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CLEAN AIR IN INDIAN COUNTRY: REGULATION AND ENVIRONMENTAL JUSTICE

SANDRA D. BENISCHEK

I. INTRODUCTION

THE recent publication of the Environmental Protection Agency's Final Rule, Indian Tribes: Air Quality Planning and Management (hereinafter; Final Rule), establishes provisions for the treatment of tribes "in the same manner as states" for implementation of the Clean Air Act (hereinafter CAA). The Final Rule also establishes requirements for tribal air management programs and federal financial assistance for tribal air quality management. The general areas to be addressed in this Comment are the legal problems raised by the EPA's Final Rule for implementation of CAA in Indian Country by tribal governments.

CAA is distinguished from other environmental acts affecting tribes in Indian Country because it is a unique environmental act

1. See 63 Fed. Reg. 7254 (1998) (implementing 42 U.S.C. §7601(d) (1994) Environmental Protection Agency, Indian Tribes: Air Quality Planning and Management). That section lays out that the EPA Administrator is to treat the tribes as states. See id. The purpose of the Final Rule was to facilitate trial control of air pollution within areas where the tribes have jurisdiction. See id. An EPA Final Rule is also known as a promulgated rule which is published in the Federal Register after the draft rule is published and the public comment period expired. For further information on the Clean Air Act's promulgated rules see 42 U.S.C. §7607(5).


3. See Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S. 114, 123 (1993) (holding tribal member's residence in Indian Country will limit state's jurisdiction for collecting taxes). "Indian country" is the area where there are tribal and federal jurisdictions and is defined in 18 U.S.C. §1151 as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation,
(b) all dependent Indian communities within the borders [sic] 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.

that seeks to regulate mobile and stationary sources of pollution. The regulation of air pollutants is very problematic; and the artificial boundaries of state and tribal authority, particularly in highly populated areas, only create additional confusion. CAA is currently characterized as a patchwork of regulation, and it is implemented within each state through a State Implementation Plan (hereinafter SIP).

The proposed and final rules of the EPA regulations imposed a Tribal Implementation Plan (TIP) on Indian Country. The TIP, however, still leaves some questions unresolved. The procedure for establishing a TIP includes shared responsibility, implementation, accountability, and enforcement by EPA and Indian Country. These four elements lead to general policies for the implementation of CAA.

The Final Rule of CAA mandates that tribes be treated “in the same manner as states,” does not fit neatly within the broader goals of CAA. The intent of CAA was 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.” The tribal governments lack the resources to implement the Final Rule and as a result the plan falls short of stated EPA policy to develop rules without unnecessary burdens. Criteria for tribal govern-

6. See id. at 33-47. A State Implementation Plan [hereinafter SIP] is a plan adopted by a state which addresses how the state will implement, maintain and enforce standards for air quality control. See 42 U.S.C. §7410.
7. See 59 Fed. Reg. 43956 (1994); 63 Fed. Reg. 7254 (1998) (setting forth proposed rule for tribal implementation plan (TIP) for air quality); see also 42 U.S.C. §7410(o) (providing “[if] an Indian tribe submits an implementation plan . . . the plan shall be reviewed in accordance with the provisions set forth in this section for State plans, except as otherwise provided . . .”).
11. See Grant, supra note 6 and accompanying text (discussing intended goals of Final Rule). The lack of financial resources presents a substantial problem to achieving the intended goals of the Final Rule because full implementation of the Final Rule incurs substantial costs to the tribe. See id.
ments in administering CAA, however, are less rigorous than the state criteria, and tribes are exempted from citizen suit provisions.\textsuperscript{12}

In addition, numerous legal issues arise from the Final “Treatment As States” Rule (hereinafter TAS), because of legal or historic definitions.\textsuperscript{13} Legal concerns in Indian Country include the following: the ambiguous territorial authority given to tribes in the Final Rule; the lack of due process provisions; and issues of environmental justice. Yet, for purposes of CAA, tribal authority is granted “over all resources within exterior boundaries of reservation lands.”\textsuperscript{14} In western states such as Oklahoma, the implications are far reaching because most of the states include former Indian reservation lands.\textsuperscript{15}

