Separate and Unequal: Environmental Regulatory Management on Indian Reservations

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I. INTRODUCTION

This article relies on two assumptions. First, the relationship between indigenous peoples and settlers revolves around an economic battle for control over natural resources. Second, this control is vital to the existence of communities striving for independence and economic sustainability. These assumptions have previously been applied to natural resource allocation issues.[1] This article now applies these assumptions to natural resource protection issues and environmental quality concerns.

In particular, this article addresses whether the federal government is obligated to provide environmental regulatory protection to residents of Indian reservations commensurate to that which is provided to state residents. This article concludes that the federal government has a statutory obligation, a trust mandate, and a constitutional responsibility to provide an equal level of environmental protection to residents of Indian reservations. These obligations include requirements to fund, train, and delegate authority to tribal governments so they can assume environmental regulatory programs. This is consistent with federal policy and traditional notions of tribal sovereignty.

The United States Environmental Protection Agency ("EPA"), however, has failed to adequately implement environmental regulatory programs on Indian reservations. There is no comprehensive application of federal environmental programs on Indian reservations. Furthermore, even where federal environmental policies are implemented on Indian reservations, it is not commensurate with state entitlements. To the extent the EPA is applying environmental regulatory programs on Indian reservations inadequately; tribes can enforce their right to equal environmental regulatory protection under several legal theories discussed in this article.

Part II of this article addresses the available statutory framework. It demonstrates EPA's statutory obligations to ensure environmental regulatory programs are implemented on Indian reservations. This statutory obligation exists even if the EPA delegates regulatory authority over environmental programs to tribes.

Part III focuses on the federal government's fiduciary obligation to Indian tribes. It concludes that the trust relationship between the federal government and tribes requires the federal government ensure environmental protection programs are implemented on tribal lands effectively. Moreover, apart from federal environmental statutes, Indian tribes may possess an implied treaty right guaranteeing a healthy environment on reservation land. Further, Part III argues that the federal government's fiduciary duty requires the federal government

[1] *See* Benjamin A. Kahn, *The Legal Framework Surrounding Maori Claims to Water Resources in New Zealand: In Contrast to the American Indian Experience*, 35(1) STAN. J. INT'L L. 49, 50-52 (1999).

provide training and funding to Indian tribes so they assume delegation of environmental regulatory programs. This delegation is consistent with traditionally honored concepts of tribal self-determination.

Part IV examines the constitutional implications of failing to provide commensurate environmental protection on Indian reservations. It concludes that the failure to fund and train tribal governments to assume regulatory authority, and the environmental regulatory gap on Indian reservations, deny residents of Indian reservations equal protection under the laws.

Despite this multi-faceted federal responsibility, environmental conditions on Indian reservations remain challenging. The EPA simply does not pay enough attention to tribes in administering of federal environmental programs. Part V therefore concludes that the EPA should revisit its funding allocation to ensure equitable funding and training for environmental regulation on Indian reservations. If necessary, the judiciary should exercise oversight to ensure that the EPA implements a plan that includes equitable funding and appropriate delegation of regulatory authority to tribal governments for environmental programs.

II. STATUTORY OBLIGATIONS: THE FEDERAL GOVERNMENT MUST TREAT TRIBES LIKE STATES

Federal environmental statutes provide for comprehensive national regulation. If the federal government is not administering environmental laws on Indian reservations directly, it generally has a statutory obligation to delegate authority to tribes to administer environmental programs on reservation lands.[2] This obligation requires the federal government delegate regulatory authority to tribal governments and fund tribal regulatory programs if tribes meet certain criteria.

A. Safe Drinking Water Act

The Safe Drinking Water Act ("SDWA") authorizes the EPA Administrator to "treat Indian Tribes as States."[3] This authority includes direction to "delegate to such Tribes primary enforcement responsibility for public water systems and for underground injection control" and to "provide such Tribes grant and contract assistance."[4] The EPA, however, can only delegate regulatory authority

[2] Wash. Dep't of Ecology v. EPA, 752 F.2d 1465, 1469-70 (9th Cir. 1985); *see* Phillips v. EPA, 803 F.2d 545 (10th Cir. 1986) (parties agreed Oklahoma had no Safe Drinking Water Act UIC regulatory power over the Osage Indian Reservation). Any federal failure to protect reservation environments or fund, train and delegate authority to tribal governments for environmental regulatory programs may be an "arbitrary and capricious" action in violation of the Administrative Procedure Act (APA). Administrative Procedure Act § 10, 5 U.S.C. § 706(2)(A) (1988).

[3] Safe Drinking Water Act, 42 U.S.C. § 300j-11(a) (2006).

[4] *Id.*

and funding to federally recognized tribes that possess substantial governing bodies and the necessary management and technical capabilities.[5] The latter can be demonstrated by prior management experience, "which may include, the administration of programs and services authorized by the Indian Self–Determination and Education Assistance Act (25 U.S.C. 450 et seq.), the Indian Mineral Development Act (25 U.S.C. 2101 et seq.), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004)."[6] If the tribe has no relevant or technical experience it is caught in a funding gap that precludes regulatory delegation to the tribe.[7]

The EPA is obligated to help the tribes "obtain 'regulatory primacy' by providing technical assistance"[8] once tribes fulfill the requirements to receive state treatment. Tribal regulatory authorities must then implement environmental standards that are at least as stringent as any federal regulation.[9] SDWA regulations make clear that "it is the Agency's intent that Indian reserve funds will be used either by EPA Regions for activities on Indian lands or by eligible Indian Tribes."[10] Accordingly, the SDWA is designed to ensure that federal safe drinking water objectives are met on Indian reservations through either delegation of the regulatory program or direct federal regulation.

B. Clean Water Act

The Clean Water Act ("CWA") also includes provisions to delegate regulatory authority and funding to tribal governments if the tribes meet certain requirements. The CWA authorizes the EPA Administrator "to treat an Indian Tribe as a State . . . to the degree necessary to carry out the objectives of this section."[11] A range of activities are subject to potential CWA delegation, including everything from constructing treatment works facilities to implementing pollution control programs.[12] The CWA is also intended to promote research, investigation, and training with respect to water quality standards and water quality implementation plans.[13] CWA provisions clarify that the federal government's statutory clean water obligations apply to Indian

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[5] *Id.* § 300j-11(b)(1).

[6] 40 C.F.R. § 131.8 (1994); Richard A. DuBey, Michael P. O'Connell & James M. Grijalva, *Clean Water Act: An Examination of Federal Environmental Regulatory Delegation to Indian Tribes* (on file with Stoel, Rives, Boley, Jones & Grey (Seattle office)).

[7] *See* Safe Drinking Water Act, 42 U.S.C. § 300j-11(b)(1) (2006).

[8] Safe Drinking Water Act, 52 Fed. Reg. 37,396 (Sept. 26, 1988) (to be codified at 40 C.F.R. pt. 142).

[9] 42 U.S.C. § 300j-11(b)(2).

[10] Safe Drinking Water Act, 52 Fed. Reg. at 37,396.

[11] Clean Water Act, 33 U.S.C. § 1377(e) (2006).

[12] *Id.* § 1251(a) (2006).

