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POLLUTION AND HAZARDOUS WASTE ON INDIAN LANDS: DO FEDERAL LAWS APPLY AND WHO MAY ENFORCE THEM?

Teresa A. Williams*

Introduction

An essential means by which Indian tribes will maintain the integrity of tribal lands is through environmental regulation.¹ Currently, it is unclear who has the jurisdictional authority to administer environmental protection programs on tribal lands.² Jurisdiction on Indian land is apportioned among three governments — federal, tribal, and state — all of which claim a degree of regulatory authority over the territory of Indian nations.³

The federal government claims the right to regulate by virtue of its asserted position as the dominant sovereign throughout the United States.⁴ The tribal government claims entitlement to regulate the persons and lands within its territorial domain pursuant to inherent sovereign powers.⁵ The state government claims regulatory authority because Indian nations are not extraterritorial to the states and about them.⁶

Tribal governments have traditionally been responsible for managing natural resources located on Indian lands.⁷ However, since most of

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1. B. Kevin Gover & Jana L. Walker, *Tribal Environmental Regulation*, 36 FED. B. NEWS & J. 438 (1989).

2. *Id.*

3. 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, 584 (1989).

4. *Id.*

5. *Id.* at 585.

6. *Id.*

7. Washington: Final Authorization of State Hazardous Waste Management Program, 51 Fed. Reg. 3783 (1986). The EPA views Indian lands as synonymous with Indian Country. Indian Country encompasses all lands, including fee lands, within reservation borders, all dependent Indian communities, and all Indian allotments.

The EPA's definition is an abbreviated version of the statutory definition of "Indian Country," which includes:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any

the federal environmental statutes delegate authority to the states to implement and enforce environmental protection programs,⁸ the tribal governments have had an insignificant role in developing or implementing federal environmental regulatory programs.⁹ Congress, in promulgating these statutes, failed to consider the regulatory authority of the tribal governments and the limited nature of state authority on Indian reservations.¹⁰ As a result of this failure, the question of whether or not Indian tribes should be treated as states for purposes of federal environmental statutes has arisen.

In 1983 the Reagan administration adopted a major new Indian policy acknowledging the governmental status of Indian tribes.¹¹ To further this national Indian policy, the Environmental Protection Agency (EPA) issued a revised Indian environmental policy that addressed the development and implementation of tribal environmental protection programs under federal law.¹²

The majority of the seven federal environmental acts now contain provisions authorizing tribes to be treated as states for most purposes. The Surface Mining Control and Reclamation Act of 1977 (SMCRA)¹³ contains a provision that the tribes shall be treated as states under the abandoned mine reclamation program. Amendments to the Clean Water Act (CWA)¹⁴, the Superfund Act (SARA),¹⁵ and the Safe Drinking Water Act (SDWA)¹⁶ have added "tribes-as-states" provisions. However, there are limitations to these provisions.

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- patent, and including rights of way running through the reservation,
 - (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
 - (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1988).

8. See Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6997 (1988) (RCRA); Clean Air Act Amendments of 1977, 42 U.S.C. §§ 7401-7642 (1988) (CAA); Clean Water Act of 1972, 33 U.S.C. §§ 1251-1376 (1988) (CWA); Safe Drinking Water Act of 1977, 42 U.S.C. §§ 300f-300j (1988) (SDWA); Federal Insecticide, Fungicide, and Rodenticide Act of 1978, 7 U.S.C. §§ 136-136y (1988) (FIFRA).

9. Richard A. DuBey et al., *Protection of the Reservation Environment: Hazardous Waste Management on Indian Lands*, 18 ENVTL. L. 449, 450 (1988).

10. Gover & Walker, *supra* note 1, at 438.

11. DuBey et al., *supra* note 9, at 451.

12. *Id.*

13. 30 U.S.C. § 1235(k) (1988).

14. 33 U.S.C. § 1377 (Supp. I 1989).

15. 42 U.S.C. § 9626 (1988).

16. *Id.* § 300j-11(a).

Other federal environmental statutes specifically delegate primary authority for certain programs to the tribes. The Clean Air Act (CAA)¹⁷ gives exclusive authority to the tribes to redesignate air quality for lands within the exterior boundaries of the reservations.¹⁸ The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)¹⁹ contains certain provisions relating to funding, training, and certification which have been extended to tribes.²⁰

The Resource Conservation and Recovery Act (RCRA)²¹ is the only federal environmental act which does not contain either a general tribes-as-states section or express authorization for tribes to assume certain program responsibilities.²² While tribes are defined as being among those "persons" to whom the enforcement provisions of the RCRA apply, the statute is silent as to the authority of the states to enforce their hazardous waste regulations against Indian tribes or individuals on Indian land.²³

This note discusses whether the federal government, the states, or the tribes themselves have the authority to enforce environmental regulations on Indian lands. It is this author's view that the authority should be placed with the tribes. Even though some authority has been granted to the tribes through the existing federal statutes, the authority is not enough to provide for the effective implementation and enforcement authority of the tribes. Thus, additional amendments to these statutes are necessary and are also discussed.

I. Jurisdiction

Congressional power over Indian lands is plenary under the Indian Commerce Clause.²⁴ Congress may expressly assign jurisdiction over Indian lands to federal, state, or tribal governments.²⁵ When Congress is silent or ambiguous in its assignment of control, there is no guidance

17. *Id.* §§ 7401-7642.

18. *Id.* § 7474(c).

19. 7 U.S.C. §§ 136-136y (1988).

20. *Id.* § 136u.

21. 42 U.S.C. §§ 6901-6997 (1988).

22. Royster & Fausett, *supra* note 3, at 581.

23. Washington Dep't of Ecology v. EPA, 752 F.2d 1465, 1469 (9th Cir. 1985).

24. The Indian Commerce Clause confers authority on Congress to regulate commerce with Native American tribes. U.S. CONST. art. I, § 8, cl. 3. The source of congressional authority over Native American lands is derived from this clause. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973); *see also* *Rice v. Rehner*, 463 U.S. 713, 718-19 (1983); *Washington Dep't of Ecology*, 752 F.2d at 1470; FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 259 n.120 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN]. *See generally* Leslie Allen, *Who Should Control Hazardous Waste on Native American Indian Lands? Looking Beyond Washington Department of Ecology v. EPA*, 14 ECOLOGY L.Q. 69, 88 (1987).