Recognizing jurisdictional questions with respect to tribal sovereignty, EPA promulgated an Indian policy in 1984.\textsuperscript{16} “The heart of the policy was centered around whether tribes should play a role in partnerships between federal authority and tribal authority in Indian Country, modeled after the previous policy of federal-state partnership.”\textsuperscript{17} Through the Final Rule, EPA implemented tribal air quality planning and management programs, hoping to achieve the goal of independent tribal regulation of air pollution.\textsuperscript{18} Unfortunately this goal was not met because there are still many practical issues, including a tribe’s ability to implement the regulations of CAA, which must be addressed.\textsuperscript{19} “Jurisdictional difficulties are encountered when a city or factory on a reservation creates pollution

\textsuperscript{12} See 63 Fed. Reg. 7254 (1998) (exemplifying that state and tribal criteria are similar because both can impose more stringent standards than those of federal government).

\textsuperscript{13} See Grant, supra note 5, at 539 (explaining four criteria under §301(d)(2) that tribe must meet under CAA).

\textsuperscript{14} See 63 Fed. Reg. 7256 (referring to CAA §110(o) and §164(c)).


\textsuperscript{16} See Mr. Leigh Price, Address at the Sovereignty Symposium XII, Tulsa, Oklahoma (June 8, 1999).

\textsuperscript{17} See id. (discussing EPA’s attempt to duplicate federal-state model of partnership with tribal governments.)

\textsuperscript{18} See Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254 (Feb. 12, 1998).

\textsuperscript{19} See Grant, supra note 5, at 538.
that has effects reaching across reservation, county, city, state and perhaps national boundaries."20 In an attempt to answer this question, EPA, during the TAS policy formation, looked at the question of congressional authority and determined CAA gave statutory authority to the tribes.21 In contrast, enforcement of similar statutes such as the Clean Water Act (hereinafter CWA) is delegated to tribes only where tribes have their own authority.22 Also, the EPA Final Rule does not address the consequences of tribal governments having jurisdictional authority over regulation of an existing source that is concurrently regulated by another government.23 Due to the ambiguity of the Final Rule, the question, "who would prevail in a dispute," causes confusion in a regulated industry under SIPs and TIPs.24

Without the cooperation of the states, the tribal CAA authority creates interference and conflict with the SIP. Due to this conflict, a regulated industry may unwittingly be caught in the middle of EPA's attempt to please a multitude of jurisdictional interests, and implementation may cause existing industries to withdrawal from Indian Country to avoid the jurisdictional conflicts.25 As a result, the tribes may experience a reversal of the economic development

20. See Douglas Nash, International Law, Tribal Sovereignty and Air Pollution 24 (Mar. 29, 1971) (unpublished manuscript, available at University of New Mexico Law School Library). Although all tribes are ultimately under the control of the federal government, due to its sovereign status, the Indian situation is different. Id. at 24.

21. See Mr. Jim Harvard, J.D, Address at the Sovereignty Symposium XII, Tulsa, Oklahoma (June 8, 1999).


23. See 42 U.S.C. §7411(a)(6). Existing sources, namely those industries that commenced operation prior to the rule, are potentially subject to both tribal and state regulation. The term "existing source" refers to any stationary source other than a new source. Id. The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations. See 42 U.S.C. §7411(a)(2).


25. See Grant, supra note 5, at 8. For example:

At the same time as many CAA issues are complex and the outcome uncertain, the stakes remain high. The future of entire industries can depend on whether emission standards are set at levels that can be achieved with current technology or require technological breakthroughs. The EPA must phase out some products, may ban others and may regulate pervasive products like consumer goods, autos and fuels. For company managers to make decisions, they need skilled practitioners to guide them through the maze. Id. at 8.
that tribes have long tried to achieve. As the new regulator, tribes must also be cognizant of industry pressure to regulate Indian Country less stringently than the federal and state governments regulated it. The role of interest groups is well documented in the federal regulatory process. Supporters of the EPA argue that only the national government is able to stand up to locally powerful industries. However, federal agencies are experienced with political and industry pressures through various forums.

26. See David H. Getches, et al., Cases and Materials on Federal Indian Law 683, 683 (1998) (stating "[I]t is perhaps in the arena of economic development that Indian tribes have made their most significant advances over the past half-century, and their most significant impact on the larger society").