[13] *Id.*

reservations as well as states.[14] However, similar to the SDWA, the CWA requires tribes meet certain criteria before the tribe can receive state-like treatment, including federal recognition, a substantial governing body, and regulatory capability.[15] Once again, a tribe poor in experience or investment capital can effectively be boxed out of the regulatory delegation option and be subject to the federal government's direct CWA regulation.[16]

C. Clean Air Act

The Clean Air Act ("CAA") similarly authorizes the EPA Administrator to treat Indian tribes as states, and to "provide any such Indian tribe grant and contract assistance to carry out functions provided by this chapter."[17] The CAA also authorizes funding to tribal regulatory authorities

> in an amount up to three-fifths of the cost of implementing programs for the prevention and control of air pollution or implementation of national primary and secondary ambient air quality standards. For the purpose of this section, 'implementing' means any activity related to the planning, developing, establishing, carrying-out, improving, or maintaining of such programs.[18]

While EPA has a statutory obligation to provide funding to tribes, the EPA is not required to treat tribes exactly like states for funding purposes because tribes are exempted from minimum state funding requirements.[19] Additionally, tribes must meet certain criteria before the EPA can delegate regulatory authority or funding.[20]

The CAA's purpose is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[21] Accordingly, the CAA provides that the EPA Administrator may administer a program directly to implement the statute if a tribe does not receive delegation of regulatory authority.[22] As such, the federal

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[14] Wisconsin v. Environmental Protection Agency, 266 F.3d 741, 743-46 (7th Cir. 2001).

[15] Clean Water Act, 33 U.S.C. § 1377(e) (2006); *see generally* Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876 (Dec. 12, 1991) (to be codified at 40 C.F.R. pt. 131).

[16] 42 U.S.C. § 1377(e).

[17] Clean Air Act of 1990, 42 U.S.C. § 7601(d)(1)(B) (2000); *see* 42 U.S.C. § 7474(c) (stating that redesignation of reservation air quality standards can only be done by "the appropriate Indian governing body").

[18] 42 U.S.C. § 7405(a)(l)(A) (1990).

[19] *Id.* § 7601(d)(1)(A).

[20] The criteria again are federal recognition, a governing body and management capability. *Id.* § 7601(d)(2).

[21] Clean Air Act, 42 U.S.C. § 7401(b)(1) (2006).

[22] *Id.* § 7601(d)(4).

government has a statutory obligation to provide for proper clean air regulation on Indian reservations, but a tribe can only receive regulatory authority and funding if it meets stringent criteria. However, even if a tribe receives funding, the funding is fractional as a matter of statutory fiat.[23]

D. Federal Insecticide, Fungicide, and Rodenticide Act

The EPA also may delegate authority to any state or Indian tribe to enforce the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA").[24] EPA's regulations allow the federal government to delegate to tribes the pesticide certification program, which is the primary enforcement mechanism under FIFRA.[25] Federal regulations suggest that in the absence of tribal delegation, the EPA is to administer a federal certification program on tribal lands.[26] As such, the federal government has statutory obligations to delegate or directly administer FIFRA programs on Indian reservations.

E. Solid Waste Disposal Act (the Resource Conservation and Recovery Act)

The Solid Waste Disposal Act ("SWDA/RCRA") does not address whether tribes can be delegated regulatory authority or funding.[27] However, tribes are included in the statutory definition of "municipalities" and the definition of "persons."[28] Thus, the SWDA/RCRA applies to Indian reservations.[29] The EPA itself takes the position that delegation of certain SWDA/RCRA programs to tribes is appropriate.[30] The federal government, therefore, acknowledges that statutory solid waste disposal rules and regulations extend to Indian reservations and that it has a statutory obligation to delegate regulatory authority or administer the SWDA/RCRA programs directly.[31]

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[23] The criteria again are federal recognition, a governing body and management capability. *See* Clean Air Act, 42 U.S.C. § 7405(a)(1)(A) (2006), 7601(d)(2) (2006).

[24] Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136u(a)(1) (2006).

[25] 40 C.F.R. § 171.10(a) (1993).

[26] *Id.* § 171.11(a).

[27] Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992k (2006).

[28] *Id.* § 6903(13), (15).

[29] *Wash. Dep't of Ecology*, 752 F.2d at 1472.

[30] *See* Legal Opinion of Acting Regional Counsel for EPA Region V (November 3, 1989).

[31] The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") also provides for tribal environmental regulatory management of hazardous wastes. The statute provides that

> [t]he governing body of an Indian tribe shall be afforded substantially the same treatment as a State with respect to the provisions . . . (regarding notification of releases) [. . . (regarding] consultation on remedial actions) [. . . (regarding] access to information) . . . (regarding health authorities) . . . [and . . .] (regarding roles and responsibilities under the national contingency plan and submittal of priorities for remedial action, but not including the provision regarding the inclusion of one facility per State on the National

III. FIDUCIARY OBLIGATIONS: THE FEDERAL GOVERNMENT MUST ENSURE INDIAN RESERVATIONS RECEIVE ADEQUATE ENVIRONMENTAL PROTECTION

The federal government is obligated to administer environmental programs on Indian reservations effectively. Notwithstanding federal environmental regulatory schemes discussed above, the trust relationship between the federal government and Indian tribes obligates the government to protect the health and welfare of Indian people. Indian nations and tribes also may have an implied treaty right to a healthy reservation environment.

Indian tribes should receive funding and training so they can assume delegation of environmental regulatory authority. Aside from statutory mandates, federal policy envisions delegation of regulatory authority to tribes as part of a broader movement toward tribal self-determination. Furthermore, a policy of funding and training tribes so they can assume delegation of environmental regulatory authority is consistent with tribal sovereignty.

A. The Federal Government Is Obligated to Ensure That Environmental Programs are Effectively Administered on Indian Reservations

States generally do not have the right to regulate environmental programs on sovereign Indian land.[32] In contrast, federal government's responsibility is clear. Federal environmental laws are comprehensive and aim at protecting the entire nation's environmental quality, including environmental quality on Indian reservations.[33] Further, the "Financial Assistance for Continuing Environmental Programs" regulations direct the EPA Administrator to "use all or part of the funds to support a federal program required by law in the . . . absence of an acceptable [tribal] program."[34]

More importantly, the trust relationship obligates the federal government to protect the health and well-being of Indian people. Indian tribes also may have an implied treaty right to a healthy reservation environment. These overlays are important, because federal environmental statutes and regulations alone have been insufficient to protect Indian reservations.[35]

Priorities List).

Indian Tribes can also recover costs from responsible parties. But CERCLA does not provide for delegation of regulatory authority to either states or tribes. Instead, CERCLA provides protection in the form of comprehensive federal remediation efforts that cross state or tribal boundaries. Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9626(a), 9607(a)(4)(A) (2006).

[32] *See Wash. Dep't of Ecology*, 752 F.2d at 1469-702.

[33] *Id.*; *see* Administrative Procedure Act §10, 5 U.S.C. §706(2)(A) (1988); *see also Phillips v. EPA*, 803 F.2d at 545.

[34] 40 C.F.R. § 35.116 (2011).