25. COHEN, *supra* note 24, at 259.

for the courts in determining jurisdiction.²⁶ Use of the common law preemption principles is one method employed by the courts in determining jurisdiction over Indian lands in the absence of a clear congressional directive.²⁷ A court must examine and balance federal, state, and tribal interests to determine whether federal law preempts state regulation.²⁸

In 1831 the Supreme Court recognized Indian tribes as distinct political entities.²⁹ The following year, in *Worcester v. Georgia*,³⁰ the Supreme Court held that state laws had no effect in Indian lands.³¹ The *Worcester* defendants were non-Indians convicted of living in Cherokee Indian Country without the permit required by Georgia statute.³² In overturning the convictions, the Supreme Court reasoned that the state statute violated federal treaties recognizing tribal sovereignty.³³ As these treaties were the supreme law of the land, the Georgia statute regulating non-Indians was held void.³⁴

The *Worcester* decision firmly established the doctrine of tribal sovereignty. *Worcester* established that Indian tribes are sovereign nations the powers of which are not delegated by express acts of Congress, but rather are "inherent powers of a limited sovereignty which have never been extinguished."³⁵ As inherently sovereign nations, the states are excluded from exercising jurisdiction over them.³⁶

However, tribal sovereignty has not been a complete bar to the exercise of state authority. States may, in certain circumstances, have legitimate interests in regulating some activities within Indian Country.³⁷ In such cases, the doctrine of tribal sovereignty "provides a 'backdrop' against which the applicable treaties and statutes must be read."³⁸ This "backdrop" creates a presumption that tribal sovereignty preempts state regulation.³⁹

26. *Id.*

27. Allen, *supra* note 24, at 88.

28. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-45 (1980); *see also* Allen, *supra* note 24, at 90.

29. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831).

30. 31 U.S. (6 Pet.) 515 (1832).

31. "The Cherokee nation, then, is a distinct community, occupying its own territory, within boundaries accurately described, in which the laws of Georgia can have no force." *Id.* at 561.

32. *Id.* at 536-37.

33. *Id.* at 560-61.

34. *Id.* at 561.

35. COHEN, *supra* note 24, at 231 (quoting *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)); *see also* Catherine E. Pope, Note, *Environmental Law — Federal Indian Law — Recent Developments* — State of Washington, Department of Ecology v. United States Environmental Protection Agency, 27 NAT. RESOURCES J. 739, 743 (1987).

36. Pope, *supra* note 35, at 743.

37. *Id.*

38. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973).

39. *Rice v. Rehner*, 463 U.S. 713, 718 (1983).

The Supreme Court's concept of how tribal sovereignty should be weighed in the preemption balancing test has been changing.⁴⁰ Early decisions showed a trend towards placing less emphasis on tribal sovereignty. In *Montana v. United States*,⁴¹ the Supreme Court stated that the "exercise of tribal power beyond what [was] necessary to protect tribal self-government or to control internal relations [was] inconsistent with the dependent status of the tribes, and [could not] survive without express congressional delegation."⁴² This indicates that the "tribes retain only those powers of self-government that involve relations among tribal members . . . [such as the] power to punish tribal offenders, determine tribal membership, and regulate domestic relations among members."⁴³

In the 1983 case *Rice v. Rehner*,⁴⁴ the Supreme Court further curtailed tribal sovereignty. The Court looked at the *historical traditions* of a tribe's sovereignty in the *particular* regulatory area in question.⁴⁵ *Rice* involved the application of state liquor laws to Indian reservations to control both Indian and non-Indian activity. The Court found no history of tribal control in the licensing and distribution of alcoholic beverages, and that liquor sales on reservations would have substantial spillover effects on the state regulatory programs outside the reservation.⁴⁶ Accordingly, the Court afforded little weight to tribal sovereignty.⁴⁷ The *Rice* "traditional view test" indicates that tribal sovereignty will play a decreased role where there is either no historical tradition or where there are strong state interests that weigh against it.

Rice appeared to have shifted the presumption in favor of state regulation in the preemption inquiry. The Supreme Court seemed less willing to protect tribal sovereignty in disputes over state regulation. The Supreme Court in *Rice* afforded more weight to state interests and placed less emphasis on tribal sovereignty.

However, the *Rice* "traditional view test" was sharply limited in the Supreme Court's most recent articulation of the balancing test in

40. *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274 (9th Cir. 1981). "The limited, present-day right of tribal self-government has devolved from the broad tribal sovereignty principle of *Worcester v. Georgia*, as 'notions of Indian sovereignty have been adjusted to take account of the State's legitimate interest in regulating the affairs of non-Indians.'" *Id.* at 1284 n.11, *quoted in* Allen, *supra* note 24, at 92 n.144 (citations omitted).

41. 450 U.S. 544 (1981).

42. *Id.* at 564, *quoted in* Allen, *supra* note 24, at 92.

43. Allen, *supra* note 24, at 92 (citing *Montana v. United States*, 450 U.S. 544, 564 (1981)).

44. 463 U.S. 713 (1983).

45. *Id.* at 719-20.

46. *Id.* at 724.

47. *Id.* at 725.

California v. Cabazon Band of Mission Indians.⁴⁸ In *Cabazon Band*, two tribes were conducting bingo games on their reservations that were open to the public and were played predominantly by non-Indians. While the State of California allowed charitable organizations to conduct bingo games, it prohibited prizes in excess of \$250. The games conducted by the two tribes paid much higher jackpots. California insisted that the tribes bring their games in compliance with California laws. The tribes sued in federal district court for declaratory and injunctive relief.

The Court avoided application of the "traditional view test" and looked to current federal Indian policy. The Court reasoned that "state jurisdiction is preempted if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."⁴⁹ The Court found that "[t]he inquiry [was] to proceed in light of traditional notions of Indian sovereignty and the congressional goal of self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."⁵⁰ Thus, "the Court reiterated its [earlier] view that this question should be decided against the backdrop of tribal sovereignty and Congress' goal of encouraging economic self-sufficiency."⁵¹

The *Cabazon Band* decision demonstrates that the Court is now increasing its reliance on the doctrine of federal preemption. Under this doctrine, if the application of state regulatory laws will interfere with the achievement of the policy goals of federal laws relating to Indians, the state laws cannot be applied. However, "[w]here tribal and federal interests are adequately protected and the state has a strong regulatory interest, state laws can be applied to Indian lands."⁵² The Court has yet to apply this balancing test in a case involving a state's assertion of environmental regulatory jurisdiction over Indian lands.