27. See Milo Mason, Snapshot Interview: Martha Provo, 9 Nat. Resources & Env't 48, 49 (1995). Martha Provo, Counselor to the Administrator on Indian Affairs at EPA, is quoted as saying:

[h]istorically, EPA hasn't done much to help tribal governments assume authority over federal environmental programs . . . . But EPA has virtually no field presence itself, so little has been done to carry out these programs in some parts of Indian [C]ountry. And some unscrupulous parties have taken advantage of that apparent gap in coverage).

Id.

28. See generally A. Lee Fritschler, Smoking and Politics: Policy Making and the Federal Bureaucracy 8-22 (4th ed. 1989). The Council for Tobacco Research U.S.A. was created by tobacco supporters to distribute funds for scientific research. Id. at 20. Other organizations were formed by the tobacco industry, such as the Tobacco Institute, which hired a former U.S. Senator as its director. Id. at 21. "The slowness of the government's response to the smoking studies of the 1950's was due in part, to the successful efforts of the Tobacco Industry and in part to the relative weakness of the public health interest groups." Id. at 22. "The skills of the Tobacco Institute, enhanced by the sympathies of many members [of Congress], helped to remove any doubts that might have existed in the Federal Trade Commission or elsewhere as to the ultimate policy-making authority." Id. at 110.

29. See David Schoenbrod, Why States, Not EPA, Should Set Pollution Standards, Envtl. Federalism, 268 (Terry L. Anderson et al., eds., 1997). Schoenbrod notes: Concentrated interests buy "access" in Washington just as they buy "clout" on Main Street . . . . While state and local playing fields are not perfectly level, at least people know the score. It would be hard to find an Arkansan who does not know the Tyson poultry folks have clout in Little Rock. But at the federal level, the workings of concentrated interests are shrouded by remoteness, size and complication of the federal government.

Id. at 269.

30. See Sierra Club v. Morton, 405 U.S. 727, 745-46 (1972) (Douglas, J., dissenting) (referring to enormous pressures on agencies for favorable action). Douglas stated:

"[T]he federal agencies to which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated"

Id.; see also Vine Deloria, Jr., God is Red 321, 323 (Grosset & Dunlap, eds., 1977). Justice Douglas' dissent was the first major attempt in American jurisprudence to incorporate a modern understanding of nature into law. See id. at 321.
Section II of this Comment concerns the criteria, uniqueness, and policies of CAA.\textsuperscript{31} Section III will consider legal issues raised by the Final Rule.\textsuperscript{32} Whether or not EPA set up the treatment of tribes as states under CAA to promote success or failure of tribal jurisdictions is explored in Section IV.\textsuperscript{33} Finally, Section V will search for alternatives and offer suggestions for an appropriate approach to regulate air pollution on tribal lands.\textsuperscript{34}

II. CLEAN AIR ACT

CAA seeks to control national air quality and provide for regulation of air pollution within the context of federal, state, and local partnerships.\textsuperscript{35} There are three important points in the partnerships of the various governments in implementing CAA. First, CAA established that the federal government is responsible for creating National Ambient Air Quality Standards (hereinafter NAAQS).\textsuperscript{36} Next, the national government must set forth technology-based standards for individual discharges of air pollution.\textsuperscript{37} Finally, CAA is implemented by individual states, which in turn, submit SIPs for air quality to EPA in order to meet the federal standards.\textsuperscript{38}