[35] Donald R. Wharton, Native American Rights Fund, *Implementation of EPA's Policy and Tribal Amendments to Federal Environmental Laws*, American Bar Ass'n Conf., February 20, 1992;

1. The Trust Relationship Requires the Federal Government Protect the Health and Well-Being of Indian People

The federal government has a trust responsibility to Indian nations. The Supreme Court in *Cherokee Nation v. Georgia* described the trust relationship between the federal government and Indian tribes as resembling "a ward to his guardian."[36] This trust relationship obligates the federal government to protect the health and well-being of Indian people.[37] For instance, in *Blue Legs v. United States Bureau of Indian Affairs*, the court found that the Oglala Sioux Tribe did not have sovereign immunity from RCRA liability.[38] However, the court further ruled that the Bureau of Indian Affairs and the Indian Health Service ("IHS") had a trust responsibility to share clean-up costs with the Tribe.[39] The *Blue Legs* court emphasized the federal government's trust responsibilities to Indian tribes.[40] This unique fiduciary relationship makes the federal government responsible for the health and well-being of Indian tribes regardless of whether other parties are potentially responsible as well.[41] The ruling was also consistent with the Department of Interior's fiduciary duty to Indian tribes.[42] The federal government's trust responsibilities have been cited by courts even without an affirmative statutory obligation to act. The Eighth Circuit, for example, recognized the IHS' responsibility for tribal health care costs because of the federal government's trust responsibility, even absent an explicit statutory duty.[43]

2. Indian Nations and Tribes May Have an Implied Treaty-Based Right to a Healthy Reservation Environment

Indian tribes may also have implied treaty rights to environmentally safe reservation land. The concept of implied treaty rights has been recognized with respect to water entitlements. The landmark case *Winters v. United States* held that the federal reservation of land for the GrosVentre and Assiniboine Tribes

Bunty Anquoe, *Senate Approves Plan for Indian EPA Office*, INDIAN COUNTRY TODAY, May 5, 1993, at A7 (quoting Senator McCain that only "two-tenths of one percent of EPA's total budget has gone to reservations").

[36] Cherokee Nation v. Georgia, 30 U.S. 1, 14 (1831).

[37] Blue Legs v. U.S. Bureau of Indian Affairs, 867 F.2d 1094, 1100-01 (8th Cir. 1989); White v. Califano, 437 F. Supp. 543, 555 (D. S.D. 1977), *aff'd* 581 F.2d 697 (8th Cir. 1978).

[38] *See id.*, at 1096.

[39] *Id.* at 1100.

[40] *Id.* at 1101.

[41] *Id.*

[42] *See* United States v. Mitchell, 463 U.S. 206, 225 (1983) ("Our construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people."); *see also* Exec. Order No. 12580, 52 Fed. Reg. 2923, 2926 (Jan. 29, 1987) (stating that Interior Department is federal trustee for Indian tribal natural resources).

[43] *White*, 437 F. Supp. at 555, *aff'd* 581 F.2d at 698.

included an implied water right because water is necessary to support agriculture on tribal lands.[44] The Supreme Court found implied water rights even absent explicit treaty language.[45] The Supreme Court reasoned that the reservation land was worthless without a corresponding water right.[46] Thus, water rights were implicitly included in the terms of the treaty.[47]

Courts expanded the implied rights doctrine to include rights to in-stream flows necessary to maintain fish runs.[48] In *United States v. State of Washington, Phase II*, the Court relied on *Winters* and its progeny in holding that Washington has an obligation to ensure in-stream flows sufficient to support tribal fishery runs.[49] By extension, the reservation of Indian lands implicitly includes rights to environmentally safe land and resources. Environmental quality is essential for reservation water, land, and other natural resources to be valuable to Indian tribes. Therefore, the doctrine of implied rights may include rights to a basic level of environmental quality on Indian reservations created by treaty, at least as measured against the time of the land grant.[50] The implied rights doctrine also may implicate a tribe's right to address environmental problems on Indian reservations stemming from activities outside of reservation boundaries.[51]

B. Tribes Should be Trained and Funded So They Can Assume Delegation of Environmental Regulatory Authority

Because the federal government is obligated to ensure the administration of environmental regulatory programs on Indian reservations, the federal government should train and fund tribes so they can assume delegation of environmental regulatory authority. If tribes have the capacity to administer the environmental regulatory schemes, Congress may delegate regulatory authority to tribal governments. Absent express Congressional delegation of regulatory authority to tribal governing bodies, the EPA can also promulgate regulations

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[44] Winters v. United States, 207 U.S. 564, 577 (1908).

[45] *Id.*

[46] *Id.* at 576-77.

[47] *Id.*

[48] Joint Board of Control v. United States and Confederated Salish and Kootenai Tribes, 832 F.2d 1127, 1132 (9th Cir. 1987), *cert. denied* 486 U.S. 1007 (1988).

[49] United States v Washington, Phase II, 506 F. Supp. 187, 204-05 (W.D. Wash. 1980).

[50] *See, e.g.*, Judith Constans, *The Environmental Right to Habitat Protection: A Sohappy Solution*, 61 WASH. L. REVIEW 731 (1986). Courts looking for definition with respect to an adequate level of environmental quality have sufficient precedent. *Id.* at 732-34. *See* Arizona v. California, 373 U.S. 546, 595-600 (1963) (stating reserved rights allocation should be based on that water necessary to irrigate all of "the practicably irrigable acreage" on a reservation); *see also* United States v. Washington, 506 F. Supp. 187, 208 (W.D. Wash. 1980) (stating treaty fishing rights include an implied right to environmental water quality sufficient to maintain the Tribe's "moderate living needs").

[51] *Wisconsin*, 266 F.3d at 748-49.

that delegate authority to tribes.[52] A policy of funding and training tribes to assume delegation of environmental regulatory authority is more compatible with traditional notions of tribal sovereignty than paternalistic federal administration.

1. Federal Policy Envisions Delegation of Regulatory Authority to Tribes as Part of a Broader Movement Toward Tribal Self-Determination

The trust relationship requires the federal government to protect the environmental resources of Indian nations. Within this trust relationship, federal policy envisions delegating regulatory authority to tribes as part of a broader movement toward tribal self-determination. Congress affirmed the federal trust relationship with Indian tribes in the Indian Self-Determination Act, noting the need for:

> [A] meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services [through Indian tribal governments.][53]

The Self-Determination Act evidences Congress' intent to delegate regulatory authority to Indian tribes.[54] EPA policy also supports moving toward tribal primacy in reaching environmental objectives.[55] EPA's policy statements provide that the Agency should emphasize delegation of regulatory authority to tribes

> to insure the close involvement of tribal government in making decisions and managing environmental programs affecting Indian lands. To meet this objective, the Agency will pursue the following principles . . . recognize tribal governments as the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with Agency standards and regulations.[56]

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[52] Nance v. EPA, 645 F.2d 701, 715 (9th Cir. 1981), *cert. denied sub nom. See* Crow Tribe of Indians v. EPA, 454 U.S. 1081 (1981) (upholding EPA regulations allowing tribal governments to redesignate air quality regions for reservation land, although original Clean Air Act made no reference to tribal involvement); Legal Opinion of Acting Regional Counsel for EPA Region V, *supra* note 30.

[53] Indian Self-Determination Act, 25 U.S.C. § 450a(b) (2006).

[54] *Id.*

[55] William D. Ruckelshaus, *EPA Policy for the Implementation of Environmental Programs on Indian Reservations*, (Nov. 8, 1984), *available at* http://www.epa.gov/superfund/community/relocation/policy.htm.