II. Jurisdictional Application to Environmental Regulations

Jurisdiction over Indian lands in matters of environmental regulation has not been extended to the states. Instead, in a demonstration of support for the EPA's Indian policy, Congress in 1986 and 1987 enacted amendments to the CWA, the SDWA, and CERCLA. These amendments provide that tribes are entitled to equal status with the

48. 480 U.S. 202 (1987).

49. *Id.* at 216 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983)).

50. *Id.* at 216.

51. Gover & Walker, *supra* note 1, at 439.

52. *Id.*

states.⁵³ Congress has expressly preempted state regulation over Indian lands for environmental regulation through these amendments.⁵⁴ As a result, when programs are implemented under these statutes which delegate authority to the tribes, the court will not need to balance interests.⁵⁵

Additionally, it appears that even in situations where Congress has not expressly acknowledged the tribes' regulatory authority, the strong federal interest will still favor excluding state jurisdiction on Indian lands for environmental purposes.⁵⁶ "The federal interest stems largely from the federal trust responsibility . . . [towards the] Indian tribes."⁵⁷ This "responsibility arose largely from the federal role as guarantor of Indian rights against state encroachment."⁵⁸ Moreover, the comprehensive nature of federal environmental statutes demonstrates the strong federal interest in environmental protection.⁵⁹ Congress' recent actions in granting authority to the tribes under certain environmental statutes, coupled with the federal policy which supports greater tribal responsibility over tribal government functions, tribal resources, and the tribal economy, appear to prohibit control by the states concerning hazardous wastes in Indian Country.⁶⁰

Allowing state jurisdiction for environmental concerns in Indian Country could have a detrimental effect. Often there is tension between state governments and tribal governments. Allowing state pollution control laws to govern environmental affairs in the reservation environment could result in additional hostility. The remote and sparsely-populated tribal lands "might become dumping grounds for state environmental problems."⁶¹ Due to the relatively insignificant political influence of native nations, the tribal lands could very well be the last areas of the state to receive attention or implementation of pollution control programs.⁶² Allowing state regulation would in effect give states the authority to "control pollution resources on and near reservations

53. 33 U.S.C. §§ 1251-1387 (1988) (CWA); 42 U.S.C. §§ 330f-300j-11 (1988) (SDWA); 42 U.S.C. §§ 9601-9675 (1988) (CERCLA); *see also* DuBey et al., *supra* note 9, at 466-67.

54. DuBey et al., *supra* note 9, at 468.

55. *Id.*

56. *Id.*

57. *Id.* at 469-70 (citing *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465, 1470 (9th Cir. 1985)); *see also* *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 660 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

58. *Washington*, 752 F.2d at 1470 (citing *United States v. Kagama*, 118 U.S. 375 (1886)).

59. DuBey et al., *supra* note 9, at 470.

60. *Id.*

61. *Royster & Fausett*, *supra* note 3, at 657.

62. *Id.*

to the extent the state deemed acceptable, subject only to federal minimum requirements."⁶³ Thus, state jurisdiction would wipe out the native nations' ability to control pollution consequences within their own lands.⁶⁴

III. *Environmental Statutes Providing for Indian Regulation*

A. *Tribes As States*

The federal pollution control laws grant jurisdiction to states to operate the applicable programs within state borders.⁶⁵ Under general principles of sovereignty, one state may not regulate in the territory of another.⁶⁶ Consequently, by treating tribes as states, other states would be preempted from asserting jurisdiction in tribal territory. "For example, if the Crow Tribe is a 'state' for purposes of CWA programs, the State of Montana can no more assert jurisdiction over the Crow Reservation than Montana can over its neighboring state of Wyoming."⁶⁷

Four federal pollution control laws — the SMCRA, the CWA, the SDWA, and CERCLA/SARA — currently contain tribes-as-states provisions. However, these provisions do not completely solve the problem. The following discussion illustrates that additional amendments to these laws may be necessary before tribes are indeed treated as states.

IV. *Surface Mining Control and Reclamation Act of 1977*

In contrast to underground coal mining, which requires removing coal from the earth, surface mining consists of removing the earth from the coal.⁶⁸ Following the removal of the coal, reclamation of the mining site takes place in two phases.⁶⁹ First comes the back-filling, drainage, and regrading required to achieve the desired surface configuration.⁷⁰ Then the surface must be fertilized, cultivated, and seeded or planted for revegetation.⁷¹ Through the SMCRA,⁷² Congress adopted a program of nationwide minimum environmental standards, with enforcement primarily in the hands of the states if they elect to exercise authority.⁷³

63. *Id.*

64. *Id.*

65. *Id.* at 624.

66. *Id.*

67. *Id.* at 624-25.

68. ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW 280 (1988).

69. *Id.* at 281.

70. *Id.*

71. *Id.*

72. 30 U.S.C. §§ 1201-1328 (1988).

73. FINDLEY & FARBER, *supra* note 68, at 281-82.

The SMCRA also provided that tribes shall be considered as states under the abandoned mine reclamation program.⁷⁴ However, an irregularity appears to exist in the structure of this Act. States may not receive federal approval of their mine reclamation programs unless they have approved state regulatory programs.⁷⁵ If this requirement applies equally to tribes as states, then tribes are in an impossible position.⁷⁶ Tribes are not treated expressly as states under the Act's provisions for regulating surface coal mining. Therefore, tribes cannot have approved "state" regulatory programs. Thus, despite the express authorization of section 1235(k), tribes seemingly cannot obtain federal approval for abandoned mine reclamation programs.⁷⁷

The SMCRA additionally provided for a study on the question of regulation of surface mining on Indian lands.⁷⁸ The report was submitted in 1979. The study advanced proposals for remedial legislation, but the Act has yet to be amended with regard to the regulation of surface coal mining in Indian lands.⁷⁹

Under the SMCRA, treatment as states is available only to tribes with eligible lands and lands from which coal is produced.⁸⁰ Eligible lands are those which were mined for coal or which were affected by such mining, wastebanks, coal processing, or other coal mining processes, and abandoned and left in an inadequate reclamation status prior to August 3, 1977, and for which there is not continuing reclamation responsibility under state or other federal laws.⁸¹

While the SMCRA purports to treat tribes as states, certain amendments are necessary before tribes will actually be treated the same as states. Currently, tribes are only considered equal under the abandoned mine reclamation program. The provisions for surface coal mining should be amended to also allow the tribes equal treatment with the states. This would allow the tribes to have approved regulatory programs and receive federal approval for their mine reclamation programs. Additionally, the limitation for eligible lands for tribes should be eliminated. The tribes should be eligible under the SMCRA on the same basis as the states.