\textsuperscript{31} For a discussion of the policies behind CAA, see infra notes 35-42 and accompanying text.
\textsuperscript{32} For a full examination of the implications of the Final Rule, see infra notes 43-113 and accompanying text.
\textsuperscript{33} For a discussion the effects of the implementation of CAA on tribes and tribal jurisdiction, see infra notes 114-124.
\textsuperscript{34} For a comprehensive analysis of the alternatives to CAA in regulating air quality in tribal lands, see infra notes 125-159.
\textsuperscript{35} See Grant, supra note 5, at 2.
\textsuperscript{37} See Steven Ferrey, ENVTL. L., 141, 146 (Aspen Law & Business, ed., 1997) (discussing results of 1970 amendments to CAA). Before the 1970 amendments, there were no enforceable national air quality standards and states set the standards to limit air pollution. Id. at 141. The 1970 amendments created a federal/state partnership. Id. at 141. "The federal role was to create: (1) nationally uniform quality standards for ambient air, and (2) technology-based standards for individual polluters' emissions." Id. at 141.
\textsuperscript{38} See Grant, supra note 5, at 5-6; see also 42 U.S.C. §7410(a-p) (discussing process by which SIPs are adopted for air quality standards). The process for adoption of a SIP begins when each state submits a SIP for attainment of primary National Ambient Air Quality Standards [hereinafter NAAQS]. Id at 144. The SIP includes predictions for each air quality region where the standards are in danger of being exceeded and the emission reductions necessary to avoid exceeding those standards. Id. at 144. "After a SIP is submitted, EPA has four months to make a finding that accepts, accepts in part, or rejects the plan in whole or in part. If the plan is adequate the EPA must approve it. Once approved by the EPA, the state and local regulations in the SIP become enforceable as federal law." Id. at 144.
The states are also charged with the regulation of individual permits for industries that emit air pollutants.\textsuperscript{39} Air pollutants are divided into two categories: "mobile" and "stationary."\textsuperscript{40} The stated purpose of CAA is "to protect and enhance the quality of the Nation's air resources as to promote the public health and welfare."\textsuperscript{41} Congress recognized the nature of air pollution as a mobile problem that required regulation at the source of the problem.\textsuperscript{42} Consequently, the mobile character of the pollutant necessarily distinguishes regulation of air pollution from other environmental statutes.

In 1990, Congress amended CAA and provided that Indian tribes should be treated as states under CAA.\textsuperscript{43} The TAS section fosters the development and implementation of particular sections of CAA on tribal lands.\textsuperscript{44} Tribal participation in CAA programs is voluntary and requires the submission of an application for EPA approval.

A tribe must meet four criteria to qualify for tribal implementation of any portion of CAA.\textsuperscript{45} First, the Indian tribe must be federally recognized.\textsuperscript{46} Second, the Indian tribe must have a governing

\begin{itemize}
\item \textsuperscript{39} See Fritschler, supra note 28, at 140-45 (discussing regulations of air pollution prior to 1970 and also 1970 amendments to CAA).
\item \textsuperscript{40} See id. at 140 (stating, "[m]obile sources include automobiles, buses, trucks, trains, airplanes and tunnels that exhaust vehicle fumes. Stationary sources include factories, power plants, or any structure or facility that emits a significant amount of pollutant into the air.").
\item \textsuperscript{41} 42 U.S.C. §7401(b)(1); see also H.R. Rep 101-952, 101st Cong., 2d Sess. (October 26, 1990) "Joint Explanatory Statement of the Committee of Conference" (explaining congressional intent in passing 1990 CAA).
\item \textsuperscript{42} See 42 U.S.C. §7401(a)(3) (noting that reduction or elimination of air pollution and control of such pollution control at its source are primarily responsibility of states and local governments).
\item \textsuperscript{43} See 42 U.S.C. §7601(d)(2)(a-c) (describing when it is appropriate to treat Indian Tribes as states); see also 59 Fed. Reg. 13820, 13820-21 (1994) "Indian Tribes: Eligibility of Indian Tribes for Program Authorization."
\item \textsuperscript{44} See 42 U.S.C. §7601(d)(2)(a-c).
\item \textsuperscript{45} See 59 Fed. Reg 42956, 43968 (1994) "Indian Tribes: Air Quality Planning and Management." The tribes are not required by the 1990 Amendments to implement the entire CAA program but can qualify for portions of CAA. See 63 Fed. Reg. at 7263. EPA developed a comprehensive strategy which addresses two major concerns in Indian Country: "(1) Gaps in Federal Regulatory programs that need to be filled in order for EPA to implement the CAA effectively in Indian Country where tribes opt not to implement their own CAA programs; (2) identifying and providing resources, tools, and technical support that tribes will need to develop their own CAA programs." Id. For example, the air permitting program requirements for major or minor sources of air pollution emission in non-attainment areas have not been issued by EPA. See id.
\item \textsuperscript{46} See 42 U.S.C. §7602(r) (describing term "Indian Tribe" as "any Indian tribe, band, nation, or other organized group or community, including Alaska Native village, which is Federally recognized as eligible for the special programs and
body that carries out substantive governmental duties and powers, as defined by EPA. 47 Third, the tribe must be able to perform functions that “pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe’s jurisdiction.” 48 Fourth, the tribe must be “capable, in the judgment of the Administrator [of the EPA], to carry out the functions to be exercised in a manner consistent with the terms and purposes” of CAA. 49 On the other hand, if a tribe does not seek TAS approval, EPA has the responsibility of administering air pollution regulations in Indian Country. 50