[56] *Id.*

To date, however, the EPA has failed in its objective of broadly delegating regulatory authority to tribal governments.[57]

2. A Policy of Funding and Training Tribes So They Can Assume Delegation of Environmental Regulatory Authority is Bolstered by Traditional Notions of Tribal Sovereignty

The movement toward delegating regulatory authority to Indian tribes stems from twin themes: national Indian policy should recognize and promote tribal self-government, and a special government-to-government relationship exists between the federal government and sovereign Indian nations.[58] President Reagan identified these guiding principles in his 1983 Indian Policy Statement.[59] EPA also echoed these themes by adopting the position that "[t]he environment is generally best protected by those who have the concern and ability to protect it . . . [c]ertainly, if the principle favoring local stewardship of the environment has meaning anywhere, it is on the Indian reservation."[60] EPA then directed program managers to implement environmental regulation on Indian reservations, keeping in mind the "principle of Indian self-determination" and promoting tribal governments "to assume essential roles in implementing EPA's delegable Federal environmental programs and activities."[61] EPA subsequently pursued a federal policy of working with tribal governments directly.[62] The administration reaffirmed this policy objective in 1991.[63]

Absent federal delegation of regulatory authority to tribes, Indian tribes may retain inherent sovereign regulatory power to regulate their reservation environments anyway. After all, an Indian tribe's governmental authority is not limited to those delegated powers granted by Congress but includes inherent powers of a limited sovereign that have never been extinguished.[64] The Court in *United States v. Wheeler* held that an Indian nation has the right to set criminal

[57] Wharton, *supra* note 35; Anquoe, *supra* note 35.

[58] Richard A. Dubey, Mervyn T. Tano & Grant D. Parker, *Protection of the Reservation Environment: Hazardous Waste Management on Indian Land*, 18 ENVTL. L. REV. 449, 485 (1988); *President's Indian Policy Statement*, 19 WEEKLY COMP. PRES. DOC. 98 (Jan. 28, 1983); *see* ENVIRONMENTAL PROTECTION AGENCY MEMORANDUM EPA/STATE/TRIBAL RELATIONS ATTACHMENT, FEDERAL, TRIBAL AND STATE ROLES IN THE PROTECTION AND REGULATION OF RESERVATION ENVIRONMENTS: A CONCEPT PAPER 3 (July 10, 1991), *available at* http://www.epa.gov/region4/Indian/EPAStTri_relations.pdf.

[59] *President's Indian Policy Statement*, 19 WEEKLY COMP. PRES. DOC. 98 (Jan. 28, 1983).

[60] OFFICE OF FED. ACTIVITY, EPA, ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN LANDS 4-5 (1983).

[61] *Id.* at 6.

[62] OFFICE OF FEDERAL ACTIVITIES, OFFICES OF EXTERNAL AFFAIRS, INTERIM STRATEGY FOR IMPLEMENTATION OF THE EPA INDIAN POLICY 11 (1985).

[63] UNITED STATES BUREAU OF INDIAN AFFAIRS, AMERICAN INDIANS TODAY: ANSWERS TO YOUR QUESTIONS 5-6 (1991).

[64] United States v. Wheeler, 435 U.S. 313, 322-23 (1978).

laws within its reservation, noting, "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[65] Thus, Congress can expressly limit or encourage tribal regulatory authority, but absent any divesting language, tribes retain regulatory authority over the environment of Indian lands. This is especially true when Congress is silent on potential delegation of authority to Indian tribes, as in RCRA.[66] As explained by the Supreme Court, "[b]ecause the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from [Congressional] silence . . . is that the sovereign power . . . remains intact."[67]

In short, retained sovereign power allows Indian tribes to use environmental regulatory control to monitor environmental quality even absent express delegation. Furthermore, tribal regulation of non-Indian activities on the reservation is always appropriate "when those activities threaten or have a direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[68]

Tribes cannot exercise their authority to implement environmental programs, however, when they lack the training and resources necessary to provide effective administration. As a fiduciary matter, the federal government therefore should provide adequate funding and training to allow tribes to implement environmental protection directly and effectively. This will advance the federal government's policy of promoting Indian self-determination and tribal sovereignty over internal matters.

IV. CONSTITUTIONAL OBLIGATIONS: THE COMPREHENSIVE AND FEDERAL NATURE OF ENVIRONMENTAL STATUTES MANDATES THAT INDIAN RESERVATIONS RECEIVE AN EQUAL LEVEL OF ENVIRONMENTAL PROTECTION

The comprehensive nature of federal environmental statutes mandates that residents of Indian reservations receive environmental protection equal to that provided to residents outside the boundaries of tribal land. The federal government is obligated to provide reservation residents with the same level of environmental protection afforded to the rest of the nation's population, because of the constitutional equal protection guarantee. In *Washington Department of Ecology v. United States Environmental Protection Agency*, the court expressly

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[65] *Id.* at 323.

[66] *See* Resource Recovery and Conservation Act ("RCRA"), 42 U.S.C. § 6901-6992k. (1976).

[67] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 n. 14 (1982) (taxation context).

[68] Montana v. United States, 450 U.S. 544, 565-66 (1981) (stating how the effects of the activities in question must be serious in nature to warrant such regulation); Amendments to the Water Quality Standards Regulations That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,878 (Dec. 12, 1991) (to be codified at 40 C.F.R. pt. 131); *see* Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 431 (1989).

declined to decide whether RCRA provided for delegation of regulatory authority to tribes.[69] However, the court clarified that the State of Washington itself could not regulate Indian reservations within the state.[70] The court explained that "[t]he absence of state enforcement power over reservation Indians, however, does not leave a vacuum in which hazardous wastes go unregulated. EPA remains responsible for ensuring that the federal standards are met on the reservations."[71] In short, as a constitutional matter, the federal government must take affirmative steps to ensure that residents living on Indian reservations receive the same federal environmental protection standards as those living outside of Indian reservations.

Despite the constitutional guarantee that all people receive equal protection under the laws, weak environmental regulation on Indian reservations prevails. Specifically, the federal government has yet to train and fund all Indian tribes who seek to assume delegation of environmental regulatory authority in a manner similar to states.[72] In contrast, states receive substantial training and funding to administer federal environmental statutes and regulations.[73] This funding disparity results in the potential for environmental neglect on Indian reservations. This unequal distribution of federal environmental funding should be subject to stringent, if not strict review, because this funding discrepancy only disadvantages Indian reservation residents and therefore is essentially a racial classification.

A. Indian Nations and Tribes Need More Training and Funding to Assume Delegation of Environmental Regulatory Authority

The federal government should train and fund tribal environmental regulatory programs in a manner similar to states.[74] Lack of funding and training disadvantages Indian reservation residents, if tribes cannot obtain equal environmental regulatory delegation compared to states. The major problem preventing tribal delegation is that the federal government requires tribes meet numerous prerequisites before delegating environmental regulatory authority to tribes.[75] Many of these requirements, such as the requirement that tribes demonstrate management capability through prior management experience with

[69] *Wash Dep't of Ecology*, 752 F.2d at 1472.

[70] *Id.*

[71] *Id.*

[72] Wharton, *supra* note 35, at 23; Anquoe, *supra* note 35 (stating that EPA funding does not come close to addressing environmental needs in Indian Country).

[73] An empirical analysis of federal funding disparities is beyond the scope of this article, but would be necessary to establish discrepancies between federal investments in state and tribal training and management capabilities for constitutional equal protection purposes.