V. Clean Water Act

In 1977 the Federal Water Pollution Control Act was amended and the name was officially changed to the Clean Water Act (CWA).⁸² The

74. 30 U.S.C. § 1235(k) (1988).

75. *Id.* § 1235(c).

76. Royster & Fausett, *supra* note 3, at 619 n.148.

77. *Id.*

78. 30 U.S.C. § 1300(a) (1988).

79. Royster & Fausett, *supra* note 3, at 619 n.148.

80. 30 U.S.C. § 1235(k) (1988).

81. *Id.* § 1234.

82. 33 U.S.C. §§ 1251-1387 (1988).

CWA prohibits the discharge of pollutants into navigable waters without a permit.⁸³ The CWA also requires state certification of permits covering operations which may result in any discharge into navigable waters.⁸⁴ Navigable waters are defined under the CWA as "the waters of the United States, including the territorial seas."⁸⁵

The CWA was amended in 1987 to allow treatment of tribes as states for certain purposes. Section 1377 provides that Indian tribes meeting certain conditions, such as having a governing body, reservation lands, and the capability to carry out environmental regulatory functions will be treated in a manner similar to states.⁸⁶ Under the amendments, tribes are treated as states for the following purposes: (1) grants for pollution control programs under section 1256; (2) grants for construction of treatment works; (3) water quality standards and implementation plans; (4) enforcement of certain standards; (5) clean lake programs; (6) certification of National Pollutant Discharge Effluent System (NPDES) permits; (7) issuance of NPDES permits; and (8) issuance of permits for dredged or fill material.⁸⁷

A tribal government which assumes responsibility for programs under the CWA may exercise authority over water resources held by the tribe, by the United States in trust for the tribe, or by a member, or water resources otherwise within the borders of an Indian reservation.⁸⁸ The CWA also contains provisions for federal settlement of disputes between states and tribes sharing common bodies of water.⁸⁹

The CWA is a comprehensive statute regulating all waters of the United States. It contains a savings clause which preserves statutory or common law claims.⁹⁰ The overriding federal role in the statute serves to limit state encroachment on the territory or a neighboring territory.⁹¹ In the recent Supreme Court decision *International Paper Co. v. Ouellette*,⁹² the Court determined that the CWA does not preempt a nuisance lawsuit filed in the source (or polluting) state's forum which does not conflict with the goals of the federal statute.⁹³ The Court found that even though a state may be harmed by discharges, an affected state only has an advisory role in regulating

83. *Id.* § 1311(a).

84. *Id.* § 1341(a)(1).

85. *Id.* § 1362(7).

86. *Id.* § 1377.

87. Gover & Walker, *supra* note 1, at 444.

88. 33 U.S.C. § 1377(e)(2) (1988); *see also* Royster & Fausett, *supra* note 3, at 619 n.149.

89. *Id.*

90. 33 U.S.C. § 1365(e) (1988).

91. DuBey et al., *supra* note 9, at 477.

92. 479 U.S. 481 (1987) (plurality opinion).

93. *Id.* at 481.

pollution that originated beyond its borders.⁹⁴ The Court stated that the affected state must apply the law of the state where the point source is located.⁹⁵ *Ouellette* demonstrates the Court's unwillingness to allow a state to extend its environmental standards to a neighboring state.⁹⁶ The decision indicates that if the point source is located on Indian lands, the state may not assert jurisdiction and enforce its law on Indian lands. It would have only an advisory role in regulating such pollution.

VI. *Safe Drinking Water Act*

The SWDA⁹⁷ requires the EPA to set health-based standards for maximum levels of contamination in drinking water.⁹⁸ The SDWA requires water supply system operators to come as close as possible to meeting the standards by using the best available technology that is economically and technologically feasible.⁹⁹ Primary enforcement responsibility may be delegated to the states which request it, if the state adopts drinking water regulations no less stringent than the national standards and implement adequate monitoring and enforcement procedures.¹⁰⁰

The SDWA was amended in 1986 to authorize the EPA to treat Indian tribes, in circumstances similar to those required under the CWA, as states.¹⁰¹ The SDWA also requires the EPA to promulgate regulations delegating control to tribes on the same basis as states for the Public Water Systems (PWS)¹⁰² and the Underground Injection Control (UIC)¹⁰³ programs.¹⁰⁴ Thus, the tribes have primary enforcement responsibility for PWS and UIC, and the federal government can provide grant and contract assistance to tribes to carry out functions provided for by the SDWA.¹⁰⁵ Under the UIC programs, tribes are exempted from certain time limitations which are placed upon the states, and the EPA will prescribe a UIC program where one does not exist for an Indian tribe.¹⁰⁶ The 1986 amendments also provide that a

94. *Id.* at 490.

95. *Id.* at 487.

96. *Id.* at 481; see also DuBey et al., *supra* note 9, at 480.

97. 42 U.S.C. §§ 300f-300j-11 (1988).

98. FINDLEY & FARBER, *supra* note 68, at 156.

99. *Id.*

100. *Id.*

101. 42 U.S.C. § 300j-11 (1988).

102. *Id.* §§ 300g-1 to 300g-5.

103. *Id.* §§ 300h to 300h-4.

104. Steven M. Christenson, *Regulatory Jurisdiction over Non-Indian Hazardous Waste in Indian Country*, 72 IOWA L. REV. 1091, 1108-09 (1987).