The delegation of authority under CAA differs from other environmental statutes with regard to the delegation of authority to tribes. The delegation of authority to tribes in CAA requires the same criteria for eligibility of TAS approval but is more extensive in jurisdiction and coverage of land area. 51 For example, EPA deter-

services provided by the United States to Indians because of their status as Indians); see also State of Alaska v. Native Village of Venetie Tribal Government, 101 F.3d 1286, 1291 (9th Cir. 1996) (holding Alaskan Native villages have same sovereign rights as other Indian nations).


Although no longer “possessed of the full attributes of sovereignty,” they remain a “separate people, with the power of regulating their internal and social relations.” United States v. Kagama, 118 U.S. 375, 381-82 (1886). See United States v. Wheeler, 435 U.S. 313 (1978). They have power to make their own substantive law in internal matters. See Roff v. Burney, 168 U.S. 218 (1897)(membership); Jones v. Meehan, 175 U.S. 1, 29 (1899)(inheritance rules); United States v. Quiver, 241 U.S. 602 (1916)(domestic relations), and to enforce that law in their own forums, see, e.g., Williams v. Lee, 358 U.S. 217 (1959).


48. See 42 U.S.C. §7601(d)(2)(b); see also Arizona Pub. Serv. Co. v EPA, 211 F.3d 1280, 1285 (D.C. Cir. 2000). The EPA correctly interpreted the statute to express Congress’ intent to grant tribal jurisdiction over nonmember owned fee land within the reservation without need to determine, on a case-specific basis, whether the tribe possesses inherent sovereign power. See id. The term “reservation” includes formally designated reservations, as well as trust lands that are validly set apart for use by the tribe despite that land not being formally designated as reservation. See 42 U.S.C. § 7610(d)(2)(B). This includes pueblos and tribal trust land. See id.


50. See 42 U.S.C. §7601(d)(4). EPA will administer CAA provisions if the Indian tribe does not administer the program. See id. “In any case in which the Administrator determines that the treatment of Indian tribes as identical to states is inappropriate or administratively infeasible, the Administrator may provide by regulation, other means by which the Administrator will directly administer such provisions as to achieve appropriate purpose.” Id.; see also Philips Petroleum Co. v. EPA, 803 F.2d 545, 563 (10th Cir. 1986) (holding EPA is empowered by Congress from Safe Drinking Water Act to implement underground injection control programs on Indian lands).

51. See Grant, supra note 5, at 539.
minded that section 518(e) of CWA delegates authority to tribes only over land within a tribe's reservation.\textsuperscript{52} Additionally, a tribe, under TAS provisions of CWA, must demonstrate it presides over all land it claims it has authority over, even if the land in question is within the boundaries of the reservation.\textsuperscript{53} The Safe Drinking Water Act (hereinafter SDWA) also requires the tribe to establish its jurisdiction for each area regulated.\textsuperscript{54} Nevertheless, SDWA is broader than CWA since it requires that tribal authority be exercised "within the area of the Tribal Government's jurisdiction."\textsuperscript{55} Both EPA and CAA interpret this to mean Indian Country.\textsuperscript{56} Tribal authority, to qualify as a state under CAA, requires tribes to manage and protect "air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction."\textsuperscript{57} This definition is unclear. Hypothetically, a non-Indian, who owned land within the boundaries of the reservation and decided to build a cement factory on his land, could do so within Indian Country. Assuming the tribe had CAA program authority, there is confusion as to whether the tribe or the state would be the entity to permit the cement factory. Under the Supreme Court's decision in \textit{Montana v. United States},\textsuperscript{58} specifically that tribes do not regulate non-Indians, the authority would fall to the federal government.\textsuperscript{59}