[74] *Id.*

[75] *Supra* § II.

programs authorized by the Indian Mineral Development Act, Indian Self-Determination and Education Assistance Act, or the Indian Sanitation Facility Construction Activity Act are unique to tribes.[76] These prerequisites exist even though the EPA is aware that many tribes may not qualify for delegation of authority due to a lack of existing expertise.[77]

Native American Rights Fund attorney Donald R. Wharton documented the dramatic impact on Indian communities caused by the federal government's failure to provide reservations with equal environmental regulatory protection:

> Since the adoption of its Indian Policy (a period between 1985 and 1990) EPA has provided $25.9 million in direct assistance to all Indian tribes - an average of less than $5.2 million per year. During that same time frame three states comparable in size and population to the total of all reservations – Idaho, North Dakota, and South Dakota – received three to four times that amount.[78]

This example is even more egregious when one considers that comparable states received three to four times the amount of money *after* they put in place their environmental regulatory infrastructures.[79] Gaps in tribal regulatory infrastructure will continue to plague tribal environmental regulatory efforts, even if the EPA shifts to a reformed funding policy.[80]

Any analysis of federal constitutional obligations should recognize EPA's own awareness of the importance of delegating environmental regulation to tribes. EPA's Indian Policy states that the Agency should "take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands."[81] Furthermore, the EPA instructs offices to incorporate delegation of regulatory authority goals into budget, planning, management, legislative, and operating policies.[82]

Any constitutional analysis of Indian reservation environmental quality should consider the fact that the EPA understands tribes need more funding to obtain regulatory delegation capabilities. The EPA Indian Policy Implementation Guidance states that it should "[a]llocate resources to meet tribal needs."[83] Specifically, "[a]s tribes move to assume responsibilities similar

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[76] *Id.*

[77] 40 C.F.R. § 131.8(b)(4)(v) (1994) (Clean Water Act context). EPA allows a tribe to submit a plan proposing how the tribe will acquire necessary administrative skills, technical expertise and funding for this education.

[78] Wharton, *supra* note 35, at 23.

[79] *Id.*

[80] *Id.*

[81] Ruckelshaus, *supra* note 55.

[82] *Id.*

[83] EPA, INDIAN POLICY IMPLEMENTATION GUIDANCE (Nov. 8, 1984), *available at* http://www.epa.gov/compliance/resources/policies/civil/rcra/indianimpgud-mem.pdf.

to those borne by EPA or State Governments, an appropriation block of funds must be set aside to support reservation abatement, control and compliance activities."[84] Furthermore, EPA should "[a]ssist tribal governments in program development as they have done for states."[85] In an EPA memorandum, the Agency even "urges states to constructively assist tribes in developing environmental expertise and management capability."[86] Despite this recognition, the EPA has failed to provide tribes with these important building blocks and funding.[87]

Any funding to bring tribal management and technical training to a state level should come from the federal government, i.e., the entity otherwise responsible for environmental protection of reservation residents. Indeed, EPA should modify its uneven approach and tribal communities should receive a commensurate degree of environmental regulatory funding, training, delegation of authority, and protection.[88]

To provide Indian reservation residents with equal environmental regulatory protection, as mandated by the Constitution, EPA must immediately assist tribes with training, management, and proportionate funding.[89] EPA estimates indicate that annual funding to Indian tribes will need to increase dramatically to provide comprehensive environmental regulation on reservations.[90] In sum, the administering agency must "develop distribution criteria that are rationally aimed at an equitable division of its funds."[91] Unfortunately, EPA has historically failed to allocate funds to states and Indian tribes using any understandable system such as management training objectives, environmental need, population or land area.

B. Any Failure to Adequately Fund and Train Tribal Governing Bodies for Regulatory Delegation Implicates the Equal Protection Clause of the Constitution

The Equal Protection Clause of the Fourteenth Amendment forbids states from treating similarly situated persons differently.[92] It guarantees "all persons

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[84] *Id*.

[85] *Id.*

[86] EPA, EPA/STATE/TRIBAL RELATIONS ATTACHMENT FEDERAL, TRIBAL AND STATE ROLES IN THE PROTECTION AND REGULATION OF RESERVATION ENVIRONMENTS at 3 (July 10, 1991).

[87] Wharton, *supra* note 35, at 23.

[88] *Id.* at 23-25.

[89] *Id.* at 25.

[90] *Id.*; EPA, INDIAN RESOURCE TASK FORCE REPORT 4 (1990) (EPA would have to increase annual tribal funding by thirty-five million dollars beginning in 1991 to achieve adequate funding by 2000).

[91] Rincon Band of Mission Indians v. Harris, 618 F.2d 569, 575 (9th Cir. 1980) (applying allocation principles amongst tribal entities).

[92] U.S. CONST. Amend. XIV, § 1.

similarly circumstanced shall be treated alike" under the law.[93] The Equal Protection Doctrine applies to all federal government action via the Due Process clause of the Fifth Amendment.[94] In *Bolling v. Sharpe* the Supreme Court interpreted the Due Process clause of the Fifth Amendment to include an equal protection component for federal actions.[95]

Denial of equal protection occurs when differential treatment by the federal government fails to further an appropriate governmental interest.[96] Here, Indian tribes can claim that the federal government denied Indian reservation residents equal environmental regulatory protection by creating training and funding hurdles that cripple the ability of many tribes to assume regulatory delegation similar to states. The federal government's differential treatment of Indian tribes may harm tribal residents by creating an environmental regulation gap on reservations absent direct federal oversight. One could alternatively argue that prerequisites for tribal delegation are fair and mirror state standards, or that the federal government's systematic failure to provide funding is simply a pretextual and preordained method to thwart tribal delegation. Ultimately, it is uncontested that the federal government's failure to adequately fund and train tribal governing bodies to assume environmental regulatory authority, or otherwise implement federal environmental statutes, is a federal action. This gives private litigants, such as Indian tribes or individuals, possible arguments to sue the federal government directly for equal protection violations.[97]

Unequal protection under the laws can occur when a statute is facially discriminatory, or appears designed to discriminate.[98] Disparate impact alone, however, is an insufficient basis to warrant finding an unconstitutional intent to discriminate.[99] But here, the federal environmental statutes in question may be facially discriminatory or are arguably intended to disadvantage Indian people.

For example, a tribe could argue that the Clean Air Act ("CAA") is facially discriminatory. The statute acknowledges "that Federal financial assistance and leadership is essential for the development of cooperative Federal, State,

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[93] Royster Guano v. Virginia, 253 U.S. 412, 415 (1920).

[94] Hampton v. Mow Sun Wona, 426 U.S. 88, 100 (1976); Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (stating that the Due Process Clause of the Fifth Amendment prohibits the federal government from denying equal protection under the law).

[95] *Bolling*, 347 U.S. at 499.

[96] Chicago Police Dep. v. Mosley, 408 U.S. 92, 95 (1972).

[97] Davis v. Passman, 442 U.S. 228, 244 (1979) (stating that private cause of action exists to enforce the Fifth Amendment).

[98] Washington v. Davis, 426 U.S. 229, 239-45 (1976); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

[99] *Washington*, 426 U.S. at 239-45; *see also* East Bibb Twiaas Neighborhood Ass'n v. Macon-Bibb Cnty. Planning and Zoning Comm'n, 706 F. Supp. 880, 884 (M.D. Ga. 1988), *aff'd* 896 F.2d 1264 (11th Cir. 1989); Bean v. Southwest Waste Mgmt. Corp., 482 F. Supp. 673, 677 (S.D. Tex. 1979).

regional, and local programs to prevent and control air pollution."[100] It also authorizes EPA "to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs."[101] However, the CAA limits tribal grant and contract assistance, by excluding tribes from minimum state funding entitlements.[102] Without funding to train and implement the statute, tribes struggle to assume regulatory delegation.[103] The CAA's fractional funding scheme applies solely to Indian tribes.[104] The CAA defines "Indian tribes" as "any Indian tribe, band, nation, or other organized group or community . . . which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."[105] It also defines "Indian reservations" as "[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes . . . ."[106] Any EPA failure to fund and train tribal governments to assume environmental regulatory programs with equal technical and financial assistance lends credence to the notion that the CAA is facially discriminatory by explicitly excluding tribes from minimum state funding entitlements.