105. Gover & Walker, *supra* note 1, at 443.

106. Royster & Fausett, *supra* note 3, at 620 n.151.

tribe may not assume or maintain primary responsibility for public water systems or underground injection control in a manner that is less protective of public health or welfare than that of similar state programs.¹⁰⁷

A tribe must meet three criteria in order to be treated as a state under the SDWA: (1) the tribe must have a governing body carrying out substantial powers and duties; (2) the functions to be exercised by the tribe must be within its jurisdiction; and (3) the Administrator must perceive the tribe as being capable of carrying out the functions in a manner consistent with the terms and purposes of the SDWA and all applicable regulations.¹⁰⁸ The SDWA additionally provides that where treatment of a tribe as a state is considered "inappropriate, administratively infeasible, or otherwise inconsistent with the purposes of the Act, the EPA is authorized to include in the regulations other means for administering such provisions in a manner that will achieve the purpose of the provision."¹⁰⁹

In the 1986 case *Phillips v. EPA*,¹¹⁰ the Tenth Circuit specifically addressed the question of whether the EPA was empowered to regulate on Indian reservations prior to the 1986 amendments to the SDWA. All parties to the case agreed that the Oklahoma state government had no power to prescribe a UIC program regulating the Osage Indian Reserve.¹¹¹ In supporting the EPA's decision, the court found that Congress intended to include Indian lands in the broad, national scope of the SDWA.¹¹² The SDWA and general federal Indian policy clearly support federal, as well as tribal, authority to regulate Indian lands to the exclusion of state governments.¹¹³

VII. CERCLA and SARA

In 1980 Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).¹¹⁴ The Act was intended to grant the government authority to clean up active and abandoned leaking hazardous waste disposal sites.¹¹⁵ The goal of CERCLA was to place the financial burden of the cleanup on the parties who were responsible for the problem and who benefitted from the

107. Gover & Walker, *supra* note 1, at 444.

108. *Id.* at 443.

109. 42 U.S.C. § 300j-11(b)(2) (1988); *see also* Royster & Fausett, *supra* note 3, at 620 n.151.

110. 803 F.2d 545 (10th Cir. 1986).

111. *Id.* at 552.

112. *Id.* at 555; *see also* DuBey et al., *supra* note 9, at 488.

113. DuBey et al., *supra* note 9, at 488-89.

114. 42 U.S.C. §§ 9601-9657 (1988).

115. Martin H. Sokolow, Jr., *Hazardous Waste Liability and Compensation: Old Solutions, New Solutions and No Solutions*, 14 CONN. L. REV. 307, 307-40 (1982).

hazardous waste activity.¹¹⁶ CERCLA distinguished between two kinds of response: remedial actions, which are generally long-term or permanent containment or disposal programs¹¹⁷, and removal efforts, which are typically short term arrangements.¹¹⁸

CERCLA, more commonly known as Superfund, made money available for cleanup efforts. A \$1.6 billion fund was provided to pay for the cleanup of 400 sites targeted by the EPA.¹¹⁹ The fund was financed primarily through an excise tax imposed on the oil and chemical industries.¹²⁰ However, the limited Superfund monies could not even begin to cover the cost of all the hazardous waste cleanup. To accommodate for the deficiency, CERCLA contained provisions for civil actions against parties potentially responsible for a release of hazardous substances.¹²¹ These provisions authorized civil suits for cost recovery actions under section 9607(a) and abatement actions under section 9606(a).

CERCLA created liability for four classes of potentially responsible parties. The federal government, the states, or private persons may recover hazardous substance cleanup costs from: (1) current owners and operators of facilities; (2) owners and operators of facilities at the time of disposal; (3) generators who disposed of hazardous waste at the facility; and (4) transporters of hazardous waste to the facility.¹²² These classes of responsible parties are liable for the costs of cleaning up hazardous waste facilities when there is a release or threatened release of hazardous substances.¹²³ The parties are strictly liable¹²⁴ and may be jointly and severally liable for all cleanup costs.

Congress gave the original CERCLA statute a lifetime of five years because of uncertainties over the number of hazardous waste sites in the United States and the amount of money required to clean them up.¹²⁵ The taxing authority of CERCLA expired on September 30,

116. *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1276 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988).

117. 42 U.S.C. § 9601(24) (1988).

118. *Id.* § 9601(23).

119. Virginia L. Martin, *Hidden Hazards of Hazardous Waste Cleanup Laws: Lenders and Title Insurers Beware*, 18 CUMB. L. REV. 723 (1988).

120. 42 U.S.C. § 9631(b)(1)(A) (1988). A tax on crude oil, imported petroleum products, and chemical raw materials raised 87.5% of the \$1.6 billion. The taxing authority began on April 1, 1981, and expired on September 30, 1985. The balance of the \$1.6 billion came from general revenues. *Id.* § 4611.

121. *Id.* §§ 9606-9607.

122. *Id.* § 9607(a).

123. *Id.* § 9601.

124. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985).

125. Phillip M. Allred, *Georgia's Participation in Superfund*, 38 MERCER L. REV. 525 (1987).

1985.¹²⁶ An emergency appropriation on April 1, 1986, allowed CERCLA to continue.¹²⁷ Then, on October 8, 1986, Congress passed the 1986 Superfund Amendments and Reauthorization Act (SARA). SARA increased Superfund to \$8.5 billion. It also granted the EPA the power to assert liens on lands if CERCLA funds were spent for costs of cleanup, removal of hazardous substances, and other response costs.¹²⁸

Recent amendments to CERCLA provide that tribes will receive treatment substantially similar to the states.¹²⁹ Tribes are specifically authorized to enter into contracts or cooperative agreements with the federal government to carry out removal or other remedial actions in cases of releases of hazardous substances,¹³⁰ and to assert claims against Superfund for damages to tribal natural resources and costs of restoring or replacing damaged resources.¹³¹

However, some definite exceptions to the tribes-as-states provision exist. Each state is entitled to have one facility on the national list of priorities for remedial action.¹³² The treatment of tribes as states specifically excludes this entitlement.¹³³ Indian nations are also exempt from certain assurances of future maintenance and cost-sharing required of states in the case of federal remedial actions.¹³⁴

CERCLA amendments also called for a study of hazardous waste sites on native lands, including recommendations on tribal needs, with an emphasis on maximum tribal participation in the administration of CERCLA programs.¹³⁵ The survey disclosed that 1200 hazardous waste generators or other hazardous waste activity sites were located on or near the twenty-five Indian reservations selected for the survey.¹³⁶ The survey also indicated that hazardous waste management requirements of Indian tribes may differ from those of states. For example, the federal law may not adequately protect or even assess the many cultural or spiritual values unique to Indian tribes.¹³⁷ Moreover, the economic

126. *Id.* at 531.