CAA criteria for state authority differ from tribal authority in enforcement provisions, deadlines for program implementation,

\begin{itemize}
\item \textsuperscript{52} See id. (noting that EPA will interpret the provision broadly to include tribal trust land outside boundaries of official reservation).
\item \textsuperscript{53} See id. (noting tribes must prove on case-by-case basis that they possess jurisdiction over land outside reservation and non-Indians).
\item \textsuperscript{54} See 63 Fed. Reg. 7256.
\item \textsuperscript{55} See Grant, \textit{supra} note 5, at 539 (citing 42 U.S.C. §300j-11(b)(1) and 33 U.S.C. §1377(e)). "The only real difference between the three TAS provisions is in the wording of the jurisdiction criterion, and of the three, the CAA provision . . . provides for delegation to tribes over the broadest area of land with the most certainty as to the scope of jurisdiction." \textit{Id}.
\item \textsuperscript{56} See Grant, \textit{supra} note 5, at 540.
\item \textsuperscript{58} 450 U.S. 544 (1981).
\item \textsuperscript{59} See \textit{Montana v. United States}, 450 U.S. 544, 558-61 (1981) (stating that although tribes may prohibit or regulate hunting or fishing by nonmembers on land belonging to tribes or held by United States in trust for tribes, it has no power to regulate non-Indian fishing and hunting on reservation land owned fee by nonmembers of tribe).
\end{itemize}
and sanctions for failure to comply with deadlines.\textsuperscript{60} EPA exempted the tribes from the enforcement sanction provisions since participation in state air programs are mandatory while tribal air programs are voluntary. The tribes cannot be penalized for failing to implement a voluntary provision.\textsuperscript{61} Other than the exceptions outlined, tribes are subject to the same requirements as states including air quality requirements as stringent as CAA.\textsuperscript{62} Tribes, in most cases, can implement more stringent standards than CAA.\textsuperscript{63} In many instances, courts have upheld tribal environmental standards, which are more stringent than those, established by EPA.\textsuperscript{64}

The tribes are subject to sanctions if they fail to adequately enforce an EPA program.\textsuperscript{65} Yet, criminal enforcement provisions of CAA will not be available to the tribal governments, due to their limited criminal jurisdiction.\textsuperscript{66}

III. LEGAL ISSUES AND TRIBAL MANAGEMENT OF CAA PROVISIONS

There are three significant legal issues that arise with respect to tribal management of CAA. First, the definition of Indian Country is ambiguous due to historical and territorial authority over tribal

\textsuperscript{60} See Grant, supra note 5, at 542 (noting that EPA has determined that deadlines imposed on states are inappropriate for tribes since implementation of CAA is voluntary in Indian Country — i.e. stringent deadlines which must be met by states are inapplicable).

\textsuperscript{61} See id. Tribal sovereignty, a recurrent theme in this Comment, is given strong deference by the courts. See Grant, supra note 5, at 345.

\textsuperscript{62} See id. (noting tribes must implement CAA standards which are at least as strict as states provisions).

\textsuperscript{63} See id. at 542 n.19.

\textsuperscript{64} See City of Albuquerque v. Browner, 865 F. Supp. 733, 741 (D.N.M. 1993) (mem.), aff'd, 97 F.3d 415 (10th Cir. 1996), cert. denied, 118 S.Ct. 410 (1997) (expanding tribal authority of environmental protection outside boundaries of tribal lands). The City of Albuquerque brought a suit against EPA for the agency's approval of the Isleta Pueblo water standards under the CWA. See id. The Rio Grande River flows from northern New Mexico through Albuquerque and Isleta Pueblo southward. See id. Under the TAS provisions of CWA, EPA approved the Pueblo's establishment of "ceremonial use" as a designated use of the Rio Grande River. See id. The Isletaens used the river for religious ceremonies that required tribal members to drink and emmerce themselves in the Rio Grande. See id. In one instance, EPA suggested that the Pueblo consider relaxing the standards during low flow periods. See id. As a response, the Pueblo refused to relax the standards because their members generally used the river "more intensively for ceremonial purposes during low flows." Id. at 741.

\textsuperscript{65} See id. Nevertheless, in Browner, the Tenth Circuit recognized that EPA dealt squarely with the Pueblo regarding the tribe's authority "to develop water quality standards more stringent than those of the federal government," and simultaneously rejected the City's position to the contrary. Id. at 740.

\textsuperscript{66} See id. The Declaratory Judgment Act "does not enlarge the parties' substantive rights." Id. at 737.
lands. Second, regulated industries lack remedies since tribes are immune from lawsuits under tribal sovereignty. Additionally, except in extreme cases, courts will give the tribal decisions deference. Third, environmental justice concerns of industries can be exacerbated by tribal implementation of air regulations.

