied to revenues.[23] The reforms proposed in this Article would clarify that the relationship between the federal/tribal governments is a co-regulator partnership. Federal recognition of tribal inherent authority may placate uneasy neighbors[24] because then non-Indian pesticide applicators regulated by tribal governments would be assured that tribal pesticide programs are subject to EPA approval based on consistency with the national FIFRA program. Also, EPA oversight would ensure tribal programs operate with transparency, accountability, and fairness.

Finally, tribal assertion of environmental regulatory authority within Indian country should be recognized by EPA. Environmental regulation is one area where tribal governmental interests are substantial and significant because protecting the environment is essential to protect tribal integrity, economic security, and the health and welfare of the people.[25] Unified management of the reservation environment is better than a checkerboard pattern of state and tribal authority depending on tribal membership or land status, which would be confusing and difficult to administer because pollution readily moves between private properties.[26]

### *B. Synthesis of Environmental Law and Federal Indian Law*

#### 1. Beginning of Environmental Laws and the Modern Era of Federal Indian Law

The beginning of the modern era of federal Indian policy coincided with the beginning of the environmental movement.[27] Federal environmental laws are implemented through partnerships between the federal, state, or tribal governments based on principles of cooperative federalism.[28] President Richard M. Nixon formed EPA and coincidentally (or not) at the same time promoted the modern era of federal Indian law and policy.[29] National laws and policies to protect human health and the environment began to take shape in 1970 with the formation of EPA and enactment of one the first major federal environmental laws, the National Environmental Policy Act (NEPA) of 1970.[30]

The modern era of Indian self-determination started slowly in the 1960s. The mythic proportions of the Indian occupation of Alcatraz Island in California in 1969, and the uprising at Wounded Knee in 1973,[31] were significant events that resonated with Indian people and the federal

grams, the Agency will retain responsibility for reservations (*unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government*)." *Id*. (emphasis added).

20. EPA Indian Policy, *supra* note 4.
21. *See generally* Royster & Fausett, *supra* note 19.
22. *See generally* Craighton Goeppele, *Solutions for Uneasy Neighbors: Regulating the Reservation Environments After* Brendale v.Confederated Tribes and Bands of Yakima Indian Nation, *109 S. Ct. 2994 (1989)*, 65 Wash. L. Rev. 417 (1990).
23. Serious confrontations between federal, tribal, and state governments challenge the federal/tribal partnership in environmental protection. Confrontations were abundant in 2002 on the Omaha and Winnebago Indian Reservations in northeastern Nebraska when two tribal governments and EPA announced plans for the tribes to implement FIFRA regulatory programs. During that summer, EPA and the tribes held four public information sessions on these reservations. Hundreds of people including non-Indians reservation residents attended these meetings, and many expressed anger and frustration at the possibility of tribal governments regulating pesticides. Many of the non-Indians believed that the State of Nebraska Department of Agriculture was regulating pesticides on the reservations, which was inaccurate. Some comments EPA received during this time threatened violence by non-Indians toward EPA and the tribes. "I do not agree with violence, but I do believe you are pushing American property owners to the brink in Thurston County." E-mail from non-Indian resident of Omaha Reservation to EPA (Jan. 27, 2003). See also Art Hovey, *Tribe Wants to Enforce Rules Over Ag Chemicals*, Lincoln J. Star, July 12, 2002, for a few details about the confrontation, although not entirely accurate (based on author's personal knowledge from attending these meetings). Hovey quotes the Nebraska Farm Bureau president who said that the situation was "a real powder keg and a spark will set off a fuse and we will have a real problem."
24. Goeppele, *supra* note 22. The author presents arguments in favor of Indian authority to impose environmental regulation over all lands within reservation boundaries and suggests that cooperative agreements are a promising alternative to prolonged litigation over environmental regulation in Indian country.
25. Montana v. United States, 450 U.S. 544 (1981). The Court prescribes a general presumption that absent congressional delegation, Indian authority does not extend "beyond what is necessary to protect tribal self-government or to control internal relations." *Id*. at 564. The Court established two exceptions (called the *Montana* test) under which tribes retain authority: first, in regulation of non-members engaged in consensual relations with Indians; second, in regulation of conduct of non-Indians on fee land when it "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565.
26. EPA State & Tribal Relations Memo (1991) (Anti-Checkerboarding Policy).
27. This is not to say that the modern era of Indian law and policy was a catalyst for the environmental movement. It is just that the two movements started at about the same time in history.
28. For an in-depth discussion of tribal role in federal environmental laws, see David F. Coursen, *Tribes as States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Laws and Regulations*, 23 ELR 10579, (Oct. 1993). *See* Robert Kennedy Jr., Crimes Against Nature (2004) (commenting on the federalist system, democratic principles, and the significance of strong, enforceable federal environmental laws).
29. *See* President Richard Nixon's Message to Congress, H.R. Doc. No. 91-363, 91st Cong., 2d.Sess. (July 8, 1970), summarized in Getches et al., *supra* note 18, at 226 (President Nixon suggested delegating implementation responsibilities to tribes). *See also* James M. Grijalva, *The Origins of EPA's Indian Program*, 15 Kan. J.L. & Pub. Pol'y 191, 206, n.105 (Winter 2006) (coincidentally, President Nixon announced plans to reorganize and create EPA on July 9, 1970). Legal scholars contend that President Nixon was motivated by political pressures responding to environmentalists, who he linked to anti-war protesters. *Id.* at 195 (citing Richard Lazarus, The Making of Environmental Law (2005)).
30. 42 U.S.C. §§4321-4370f, ELR Stat. NEPA §§2-209.
31. The American Indian Movement leaders and the traditionalist elders of the Oglala Sioux Nation who resisted the IRA-formed government at Wounded Knee, South Dakota, "represented the first effort to establish the dignity of the tribe in a manner consonant with the people's memories of their older way of life." Royster & Fausett, *supra* note 19, at n.53 (citing Vine Deloria Jr. & Clifford M. Lytle, The Nations Within: The Past and Future of American Indian Sovereignty (1984)).

government.[32] These actions raised the awareness of the dominant American culture to the struggles of modern American Indian people. Without the actions of these American Indian activists, Congress might not have passed significant laws supporting self-governance for tribes, such as the Indian Self Determination and Education Assistance Act of 1975.[33]

The first federal environmental laws were passed without mention of Indian nations—governments recognized under the U.S. Constitution and federal legal systems.[34] This exclusion was significant in terms of the size and number of people residing in Indian country, i.e., nearly a million people residing on about 56 million acres.[35] Inexplicably, Congress ignored tribal governments. The exclusion of tribes in the early environmental legislation and the paucity of legislative history on later amendments that included tribes are beyond the scope of this Article, although other legal scholars have addressed these questions.[36] It is difficult to understand the initial omission because tribes make apt partners when it comes to protecting the environment and "finding a human place in nature."[37]

## 2. Valuing Indigenous Knowledge for Environmental Protection

The traditions of American Indian tribes couple humanity and the environment in sacred and culturally significant ways.[38] The Indian-and-the-environment debate has raged among scholars since the beginning of the modern era. Genuine issues include whether aboriginal Indians were true conservationists or more ecologically minded than European immigrants and whether the concept of the ecological Indian is a romanticized myth.[39] Nevertheless, there are some generally accepted observations about American Indian traditions/cultures. For example, traditional tribal cultures:

- recognize the sacredness of the earth[40];
- consider humans as related in kinship with nonhuman life on Earth[41]; and
- tend to be consistent with the overarching goals of federal environmental laws.[42]

Accepting these ideas does not require sentimentalizing Indians, and such conventional wisdom is not myth. The pre-colonial Indians' way of "sustaining themselves did not rely on subduing the earth but on using what it offered."[43] Many traditional Indian "cultures in all their behavioral, material, symbolic, and ideational manifestations were until very recently reflections of the very rich ecological diversity of this Earth."[44]

Traditional Indian cultures and values harmonize well with values stated in NEPA, the bedrock federal environmental law, that human welfare and nature are integral and interdependent. Specifically, the federal government will use "all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, [and] to create and maintain conditions under which man and nature can exist in productive harmony."[45] Prof. Daniel Wildcat identifies such existence for Indians as the "nature-culture nexus," which is "the unique interaction between a people and place."[46] In addition, he suggests this interaction embodies the "existential feature of the [American Indian's] oldest tribal traditions and identities as peoples."[47] The dominant culture can learn much from the ancient Indian cultural interactions with nature and from that knowledge better protect the environment.[48] Modern environmental historians in the dominant culture

32. November 2004 marked the 35th anniversary of the occupation of Alcatraz Island. In a celebration at the "Rock," original organizers opined that during the time, "[No] other event put on by Indians was as positive as the occupation of Alcatraz," quoting Fortunate Eagle. Jerry Reynolds, *A Myth in the Making: Alcatraz at 35*, Indian Country Today, Nov. 24, 2004. Jerry Reynolds says that the termination era came to an end because of the impact of the occupation on national opinion and the Nixon Administration. The environmental protesters in 1970 influenced President Nixon. It is likely the Indian activists also influenced this president. These courageous individuals, as well as the radicals of the American Indian Movement, who took over Wounded Knee, deserve much appreciation because their actions made our country better and more democratic by advancing Indian self-determination as an enlightened era and period of growth for our federalist system.
33. 25 U.S.C.A. §§450a-450n.
34. Grijalva, *supra* note 29, at 201-22 (describing the statutory silence on Indians and tribes in the earliest environmental laws including NEPA, the CAA, the CWA, the SDWA, and FIFRA). *See also* Don Wharton, Native American Rights Fund, *Implementation of EPA's Indian Policy and Tribal Amendments to Federal Environmental Law*, Paper, Proceedings of the American Bar Association Conference, Feb. 20, 1992.
35. *American Indian Today—Answers to Your Questions*, 1991 Edition, U.S. Dept. of the Interior, Bureau of Indian Affairs at 9.
36. See Grijalva, *supra* note 29, for in-depth discussion of early legislation and amendments adding Indian tribes.
37. James Gustave Speth, The Bridge at the Edge of the World 210 (2008). Prof. James Speth describes the need for a new worldview that overcomes human alienation from nature—a reenchantment with the natural world; suggesting indigenous people are best at making the connection between humans and nature.
38. Daniel R. Wildcat, Red Alert! Saving the Planet With Indigenous Knowledge (2009) (using indigenous knowledge to heal the earth from the wounds of global climate change).
39. Grijalva, *supra* note 29, at 196, n.36.
40. For in-depth understanding of the reverence and religious significance in which many tribes hold the earth, land, water, and air, see Christopher McLeod, In the Light of Reverence (2001).
41. Wildcat, *supra* note 38, at 56-60 and 73-78.
42. *See* NEPA, 42 U.S.C. §4331(a), where Congress recognized "the profound impact of man's activities on the interrelations of all components of the natural environment . . . [and] the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man. . . ."
43. Philip Shabecoff, A Fierce Green Fire, The American Environmental Movement 15 (1993).
44. Wildcat, *supra* note 38, at 38.
45. 42 U.S.C. §4333.
46. Wildcat, *supra* note 38, at 99. For a different perspective on the "nature-culture" nexus in the dominant culture, see Karl Brooks, *Environmental History as Kansas History*, 29 Kan. Hist. 116 (Summer 2006), *available at* http://www.kshs.org/publicat/history/2006summer_brooks.pdf (environmental historians review "the rich, contingent interplay between culture and nature . . . [and offer] a new appraisal of the constant communications between people and the earth's other life-forms").
47. Wildcat, *supra* note 38, at 99.
48. Wildcat, *supra* note 38, at 101 and 103 (indigenous realism is useful knowledge and "indigenous natural law ought to be the foundation of an elementary school ecology lesson in every science curriculum around the world").

also recognize and consider the "rich contingent interplay between culture and nature" in order to "better appreciate how then became now."[49]

### 3. Amending Environmental Laws to Include Indians

Congress eventually included tribes in environmental legislation by amending several laws, beginning with the CAA in 1977,[50] FIFRA in 1978,[51] the CWA in 1987,[52] the SDWA in 1986,[53] the Superfund law in 1986,[54] and the CAA again in 1990.[55] In general, these major environmental laws, regulations, and policies include a role for tribal governments as co-regulators of the environment with the federal government, although the tribal role in FIFRA is limited. The CAA, the CWA, the SDWA and Superfund all include treatment-in-the-same-manner-as-a-state or "TAS" statutory language. These provisions authorize EPA to approve eligible tribes to implement federal environmental programs via delegation of federal authority or approval of inherent tribal authority. TAS may authorize tribes to be the primary enforcement authority, commonly referred to as "primacy." TAS provisions support general principles of federal Indian law that recognize inherent tribal sovereignty particularly over matters impacting the health and welfare of the tribal members.[56] Also, these provisions effectively keep state environmental programs out of Indian country.

The TAS amendments show that Congress recognizes tribal self-governance and sovereignty over the environment. However, tribes need support to develop capacity to implement environmental programs. Congress recognized the disparity between state and tribal environmental capacity and passed the Indian Environmental General Assistance Program Act of 1992, which provides funds for tribal environmental capacity-building.[57] Congress is not alone in supporting tribal self-governance.