127. *Id.*

128. 42 U.S.C. §§ 9601(23)-(25) (1988).

129. *See id.* § 9626; *id.* § 9603 (regarding notification of hazardous waste releases); *id.* § 9604(c)(2) (regarding consultation on remedial actions); *id.* § 9604(e) (regarding access to information); *id.* § 9604(i) (regarding health authorities); *id.* § 9605 (regarding remedial actions); *id.* § 9607 (regarding liability for damage caused during emergency actions); *id.* § 9611 (regarding special uses of funds); *see also* Christenson, *supra* note 124, at 1108 n.162.

130. 42 U.S.C. § 9604(d)(1)(A) (1988).

131. *Id.* § 9611(b)(1)(c); *see also* Royster & Fausett, *supra* note 3, at 620 n.150.

132. 42 U.S.C. § 9605(a)(8)(B) (1988).

133. *Id.* § 9626(a).

134. *Id.* § 9604(c)(3).

135. Royster & Fausett, *supra* note 3, at 620 n.150.

136. DuBey et al., *supra* note 9, at 459.

137. *Id.*

and social impacts resulting from hazardous waste contamination are likely to be greater on tribes because Indian tribes have less land and fewer economic development options than states.¹³⁸ Accordingly, what would be a minor matter to the EPA may well be considered a major on-reservation problem by the tribe. Relocating a tribe could be disastrous to the tribe's well-being and destroy the very fabric of Indian society as a whole.¹³⁹

In light of the survey findings, it is critical that tribes be treated as states. While CERCLA/SARA purports equal treatment, additional amendments are still necessary before tribal powers will equal state powers under this Act. Congress should consider allowing the tribes to list a facility on the national list, and assure future maintenance and cost-sharing in federal remedial actions.

B. Specific Tribal Participation Provisions

Not all of the federal pollution control laws contain a tribes-as-states provision. Two federal laws, the CWA and the FIFRA, include specific language concerning tribal participation in particular programs. These laws could also be amended to accord the tribes more equal treatment with the states.

VIII. Clean Air Act

The goal of the CAA is to establish a regulatory program that would assure the air is free from harmful contaminants, while minimizing the impact on growth and development, and distributing the burden of achieving clean air fairly among responsible parties.¹⁴⁰ An initial effort was made in 1955 with the enactment of the Air Pollution Control Act.¹⁴¹ In 1970 Congress restructured the CAA and created the EPA.¹⁴² The EPA was entrusted with the authority to develop and administer a plan for achieving compliance with the ambient air standards in those states that failed to adopt their own adequate plan.¹⁴³

Section 110 of the CAA provides for the development and implementation of plans that are designed to assure attainment and maintenance of the national air standards.¹⁴⁴ The state implementation plans must set out the legal authority of the state agency to regulate air pollution¹⁴⁵ and the resources that have been made available to carry out the plan.¹⁴⁶

138. *Id.*

139. *Id.* at 460.

140. MARK SQUILLACE, ENVIRONMENTAL LAW: AIR POLLUTION 41 (1988).

141. Act of July 14, 1955, Pub. L. No. 84-145, 69 Stat. 322.

142. Act of Dec. 31, 1970, Pub. L. No. 91-604, 84 Stat. 1676.

143. *Id.*

144. *Id.*

145. 40 C.F.R. § 51.11 (1991).

146. *Id.* § 51.20.

The CAA does not contain a tribes-as-states provision, but delegates limited jurisdiction over all land within Indian Country to tribal governments by statute.¹⁴⁷ Tribes are authorized to determine the level of air pollution which will be allowed on their reservations with the same degree of autonomy given to the states.¹⁴⁸ The CAA also provides for federal resolution of disputes between Indian governments and states, when either government objects to redesignation by the other or to a permit for a new emission source that would cause or contribute to air pollution in excess of that allowed by the tribal or state government.¹⁴⁹ Either government may request the EPA to enter into negotiations with the governments involved and to make recommendations to resolve the dispute. If the parties do not reach an agreement, however, the EPA shall resolve the dispute and the federal determination becomes part of the governments' air quality plans.¹⁵⁰

The enforcement provisions of the CAA apply to "owners," "operators," and "persons,"¹⁵¹ but none of these terms specifically include Indian tribes.¹⁵² As a result, at least some doubt exists that tribes are subject to the enforcement provisions of the CAA. The CAA enforcement provisions would more than likely be held to apply to the tribes since the purpose of the CAA requires national or uniform application.¹⁵³ An amendment clarifying the enforcement provisions would be beneficial.

IX. *Federal Insecticide, Fungicide, and Rodenticide Act*

The federal statute regulating pesticides is the FIFRA. The FIFRA contains two significant sections. Section 135 embodies the original legislative scheme and requires that "economic poisons" be registered with the EPA before they may be distributed in interstate commerce.¹⁵⁴ An economic poison may lawfully be registered only if it is properly labeled.¹⁵⁵ Section 136 contains provisions for cancellation and suspension if an unreasonable environmental risk arises.¹⁵⁶

The FIFRA contains no express provision for the treatment of tribes as states. However, certain provisions relating to funding, training,

147. 42 U.S.C. § 7474(c) (1988).

148. 40 C.F.R. § 52.21(g)(2) (1991); see also Christenson, *supra* note 124, at 1107-08.

149. 42 U.S.C. § 7474(e) (1988); see also Royster, *supra* note 13, at 621 n.154.

150. *Id.*

151. 42 U.S.C. §§ 7411(e), 7412(c) (1988).