The Clean Water Act ("CWA") reserves for tribes "one-half of one percent of the sums appropriated . . . for the development of waste treatment management plans and for the construction of sewage treatment works," without any consideration of proportionate tribal populations, sewage or waste capacity and production, or land base size.[107] Likewise, tribes are entitled to "[n]ot more than one-third of one percent of the amount appropriated" for nonpoint source programs, without any consideration of tribes' equitable needs.[108] State programs have no such limitations.[109] This makes residents of states the potential beneficiaries of inherently larger clean water regulatory programs, whereas Indian reservation residents receive piecemeal funding at best.[110] Like the CAA, the unfair funding schemes are limited to "Indian tribes." Indian

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100 Clean Air Act, 42 U.S.C. § 7401(a)(4) (2006).

101 *Id.* § 7401(b)(3).

102 *Id.* § 7601(d)(1)(A).

103 The EPA has conducted a pilot program with the Navajo Nation to develop a tribal implementation plan for the delegation of regulatory authority with respect to federal air quality standards within reservation boundaries. Judith Royster and Rory Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 582 (1989).

104 42 U.S.C. § 7601(d)(1)(A).

105 *Id.* § 7602(r).

106 *Id.* § 7474(c).

107 Clean Water Act, 33 U.S.C. § 1377(c), (e) (2006).

108 *Id.* § 1377(f).

109 *Id.*

110 *Id.*

tribes are defined as "any Indian tribe, band, group or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation."[111] These provisions could support an argument that the CWA fails to consider population or need in allocating funding and therefore is facially discriminatory and unfair.

The SDWA is another example of potential federal discrimination in the environmental regulation arena. The Indian regulatory funding allocation is limited to three percent (for Public Water Systems) or five percent (for Underground Injection Control Programs) of the amount allocated to states.[112] This funding allocation is justified as an increase in historic levels of funding, but it is without any consideration of environmental needs, population size, or land base.[113] The funding inadequacies are, again, limited to "Indian tribes" and "Indian tribes" are a term defined as "any Indian Tribe having a Federally recognized governing body carrying out substantial governmental duties and powers over a defined area."[114] These disparate and random SDWA funding distinctions could be viewed as discriminatory by design.

It can also be argued that RCRA is discriminatory on its face. RCRA denies tribes full delegation in a manner similar to states, while still subjecting tribes to liability under the Act.[115] Although EPA believes it can delegate authority to tribes under RCRA, it has yet to do so comprehensively.[116] RCRA does not define "tribes," but defines "States" and treats them differently than tribes for delegation purposes.[117] RCRA's differential treatment of tribes and states for the purpose of regulatory delegation could also support a possible equal protection claim argument.

Tribes are constitutionally entitled to funding proportionate to funding allocated to other state, regional, and local governments of similar size or with similar environmental needs. In *Nance v. United States Environmental Protection Agency*, the court allowed the Northern Cheyenne Tribe to redesignate its reservation, noting "within the present context of reciprocal impact of air quality standards on land use, the states and Indian tribes . . . stand on substantially equal footing."[118] This tribal statutory entitlement to equal

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111 *Id.* § 1377(h)(2).

112 53 Fed. Reg. 37,404 (Sept. 26, 1988).

113 *Id.* at 37,404-405 (Sept. 26, 1988).

114 53 Fed. Reg. 37,396-401 (Sept. 26, 1988) (to be codified at 40 CFR pts. 35, 105, 124.2, 144.3, 146.3).

115 *Compare* Blue Legs v. U.S. Bureau of Indian Affairs, 867 F.2d 1094, 1098 (8th Cir. 1989) (stating that Oglala Sioux Tribe is responsible for RCRA liabilities) *with* Legal Opinion of Acting Regional Counsel for EPA Region V, *supra* note 30.

116 *Compare* Legal Opinion of Acting Regional Counsel for EPA Region V, *supra* note 30 *with* Anquoe, *supra* note 35; Wharton, *supra* note 35.

117 42 U.S.C.A. § 6903(31) (West 2012).

118 *Nance*, 645 F.2d at 714.

environmental treatment should also be subject to constitutional equal protection guarantees.

The federal environmental statutes examined in this article have a disparate impact on Indian tribes. Indian tribes only have the statutory right to assume regulatory authority over select programs. Tribes assuming regulatory authority also must satisfy a host of prerequisites requiring management expertise, training and bureaucratic infrastructure. There is no statutory mechanism in place to ensure tribal capability for delegation. Tribes do not receive proportionate funding relative to states, to develop technical and management expertise that would allow tribes to implement programs and administer environmental standards.[119] In addition, the federal government may fail to regulate comprehensively environmental impacts on the reservations of tribes that do not receive a delegation of authority. These federal environmental policies as applied, therefore, have a disparate impact on tribes.

Even if a statute is facially fair, "if it is applied and administered by public authority with an evil eye and unequal hand, the denial of equal justice is still within the prohibition of the Constitution."[120] Thus even if the statutes are not facially discriminatory; they may be discriminatory by design or as applied.[121] Discriminatory intent, in turn, can be established by a totality of the relevant facts.[122] In *Arlington Heights v. Metropolitan Housing Development* the Supreme Court held that coupled with disparate impact the following may show discriminatory intent: (1) extreme disproportionate impact, (2) absence of justification, (3) historical background of the action, (4) departures from normal procedural standards, and (5) departures from typically applied substantive rules.[123]

Here, there is a disproportionate impact because most Indian tribes do not receive federal funding and training for regulatory delegation, whereas every state has comprehensive programs and funding in place.[124] Although states routinely receive full funding, training, and are delegated authority to take over management of federal environmental programs, Indian reservation residents are systematically denied equal regulatory options. Tribes have historically received different treatment by the federal government with respect to the delegation of environmental regulatory authority, funding and training, and there are different substantive and procedural norms applied to reservations compared

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[119] *See* Anquoe, *supra* note 35; *see also* Wharton, *supra* note 35, at 23.

[120] *Yick Wo*, 118 U.S. at 373-74 (striking down an ordinance prohibiting wood laundry buildings, where the majority of existing laundry businesses were wood and were owned by Chinese immigrants).

[121] *See id.*

[122] *Davis*, 426 U.S. at 242.

[123] Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 265-70 (1977).

[124] Wharton, *supra* note 35.

to states.[125]

None of the federal statutes explicitly prohibit equal protection under federal environmental laws for Indian reservation residents. Yet, discriminatory language or intent regarding tribes or implementation differences may be so extreme as to exceed disparate impact and infer discriminatory intent.[126] If one were to rely solely on disparate impact to support a claim of discriminatory intent, however, a litigant would have to use the Freedom of Information Act and other available resources to collect empirical evidence of a manifest and extreme disparate impact on tribes or reservation residents.

C. EPA's Discriminatory Actions Should Be Subject to Constitutional Limitations and Judicial Review

EPA's actions should be subject to a strict standard of review, because people living on Indian reservations receive unequal federal environmental regulatory benefits due to laws that on their face are designed to treat tribes differently. The strict scrutiny standard of judicial review is applicable when government actions burden a suspect class, such as a racial minority, or interfere with a fundamental right.[127] When government action is subject to strict scrutiny, the only justification a court will accept is that the action is necessary to achieve a compelling state interest.[128] Even if the court does not employ strict scrutiny, at a minimum, the EPA's actions must be rationally related to the federal government's unique obligations to Indians.[129] Trends in Supreme Court jurisprudence suggest an increasing recognition that statutes, which discriminate against Indian tribes, should be subject to very stringent review, if not the

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[125] *See generally*, *infra*, § II (discussing the different requirements for funding and delegation of environmental programs).