The executive branch also embraces tribal government partnerships and recognizes tribal sovereignty. The Barack Obama Administration recently decided to review the United Nations Declaration of the Rights of Indigenous Peoples for acceptance by the United States.[58] EPA Administrator Jackson has made building strong partnerships with tribes a priority.[59] EPA's long-standing support for sovereignty is stated in the 1984 Indian Policy,[60] the anti-checkerboard policy of 1991,[61] and is reflected in the Consultation and Coordination With Indian Tribes Policy of 2011.[62]

Notwithstanding the congressional amendments of other environmental laws and the Obama Administration's advancements in federal Indian policies, a limited role for tribal governments persists under FIFRA. The statute should be brought up-to-date like other environmental laws, so that tribes have the opportunity to co-regulate pesticide use in Indian country as full partners with EPA in the same way tribes are partners under other environmental regulatory programs. Although some federal Indian law scholars contend that FIFRA includes a TAS provision, it does not.[63] Congress should add an explicit TAS provision, or EPA should interpret FIFRA as having an implicit TAS provision.

## *C. Federal Jurisdiction in Indian Country*

The scope of federal power in Indian country is known as the "federal plenary power," and it is extremely broad. It can be used to reform FIFRA and enhance the role for tribes. However, federal plenary power is not unlimited in Indian country.[64] Federal powers in Indian country stem from the early 19th century doctrine of discovery as described in the case of *Johnson v. M'Intosh*.[65] In *Johnson*, Chief Justice John Marshall addressed the central issues of how our young country could legally exercise superior sovereignty over the Indian nations, who enjoyed free reign over the country

49. Brooks, *supra* note 46, at 131.
50. 42 U.S.C. §7474(c)) (1977 CAA amended authorizing reservation airshed redesignations by Indian governing bodies).
51. 7 U.S.C. §136, (FIFRA amended to add tribes in 1978).
52. 33 U.S.C. §1377(d), (CWA amended to add tribes in 1987).
53. 42 U.S.C. §300j-11, (SDWA amended to add tribes in 1987).
54. 42 U.S.C. §9626 (amended to add tribes by the Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, Oct. 17, 1986).
55. 42 U.S.C. §§7474 and 7601(d) (CAA amended to add TAS in 1990).
56. *Montana*, *supra* note 25; *see also* Grijalva, *supra* note 29.
57. Indian General Assistance Program Act, 42 U.S.C. §4368b (2006).
58. Valerie Richardson, *Obama Adopts U.N. Manifesto on Rights of Indigenous Peoples*, Wash. Times, Dec. 16, 2010 (President Barack Obama reconsidering U.S. opposition to the United Nations Declaration on the Rights of Indigenous Peoples. *See* U.S. Department of State website, *U.N. Declaration on the Rights of Indigenous Peoples Review*, http://www.state.gov/s/tribalconsultation/declaration (last visited Nov. 30, 2011).
59. *See supra* note 3.
60. EPA Indian Policy *supra* note 4.
61. U.S. EPA, *A Concept Paper on Federal, Tribal, and State Roles in the Protection and Regulation of Reservation Environments*, Administrator William K. Reilly, July 10, 1991 [hereinafter EPA Concept Paper] (provides that tribes are appropriate party to regulate reservation, even when non-members hold fee land. The goal is to have a unified management of the environment within reservations.).
62. *EPA Policy on Consultation and Coordination With Indian Tribes*, May 4, 2011, http://www.epa.gov/tp/pdf/cons-and-coord-with-indian-tribes-policy.pdf (last visited Dec. 12, 2011).
63. Grijalva, *supra* note 29, at 219 (EPA's approach to FIFRA allows tribal governments to issue certifications to pesticide applicators in Indian country including non-Indian applicators). To that limited extent, tribes may be treated in a manner similar to states, i.e., for the certification and training (C&T) program. *See* 40 C.F.R. §171.10. However, this certification scheme contains no statutory or TAS language. Most significantly, a tribal C&T program does not authorize a tribe to take enforcement actions, e.g., assessing FIFRA penalties for pesticide misuse. The only enforcement component is for the tribe to suspend, modify, or revoke the applicator's tribally issued certification.
64. Federal plenary authority in Indian country was an issue in *United States v. Billy Jo Lara*, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004) (Congress possesses the constitutional power to relax restrictions that the federal government has placed on the exercise of tribal inherent legal authority, including from taking actions that modify or adjust the tribes' sovereign status). Inviting the Court to challenge the scope of federal plenary power, Justice Clarence Thomas, concurring in the majority opinion, explains that he "cannot agree . . . that the Constitution grants to [C]ongress plenary power to calibrate the 'metes and bounds of tribal sovereignty' . . . [T]he Court should admit that it has failed in its quest to find a source of congressional power to adjust tribal sovereignty." *Id.* at 1648.
65. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823).

before discovery.[66] "By deeming Indian tribes 'domestic dependent nations,' Marshall ensured that neither foreign powers nor any of the several states would meddle in Indian affairs."[67] The Marshall Trilogy[68] includes two more Indian law opinions from Chief Justice Marshall and taken together, the three define federal plenary authority, the federal trust responsibility in Indian country, and established the presumption against application of state laws within Indian country. Regardless of the "judicial alchemy" that might describe the reasoning behind the Marshall Trilogy, the domestic federal courts follow common-law precedents to justify federal plenary authority over Indians and Indian country.[69] Although the courts and the Constitution support plenary power,[70] this power is modulated by the federal Trust Responsibility Doctrine.[71]

### 1. Limits on "Plenary" Power

Despite its common meaning, "plenary" in the context of power over Indians and Indian country does not mean complete.[72] Congressional plenary power must be exercised within reason and tied rationally to the federal trust responsibility.[73] For Congress, that means acting in the best interests of the Indians, which is a moral responsibility of the highest fiduciary duty. Also, tribes should be able to rely on the "[j]udicial checking power of congressional interests in Indian affairs,"[74] but "the Supreme Court itself arguably is the current primary wielder of a plenary authority adverse to native interests."[75] Some legal scholars argue that the plenary authority of Congress as articulated under the doctrine of discovery is "ultimately genocidal in both its practice and intent."[76] Other scholars believe the plenary power offers reliability.[77] Justice Clarence Thomas has gone so far as to suggest that congressional plenary power to adjust tribal sovereignty has no basis in the Constitution.[78] Notwithstanding its plenary power, Congress may legislate within its constitutional powers, including enacting laws that apply in Indian country.[79]

### 2. The *Tuscarora* Rule as Applied to FIFRA

Federal environmental laws, like most general federal laws, apply in Indian country.[80] The Court's leading case

66. The doctrine of discovery was not universally accepted, and some views were contrary to Chief Justice John Marshall's opinion in *Johnson.* The 15th century legal theorist, Franciscus de Victoria (1480-1546), provided an alternate view. *See* Getches, *supra* note 18, at 49-51. The basic principles that Victoria developed were that according to natural law, the Indians whose lands were "discovered" by Spain were free and were therefore "true owners" of the territory they possessed. *Id.* Victoria dismissed the popular theory of "title by first discovery." *Id.* It seems some of Victoria's theories entered into Justice Marshall's thinking in later cases. Victoria suggested that Indians should be placed under a civilized nation's guardianship. *Id.* The civilized nation would then hold just title over the property of the Indians and undertake the responsibility for administering their affairs. *Id.* Some of Victoria's ideas appeared in *Cherokee Nation v. Georgia* where the Chief Justice said: "[T]heir relation to the United States resembles that of a ward to his guardian." Nevertheless, who can say how Justice Marshall invented "domestic dependent nations," words that confound us to this very day.
67. Eric Kades, *History and Interpretation of the Great Case of* Johnson v. M'Intosh, 19 L. & Hist. Rev. 1, 127 (Spring 2001).
68. Cherokee Nation v. Georgia, 30 U.S. 1, 5 Pet. 1, 8 L. Ed. 25 (1831); and Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832).
69. Royster & Fausett, *supra* note 19, at 586.
70. U.S. Const. art. I, §8, cl. 3, the Indian Commerce Clause; art. II, §2, cl. 2, the Treaty Clause; and art. VI, cl. 2, the Supremacy Clause. *But see* Justice Thomas' concurrence in *Lara*, *supra* note 64, where he suggests revisiting the constitutional underpinnings of the federal powers, "I cannot agree that the Indian Commerce Clause provides Congress with plenary power to legislate in the field of Indian affairs". . . and "I would be willing to revisit the question."
71. It has been said that Congress has absolute power over tribes and Indian country. The Trust Relationship Doctrine acts as a check on that power because it creates moral responsibilities of the highest fiduciary duty. The origins of the Trust Relationship Doctrine are found in both *Cherokee Nation v. Georgia*, (guardian/ward relationship) and *United States v. Kagama*, 118 U.S. 375, 384-85 (1886):

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers . . . must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the Tribes.

After *Kagama*, numerous cases characterized congressional power over Indian affairs as plenary; Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S. Ct. 216 (1903) (federal power to abrogate provisions of an Indian treaty "though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interests of the country and the Indians themselves, that it should be so"); and United States v. Sandoval, 231 U.S. 28, 34 S. Ct. 1 (1913):

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the power and duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and within or without the limits of a State.

72. "Plenary: complete in every respect : absolute, unqualified," Merriam-Webster.com, http://www.merriam-webster.com/dictionary/plenary (last visited Dec. 12, 2011).
73. Bryan v. Itasca County, 426 U.S. 373 (1976) ("[W]e must be guided by the eminently sound and vital canon . . . 'statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians,' *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918)."); and McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 93 S. Ct. 1257 (1973) (holding that Indian treaties are to be interpreted such that "doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and in good faith").
74. Royster & Fausett, *supra* note 19, at n.22, debating views that judicial review of congressional actions represents a significant narrowing of the plenary power doctrine.
75. *Id.*
76. *Id.* at n.15 (citing Robert Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*," 1986 Wis. L. Rev. 219, 260-65).
77. *Id.* at n.15 (citing R. Laurence, *Learning to Live With the Plenary Power of Congress Over the Indian Nations: An Essay in Reaction to Professor Williams' "Algebra,"* 30 Ariz. L. Rev. 413, 416-19 (1988)).
78. *Lara*, *supra* note 64.
79. Royster & Fausett, *supra* note 19.
80. For a detailed discussion of the applications of the *Tuscarora* Rule to general federal laws including environmental laws, see Royster & Fausett, *supra* note 19, at 591. *See also* Washington Dept. of Ecology v. EPA, 725 F.2d 1465 (9th Cir. 1985) (RCRA is applicable to hazardous waste activities of Indians on reservations); United States v. Dion, 476 U.S. 734, 743 (1986) (The legislative history of Bald Eagle Protection Act, and express provisions for permits to natives to take eagles for religious purposes, reflected Congress' belief "that it was abrogating the rights of Indians to take eagles."); Blue Legs v. EPA, 668 F. Supp 1329 (D.S.D. 1987) (tribes and federal agencies are bound by the RCRA requirements prohibiting "open dumps" on Indian lands; however, RCRA does not grant EPA authority over open dumping of solid wastes.); and Nance v. EPA, 645 F.2d 701 (9th Cir. 1981) (The CAA applies in Indian country.).

on applicability of federal laws in Indian country is *Federal Power Commission v. Tuscarora Indian Nation*.[81] The Court held that absent a treaty or federal statute to the contrary, federal laws of general applicability apply also to natives and to native tribes.[82] Known as the *Tuscarora* Rule, the principle is that a "general statute in terms of applying to all persons includes Indians and their property interest."[83] However, some exceptions apply when difficult cases arise where a statute of general applicability conflicts with Indian rights.[84]

Congress explicitly authorizes tribal governments to cooperate in FIFRA implementation, but that only implies that FIFRA is applicable in Indian country.[85] Under administrative enforcement, the Agency has pursued FIFRA violators in Indian country with success,[86] but no one has challenged applicability of the law in Indian country. For example, a tribal pesticide applicator could misuse a pesticide in violation of FIFRA and contend that he or she is only subject to tribal law and not FIFRA based on a specific treaty provision. Most likely, the courts would uphold application of FIFRA under the *Tuscarora* Rule because FIFRA is generally applicable to all persons. The outcome of this hypothetical case would depend on the specific treaty language at issue. Thus, it is possible that a tribe may have treaty rights that could nullify FIFRA's application in their territory. This is simply a reflection of the power of treaty rights and tribal sovereignty.