152. Gover & Walker, *supra* note 1, at 439.

153. *Id.*

154. FINDLEY & FARBER, *supra* note 68, at 146.

155. *Id.*

156. *Id.*

and certification programs have been extended to Indian tribes.¹⁵⁷ The FIFRA does permit the EPA Administrator to delegate authority to tribes for operating pesticide applicator certification programs on the same basis as such authority is delegated to the states.¹⁵⁸ The FIFRA should be amended to include a provision for equal treatment of tribes as states.

X. Environmental Statutes Not Providing for Indian Regulation

There is currently only one federal environmental act which does not contain either a general tribes-as-states provision or an express authorization for tribes to assume certain responsibilities under the act. This act is the RCRA. In light of the recent amendments to other acts, Congress should also amend the RCRA to provide for the delegation of primary enforcement to the tribes.

XI. Resource Conservation and Recovery Act

The RCRA¹⁵⁹ provides a comprehensive "cradle-to-grave" program to manage hazardous wastes. The RCRA made hazardous waste management a federal concern, subject to a national regulatory program implemented by the EPA.¹⁶⁰ The RCRA directed the EPA to control the treatment, storage, transportation, and disposal of hazardous waste that might harm human health or the environment.¹⁶¹

Although the RCRA is comprehensive, Congress did not specifically address the role of Indian tribal governments under the RCRA.¹⁶² The RCRA vests regulatory authority over hazardous wastes in both the EPA and the states. The RCRA requires the EPA to develop and implement regulations for a comprehensive hazardous waste program that sets forth minimum standards for hazardous waste management.¹⁶³ It authorizes any state to develop, administer, and enforce its own hazardous waste program in lieu of the federal program.¹⁶⁴ Before a state can carry out its program, the state must submit its program to the EPA for approval.¹⁶⁵ If the program is equivalent to the minimum

157. 7 U.S.C. § 136u (1988).

158. *Id.*; see also Christenson, *supra* note 124, at 1108.

159. 42 U.S.C. §§ 6901-6987 (1988).

160. DuBey et al., *supra* note 9, at 455.

161. 42 U.S.C. § 6902(4) (1988).

162. DuBey et al., *supra* note 9, at 455-56.

163. See 42 U.S.C. § 6921 (1988) (identification of wastes); *id.* § 6922 (standards for generators of hazardous waste); *id.* § 6923 (standards for transporters); *id.* §§ 6924-6925 (standards and permits for owners and operators of hazardous waste treatment, storage, and disposal facilities); see also Allen, *supra* note 24, at 77.

164. 42 U.S.C. § 6296(b) (1988).

165. *Id.*

federal requirements, the EPA must approve a state's alternative program.¹⁶⁶ The RCRA authorizes states to develop regulations that are more stringent than the EPA's regulations.¹⁶⁷ While the RCRA vests supervisory control with the EPA, Congress intended states to have primary authority to implement and enforce their own programs.¹⁶⁸

Although the RCRA and its legislative history are virtually silent with regard to the protection of Indian lands, the EPA has stepped forward and addressed this matter by administratively interpreting the RCRA to apply to Indian lands.¹⁶⁹ It was further determined that the EPA, not the states, is responsible for implementing the federal RCRA program in Indian Country. Unless a state can prove otherwise, there is a presumption against the validity of state environmental laws in Indian Country.¹⁷⁰

Two federal courts have held that the RCRA applies to Indian lands and may be enforced against Indian tribes.¹⁷¹ The RCRA applies to all persons who conduct hazardous waste activities.¹⁷² The term "person" is defined to include, among others, individuals and municipalities.¹⁷³ The term "municipality" includes "an Indian tribe or authorized Indian tribal organization."¹⁷⁴

In *Blue Legs v. Bureau of Indian Affairs*,¹⁷⁵ Oglala Sioux Tribe members brought suit against the EPA, Bureau of Indian Affairs (BIA), Indian Health Service (IHS), and the tribe itself for violations of the RCRA. The United States District Court for the District of South Dakota dismissed the EPA and its administrator from the action.¹⁷⁶ It ordered the Tribe, the BIA, and the IHS to submit a plan within 120 days to bring the dumps into compliance.¹⁷⁷ This decision was appealed to the Eighth Circuit.

On appeal, the Tribe argued that it was immune from suit. However, the Eighth Circuit stated that the text and history of the RCRA clearly indicated congressional intent to abrogate the Tribe's sovereign immunity with respect to violations of the RCRA.¹⁷⁸ The Eighth Circuit

166. *Id.*

167. *Id.* § 6929.

168. Allen, *supra* note 24, at 77.

169. DuBey et al., *supra* note 9, at 456; *see also* Washington Dep't of Ecology v. EPA, 752 F.2d 1465, 1467 (9th Cir. 1985).

170. DuBey et al., *supra* note 9, at 456.

171. *See* Blue Legs v. Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir. 1989); *Washington Dep't of Ecology*, 752 F.2d at 1465.

172. 42 U.S.C. § 6928(d) (1988).

173. *Id.* § 6903(15).

174. *Id.* § 6903(13).

175. 867 F.2d 1094 (8th Cir. 1989).

176. *Id.* at 1095.

177. *Id.*

178. *Id.* at 1097.

held that the Indian Tribe, the BIA, and the IHS all were liable for the cleanup of open dumps located on the reservations under the RCRA.¹⁷⁹ *Blue Legs* clearly indicates that the RCRA does apply to Indian tribes and Indian lands.

The only indication that Congress may have intended to permit state jurisdictional authority over Indian lands is the RCRA's treatment of tribes as municipalities.¹⁸⁰ Various sections of the RCRA provide for municipalities to receive federal grants and financial assistance, either directly or through the states, for such activities as materials conservation, resource recovery, and solid and hazardous waste management facilities.¹⁸¹ The RCRA also authorizes the Administrator to provide money to municipalities in states that operate their own hazardous waste management plans under the EPA approval.¹⁸² The EPA may not provide any financial assistance unless the state certifies that the municipality's use of the funds is consistent with the state's program.¹⁸³ These statutes provide some confusion because it appears that financial assistance for the tribes as municipalities is conditioned on conformance with the state's plan.