[126] *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960) (reshaping town boundaries from a square to a 28-sided figure effectively excluded African Americans and was unconstitutional violation of fundamental voting rights); *see also* Yick Wo, 118 U.S. at 373-74; *see also* Hawkins v. Town of Shaw, 437 F.2d 1286, 1288 (5th Cir. 1971) (holding that facially neutral law was ruled unconstitutional and a violation of equal protection because of the "gross disparities in services between black and white areas of town"); *see also* Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931 (2d Cir. 1968) ("the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme,") (quoting Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967)); *see also* United States *ex rel.* Seals v. Wimam, 304 F.2d 53, 65 (5th Cir. 1962) (considering the systematic exclusion of African Americans from juries, "it is not necessary to go so far as to establish ill will, evil motive, or absence of good faith, but that objective results are largely to be relied on in the application of the constitutional test").

[127] Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) (holding that race is a suspect classification subject to strict scrutiny).

[128] *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) ("[t]here is patently no legitimate overriding purpose" to justify anti-miscegenation statutes); *see also Hawkins*, 437 F.2d at 1288.

[129] Morton v. Mancari, 417 U.S. 535, 554-55 (1974).

strictest of scrutiny.[130]

Because an overwhelming percentage of Indian reservation residents are Indians, one could argue that any federal law treating tribes or Indian reservations differently than states for the purpose of environmental regulation should be subject to strict scrutiny. Federal law discriminating against Indian tribes or reservation residents essentially discriminates against Indian people, as the primary residents on reservations. Laws classifying groups of people by race use a suspect classification, which is subject to strict scrutiny.[131] The law, however, is still evolving with respect to the standard of review applicable to statutes that treat Indian tribes or people differently.[132]

In *Morton v. Mancari*, the Supreme Court declined to apply strict scrutiny standard of review and find that Indians are a suspect classification in upholding a preferential treatment policy.[133] The court established an intermediate level of review that was more stringent than the rational basis test but more lenient than strict scrutiny. The court stated that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."[134] The fact that the court would not consider *preferential treatment* of Indian people an action subject to strict scrutiny is harmonious with the federal government's trust responsibilities to Indian people. However nothing regarding the *Mancari* standard spoke directly to the appropriate level of review for legislation that *discriminates* against Indian tribes or people.[135]

When government action actually discriminates against a tribe, however, any review of the federal action should be subject to strict scrutiny. For example, in *Navajo Nation v. New Mexico*, the district court ruled that New Mexico's decision to cut forty percent of the Navajo Nation's previous Title XX human services allotment was facially discriminatory because it singled out Navajos for unequal treatment.[136] The circuit court agreed that Navajos did not receive equal protection, but did not address whether the action was facially discriminatory.[137] Instead, the circuit court agreed with the lower court's alternative reasoning that

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[130] *See* Rice v. Cayetano, 528 U.S. 495 (2000); *see also* L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 731-48 (2001).

[131] *Palmore*, 466 U.S. at 432-33 (to pass constitutional muster, racial classifications "are subject to the most exacting scrutiny . . . they must be justified by a compelling government interest" and be necessary to accomplish a legitimate purpose.); McLaughlin v. State of Florida, 379 U.S. 184, 192 (1964); *Jackson*, 400 F.2d at 537; *Hawkins*, 437 F.2d at 1288.

[132] *See* Gould, *supra* note 130, at 731-48.

[133] *Morton*, 417 U.S. at 554-55.

[134] *Id.* at 555.

[135] Gould, *supra* note 130, at 718, 731.

[136] *See* Navajo Nation v. New Mexico, 975 F.2d 741 (10th Cir. 1992), *cert. denied* 507 U.S. 986 (1993).

[137] *Id.* at 743.

New Mexico's decision to cut funding to the Navajo Nation violated Navajos' equal protection rights under a strict scrutiny standard.[138] Inadequate funding violated the equal protection doctrine because New Mexico's action was motivated by discriminatory intent *and* had a disparate impact on the Navajo community.[139] The circuit court noted that discriminatory intent did not have to be the primary motivation behind the action. It emphasized that if the decision-maker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects on an identifiable group" then the course of action would violate the equal protection clause.[140]

The circuit court agreed that New Mexico's actions could not pass the strict scrutiny test.[141] The court echoed the lower court's reasoning that New Mexico "'knew that 'only Navajos would suffer the consequences' of the spending cut . . . and that [t]he 'decision to obtain funding . . . only from the Navajo contract was based primarily on concerns about political retaliation if cuts were made elsewhere in the state.'"[142] The court based this finding in part on a New Mexico official's comment that political constraints prompted the cut.[143]

In *United States v. Antelope* the Ninth Circuit similarly held that strict scrutiny was the proper standard of review when Indians as a whole are disadvantaged by a federal statute.[144] The Supreme Court subsequently reversed and applied the *Mancari* test, holding that "federal regulation of Indian affairs is not based on an impermissible [racial] classification" but rather on political community.[145] Consequently, the court did not apply strict scrutiny in *Antelope* even when federal regulation disadvantaged Indians.[146] The litigant class or tribe in an associated equal protection case therefore would need to demonstrate disparate impact and direct tribe or class-specific discriminatory intent to trigger a strict scrutiny standard of review under current common law. Alternatively, the litigant could rely on the intermediate level of review cited in *Mancari*.[147]

However, the Supreme Court is increasingly skeptical of the *Mancari*

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[138] *Id.*

[139] *Id.* at 743-44.

[140] *Id.* (quoting Personnel Admin. v. Feeney, 442 U.S. 256, 279 (1979)).

[141] *See id.* at 744.

[142] *Id.*

[143] *Id.*

[144] *See* United States v. Antelope, 523 F.2d 400, 403-406 (9th Cir. 1975), *rev'd* 430 U.S. 641, 641 (1977) (holding statute in question did not discriminate against Indians).

[145] *Antelope*, 430 U.S. 641, 646 (1977).

[146] *See id.* at 647-50; *see also* Fisher v. District Court, 424 U.S. 382, 390 (1976) ("[W]e reject the argument that denying [the Indian plaintiffs] access to the Montana courts constitutes impermissible racial discrimination. The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.").

[147] *Morton*, 417 U.S. at 555.

standard.[148] The *Mancari* standard allows legislation that creates racial distinctions with respect to Indians to escape strict scrutiny review.[149] Since the *Mancari* decision, Indian tribes and people have largely been unable to challenge discriminatory legislation, because *Mancari* broadly defined the federal trust responsibility and relationship to allow almost unlimited congressional and judicial discretion.[150] According to one commentator, "*Mancari* is a refuge for race-conscious legislation" and "permits preferences and delegations of authority that otherwise would not escape strict scrutiny."[151] Accordingly, lower federal courts have chipped away at the reach and standard articulated in *Mancari*.[152] Furthermore, the Supreme Court has held outside of the Indian law context that federal programs using race classifications are always subject to strict scrutiny.[153]

The Supreme Court revisited the *Mancari* standard in the case of *Rice v. Cayetano*.[154] The *Rice* case revolved around the propriety of the Office of Hawaiian Affairs ("OHA"), which was overseen by Hawaiian descendants of the aboriginal people who inhabited the Hawaiian Islands in 1778.[155] The district court granted summary judgment to Hawaii in support of the OHA. The court relied on the *Mancari* standard and analogized the unique relationship between Congress and Native Hawaiians to the relationship between the federal government and Indian tribes. The Ninth Circuit affirmed, citing *Mancari* and the special relationship standard.[156]