### *D. Tribal Jurisdiction and Its Limitations*

Tribal sovereign power is inherent from time immemorial, and its existence is presumed.[87] Tribal jurisdiction to govern flows from this inherent power. Limits on tribal authority or jurisdiction have been imposed by treaty, excised by federal legislation, and divested by the courts. For example, the federal judiciary implicitly divested tribes of some jurisdiction in Indian country.[88] On the other hand, tribal inherent authority can be protected by treaty such as usufruct treaty rights,[89] recognized by federal delegation, or reaffirmed by acts of Congress.[90]

Generally, Indian reservation boundaries form a political boundary between tribes and states. A casual observer might suppose that tribal jurisdiction should be exercised over persons, places, and activities within reservation boundaries, and state governments should regulate persons and activities outside said boundaries. However, this is not necessarily true.[91] Indian reservations often include land owned by the federal government, held in trust for tribes or individual Indians, and lands owned in fee-simple by non-Indians (fee land) as a result of the Allotment Era.[92] The activities of non-Indians on fee lands are not always subject to tribal jurisdiction. As discuss further below, the Supreme Court's decision in the seminal *Montana v. United States*[93] case implicitly divested tribes of some civil jurisdiction over non-Indian persons' activities on fee land and to a very limited extent on trust lands.[94] Thus, states may have jurisdiction in Indian country in certain situations involving non-Indians.[95]

Tribal jurisdiction over the environment is an inherent governmental authority necessary for tribes to protect the health and welfare of their members and the integrity of the reservation environment. This Article proposes that tribes should be free to exercise inherent authority over pes-

81. Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960).
82. *Id.* at 123-24 (absent a treaty or federal statute to the contrary, federal laws of general applicability apply also to natives and to native tribes).
83. *Id.* at 116.
84. *See* Getches, *supra* note 18, at 327, where the authors note that difficult cases arise when a statue of general applicability conflicts with Indian rights. The principle announced in *Tuscarora* that a "general statute in terms applying to all persons includes Indians and their property interest" is subject to certain exceptions:

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof or by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations. . . .

*Id.* There is a split among the circuit courts on the application of the *Tuscarora* Rule, *id.* (OSHA could not apply on Navajo Nation because of treaty guarantee); Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985) (opposite result; OSHA could apply on Coeur d'Alene); U.S. Department of Labor v. Occupational Safety & Health Review Commission, 935 F.2d 182 (9th Cir. 1991) (OSHA applies on the Warm Springs Reservation); Lumber Industry Pension Fund v. Warm Springs Forest Products Industries, 939 F.2d 683 (9th Cir. 1992) (ERISA applies on the Warm Springs Reservation); *cf.* Smart v. State Farm Insurance Co., 868 F.2d 929 (7th Cir. 1989) (denial of ERISA benefits to tribal member has no effect on tribal self-governance).
85. FIFRA, 7 U.S.C. §136u, providing that tribes may cooperate with EPA in the enforcement of FIFRA indicates that Congress intended FIFRA to apply in Indian country.
86. In the Matter of Washington Liquid Fertilizer Company, Incorporated, 2003 WL 22891309 (EPA). This Consent Agreement Final Order resolved the alleged FIFRA violation related to the Respondent's aerial application of rodenticide in a manner inconsistent with labeling. The misuse occurred on fee lands within the Yakama Indian Reservation.
87. Royster & Fausett, *supra* note 19, at 593.
88. Montana v. United States, 450 U.S. 544 (1981) and its progeny, Strate v. A-1 Contractors, 520 U.S. 438 (1997); Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001); Nevada v. Hicks, 171 S. Ct. 2304 (2001), and Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709 (2008).
89. James M. Grijalva, *Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters*, 71 N.D. L. Rev. 433, 442 (1995).
90. Indian Civil Rights Act Amendment (*Duro* Fix), 105 Stat. 646 (Oct. 28, 1991) (codified as amended at 25 U.S.C. §§1301-1303 (2006)) [hereinafter *Duro* Fix]. Congress amended the Indian Civil Rights Act to reaffirm inherent tribal court criminal authority over all Indians and was upheld as constitutional in *Lara*, *supra* note 64, and *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005). *See* Duro v. Reina, 495 U. S. 676, 679 (1990) (holding that a tribe no longer possessed *inherent or sovereign authority* to prosecute a non-member Indian). Soon after, Congress enacted the *Duro* Fix, specifically authorizing a tribe to prosecute Indian members of a different tribe.
91. Grijalva, *supra* note 89, at 442.
92. For a full discussion of the depressing Allotment Era of Federal Indian Policy, see Getches, *supra* note 18, at 141-90.
93. 450 U.S. 544 (1981).
94. Nevada v. Hicks, 121 S. Ct. 2304, 2308 (2001) (tribal courts lack jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation). The Court also affirmed application of the principles announced in *Montana*, even though in *Hicks* the non-Indian activities occurred on tribal trust lands, rather than fee lands as in *Montana*.
95. *Id.*; *see* Grijalva, *supra* note 89, at 446.

ticide users in Indian country and rely on such authority for primary enforcement authority under FIFRA, despite other limitations on tribal authority imposed by Congress and the Court. A basic understanding of tribal inherent authority and its limitations is essential to understanding the basis for FIFRA reforms proposed herein.

### 1. Inherent Tribal Authority

The basis for inherent tribal authority is tribal sovereignty.[96] Tribal governments need a broad definition of sovereignty to regulate the environment, e.g., sovereignty is "a timeless trust, emanating out of the past, binding the ancestors—the living and the unborn—with the sacred land, empowering and obligating all, and insuring that the road of the people in the world will continue."[97] Tribal sovereignty means that a tribal government has authority over tribal members and territory.[98] Territorial jurisdiction of tribes, like that of other sovereigns, extends to the land base.[99] However, unlike other sovereigns, tribal civil jurisdiction over non-members' fee land within that land base is limited by judicial divestment.[100]

Inherent tribal authority over people and their activities stems from the tribal sovereign's authority "to make their own laws and be ruled by them."[101] Tribal governments exercise jurisdiction over tribal members by maintaining the right to control tribal internal and social affairs. However, tribal civil jurisdiction over non-members and their activities within Indian country and criminal jurisdiction over non-Indians has been limited by judicial divesture and acts of Congress.[102] Thus, tribal jurisdiction over people, land, and activities in Indian country is a confusing morass that depends on membership in the tribe and land status where an activity occurs.

### 2. Limits on Inherent Tribal Authority

Tribes retain all inherent powers of national sovereignty that have not been lost by operation of the federal government. For example, tribal inherent powers can be diminished by operation of treaties, statutes, and judicial decisions.[103] Legal scholars disagree about whether judicial divesture of a tribal power necessarily arrogates that power to the judiciary or Congress.[104] However, when a tribe loses power by statute, it becomes subject to federal authority, although *not* usually subject to state jurisdiction.[105] For example, in the Major Crimes Act, 18 U.S.C.A. §1153, Congress divested tribes of criminal jurisdiction over Indians for certain crimes. Thus, jurisdiction to prosecute Indians for crimes in Indian country rests with the U.S. Attorney. In 1978, the Court divested tribes of their jurisdiction to prosecute non-members for crimes committed in Indian country in *Oliphant v. Suquamish Tribe*.[106] As a result of that judicial divestment, criminal jurisdiction over non-Indian perpetrators in Indian country now rests with either the state or federal government.

The twin divestments (statutory and judicial) of tribal criminal jurisdiction are significant for development of tribal pesticide programs under FIFRA because, like most environmental laws, it includes criminal penalties. To resolve the criminal jurisdiction problem, EPA and the federal U.S. Attorneys generally prosecute federal environmental crimes in Indian country, and EPA does not authorize or delegate criminal prosecutorial authority to tribes.

The judicial divestment of civil jurisdiction over non-member activities in *Montana*[107] is very significant for the development of tribal pesticide programs, because tribes need environmental regulatory authority over their members and non-members (regardless of their identity as Indians) to control pesticide pollution within reservations. In this landmark opinion, the Court prescribes a general presumption that, absent congressional delegation, Indian authority does not extend "beyond what is necessary to protect tribal self-government or to control internal relations."[108] The Court established two exceptions (called the *Montana* test) under which tribes retain authority: first, regulation of non-members engaged in consensual

96. Grijalva, *supra* note 89, at 445.
97. Defining sovereignty is important for a thorough discussion of authority to regulate. *See* John Ragsdale, *The United Tribe of Shawnee Indians: The Battle for Recognition*, 69 UMKC L. Rev. 311, 361 (Winter 2000). Sovereignty includes fairness, the rule of law, and the ability of the sovereign to make laws and live by them.
98. Grijalva, *supra* note 89, at 445.
99. *Id.*
100. Royster & Fausett, *supra* note 19, at 595, n.45, discussing the Supreme Court's principle holdings in *Montana v. United States*, 450 U.S. 544 (1981).
101. *Id.* at 595 and n.42 (citing New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55056 (1978); Williams v. Lee, 358 U.S. 217, 220 (1959); and Worcester v. Georgia, 31 U.S. (Pet.) 515, 561 (1832)). Profs. Judith Royster and Rory Fausett might not include *Worcester* to support sovereignty if they wrote their article after the *Hicks* case.
102. Montana v. United States, 450 U.S. 544 (1981), Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), Major Crimes Act, 18 U.S.C.A. §1153; *see also* Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA L. Rev. 553 (2009).
103. Royster & Fausett, *supra* note 19, at 594, note 40.
104. *Id.* (Professor Royster states that "[w]here a tribe loses a power by 'implicit divestiture,' however, the arrogation of power belongs to the courts despite the fact that plenary power is said to reside exclusively in the legislative branch."). However, Samuel Ennis and other legal scholars argue that congressional plenary power may restore judicial divestments. *See* Ennis, *supra* note 102, at 598 and 603, n.307 (citing Alex Tallchief Skibine, *Making Sense Out of* Nevada v. Hicks: *A Reinterpretation*, 14 St. Thomas L. Rev. 347, 367 (2001)) ("[T]hese judicially divested tribal powers should be conceptualized as having been transferred in trust upon the tribes' incorporation into the United States. As such, these powers are held in trust by the United States for the benefit of the tribes.").
105. Royster & Fausett, *supra* note 19, at 595 and n.43; *but see* Public Law No. 280, where Congress did authorize state jurisdiction, Pub. L. No. 280, 28 U.S.C. §1360.
106. The Supreme Court ruled that tribal governments are divested of criminal jurisdiction over non-Indians for crimes committed in Indian country because such jurisdiction would be "inconsistent with their status." *Oliphant*, 435 U.S. at n.208.
107. Montana v. United States, 450 U.S. 544 (1981) (the Court held that the Crow Tribe did not have authority to regulate hunting and fishing by non-Indians on non-Indian fee lands within the reservation.)
108. *Id.* at 564 (exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation).

relations with Indians; second, regulation of conduct of non-members on fee land when it "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[109] Recent decisions of the Court have complicated the *Montana* test.[110] Legal scholars contend that the *Nevada v. Hicks* opinion stretched the *Montana* test by applying it to trust lands.[111] Nevertheless, the lower courts have repeatedly sustained tribal environmental regulatory authority over Indian reservations and the activities of both Indians and non-Indians within reservations.[112]

### 3. Effect of Limited Tribal Authority on Tribal Pesticide Programs

EPA has not clearly identified how tribes may demonstrate inherent authority for a tribal pesticide program. It is difficult to interpret FIFRA because the law and regulations are ambiguous where they provide a role for tribes. FIFRA, unlike other environmental laws and regulations, has no explicit provisions where EPA has authority to "treat tribes in a manner similar to states" (TAS). For example, in the CWA, tribes may submit TAS eligibility applications and demonstrate tribal inherent authority to implement a program in the same manner as a state. If necessary to regulate non-members, tribes overcome the *Montana* "general proposition"[113] under the second exception. Again, using the CWA as an example, EPA has made generalized findings that environmental regulatory programs addressing surface water pollution will cause serious and substantial impacts on human health and welfare.[114] Moreover, when necessary, EPA will make specific findings of fact about environmental impacts on the health and welfare of the tribe.

In 2008, EPA issued a new TAS Strategy guidance to improve, simplify, and streamline the process for TAS eligibility applications under the CWA, the CAA, and the SDWA.[115] Due to the lack of explicit TAS provisions and the ambiguities in FIFRA, tribal pesticide programs were not included in that strategy. Although FIFRA regulations allow a role for tribes similar to states for applicator certification programs, the Agency continues to provide no guidance on the relevance of the *Montana* test when reviewing an application for eligibility to implement a FIFRA program in Indian country, Tribal C&T Plan, or a cooperative agreement for outreach or enforcement.

### 4. Treaty-Based Tribal Authority

A significant source of tribal jurisdiction over non-Indians is a federal treaty, which for all practical purposes alleviates the need to examine inherent authority at least for trust lands.[116] The federal government promises many tribes the "exclusive and undisturbed use and occupation" of certain lands in exchange for the tribes' cession of huge tracts of other lands.[117] Traditionally, treaty rights give tribes the power to exclude non-Indians, or allow them on the reservation only if they act in accordance with tribal

109. *Id.* at 565.

110. The cases interpreting *Montana* are about distinct matters not related to environmental regulation. *See* Strate v. A-1 Contractors, 520 U.S. 438 (1997) (tribe's adjudicative authority does not exceed its legislative authority—tort case); Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001) (tribal authority does not extend to tax hotel guests at hotel located on fee land within the Navajo reservation—tax case); Nevada v. Hicks, 171 S. Ct. 2304 (2001) (tort case); and Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709 (2008) (bank foreclosure).