Initially, the territorial authority given to tribes, defined as Indian Country, is ambiguous as it includes former Indian lands no longer held by Indians. In addition, tribes can have jurisdiction over former reservation lands. Moreover, tribal lands, which are held in trust by the federal government, can constitute a tribal reservation for CAA. Tribal authority to regulate air pollution and quality is derived from two sources: (1) delegation from Congress to EPA, and (2) inherent tribal sovereignty to regulate conduct within the tribal jurisdiction as defined in case law. It is a widely accepted point of law that, through a statute, Congress may delegate federal authority to a tribe. EPA, in implementing CAA, delegated federal authority to tribes to administer CAA in the same manner as states.

EPA exercises its rule-making authority by promulgating final rules for tribal authority and implementing CAA within the exterior boundaries of the reservation. Several commentaries to the proposed rules state CAA did not expressly delegate authority to tribes

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68. See Santa Clara v. Martinez, 436 U.S. 49, 58 (1978) (holding suits against Indian tribes barred by sovereign immunity absent clear waiver by tribe or congressional abrogation). A female member of the Santa Clara Pueblo was denied the tribal membership for her children after she married a non-member of the tribe. See id. Tribal membership, however, was extended to male members of the tribe who married non-members. See id. The Supreme Court held the Indian Civil Rights Act “does not imply authorize actions for declaratory judgement or injunctive relief against either the tribe or its officers”. Id. at 72.

69. See Montana, 450 U.S. 544 (1981) (noting “inherent tribal sovereignty” is grounded in Court’s holding). Before the Europeans came to North America, the tribes were self-governing sovereign political communities. See id.

70. See Grant, supra note 5, at 545 (discussing various goals of CAA).

71. See Harvard, supra note 21 (considering remarks made at Sovereignty Symposium XII).

72. See Cochran, supra note 67, at 323.

73. See United States v. Mazurie, 419 U.S. 544, 554 (1975) (referring to Article I, §8, of the Constitution giving Congress power “[to] regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).

74. See 42 U.S.C. §7601(d) (implementing CAA 1990 Amendments will delegate EPA federal authority to tribes who met criteria).

75. See 63 Fed. Reg. 7254 (citing Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-45 (1984)).
as required by the Supreme Court.\textsuperscript{76} Tribal regulatory power is not applicable to lands held in fee by non-Indians unless the conduct threatens or has direct effect on the tribe’s health or welfare, political, and economic integrity.\textsuperscript{77} According to the Supreme Court, Indian tribes do not have authority to zone former Indian lands now held in fee by a majority of non-Indians.\textsuperscript{78} In sum, EPA interprets CAA “as an explicit delegation of federal authority to eligible tribes. It is not necessary for the EPA to determine whether tribes have inherent authority over all sources of air pollution on their reservations.”\textsuperscript{79}

The next significant legal issue concerning implementation of TAS incorporates the regulated industries lack of due process provisions. Regulated industries claim their lack of remedies amounts to a denial of due process since tribes are immune from suits under the rule of tribal sovereignty.\textsuperscript{80} Tribal governments are not required to provide an opportunity for interested parties to seek judicial review of permit applications.\textsuperscript{81} Judicial review of tribal actions imposes significant practical burdens because of the tribes remote distances from federal district courts.\textsuperscript{82}

\textsuperscript{76} See 63 Fed. Reg. 7255; see also Montana, 450 U.S. at 566 (holding non-Indian hunting and fishing did not threaten Crow Tribe of Montana’s “political or economic security to justify tribal regulation”); Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408, 428 (1989).

There is no contention here that Congress has expressly delegated to the Yakima Nation the power to zone fee lands of nonmembers of the Tribe . . . . Therefore under the general principle enunciated in Montana, the Yakima Nation has no authority to impose its zoning ordinance on the fee lands owned by petitioners Brendale and Wilkinson.

\textit{Id.}

\textsuperscript{77} See Montana, 450 U.S. at 555-56 (discussing tribal membership, and regulation of hunting and fishing on tribal lands).

\textsuperscript{78} See Brendale, 492 U.S. at 423 (noting Indians relinquished many of their sovereign rights when they executed treaties with United States).