The Supreme Court reversed, however, finding that legislation treating classes of people differently based on "defined ancestry" could be using ancestry as "a proxy for race."[157] The court drew specific parallels between Native Hawaiians and Indian tribes, and characterized *Mancari* as a narrow case confined to the Bureau of Indian Affairs context.[158] In doing so, the Court left the *Mancari* standard on the fence and opened the door to applying strict scrutiny in the context of distinctions based on race—including tribal identity or ancestry.[159] As such, *Mancari* and the special relationship standard could lose steam under the current Supreme Court and result in stricter review of legislation that

148 *Rice*, 528 U.S. at 514-26.
149 *See* Gould, *supra* note 130, at 707.
150 *See id.* at 714 (citing post-*Mancari* cases).
151 *See id.* at 717.
152 *See id.* at 732-36 (citing post-*Mancari* cases).
153 Andarand Constructors, Inc. v. Pena, 515 U.S. 200, 236 (1995).
154 *Rice*, 528 U.S. at 495-527.
155 *Id.* at 495-99.
156 *Id.* at 510-11.
157 *Rice*, 528 U.S. at 514.
158 *Id.* at 518-20.
159 Gould, *supra* note 130, at 742.

discriminates for or against Indian tribes and people.[160]

Here, EPA's failure to fund, train and delegate authority to Indian tribes is arguably discriminatory on its face and aimed exclusively at Indian reservation residents.[161] A court therefore should apply a heightened level of review, whether the standard is strict scrutiny as in *Navajo Nation* or *Rice*, or intermediate scrutiny as in *Mancari*. Either way, the federal government, at minimum, would need to demonstrate how the special statutory treatment of tribes is rationally tied to the federal government's unique obligations to Indians.[162]

The federal government likely cannot successfully justify its disparate treatment of tribes with respect to delegation of environmental authority under any standard of review. There is no compelling governmental interest or special relationship to justify underfunding and failing to train Indian tribes. Similarly, there is no rational reason, unique to the federal-tribal relationship, which commands or allows for short training and funding in the face of a supposedly comprehensive environmental regulatory scheme.[163]

Congress has attempted to prompt the EPA into action. The Indian Environmental General Assistance Program Act of 1992 specifically directed the EPA to provide financial and technical assistance for tribes to "build capacity to administer environmental regulatory programs that may be delegated."[164] The EPA was supposed to develop a program for tribes "to cover the costs of planning, developing, and establishing environmental programs."[165] In response, the EPA promulgated the Indian Environmental General Assistance Program to build tribal capacity for the administration of environmental regulatory programs.[166] Although the principal focus of the Program is to develop tribal environmental regulatory capability, available funds are capped irrespective of tribal training and infrastructure needs.[167] Similarly, other federal agencies like the Department of Health and Human Services offer piecemeal grants through the EPA to improve tribal capability to regulate environmental quality.[168] These EPA efforts are inherently and systematically lacking, and fall

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160 *Id.* at 744-46, 771-72.

161 *Supra* § IV(A)(2).

162 *Morton*, 417 U.S. at 555.

163 The scope of this article assumes and does not extend to whether the federal government is adequately regulating reservations directly absent a regulatory delegation. If there are in fact regulatory gaps on Indian reservations, however, such circumstances would only strengthen a demand for equal environmental protection.

164 42 U.S.C. § 4368b(b) (2006).

165 *Id.* § 4368b(d), (f).

166 EPA GAP for Tribes, No. 66.926, *available at* http://www.epa.gov/indian.

167 *Id.* (limiting grant awards to portion of annual appropriations).

168 Department of Health and Human Services CFDA N. 93.581 – Improving the Capability of Indian Tribal Governments to Regulate Environmental Quality, *available at* https://www.cfda.gov/

far short of the congressional mandate.[169]

In contrast, states have received more funding and therefore are more capable of receiving environmental regulatory delegation. Government action should be modified to provide Indian people with equal regulatory protection and funds at "the same level, relative to their need" as the district court ordered for social security funds in *Navajo Nation v. New Mexico*.[170] If necessary, a court can order an equitable distribution of services.[171]

V. CONCLUSION

The EPA is denying tribal governments the funding and regulatory authority for environmental programs that are necessary to protect tribal environments and natural resources. As this article first addressed, the federal government has statutory obligations to treat tribes as states for the purposes of administering environmental programs, including delegating regulatory authority, funding and training to tribal governments.

Furthermore, the federal government has a fiduciary duty to ensure that Indian reservation residents receive adequate environmental regulatory protection. The trust relationship obligates the federal government to protect Indian people. Even absent rights explicitly conferred by federal laws, Indian nations and tribes may also have implied treaty rights to a healthy reservation environment.

Tribes, therefore, should be trained and funded so that they can assume full delegation of environmental regulatory authority. This is appropriate because federal policy envisions delegation of regulatory authority to tribes as part of a broader movement toward tribal self-determination. In addition, traditional notions of tribal sovereignty would bolster a federal government policy of funding and training tribes to assume delegation of environmental regulatory authority. Finally, the comprehensive nature of federal environmental statutes mandates that Indian reservation residents receive a level of environmental protection equal to that provided to state residents through federal or state programs.

Despite the Constitution's guarantee that all people receive equal protection under the laws, Indian nations and tribes have yet to receive regulatory training and funding equivalent to states. This occurs solely in the context of tribal environmental management, which discriminates against Indian reservation

programs/93.581.

[169] *See* 42 U.S.C. § 4368b(b), (d), (f) (2006).

[170] *Navajo Nation*, 975 F.2d at 741.

[171] Hadnott v. City of Prattville, 309 F. Supp. 967, 973-75 (D. Ala. 1970) (precluding future inequitable divisions of services); *see* Gautreaux v. Chicago Housing Auth., 304 F. Supp. 736 (N.D. Ill. 1969) (same); *see also Hawkins*, 437 F.2d at 1293 (ordering town to submit a plan for equitable distribution of municipal services).

residents. Because this unequal exercise of federal environmental regulatory norms effects only Indian reservations and overwhelmingly impacts Indian people, EPA's actions should be subject to a strict scrutiny standard of review. At minimum, such actions should be subject to a rational basis with bite test tied to the unique federal-tribal relationship. EPA's actions cannot withstand heightened scrutiny, however, because there is no compelling or even rational federal interest to justify disproportionate environmental regulatory funding, training or protection on Indian reservations.

For all of these reasons, EPA's policies should change. A court may need to assume an oversight role to ensure that tribal communities receive adequate protection, funding, training, and an eventual delegation of environmental regulatory authority. Tribes should receive allocations of technical and financial assistance based on the same methodology used to determine state needs and shares, along with catch-up funding to ensure tribal capability.

This article began with assumptions that the relationship between Indian people and the federal government revolves around fights to possess or control valuable natural resources. In the context of environmental protection, it is clear that the EPA has failed to provide adequate safeguards with respect to maintaining the quality of Indian natural resources. A skeptic might conclude that these failures represent a systemic federal effort to deprive Indian people of natural resources, which could be the source of economic and political strength. A more benign view is that the federal government bungled the environmental protection process despite its best efforts, resulting in a deterioration of Indian natural resource assets and community strength. Irrespective of motive, however, the debilitating consequences of failed environmental protection to the Indian natural resource base and Indian independence are evident. Even clearer is that by improving environmental protection efforts with respect to Indian reservations, Indian people will obtain greater control over their natural resource assets and be more empowered to control their own destinies and fortune. This article therefore provides a roadmap of how tribes could use the imported laws and norms that burden Indian people for the advancement of tribal environmental regulatory delegation objectives.