111. For example, the Court's decision in *Nevada v. Hicks*, 121 S. Ct. 2304 (2001), affects the exercise of tribal authority over non-member activities on trust land that impact the reservation environment. Legal scholars contend that the *Hicks* opinion stretched the *Montana* test by applying it to trust lands. *See generally* Judith Royster, *Montana at the Crossroads*, 38 Conn. L. Rev. 631 (2006). See also John W. Ragsdale Jr., *Treaty-Based Exclusions From the Boundaries and Jurisdiction of the States*, 71 UMKC L. Rev. 763, 775-76 (2003), for a critique of the Court's decision in *Hicks*, noting the significance of the Court's holding that the state had an inherent jurisdiction, concurrent with the federal government that would permit search and seizure of tribal members on tribal land, and arguing that this opinion goes a considerable way toward the elimination of the presumption against state regulatory capability on tribal lands. However, Professor Ragsdale's thesis did not focus on tribal environmental regulatory jurisdiction. *See also* Edwin Kneedler, *Indian Law in the Last Thirty Years: How Cases Get to the Supreme Court and How They Are Briefed,* 28 Am. Indian L. Rev. 274, 283 (2004) ("*Nevada v. Hicks* is widely regarded as very adverse for tribal interests. I think that view can be overstated . . . the majority decision actually rests on fairly narrow grounds. It has to do with the interests of the state officer as the defendant—not non-Indians general.").

112. Letter from Reid Peyton Chambers et al., to Christine Todd Whitman, U.S. EPA Administrator, *Tribal Authority Over Environmental Activities Within Reservation Boundaries* (June 17, 2002), at 8, 9 and 10 [hereinafter Chambers Correspondence] (citing Wisconsin v. EPA, 266 F.3d 741 (7th Cir), *cert. denied*, 70 U.S.L.W. 3562 (June 3, 2002) (No. 01-1247)) (held that the Mole Lake Band of Lake Superior Chippewa Tribe could be treated as a state under the CWA). The U.S. Court of Appeals for the Seventh Circuit discussed *Hicks*, noting that the case before it did "not involve any question of the tribe's ability to restrict activities of state law enforcement authorities on the reservation, when those officials are investigating off-reservation crimes. *Id.*, at 8-10. *See also Montana v. EPA*, 137 F.3d 1135 (9th Cir.), *cert. denied*, 525 U.S. 921 (1998) (upheld EPA's decision to grant TAS status under the CWA to the Confederated Salish and Kootenai Tribes); and City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997) (upheld EPA's application of the Pueblo of Isleta's water quality standards to the city of Albuquerque's upstream discharges in a federal NPDES permit issued by EPA).

113. Royster, *supra* note 111.

114. For an in-depth discussion of the application of the *Montana* test and the CWA, see EPA regulations on tribal eligibility to implement CWA programs in the same manner as states. 56 Fed. Reg. 64877-78 (Dec. 12, 1991). This rulemaking says the ultimate decision regarding tribal authority must be made on a tribe-by-tribe basis. This preamble says that EPA would read the second *Montana* exception as requiring "a showing that the potential impacts of regulate activities on the tribe are serious and substantial." Serious and substantial requirement was added because of the Court's decision in *Brendale v. Confederated Tribes*, 492 U.S. 408 (1989). EPA stated further that "activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare" and, accordingly, "tribes will usually be able to meet the Agency's operating rule." EPA also observed that because of the highly mobile nature of pollutants, non-Indian activities on fee land is very likely to affect tribal lands.

115. *See generally* Coursen, *supra* note 14.

116. *But see* Justice David Souter's dissent in *Lara*, *supra* note 64 (Montana test applies on trust land). Professor Royster contends that Justice Souter's "proposal to extend Montana to non-member conduct on trust lands would substitute non-member expectations for tribal governmental authority, eviscerate the sovereign right of the tribes to exclude non-members from tribal lands and abrogate the treaty right to tribal use and occupation of tribal lands." Royster, *supra* note 111, at 647.

117. *See* United States v. Shoshone Tribe, 304 U.S. 111, 113 (1938) (addressing Shoshone Tribe's property rights under an 1868 treaty).

conditions.[118] Also, the Supreme Court has upheld Indian usufruct use of property treaty rights for ceded lands.[119]

Treaty-based rights to regulate non-Indians on fee lands can be lost when Congress opens a reservation for non-Indian land use/ownership.[120] Certain allotment acts and flood control acts that opened lands to non-Indians resulted in some tribes losing their treaty rights to exclude non-Indians from the reservation.[121] The loss of treaty rights need not necessarily abrogate tribal inherent authority.[122] Finally, treaty rights are important to consider to the extent they affect the application of FIFRA in Indian country for any particular Indian reservation.

## 5. Tribal Authority Under Federal Delegation

Tribal governments may assume regulatory authority under federal delegation.[123] Based on plenary powers, Congress may delegate federal environmental authority to tribes. For example, Congress delegated authority to tribes under the CAA to administer air pollution control programs within Indian country.[124] Congress does not need a particular verbal formula when delegating to tribes.[125]

Profs. Judith Royster and Rory Fausett note that one of the advantages of federal delegation of environmental programs to tribes is that the delegation necessarily preempts state authority for the same program.[126] Limitations on state jurisdiction in Indian country are necessary because tribes have a particular "status as pre-Constitutional semi-sovereign nations."[127] Furthermore, because pollution recognizes no boundaries (political or private property lines), a unified tribal environmental regulatory system with federal oversight is essential for efficient and effective environmental management and pollution control within tribal political boundaries. EPA policies explicitly support the unified administration of environmental regulatory programs within Indian reservations.[128]

Delegation of federal authority provides firm support for tribal environmental regulatory authority compared to authorizing tribal inherent authority, due to the *Montana* "general proposition" described above.[129] Nevertheless, delegated authority is no panacea. Professors Royster and Fausett point out that a primary difficulty with federal delegation is not legal, but perceptual.[130] The perception is that inherent tribal authority is diminished whenever tribes act under delegation of federal authority instead of inherent tribal powers.[131] Some legal scholars describe federal delegation as "offensive" or "both inappropriate and insulting" to tribes because it usurps tribal laws and traditions, and suggests tribal courts are inadequate.[132] Other legal scholars are even more disparaging and suggest that the distinction between federal delegation and inherent tribal authority "has critical implications for tribes' ability to reflect, preserve, and develop their specific culture through their judiciaries. Inherent sovereignty allows tribes to preserve their own unique customs and social order."[133] Federal delegation has important consequences for tribal enforcement of environmental laws: "tribal courts would be exercising power authorized by the federal government, thus prohibiting dual prosecutions" and tribal courts would be "Americanized" by conforming to the federal

118. Grijalva, *supra* note 89, at 444-45.
119. Kari Krogseng, Minnesota v. Mille Lacs Band of Chippewa Indians, 27 Ecology L.Q. 771, 772.
120. Grijalva, *supra* note 89, at 444.
121. Grijalva, *supra* note 89, at 445 (citing South Dakota v. Bourland, 113 S. Ct. 2309, 2315-16 (1993)) (holding that the Cheyenne River Sioux Tribe lost its treaty-based right to regulate non-Indians on waters overlying fee lands opened to non-Indian use by federal flood controls acts); and *Montana*, 450 U.S. at 547-49 (holding that the Crow Tribe lost its treaty-based right to regulate non-Indians on lands made available to non-Indian ownership through Allotment Acts).
122. *Id.* Although Prof. James Grijalva describes the loss of treaty rights for the Crow Tribe, the tribe's inherent tribal authority could have remained, provided one of the *Montana* test exceptions could have been met (although that was not the case for the Crow Tribe).
123. United States v. Mazurie, 419 U.S. 544, 557 (1975) (Rehnquist, J.):
> [W]hen Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life . . . [T]he independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority "to regulate Commerce . . . with the Indian tribes."

124. Chambers Correspondence, *supra* note 112, at 2 (citing Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 428 (1989)) (White, J.) (plurality opinion citing the CWA as an example of federal delegation); Nance v. EPA, 465 F.2d 701 (9th Cir. 1981), *cert. denied*, 454 U.S. 1091 (1981) (Congress delegated authority under the CAA to tribes to regulate non-member activities where EPA has approved that authority); and Arizona Public Service Co. v. EPA, 211 F.2d 1280 (D.C. Cir. 2000), *cert. denied*, 121 S. Ct. 1600 (2001) (court affirmed EPA regulations implementing the 1990 CAA Amendments; EPA determined that Congress had delegated tribes the authority to administer all air quality programs in Indian country, including fee land owned by non-members. The court found that the express delegation to tribes made it unnecessary to determine whether a tribe possesses "inherent sovereign power" under *Montana.*).
125. Chambers Correspondence, *supra* note 112, at 11-12 (citing Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 1296 (2002)) (Congress delegated authority to tribes over non-members within the reservation with respect to logging activities on fee land). Congress delegated authority by "ratifying and confirming "the tribe's Constitution." *Id.* at 12 (citing *Bugenig* at 1212-13). Also, the court found that no "particular verbal formula" is required to show an express delegation. *Id* at 12 (citing *Bugenig* at 1217).
126. Royster & Fausett, *supra* note 19, at 641.
127. *See* Ennis, *supra* note 102, at 557 (citing Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 880-81 (2d Cir. 1996)):
> Because tribal powers of self-government are 'retained' and predate the federal Constitution, those constitutional limitations that are by their terms or by implication framed as limitations on *federal* and *state* authority do not apply to tribal institutions exercising powers of self-government with respect to members of the tribe or others within the tribe's jurisdiction.

128. *See supra* note 26. EPA's Anti-Checkerboarding Policy provides that the "Agency will view Indian reservations as single administrative units for regulatory purposes. Hence, as a general rule, the Agency will authorize a tribal or state government to manage reservation programs only where that government can demonstrate adequate jurisdiction over pollution sources throughout the reservation. Where, however, a tribe cannot demonstrate jurisdiction over one or more reservation sources, the Agency will retain enforcement primacy for those sources. Until EPA formally authorizes a state or tribal program, the Agency retains full responsibility for program management."
129. Royster, *supra* note 111, at 638.
130. Royster & Fausett, *supra* note 19, at 597.
131. *Id.*
132. Jessica Owley, *Tribal Sovereignty Over Water Quality*, 20 J. Land Use & Envtl. L. 61 at 114-16 (Fall 2004).
133. Ennis, *supra* note 102, at 591-92.

Constitution. However, noted Indian Law scholar Prof. James Grijalva clarifies where the power lies: "[T]he most potent source of tribal jurisdiction over non-Indians is federally-delegated power."[134] Finally, Justice Thomas clearly expresses his theory that "[D]elegated power is the very antithesis of inherent power," concurring in *United States v. Billy Jo Lara* in 2004.[135]

Notwithstanding the potency of federally delegated power and its antipathy to inherent authority, the reforms suggested herein recommend relying on inherent tribal authority to regulate Indian and non-Indian pesticide polluters. EPA should eschew the perception that federally delegated powers are necessary under FIFRA because of any diminishment of tribal inherent authority to regulate pesticides. Relying on inherent authority would strengthen tribal institutions by recognizing their power over pesticide polluters. Although it might be easier to interpret FIFRA as delegation of federal authority, it would be better for EPA to rely on tribal inherent authority, because that would support tribal customs, social order, and traditions that may include indigenous knowledge of pest management.[136] Finally, because inherent tribal authority is fundamentally local, relying on it for tribal pesticide programs is consistent with FIFRA's statutory structure for implementation at the local level.

## II. FIFRA Implementation in Indian Country

### A. *The FIFRA Framework*

FIFRA is a federal environmental law that regulates pesticide users and controls pollution through registration and use restrictions. FIFRA regulates manufacturers, distributors, sellers, and dealers of pesticides, "the so-called economic poisons."[137] Section 3 of FIFRA contains the gist of the law: "no person in any state may distribute or sell to any person any pesticide that is not registered" under this law, with some general exceptions.[138]

Pesticides that are considered too hazardous for use by average users must be registered as RUPs[139] and may be applied only by certified applicators or persons under the supervision of certified applicators.[140] Other pesticides are registered for general use and may be applied without applicator certification.[141] The burden of obtaining pesticide registration is on the manufacturers, who must show safety, i.e., acceptable risk, before being granted registration from EPA.[142] Under FIFRA, the EPA Administrator may cancel a registration or suspend use of a product.[143] Pesticide registration is a nationwide process, but states can establish more stringent regulations, and such state registrations must be described on EPA-approved product labels. The statute also allows EPA to approve experimental use permits.[144]

FIFRA authorizes civil and criminal enforcement against persons who misuse pesticides by violating the usage restrictions or the EPA-approved labeling requirements. The government may issue stop sale, use, removal, and seizure orders if a pesticide is offered for sale in violation of FIFRA.[145] Penalties can be harsh: civil fines up to $5,000; criminal penalties up to $50,000; and not more than one year of imprisonment are allowed under FIFRA.[146] FIFRA is also linked to the Federal Food, Drug, and Cosmetic Act,[147] which prohibits sale or distribution of human or animal food that contains residues of a pesticide, with limited exceptions.

FIFRA anticipates that states will take the lead in pesticide regulation as the primary enforcement authority (primacy).[148] States can regulate the sale or use of federally registered pesticides,[149] register special additional local use of federally registered pesticide,[150] and establish state/local emergency exemptions from federal labeling requirements.[151] All but two states, Colorado and Wyoming, have EPA-approved primacy.[152] Tribes are not mentioned in any of those provisions.