The EPA recognized that the federal government, in certain cases, may expressly authorize state jurisdiction over hazardous waste or environmental matters on particular Indian lands. The EPA's regulations under the RCRA permit a state to seek control over hazardous waste on reservations.¹⁸⁴ The State of Washington was the first state to seek approval to apply its hazardous waste program to Indian lands. The Governor of Washington submitted an application on May 3, 1982, for interim authorization pursuant to section 3006(c) of the RCRA.¹⁸⁵ An analysis of the state's authority over activities on Indian lands was included in the application. The application was approved except as to Indian lands. In respect to the Indian lands, the EPA concluded that the state had not adequately demonstrated its legal authority to exercise jurisdiction.¹⁸⁶ The EPA found that "the RCRA did not give the state jurisdiction over Indian lands, and that states could possess such jurisdiction only through an express act of Congress or by treaty. Since Washington had cited no independent authority for its jurisdictional claim, the EPA retained jurisdiction to operate federal hazardous waste management programs on Indian lands in the State of Washington."¹⁸⁷

179. *Id.* at 1098-1100.

180. Allen, *supra* note 24, at 78.

181. 42 U.S.C. § 6943(a), (d), (f)-(g) (1988).

182. *Id.* § 6943(c)(1)(C).

183. *Id.* § 6949(a)(2)(B).

184. 40 C.F.R. §§ 271.7, 271.1(h) (1991); *see also* Allen, *supra* note 24, at 69.

185. *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465, 1467 (9th Cir. 1985).

186. *Id.*

187. *Id.*

The EPA's decision was challenged by the state of Washington in the Ninth Circuit Court of Appeals. Washington contended that since tribal powers were not expressly preserved, the RCRA had eliminated such tribal powers.¹⁸⁸ Accordingly, Washington argued that only the federal government and the individual states had authority to implement the RCRA. It was Washington's contention that there was a preference for state administration.¹⁸⁹ Washington additionally argued that section 3006 allowed a state to enforce its program "in lieu of" the entire federal program in the states including that part applying to Indian Country.¹⁹⁰ Thus, it was Washington's position that the RCRA conferred on the state the right to regulate all hazardous waste activities within the state, with no exceptions for Indian tribes or Indian lands.¹⁹¹

The court noted that both the RCRA and its legislative history were silent on the issue of state authority over reservation land.¹⁹² When a statute is silent or ambiguous, the courts must, under generally accepted principles of administrative law, defer to the agency interpretation, so long as the agency's interpretation is reasonable. Therefore, the court held that the EPA had reasonably interpreted the RCRA not to grant state jurisdiction over the activities of Indians in Indian Country.¹⁹³

In affirming the reasonableness of the EPA's interpretation, the court did not rely solely upon traditional principles of deference to the agency, but held as well that both federal Indian law and federal Indian policy supported the EPA's position.¹⁹⁴ The Ninth Circuit examined these federal policies and the "backdrop" of tribal sovereignty as they affected the EPA's interpretation of the hazardous waste statute. Specifically, the court considered the general principle that states do not have jurisdiction over natives and native land absent an express congressional grant; the federal trust responsibility toward native nations; respect for the long tradition of tribal sovereignty and self-government; the current federal policy of promoting tribal self-government; the EPA's commitment to the federal position, in theory and in practice; and the strong tribal sovereign interest in managing the environment of the reservation.¹⁹⁵ According to the court, all of these factors supported the EPA's interpretation of the RCRA as

188. *Id.* at 1467.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 1469.

193. *Id.*

194. *Id.* at 1469-71; see also Royster & Fausett, *supra* note 3, at 633.

195. Royster & Fausett, *supra* note 3, at 633-34.

prohibiting state authority to implement their "in lieu of" hazardous waste programs on reservation lands.¹⁹⁶

Thus, while the RCRA is silent with regard to the treatment of Indians, case law has established that the RCRA does apply to Indian tribes and Indian lands, and that the states are prohibited from applying their state environmental laws to Indian reservations.

XII. Conclusion

Due to the jurisdictional rules applicable to Indian lands, the EPA is unable to pursue its usual practice of delegating primary enforcement responsibility to the states. Although the federal environmental laws, as originally enacted, failed to address the regulatory authority on Indian lands, the current view of Congress, the courts, and the EPA is that states do not have jurisdiction to enforce environmental laws on reservations.¹⁹⁷ This indicates that absent specific statutory language which grants the states jurisdiction over Indian lands, the federal government through the EPA will retain jurisdiction to implement federal environmental programs on Indian lands.¹⁹⁸

Perhaps the best solution for pollution control on Indian lands is to allow tribes that are willing and able to assume control over environmental regulation. The EPA may act as an interim facilitator and as a source of funding, assistance, and technical expertise in assisting these tribes.¹⁹⁹ Such a practice would promote tribal self-government and build tribal expertise in environmental matters.²⁰⁰ Development of programs imposing stricter requirements than the federal or state law would be one option open for the Indian tribes. Such stricter standards could offer greater protection than the basic federal standards.²⁰¹ While many of the federal environmental statutes have greatly improved the tribes' position with the recent amendments, future legislation is necessary to promote comprehensive environmental management by tribal governments. The SMCRA should be amended to allow the tribes to have approved regulatory programs and to eliminate the "eligible lands" requirement. The CWA and the SDWA should be amended to allow the same treatment for tribes as states, not just similar treatment. CERCLA should be amended to allow tribes to list a facility on the national list and to assure future maintenance and cost-sharing in federal remedial actions. The CWA en-

196. *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465, 1472 (9th Cir. 1985); see also *Royster & Fausett*, *supra* note 3, at 634.

197. *Gover & Walker*, *supra* note 1, at 444.

198. *DuBey et al.*, *supra* note 9, at 503.

199. *Royster & Fausett*, *supra* note 3, at 583 n.4.

200. *Id.*

201. *DuBey et al.*, *supra* note 9, at 480.

forcement provisions should be amended to specifically include Indian tribes. Also, the CWA and the FIFRA should incorporate a tribes-as-states provision. Congress should also amend the RCRA to include the tribes-as-states provision.

Many of these federal environmental acts will soon be up for reauthorization before Congress. It is critical for tribal sovereignty and for the protection of the many cultural and spiritual values unique to Indian tribes that the tribes be accorded the same treatment as the states in developing and implementing federal environmental regulatory programs.