The only FIFRA provision that mentions Indian tribes is §23, where Congress authorizes EPA to enter into cooperative agreements with Indian tribes (and states) delegating to them the authority to cooperate in enforcement actions and to develop and administer pesticide applicator training and certification programs.[153] The 1972 FIFRA was silent

134. Grijalva, *supra* note 89, at 444.
135. *Billy Jo Lara*, 124 S. Ct., at 1642.
136. Indigenous knowledge of pest management may or may not be more effective. However, efficacy is not always the primary concern in pesticide management. Less effective pest management practices that are also less harmful may be better suited for use near schools, homes, or culturally significant plants, e.g., reeds for basket weaving. Moreover, EPA's Tribal Science Council specifically recommends consideration of "integrating Tribal Traditional Lifeways into EPA's current risk assessment process." *See* Addressing Tribal Traditional Lifeways in EPA's Risk Assessment Policies and Procedures Workshop, Jan. 25-27, 2005, http://www.epa.gov/ord/sciencematters/april2011/tribal.htm (last visited Nov. 30, 2011).
137. Zygmunt Plater et al., Environmental Law and Policy: Nature, Law and Society 54-55 (2010).
138. 7 U.S.C. §136a. *See also* FIFRA §12, 7 U.S.C. §136j, which includes a long list of unlawful acts that can subject a person to enforcement action by EPA.
139. 7 U.S.C. §136a(c)(1)(E) *Registration of Pesticides.*
140. 7 U.S.C. §136i, "Use of restricted use pesticides; applicators," which describes the plan for certification of RUP applicators that may be implemented by the federal, state, or tribal government.
141. 7 U.S.C. §136a(c)(1)(E) *Registration of Pesticides.*
142. Plater, *supra* note 137.
143. 7 U.S.C. §136d.
144. 7 U.S.C. §136c.
145. 7 U.S.C. §136k. This provision was added to FIFRA by the Federal Pesticide Act of 1978, Pub. L. No. 95-396.
146. 7 U.S.C. §1361.
147. 21 U.S.C. §§201 et seq.
148. 7 U.S.C. §136w-1.
149. 7 U.S.C. §136v(a).
150. 7 U.S.C. §136v(c).
151. 7 U.S.C. §136p.
152. U.S. EPA website, http://www.epa.gov/compliance/monitoring/programs/fifra/inspections.html (last visited Nov. 30, 2011).
153. 7 U.S.C. §136u, provides in part as follows:
Section 23. State Cooperation, Aid and Training.
(a) Cooperative Agreements—The Administrator may enter into cooperative agreements with states and Indian tribes—
(1) to delegate to any state or Indian tribe the authority to cooperate in the enforcement of this Act through the

on tribes and Indian country, but Congress amended this law in 1978 to include a role for tribes. The reforms suggested herein describe how EPA could interpret §23 to provide TAS, rather than just a role for tribes.

### *B. EPA's Direct Implementation in Indian Country*

In general, EPA directly implements FIFRA in Indian country, including authorizing Tribal C&T Plans[154] and agreements for cooperative enforcement with tribes. Three years before Congress amended §23 to add this authority, EPA interpreted the initial omission of tribes by promulgating a rule in 1975 that attempted to fill this regulatory gap allowing tribes to develop Tribal C&T Plans.[155] Essentially, the 1978 statutory amendment codified the rule and associated tribes with states in the context of cooperative environmental federalism,[156] but only to a limited extent. The rule authorizes eligible tribes to establish Tribal C&T Plans and requires tribes have authority to issue, suspend, revoke, or modify certifications for Indians and non-Indian applicators.[157] Some Indian Law scholars assume such "direct regulatory force" is treating tribes in a manner similar to states for all FIFRA.[158] However, EPA considers pesticide certification akin to a licensing scheme, not a federal regulatory enforcement program. Nothing in the rule or its codification explicitly allows tribes to be the primary enforcement authority for pesticide use violations or implement other essential pesticide programs, e.g., special local needs and emergency exemptions.

EPA has approved only eight Tribal C&T Plans since 1975. The Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota were the first to receive EPA authorization.[159] Three other tribes also have EPA- approved Tribal C&T Plans, including the Rosebud Sioux Tribe[160]; the Cheyenne River Sioux Tribe[161]; and the Shoshone-Bannock Tribes.[162] The 1975 regulations also allow tribes to enter into cooperative agreements with neighboring states and accept state applicator certifications. Thus, an EPA-approved Tribal C&T Plan using a cooperative agreement is essentially tribal recognition of state certification. EPA has approved only four such cooperative agreements, including but not limited to the Santee Sioux Nation in Nebraska and the Prairie Band Potawatomi Nation in Kansas.[163] These cooperative agreements recognize tribal inherent authority, establish Tribal C&T Plans for the reservations based on recognition of state C&T Plans, and rely on EPA regional enforcement authorities for misuse violations.[164]

All FIFRA enforcement activities in Indian country are conducted by EPA regional offices, although EPA allows tribes to cooperate in enforcement under §23. About 30 Indian tribes have pesticide cooperative agreements (grants), which fund activities such as tribal education, training, outreach, and technical assistance for RUP applicators and general pesticide users.[165] Enforcement coop-

use of its personnel or facilities, to train personnel of the state or Indian tribe to cooperate in the enforcement of this Act, and to assist states and Indian tribes in implementing cooperative enforcement programs through grants-in-aid; and

(2) to assist states in developing and administering state programs, and Indian tribes that enter into cooperative agreements, to train and certify applicators consistent with the standards the Administrator prescribes.

Tribes are not mentioned elsewhere in the statute. Even the definition of "state" only includes "a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa." 7 U.S.C. §136(aa).

154. *See* 40 C.F.R. §171.10(a) and 40 Fed. Reg. 11698 (Mar. 12, 1975). The regulation provides in part as follows:

> §171.10 Certification of applicators on Indian Reservations. This section applies to applicators on Indian Reservations.
>
> (a) On Indian Reservations not subject to State jurisdiction the appropriate Indian Governing Body may choose to utilize the State certification program, with the concurrence of the State, or develop its own plan for certifying private and commercial applicators to use or supervise the use of restricted use pesticides.
>
> (1) If the Indian Governing Body decides to utilize the State certification program, it should enter into a cooperative agreement with the State . . . should include matters concerning funding and proper authority for enforcement purposes . . .
>
> (2) If the Indian Governing Body decides to develop its own certification plan, it shall be based on either Federal standards . . . or State standards for certification which have been accepted by EPA. Such plan shall be submitted through the . . . Department of the Interior. . .
>
> (a) On Indian Reservations where the State has assumed jurisdiction under other Federal laws, anyone using . . . [RUPs] . . . shall be certified under the appropriate State . . . plan.
>
> (b) Non-Indians applying [RUPs] on Indian Reservations not subject to State jurisdiction shall be certified either under a State certification plan accepted by the Indian Governing Body or under the Indian Reservation certification plan."

The terms "Indian Reservation" and "Indian Governing Body" are defined in footnotes 1 and 2 in the regulation:

> 1. The term *Indian Reservation* means any federal-recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.
>
> 2. The term *Indian Governing Body* means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

These two footnotes in this 1975 regulation are the only FIFRA regulations that define the applicability of the provisions. Congress did not define "tribes" or "reservation" in the 1978 Amendments.

155. Grijalva, *supra* note 29, at 222.

156. *Id.*

157. For example, power to enforce the certification program must also include powers to allow modification, suspension, or revocation of the applicator's certification, as necessary. In addition, C&T Plans must provide for enforcement of FIFRA subjecting illegal applicators to civil fines or criminal penalties, for example, for misuse of a pesticide or falsification of records required to be maintained by the certified applicator. *See* 40 C.F.R. §§171.10(a) and 171.7(b)(iii)(A) and (B).

158. Grijalva, *supra* note 29, at 220.

159. Coursen, *supra* note 28, at 10585, n.84; *see also* 51 Fed. Reg. 43662 (1986).

160. 56 Fed. Reg. 22429 (1991).

161. *Id.*

162. 56 Fed. Reg. 60106 (1991).

163. *See infra* note 187.

164. Memoranda of Agreement Between Santee Sioux, State of Nebraska, and EPA, on file in EPA Region 7, Kansas City, Kansas.

165. Office of Pesticide Programs, *The National Pesticide Tribal Program: Achieving Public Health and Environmental Protection in Indian Country and Alaska Native Villages*, EPA-735-F-09-007 (Oct. 2009), at 12 (". . . there still remains work to be done. For example, out of the 562 federally recognized tribes, only about 30 have pesticide cooperative agreements with EPA.").

erative agreements also allow tribal inspectors with federal credentials to conduct FIFRA compliance investigations.[166]

EPA encourages tribes to cooperate in enforcement and has issued guidance documents to assist tribes in developing pesticide programs: for example, Guidance for Funding Development and Administration of Tribal Pesticide Field Program and Enforcement Cooperative Agreements (2011)[167]; and Guidance on Basic Elements of an EPA-Funded Tribal Pesticide Program (2002).[168] These guidance documents describe opportunities for tribes to participate in pesticide programs that protect groundwater, agricultural workers, and endangered species, and encourage tribes to enter into enforcement cooperative agreements with EPA that rely on federally credentialed tribal FIFRA inspectors. These policy and guidance documents are insufficient. EPA can do more to encourage tribal pesticide programs and build stronger partnerships with tribes.

### *C. EPA's Trust Responsibility Under FIFRA*

#### 1. The General Trust Responsibility

EPA has the highest fiduciary duty to protect the environment in Indian country in accordance with the specific mandates under FIFRA and the federal government's general trust responsibility owed to tribes.[169] EPA meets its federal trust responsibility by directly implementing FIFRA programs in Indian country[170] and upholding tribal sovereignty.[171] For example, EPA develops tribal pesticide programs, conducts inspections, and takes FIFRA enforcement actions.[172] In addition, EPA proposed a federal C&T Plan that will legalize the use of RUPs in Indian country without other C&T Plans. EPA also established a three-year pilot project that allows a limited opportunity for emergency exceptions and special local needs pesticide products to be used in Indian country, *provided* such exceptions or special local needs pesticides are approved for use in nearby states.[173]

Nevertheless, the Agency is not meeting the general trust responsibility when it continues to disregard the appropriate primary enforcement authority in Indian country, i.e., tribal governments. The way to fully meet the general trust responsibility is to resolve FIFRA's statutory ambiguity, rather than prolong the inaction on making a finding that TAS is implicit in FIFRA. Administrative law scholars contend that EPA has a duty to resolve ambiguous statutory language, rather than deciding not to decide, which allows important statutory objectives to languish in the halls of the bureaucracy sometimes due to politically infected inaction.[174] Although FIFRA §23 has little explicit language and the legislative history is sparse,[175] EPA could interpret the ambiguity in the statute and develop a FIFRA treatment as a state eligibility program for tribes.

#### 2. Finding Treatment in the Same Manner as a State Is Implicit Under FIFRA

Section 23 provides for a delegation of C&T programs to tribal governments and cooperative agreements for enforcement, but explicit treatment in the same manner as a state (TAS) language is absent. Although the term "delegate" suggests Congress is delegating federal authority,[176] it is unclear in §23 because the term modifies "authority to cooperate in enforcement."[177] Couple this vague phrase with the absence of explicit TAS language and sparse legislative history, and ambiguity reigns.[178] Under FIFRA and principles of cooperative federalism,[179] pesticide regulation responsibilities should be shared between EPA and its sovereign partners, the tribes. Thus, EPA may clarify the ambiguity and find TAS for tribal governments is implicit based on a federal/tribal partnership that is the cornerstone for implementing environmental laws.

On the other hand, EPA is hesitant to find TAS implicit in FIFRA because the Agency lost a legal challenge when it attempted to interpret ambiguity and find TAS in RCRA.[180]

166. *Id.*
167. EPA Office of Pesticide Programs, *Guidance for Funding Development and Administration of Tribal Pesticide Field Program and Enforcement Cooperative Agreements* (Jan. 2011).
168. *See generally* U.S. EPA website, *Basic Elements of a Tribal Pesticide Program*, http://www.epa.gov/opp00001/tribes/guidance.htm (last visited Nov. 30, 2011).
169. *See supra* note 11, describing basis of trust responsibility.
170. *See* Gros Ventre Tribe v. Bureau of Land Management, 469 F.3d 801 (9th Cir. 2006) (In the absence of a specific duty, "the government's general trust obligation is discharged by the government's compliance with general regulations and statues not specifically aimed at protecting Indian tribes.").
171. U.S. EPA Working Effectively With Indian Tribes Resource Guide 48-49 (1998), *available at* http://www.epa.gov/owindian/wetg/training/EPA/common/data/docs/WETGResourceGuide.pdf.
172. *Washington Liquid Fertilizer Co.*, *supra* note 86.
173. U.S. EPA Decision Memorandum, *Nationwide Pilot Program Under FIFRA Section 2(ee)(6) Regarding Use of Section 18 Emergency Exemption and Section 24(c) Special Local Need Products in Indian Country*, at 2 and 8 (Nov. 2008).
174. *See generally* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA: *From Politics to Expertise*, Sup. Ct. Rev. 51 (2007), *available at* http://www.law.harvard.edu/faculty/freeman/SCR.pdf.
175. Legislative history of the 1978 Amendments is practically void of discussion on tribes, except a few short sentences in House Reports. *See* H.R. Conf. Rep. 95-1560, 1978 U.S.C.C.A.N. 2043, 2053, and H.R. Rep. 95-663, 1978 U.S.C.C.A.N. 1988, 1993, 2036.
176. Prominent legal scholars have suggested that FIFRA is an example of a statute where Congress delegates authority to tribes. *See* Royster & Fausett, *supra* note 19, at n.227 ("The Fort Berthold cooperative agreement is the first pesticides *delegation* to a native government.") (emphasis added). *See generally* Grijalva, *supra* note 89. *See also* A. Dan Tarlock et al., Water Resource_Management 910 (4th ed. 1993) (suggesting that FIFRA, like the CWA, the SDWA, and CERCLA, allows tribes to be treated in the same manner as states).
177. 7 U.S.C. §136u.
178. *Id.* Language on treatment of tribes as states is found in the CWA, the CAA and the SDWA, but similar language is not found in FIFRA. For an in-depth discussion on TAS provisions in environmental laws, see Teresa A. Williams, *Pollution and Hazardous Waste on Indian Lands: Do Federal Laws Apply and Who May Enforce Them?*, 17 Am. Indian L. Rev. 268 (1992) and Coursen, *supra* note 28, at 10579.
179. Coursen, *supra* note 28, at 10579.
180. Backcountry Against Dumps v. EPA, 100 F.3d 147 (D.C. Cir. 1996) (The court held that RCRA defines Indian tribes as municipalities, not states; EPA had no authority to approve a tribal RCRA permitting program. The court found RCRA was not ambiguous; the plain language defined tribes, thus EPA could not interpret RCRA as providing TAS for tribes.). The FIFRA legislation is different; tribes are not defined anywhere in FIFRA. In 1978, Congress codified EPA's existing rule recognizing tribal government implementation of C&T programs.

Nevertheless, that failed attempt ought not to constrain interpretation of FIFRA. For example, RCRA unambiguously defines tribes as municipalities, FIFRA does not define tribes.[181] Congress explicitly delegates authority to tribes in §23 of FIFRA, but RCRA has no such provision.

EPA could find TAS implicit based on the need to fill a regulatory gap in Indian country because of the significant role for local governments under FIFRA, i.e., authorized states are the primary enforcement authority.[182] States develop and implement state C&T Plans, allow exceptions for certain pesticide uses in emergencies, and establish special local needs for pesticide products.[183] EPA oversees the states or directly implements the law where states choose not to implement pesticide programs, e.g., Colorado. Because tribes are the local authority, like states, they should have the implementation responsibilities in Indian country.

In the alternative, the Agency could find TAS authority implicit in the congressional codification of the 1975 Tribal C&T regulations. Arguably, approval of a Tribal C&T Plan is approval of a tribal enforcement program, although EPA views Tribal C&T Plans as mere licensing exercises.[184] For example, assume a non-Indian applicator certified by the tribe challenged a tribal inspector's authority to inspect her records, enter her real property fee land, and assesses penalties for pesticide misuse or misapplication. EPA's approval of the Tribal C&T Plan supports tribal enforcement against that applicator using the tribe's inherent authority or using federal delegated authority (neither the regulations nor guidance specifies which authority). If the applicator's challenge is to tribal inherent authority, it would be legally defensible. For example, the tribe obtained the non-Indian applicator's consent to tribal jurisdiction when she was issued the tribal certification, and her regulated activity is clearly related to the health and welfare of the tribal members. Thus, either prong of the *Montana* test could be met. Extrapolating from this simple example showing the rationale basis for tribal enforcement against the tribally certified applicator, EPA could find TAS implicit for all of FIFRA, emergency exceptions, special local needs, and primary enforcement.

### *D. Problems With EPA's Direct Implementation*

The following briefly describes problems with EPA's direction implementation of FIFRA in Indian country: limited certification and training of applicators, limited opportunity for emergency exceptions and special local needs pesticide products, and, most importantly, the absence of primary enforcement authority for tribal governments. Other deficiencies such as the inadequate financial support for tribal pesticide programs are beyond the scope of this Article.[185]

#### 1. Limited Certification and Training of Pesticide Applicators

Only eight tribes in the country have EPA-approved Tribal C&T Plans,[186] four have their own plans, and four others have cooperative agreements with states and EPA where tribal governments accept state C&T.[187] Also, the Navajo Nation has an EPA-approved federal C&T Plan.[188] Therefore at present, certified applicators may legally apply RUPs on only nine Indian reservations. The vast majority of Indian country is without a legal means to certify and train pesticide applicators under FIFRA. In 2011, EPA proposed a nationwide federal C&T Plan for all Indian country[189] and EPA Region 8 proposed a regionwide federal C&T Plan,[190] which (if finalized) will legalize the use of RUPs in Indian country. The proposed federal plans will be directly implemented by EPA and not by tribes, but that does nothing to build strong environmental institutions. Instead, EPA could find TAS for all of FIFRA, which should encourage more tribes to develop Tribal C&T Plans and the plans could be localized, e.g., training applicators in traditional tribal cultures.

Moreover, EPA's proposed federal C&T Plans implicitly finds that tribes are in §11 of FIFRA, which authorizes EPA to implement a federal plan where states choose not to have state plans. Section 11 is silent on tribes: "EPA *shall* conduct a program for certification of applicators of

181. *Id.*

182. 7 U.S.C. §136w-1, primary enforcement responsibility is generally granted to the state if it has appropriate authority. However, state regulatory authority under FIFRA does not extend in Indian country. *See supra* Part I.

183. §7 U.S.C. §136.

184. EPA is authorized to approve Tribal C&T Plans; this authorization must be based on some source of tribal authority, i.e., either inherent authority or delegated federal authority although the regulations do not specify which authority. *See* 40 C.F.R. §171.10. This regulation requires the tribe to show it has enforcement authority to suspend, revoke, or modify the tribal certification and be able to enforce against misuse or off-label application, which is the essence of a primacy program. *See also* 40 C.F.R. §171.7. This is an absurdity in EPA's decision not to grant tribes primacy. Why would Congress codify the tribal C&T regulation and limit tribal authority to certification enforcement actions? Why not also require tribes to have enforcement powers against the applicators for pesticide misuse when the very regulation it was codifying require the tribe to have such powers?

185. *See Guidance for Funding Development and Administration of Tribal Pesticide Field Programs and Enforcement Cooperative Agreements*, Jan. 2011, at 4 (EPA fiscal year 2009, $1.3 million for tribal enforcement and $933,000 for tribal field programs).

186. *Supra* Part II.A. Three Affiliated Tribes of the Fort Berthold Reservation, the Rosebud Sioux Tribe, Cheyenne River Sioux Tribe, and the Shoshone-Bannock Tribes.

187. Santee Sioux Nation of Nebraska, EPA Region VII; Prairie Band Potawatomi Nation, EPA Region VII; Jicarilla Apache Tribe, EPA Region VI; and Uintah and Ouray Indian Agency and Ute Indian Tribe, EPA Region VIII. Memoranda of Agreements on file with EPA Regional Offices.

188. Federal C&T Plan for the Navajo Nation's Indian Reservation, 72 Fed. Reg. 32648 (June 13, 2007); *see also* U.S. EPA, Region 9 website, Tribal Pesticide Meeting, http://www.epa.gov/region9/tribal/rtoc/sum10/RtocFinal-Tribal-PesticideMeeting.pdf.

189. Federal Plan for Certification of Applicators of Restricted Use Pesticides Within Indian Country, 76 Fed. Reg. 28772 (May 18, 2011); *see also* U.S. EPA website, http://epa.gov/oppfead1/cb/csb_page/updates/2011/applicator-cert.html (May 30, 2011).

190. Federal Plan for Certification of Applicators of Restricted Use Pesticides Within EPA Region 8 Indian Country, 76 Fed. Reg. 22096 (Apr. 20, 2011); *see also* U.S. EPA, Region 8 website, http://www.epa.gov/region8/toxics/pests/ppap.html (last visited Nov. 30, 2011).

pesticides in *states* without a plan" (emphasis added).[191] Consistent with EPA's Indian Policy that it will implement environmental programs until tribes are willing and able to assume delegation or authorization, the Agency has read tribes into §11.[192] Because the statute says EPA "shall" conduct C&T in areas of the country without a plan, EPA may have a mandatory duty to exercise Agency expertise and fill this regulatory gap. A logical approach to fill the gap would be to find TAS implicit in the whole statute, rather than a piecemeal process of reading tribes into the statute one section at a time.

### 2. Limited Emergency Exemptions and Special Local Needs Products

Sections 18 and 24(c) of FIFRA are also silent on tribes.[193] As a result, tribes have no authority to allow emergency exemptions or to authorize special local needs products in Indian country.[194] These sections of FIFRA authorize states to take such actions. Attempting to solve this problem, EPA determined that adjacent state emergency exemptions and special local needs pesticide products may be used in Indian country, so long as a tribal government has not excluded the use of such product under tribal law. This determination is based on §2(ee) of FIFRA, a savings clause that authorizes the Administrator to allow any use of a registered pesticide that might otherwise be considered inconsistent with the pesticide's labeling if that use of the pesticide is "consistent with the purposes of FIFRA."[195] EPA's finding recognizes that tribal governments have authority to further restrict these emergency and special pesticide uses, but does not authorize tribes to establish their own EPA-approved emergency exceptions or special local needs products. The finding is part of a three-year nationwide pilot project that expired in November 2011, however, EPA is planning to issue a final guideline to make this project permanent.[196] EPA's finding provides:

> FIFRA is silent on whether the benefits of these provisions are available to tribes and farmers in Indian country; therefore, tribes and farmers in Indian country do not explicitly have access to the full range of options available for addressing an emergency situation or special local need. This situation may present equity, enforcement and environmental protection concerns in Indian country. This gap in our national protection could allow plant diseases or pest species to affect growers in Indian country and allow them to remain uncontrolled in areas proximal to major state agricultural centers.[197]

The Agency relies on its omnibus authority in §2(ee) to create a pilot program attempting to fill this gap to prevent significant plant diseases in Indian country. However, this finding forces Indian country applicators to rely on nearby states to obtain EPA approval for emergency exceptions and special local needs. Even if EPA makes this pilot project permanent, without a finding that TAS is implicit in the statute, tribes are simply unable to seek EPA approval for their own emergency exceptions and local needs products.

### 3. Absence of Tribal Primary Enforcement Authority for Tribal Pesticide Programs

The Agency does not extend primary enforcement authority to tribal governments.[198] Instead, EPA takes FIFRA enforcement actions, and tribes cooperate. EPA's reliance on cooperative enforcement, as opposed to finding TAS, obfuscates the tribal authority role in pesticide regulation. Such muddling along undermines tribal sovereignty and opens the door to legal challenges. Non-members may challenge tribal authority to cooperate with EPA in controlling pesticide pollution on the reservation.[199] Moreover, EPA has no FIFRA regulations or policies that specify what authority is necessary—inherent tribal or delegated federal. Also, the tribal cooperative enforcement scheme weakens the spirit of the law that relies on local government implementation.

The FIFRA grant regulations do not require the tribes demonstrate authority to obtain a grant that supports a cooperative enforcement agreement.[200] Although tribal C&T regulations describe eligibility criteria for EPA approval of a Tribal C&T Plan, they specify that the tribe must have a governing body and be federally recognized.[201] However, tribes are not required to demonstrate the source of tribal authority to implement and enforce Tribal C&T Plans.

EPA guidance provides two mechanisms for tribes to cooperate under FIFRA: (1) tribal pesticide field pro-

191. 7 U.S.C. §136i (a)(1) states that EPA "shall" conduct a program for certification of pesticide applicators in "any State for which a State plan for applicator certification has not been approved by the Administrator."
192. EPA Indian Policy, *supra* note 4. EPA will implement environmental programs in Indian country until the tribal governments are willing and able to assume full responsibility for delegable programs.
193. Exemption of Federal and State Agencies, 7 U.S.C. §136p, and Authority of States, 7 U.S.C. §136v.
194. U.S. EPA Decision Memorandum, *Nationwide Pilot Program Under FIFRA Section 2(ee)(6) Regarding Use of Section 18 Emergency Exemption and Section 24(c) Special Local Need Products in Indian Country*, at 2 and 8 (Nov. 2008).
195. *Id. See also* 7 U.S.C. §136(ee)(6).
196. *Supra* note 194, at 4, *see also EPA 18/24(c) Program in Indian Country: Pilot to Final* (Aug. 2011), http://www.epa.gov/oppfead1/tribes/2011/consult-policy.html (last visited Dec. 12, 2011).
197. *Id.*
198. Office of Pesticide Programs, *The National Pesticide Tribal Program: Achieving Public Health and Environmental Protection in Indian Country and Alaska Native Villages*, EPA-735-F-09-007 (Oct. 2009) at 4 ("EPA generally is the primary enforcement authority for pesticide use violations in Indian country. But several tribes have cooperative agreements with EPA to help enforce FIFRA."). *See also* U.S. EPA Decision Memorandum, *Nationwide Pilot Program Under FIFRA Section 2(ee)(6) Regarding Use of Section 18 Emergency Exemption and Section 24(c) Special Local Need Products in Indian Country*, at 4 and 10 (Nov. 2008) ("Enforcement of violations from use of these products in Indian country would be done by the EPA regions, with the cooperation of tribes where the tribes have cooperative agreements with EPA relating to enforcement.").
199. In 2002, challenges to tribal authority were alleged during EPA's public meetings on the Omaha and Winnebago Indian Reservations in Nebraska, although no legal challenges were undertaken. *Supra* note 23.
200. 40 C.F.R. Part 35, Subpart B, Environmental Program Grants for Tribes.
201. 40 C.F.R. §171.10.

grams, which include education and outreach programs for worker safety, water quality, endangered species protection, integrated pest management (IPM), and applicator certification; and (2) pesticide compliance and enforcement programs, which include tribal inspections[202]; but does not describe necessary tribal authority under either mechanism. Also, EPA guidance describes minimal criteria for *funding* tribal cooperative enforcement agreements grants,[203] such as tribes should conduct an assessment of pesticide use on their reservation prior to receiving pesticide grants.[204] In addition, the guidance encourages development of tribal pesticide codes that meet federal minimum requirements under FIFRA, although EPA will not approve nor disapprove tribal codes.[205]

Incidentally, EPA guidance indicates that tribes may enforce an independent (without EPA approval) tribal pesticide program[206] presuming that tribes have inherent authority for an independent pesticide enforcement program. Because Congress has not occupied the entire field of pesticide regulation under FIFRA,[207] local governments are not preempted from regulating pesticide use, *provided* their regulations are no less stringent than FIFRA.[208] Therefore, tribes, as local governments, may rely on their inherent tribal authority to establish a local pesticide regulatory program independent of federal authority, *provided* such programs are consistent with FIFRA.[209]

The current direct implementation with cooperative enforcement paradigm, presuming without deciding that tribes have authority, leads non-members to challenge tribal authorities. Consider the following hypothetical:

- a tribe receives an EPA-approved and funded tribal pesticide grant and cooperative agreement for enforcement;
- develops a tribal pesticide code that EPA neither approves nor disapproves;
- wants to take an enforcement action under tribal code; and
- enforcement involves inspecting and accessing real property and business records and assessing a penalty, i.e., typical FIFRA-type enforcement activities.[210]

If the violator is a non-member operating on fee land, she could allege the tribe lacks jurisdiction. If the tribe refers the action to EPA to take enforcement rather than defend a challenge to its jurisdiction, EPA may not enforce a tribal code violation. However, if a violation was observed during a federal inspection by a federally credentialed tribal or EPA inspector and the statute was violated, EPA may take the action.[211] The whole paradigm shifts when the FIFRA violation is observed under an authorized state primacy program, where EPA defers to state enforcement of FIFRA. EPA pursues enforcement actions when the state fails to take enforcement and only 30 days after the date EPA notifies the state of its intent to take action under §§26 and 27 of FIFRA.[212]

EPA's position that FIFRA does not authorize tribal primary enforcement authority for applicator misuse or misapplication confounds the statutory scheme that makes local authority the primary enforcement authority. For example, when a state C&T Plan is approved by EPA, the state is automatically eligible for primary enforcement authority under §26(b) of FIFRA, *Special Rules,* which allow primacy upon approval of a state C&T Plan.[213] Arguably, the §26(b) special rule for primacy is available for tribes because it explicitly refers to §23, where tribes, like states, are authorized to implement C&T Plans.

202. *See* U.S. EPA, Guidance for Funding Development and Administration of Tribal Pesticide Field Programs and Enforcement Cooperative Agreements, Jan. 2011, at 10.
203. BE Guidance, *supra* note 12, at 9.
204. *Id.*
205. *Id.*
206. *See* Office of Pesticide Programs, The National Pesticide Tribal Program: Achieving Public Health and Environmental Protection in Indian Country and Alaska Native Villages, Tribal Brochure, EPA-735-F-09-007 (Oct. 2009) at 4 ("Additionally, some tribes have their own inspection and enforcement authorities to ensure compliance with their own pesticide codes and ordinances."). *See also* Office of Pesticide Programs, *Basic Elements of an EPA-Funded Tribal Pesticide Program*, http://www.epa.gov/opp00001/tribes/guidance.htm (last visited Nov. 30, 2011).
207. Wisconsin Public Intervenor v. Ralph Mortier, 501 U.S. 597, 111 S. Ct. 2476, (1991) (The Court held that FIFRA did not entirely preempt local governments regulation of pesticide use).
208. *Id.*
209. *Id.*
210. 7 U.S.C. §§136(f), 136(g), 136i-1, 136(j), 136(l), 136w-1 and 136w-2.
211. *See Guidance for Funding Development and Administration of Tribal Pesticide Field Programs and Enforcement Cooperative Agreements*, Jan. 2011.
212. 7 U.S.C. §§136w-1 and 136w-2.
213. 7 U.S.C. §136w-1(b), Special Rules. State primacy may be automatically granted under §26(b) of FIFRA when the state's C&T Plan is approved.

> 7 U.S.C. §136w-1, STATE PRIMARY ENFORCEMENT RESPONSIBILITY
>
> (a) IN GENERAL.—For the purposes of this Act, a State shall have primary enforcement responsibility for pesticide use violations during any period for which the Administrator determines that such State—
>
> (1) has adopted adequate pesticide use laws and regulations, except that the Administrator may not require a State to have pesticide use laws that are more stringent than this Act;
>
> (2) has adopted and is implementing adequate procedures for the enforcement of such State laws and regulations; and
>
> (3) will keep such records and make such reports showing compliance with paragraphs (1) and (2) of this subsection as the Administrator may require by regulation.
>
> (b) SPECIAL RULES.—Notwithstanding the provisions of subsection (a) of this section, any State that enters into a cooperative agreement with the Administrator under section 23 of this Act for the enforcement of pesticide use restrictions shall have the primary enforcement responsibility for pesticide use violations. Any State that has a plan approved by the Administrator in accordance with the requirements of section 11 of this Act that the Administrator determines meets the criteria set out in subsection (a) of this section shall have the primary enforcement responsibility for pesticide use violations. The Administrator shall make such determinations with respect to State plans under section 11 of this Act in effect on the date of enactment of the Federal Pesticide Act of 1978 [September 30, 1978] not later than six months after that date.

## III. Proposal to Reform FIFRA[214]

Few tribes have established tribal pesticide programs due to obstacles in a 1975 regulation and ambiguous directions from Congress in the 1978 FIFRA Amendments. EPA could enhance tribal participation, create strong tribal/federal partnership, and build tribal institutions by promulgating rules interpreting the 1978 FIFRA Amendments. Pending statutory or regulatory changes, EPA should continue to encourage tribes to enter into pesticide cooperative agreements with EPA for outreach and enforcement of FIFRA, and to develop Tribal C&T Plans, and, when appropriate, include states in these C&T Plans. Rulemaking, rather than mere guidance, is necessary because regulations entitle the Agency to greater judicial deference in the event of a challenge.[215]

### *A. Meet the Trust Responsibility*

#### 1. Finalize Federal C&T Plan and Make Permanent the §2(ee) Pilot Program

EPA should continue to meet federal trust responsibility obligations to the extent possible by directly implementing FIFRA programs in Indian country unless and until tribes assume these responsibilities.[216] Direct implementation requires that EPA finalize its proposed nationwide federal C&T Plans to legalize the use of RUPs in Indian country. In the meantime, EPA should encourage and work with tribes willing and able to assume their own Tribal C&T Plans under existing regulations.

Based on §2(ee) of FIFRA, EPA created a three-year pilot project that allows adjacent state emergency exemptions and special local needs pesticide products to be used in Indian country, so long as a tribal government has not excluded the use of such product under tribal law. This pilot project forces tribal pesticide applicators to rely on nearby states to seek approval for such pesticide products, which undermines tribal sovereignty. Nevertheless, it is a good stopgap measure until other reforms are undertaken. It should be made permanent. Although the pilot project expired in November 2011, EPA is considering making this a permanent finding under FIFIRA.

#### 2. Facilitate Tribal/EPA/State Cooperative Agreements

EPA should encourage more tribal and state cooperative agreements for pesticide regulatory programs in Indian country that do not compromise tribal sovereignty. EPA can facilitate tribes and states entering into cooperative agreements under FIFRA by encouraging negotiations and discouraging litigation.[217] EPA should be a party to these cooperative agreements and follow the FIFRA regulations on Tribal C&T Plans until they can be amended or modified as described below. These three-party cooperative agreements should set jurisdictional issues aside. Each party has its own authority and nothing in the agreements should affect or diminish that authority or jurisdiction. State and tribal authority disputes can be set aside because federal law is applicable throughout Indian country. EPA would continue to take all enforcement actions for FIFRA violations. As the current Tribal C&T regulations provide, states would issue applicator certifications. The cooperative agreements could clarify that states may use personal jurisdiction to suspend, revoke, or modify certifications for Indian country applicators as appropriate. This gives states a level of participation that may calm non-Indian applicators. States could notify tribes of any such actions against applicators. EPA should foster open communications and specify notification procedures in agreements that all three governments would be kept informed of FIFRA violations.

#### 3. Reinterpret Tribal C&T Regulations

EPA should amend or modify the 1975 regulations for Tribal C&T Plans by regulatory interpretation.[218] A new Tribal C&T regulatory interpretation would eliminate the state concurrence requirement for tribes that choose to accept EPA-approved state certification and training plans for pesticide applicators in Indian country. Some states are not interested in entering into cooperative agreements with tribes or insist they have jurisdiction over non-members and fee land.[219] These states are not likely to concur that

214. This discussion (like this entire Article) is offered in my individual and private capacity, and in no way represents EPA policy or guidance on how to interpret FIFRA.

215. Statutory interpretation by agencies and courts is also guided by the landmark case of *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Generally, if the statute is silent or ambiguous, the courts may defer to the Agency's interpretation. Administrative decisions not subject to *Chevron* deference may be entitled to a lesser degree of deference, but the Agency position should be followed to the extent persuasive. *See* United States v. Mead Corp., 533 U.S. 218, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001); and Christensen v. Harris County, 529 U.S. 576, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000).

216. It goes beyond the scope of this Article to articulate the extreme financial difficulty that tribes face trying to implement environmental programs and the incredibly limited amount that Congress appropriates for such purposes.

217. Getches, *supra* note 18, at 619-20. *See also* Terry Williams, American Indian Environmental Office, EPA Memorandum, *AIEO Policy on Tribal-Sate Cooperative Agreements*, May 22, 1995:

> At the present time there is a significant gap in the maturity of state environmental programs versus tribal environmental programs. All else being equal, this situation alone may adversely impact the tribes' ability to negotiate freely a cooperative agreement with a state. Therefore, the Agency, as a trustee, must be cognizant of this situation when encouraging cooperative agreements so as not to be a party to an action that may cause harm to tribal resources or the tribe's governmental rights.

218. *See* United States v. Magnesium Corporation of America et al., 616 F.3d 1129 (10th Cir. 2010), (EPA's prior interpretation of ambiguous language contained in its own regulation was a tentative one, and accordingly, the Agency was free to change its mind and issue a new interpretation of its regulation without notice and comment.).

219. Don Stenberg, Nebraska Attorney General, *Authority of the Santee Sioux Tribe to Regulate the Application of Farm Chemicals and Pesticides*, July 27, 1992:

> The State of Nebraska would not supersede tribal authority if it enacts FIFRA legislation without an express grant of authority from the federal government. However, the state would have control over

a tribe could rely on their state certifications to build a Tribal C&T Plan. However, once EPA approves a C&T plan (state or tribal) it is essentially a federal plan that subjects violators to EPA enforcement authority.[220] Thus, a regulatory reinterpretation would *provide* that upon EPA approval, the Tribal C&T Plan could rely on a state certification even though the state may not concur.

The regulatory reinterpretation would also create an opportunity for tribes to be automatically eligible to be the primary enforcement authority upon EPA approval of their Tribal C&T Plans. For example, tribes that create their own Tribal C&T Plans, including enforceable tribal pesticide codes, would be eligible for the special rule under §26(b) of FIFRA that authorizes primacy. EPA would review for approval/disapproval a tribe's eligibility application for §26(b) special rule primacy based on an analysis of tribal inherent authority. The special rule primacy would not be available for tribes that accept state C&T Plans under cooperative agreements because such agreements do not provide for tribal enforcement.

### *B. Promulgate a TAS Rule Under FIFRA*

EPA should promulgate a new TAS regulation interpreting FIFRA.[221] The regulation would fill the gap, making equal protection coverage nationwide by including Indian country and tribal governments as partners with EPA co-regulating and controlling pesticide pollution. A TAS eligibility program would authorize EPA to approve tribal pesticide programs based on the inherent authority of tribal governments. EPA could make generalized findings that pesticides may cause serious and substantial impacts to health and welfare on reservations, which would support case-by-case tribal eligibility applications for FIFRA programs in Indian country, including on fee lands and over non-Indian activities.

The new FIFRA rule should provide that tribes are eligible to assume all aspects of FIFRA implementation the same as states, including emergency exceptions; special local needs-use registrations[222]; inspection authority; and primary enforcement authority.[223] Before assuming primacy, a tribe would have to demonstrate that it has the requisite authority to implement a FIFRA enforcement program. For example, a tribe would have to show inherent authority to enforce civil penalties, issue notice of violations, complaints, and utilize its own tribal law and order infrastructure and tribal courts to assess and collect penalties.[224] One of the benefits of such a rulemaking is that any objections of non-Indians to tribal enforcement would be nullified, because the tribal program would be approved based on consistency with FIFRA (although tribes may be more stringent). Also, primacy includes strong federal oversight of tribal government implementation and obligations. Oversight would strengthen the federal/tribal partnership.[225] Federal oversight is essential in all federal environmental regulatory programs, whether state or tribal.

The express language in FIFRA says EPA may "delegate" authority to tribes. Thus, some legal scholars will contend that EPA should interpret this language as a delegation of federal authority. Delegation of authority would eliminate the need for the *Montana* test analysis in evaluating a tribal application for approval of a FIFRA program. Delegation of federal authority to tribes recognizes that even with limited sovereignty, a tribal government may implement federal programs. However, federal delegated authority may not support sovereignty as well as tribal inherent authority, which is legally sufficient, acknowledged, and supported by Congress and the president.[226] It should be supported by the federal agencies as well. Although EPA could interpret FIFRA as a federal delegated power, interpreting it as "inherent authority" facilitates tribal self-governance and autonomy.

One other possible basis for interpretation of FIFRA that would also avoid the need for using the *Montana* test analysis, is to give retroactive effect to the rule of law enunciated by the Supreme Court in *United States v. Lara*.[227] Some legal scholars contend that *Lara* could be read to reinvest sovereignty in the context of any statute that is properly understood to recognize and affirm tribal sovereignty.[228] Prof. Ann Tweedy has made a convincing argument that the TAS provision of the CWA is one area where

non-Indians and fee lands within the reservation . . ." and the state would not have authority over Indians and trust lands.).

220. *See* Legislative History, H.R. Rep. 95-663, 1978 U.S.C.C.A.N. at 2028.

221. EPA has to exercise caution in interpreting silent or ambiguous statutes to grant TAS eligibility to tribes because of the decision in *Backcountry Against Dumps v. EPA*, 100 F.3d 147 (D.C. Cir. 1996) (The court held that RCRA defines Indian tribes as municipalities, not states; EPA had no authority to approve a tribal RCRA permitting program. The court found RCRA was not ambiguous—the plain language defined tribes—thus, EPA could not interpret RCRA as providing TAS for tribes.). The FIFRA legislation is different. Tribes are not defined anywhere in FIFRA. Congress incorporated EPA's existing rule recognizing tribal government implementation of C&T programs. *See* EPA comments during legislative history, H.R. Rep. 95-663, 1978 U.S.C.C.A.N. at 2036. Congress gave tribes authority similar to states for FIFRA enforcement and cooperative agreements for C&T, and Congress gave states with cooperative agreements for C&T primary enforcement authority in §26(b). It would be reasonable for EPA to interpret this statute as giving tribes that same primary enforcement authority.

222. *See* U.S. EPA, *Nationwide Pilot Project: FIFRA §2(ee)(6) Finding Regarding Use of §18 and 24(c) in Indian Country—Decision Memorandum*, Nov. 10, 2008. In this decision document, the Agency recognizes that "FIFRA is silent on whether . . . these provisions are available to tribes and farmers in Indian country . . . state [issued exemptions are] not valid in Indian country . . . As a result, use of §18 or §24(c) registrations in Indian country would be considered a violation of FIFRA." The Agency relies on this finding memo without notice and comment using an omnibus, definitional section of FIFRA to get a important aspects of FIFRA to function in Indian country, e.g., emergency use of pesticides. A new rule would be better; it would give EPA the deference in judicial review it should have when interpreting and applying FIFRA holistically in Indian country similar to how the law is applied in the states.

223. The legislative history, while sparse, supports an interpretation that tribes are eligible for primary enforcement authority under §§23 and 26 of FIFRA. *See* H.R. Conf. Rep. No. 95-1560 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2043, 2057.

224. EPA would continue most criminal enforcement actions in Indian country as long as the Major Crimes Act is in effect. Obviously, federal criminal enforcement of FIFRA was one reason for §23 of FIFRA authorizing tribes to enforce FIFRA in cooperation with EPA.

225. *See* 7 U.S.C. §136w-2.

226. *Supra* notes 107, 108, and 109.

227. *Supra* note 14, 35 Envtl. L. 471 at 490.

228. *Id.*

*Lara* should have retroactive effects. However, Professor Tweedy's creative legal theory is difficult to apply under FIFRA because it has no TAS language.

Challenges to EPA's regulatory actions would be expected. EPA's determinations would likely withstand judicial scrutiny if the reviewing court deferred to EPA's expertise in matters of environmental law.[229] On the other hand, a de novo review is likely when EPA is interpreting matters outside its area of expertise, such as federal Indian law matters. The proposed TAS regulation would address decades of inaction and EPA's decision not to decide that local tribal authority is appropriate for implementing FIFRA in Indian country. The courts may look with favor on such a regulation as being well within EPA's expertise. However, the proposals herein are at the crossroads—a mix of environmental and federal Indian laws—making it difficult to predict the outcome of judicial review. Thus, congressional action is recommended.

### C. Amend FIFRA to Include TAS for Tribes

Congressional plenary power over federal Indian matters would support an amendment to FIFRA to substantiate the inherent authority of tribes to regulate pesticide use in Indian country.[230] Congress can amend FIFRA by adding a TAS provision for FIFRA where state and local governments lead the implementation. The amendment would add a TAS provision for selected parts of FIFRA, particularly, §§8, 9, 11, 18, 24, 26, 27, among others, that relate to inspections, C&T, local use registrations and emergency exceptions, and primary enforcement authority. The TAS provision should explicitly "recognize and affirm" in each tribe the inherent tribal powers (not delegated federal power) to enforce FIFRA within Indian country.[231]

The TAS provision in FIFRA would be an explicit recognition of inherent authority over Indians and non-Indians and all property in Indian country, similar to the "*Duro* Fix" Congress passed to recognize inherent authority of tribes over non-member Indians for misdemeanors.[232] Justice Stephen Breyer, writing for the majority in *Billy Jo Lara*,[233] found that Congress could act to remove "restrictions on the tribes' inherent authority" . . . [and] . . . change 'judicially made' federal Indian law through [*Duro* Fix] kind of legislation." The Court held this statute permits

> a tribe to bring certain tribal prosecutions against non-member Indians [but] does not purport to delegate the Federal Government's own *federal* power. Rather, it enlarges the *tribes'* own powers of self-government to include the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians, including non-members (internal quotation marks omitted).[234]

The legislation in question in the *Billy Jo Lara* case was not considered a federal delegation of authority. Instead, Congress restored inherent tribal authority to a dependent sovereign. Therefore, Congress can rely on its plenary authority and fix FIFRA, too. Proposed legislation could be as simple as a one multipart sentence amendment, to wit:

> **FIFRA Tribal Authority**
>
> The Administrator is authorized to recognize tribal inherent authority, which is hereby recognized and affirmed, to exercise civil jurisdiction over all members and non-member activities as a basis to treat an Indian tribe as a State for purposes of subchapter II, *Environmental Pesticide Control*, to the degree necessary to carry out the objectives of this chapter, but only if—
>
> (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers; and
>
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of human health and the environment within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and
>
> (3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

The most significant aspect of the proposed statutory amendment is that it explicitly reinvests and affirms tribal sovereignty. Congress would restore tribal authority to overcome *Montana*'s general proposition as applied to non-members using pesticides in Indian country. Thus, when a tribe would seek primacy under this TAS amendment, the congressional recognition of sovereignty obviates any need for EPA to conduct an analysis of tribal authority under the *Montana* test. This would make TAS decisions more efficient and effective and could increase the number of tribes that would implement FIFRA primacy programs, thereby, achieving one of EPA's Indian Policy goals and an objective of cooperative federalism.

## IV. Conclusion

One of the best places to hold on to tribal sovereignty is tribal governance over the environment using inherent authority, because traditional tribal cultural values and indigenous knowledge are compatible with federal environmental laws. Developing pesticide regulatory programs is important for tribes that value the ecology of their home-

229. *See generally* Coursen, *supra* note 14; *see also* Jody Freeman & Adrian Vermeule, *supra* note 173 ("expertise forcing" in administrative law).

230. EPA's Indian Policy says that EPA will seek to remove impediments to tribes fully implementing environmental regulatory programs. EPA Indian Policy, *supra* note 4.

231. *Lara*, *supra* note 64, at 1634 (the plenary power authorizes Congress to enact legislation that both restricts and in turn relaxes those restrictions on tribal sovereign authority).

232. *See Duro* Fix, *supra* note 90.

233. *Id.*

234. *Lara*, *supra* note 64, at 1632.

lands and are concerned about protecting human health and the environment within their territories. The tribal/federal partnership can be strengthened by building pesticide programs that recognize tribal inherent authority and enhance the opportunities for tribal members and non-members to learn about indigenous knowledge for protecting human health and the environment. A regulatory reinterpretation or congressional amendment of FIFRA that recognizes tribal inherent authority would address the issue of treating tribes as the appropriate authority for implementing FIFRA in Indian country and, hopefully, the overwhelming federal role would decrease and the tribal role would increase.

The best governance comes from within—governance based on inherent sovereign authority. On the other hand, inherent tribal authority is not without its limitations and detractors. The Supreme Court has steadily chipped away at tribal jurisdiction over non-members for a variety of activities. However, when non-members are irresponsible polluters inside Indian country, such as non-Indian applicators misusing or misapplying "economic poisons," tribal jurisdiction is essential to protect the economic security, integrity, and health and welfare of the tribe. Moreover, as discussed herein, recognizing inherent tribal authority to implement FIFRA programs, including enforcement, enhances the role of tribes in protecting their environment, builds tribal institutions, promotes strong federal/tribal partnerships, and supports tribal sovereignty.

On the other hand, federal delegated power may seem more reliable and easier to use in Indian country compared to inherent tribal authority. Legal scholars portend that federal delegated authority may supplant tribal inherent authority altogether someday.[235] Such a future is an anathema to the great experiment that is cooperative environmental federalism. Moreover, federal delegated authority appears to diminish inherent authority, and legal scholars contend it is offensive and insulting to tribes and usurps traditional law and customs. Federal delegation of FIFRA authority could increase the number of tribes with pesticide programs, because it would be relatively easy for EPA to delegate federal authority. Letting go of federal delegated power and holding on to inherent tribal authority strengthens the partnership, and Administrator Jackson's priorities include strengthening the federal/tribal partnership.

The best way to ensure equal environmental protection nationwide without exclusion or gaps in Indian country and strengthen the partnership with federal oversight is for tribes to have the opportunity to participate as co-regulators and full partners with EPA through treatment in the same manner as a state (TAS) eligibility that recognizes inherent tribal authority to implement pesticide programs. Although not all tribes will be ready, willing, and able to seek TAS authorization for FIFRA programs, new statutory language as proposed herein with promulgation of TAS eligibility rules would clarify roles and responsibilities under FIFRA for all tribes and strengthen the partnership for tribes that receive TAS approvals. Also, a statutory TAS provision recognizing tribal inherent authority would support tribal sovereignty and keep state authorities at bay.

The general trust responsibility under FIFRA guides EPA's direct implementation of the law in Indian country. As described in this Article, problems with EPA's direct implementation have led to regulatory gaps in environmental protection coverage in Indian country, e.g., limited certification and training of pesticide applicators, limited emergency exemptions and special local needs products, and the absence of tribal enforcement of tribal pesticide programs. A regulatory interpretation and guidance memoranda could reform FIFRA at the administrative level pending any act of Congress to amend FIFRA. As described above, EPA could meet its general trust responsibility by finalizing the proposed federal C&T Plan, making the FIFRA §2(ee) Pilot Program permanent, facilitating more Tribal/EPA/State Cooperative Agreements, reinterpreting Tribal C&T Regulations to eliminate the need for state concurrence, and promulgating an interpretative TAS rule under FIFRA that would include TAS for tribes based on inherent tribal authority.

Congress should explicitly recognize, reinvest, and affirm tribal sovereignty under FIFRA, which would demonstrate support for cultures and traditions that depend upon tribal homelands. If enacted, the reforms herein would encourage EPA to hold on to tribal sovereignty and protect tribal environments from pesticide pollution by building tribal pesticide programs based on inherent tribal authority and promoting strong federal/tribal partnerships.

---

235. Justice Thomas' concurring opinion in *Lara* states quite candidly that "[d]elegated power is the very antithesis of inherent power." *Lara*, 124 S. Ct. at 1642. This statement does not square with Justice William H. Rehnquist's holding in *Mazurie*, *supra* note 123 (Delegation of federal authority to regulate liquor requires some tribal authority at least enough to transfer delegated federal authority). Most troubling about Justice Thomas' concurrence in *Lara* is that he appears ready to reconsider the entire question of tribal sovereignty when he says, "[i]n my view, the tribes are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously." *Lara*, *supra* note 64, at 1642. The separate sovereignty of tribal governments has limitations, but it remains viable. Justice Thomas' doubt about the existence of tribal sovereignty is illogical when read in the light of environmental laws and cooperative federalism.