\textsuperscript{79} See 63 Fed. Reg. at 7257. “EPA believed that this ‘territorial approach . . . best advances rational, sound, air quality management.’” \textit{Id.} at 7255.


\textsuperscript{81} See Fed Reg. at 7261-62 (noting that due to tribal sovereignty, interested parties may not seek judicial review of CAA permits).

\textsuperscript{82} See Martinez, 436 U.S. at 64 (noting “the cost of civil litigation in federal district courts, in many instances located far from reservations, doubtless exceeds that in most tribal forums”). Pursuant to 42 U.S.C. \textsection 7601(d)(4), EPA has authority to exempt tribes from judicial review requirements of CAA. See Arizona Pub. Serv. Co. v EPA, 211 F.3d 1280, 1286 (D.C. Cir. 2000).

Thus, EPA indicated its willingness ‘to consider alternative options, developed and proposed by a tribe in the context of a tribal CAA Title V program submittal, that would not require tribes to waive their sovereign immunity to judicial review but, at the same time, would provide for an avenue for appeal of tribal government action or inaction to an indepen-
More important, allowing citizens to sue for enforcement of air pollution regulations would subrogate the sovereignty of the tribes.\textsuperscript{83} Tribal governments are not subject to citizen suit provisions of CAA.\textsuperscript{84} Citizen suit provisions serve an important role as "watchdogs" for enforcement of the statute.

Generally, CAA permits a public interest group or citizen to seek penalties against EPA or a private party for violations.\textsuperscript{85} A citizen bringing a suit must provide the non-complying regulated source owner or operator and EPA with sixty days notice prior to filing the suit to allow an opportunity for compliance.\textsuperscript{86} In deciding a citizen suit, the court can assess damages or issue an injunctive order for injunctive relief compelling compliance with the regulation.\textsuperscript{87} EPA, however, relies on \textit{Santa Clara v. Martinez}.\textsuperscript{88} In \textit{Martinez}, the Court held that unless congressional intent indicates otherwise, tribes enjoy sovereign powers that provide them immunity from suits for declaratory or injunctive relief.\textsuperscript{89}

\begin{itemize}
  \item \textit{Id.} review body and for injunctive-type relief to which the Tribe would agree to be bound.

  \item 63 Fed. Reg. at 7262.

  \item 83. \textit{See} 41 Am.J.2d INDIANS 32 (1995). One commentator notes:

  \item In the absence of an unequivocal expression of contrary legislative intent, suits under the Indian Civil Rights Act against a tribe, which possesses the common-law immunity from suit traditionally enjoyed by sovereign power, are barred by the tribes sovereign immunity. Therefore, the Act does not subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief.

  \item \textit{Id.}

  \item 84. \textit{See} 63 Fed. Reg. at 7262. Citizen suit provisions of CAA authorize a citizen to bring a civil action in court against any person or company alleged to have violated an emission standard or limitation. \textit{See id.} 42 U.S.C. \S\ 7604. The violation could have occurred in the past or present. \textit{See id.}

  \item 85. \textit{See} Grant, \textit{supra} note 5, at 515. Civil penalties under the citizen suit provisions are at the discretion of the judge using the "penalty assessment factors set out in CAA Section 113(c)." \textit{Id.} at 517.

  \item 86. \textit{See id.} EPA can intervene in a citizens suit at any time during the suit. \textit{See id.} at 516.

  \item 87. \textit{See id.} Penalties awarded under citizen suits are deposited into a fund and made available for EPA compliance activities. \textit{See id.} EPA and the Department of Justice are allowed 45 days after final judgement to submit comments to the court. \textit{See id.} at 517.

  \item 88. 436 U.S. 49 (1978).

  \item 89. \textit{See} Martinez, 436 U.S. at 61; \textit{see also} Santa Clara v. Martinez, 436 U.S. 49 (1978) (discussing implied authorization of Indian Civil Rights Act for relief of private actions against tribal officers when tribal members' civil rights were denied). The Court determined that Congress' failure to provide relief other than habeas corpus was deliberate. \textit{See id.} Suits against the tribe under the Civil Rights Act were therefore barred by the tribe's sovereign immunity from suit. \textit{See id.} Any deviation therefrom thus would constitute a judicial intrusion into the Indian Civil Rights Act. \textit{See id.}
The third legal issue is the possible acceleration of environmental justice concerns due to tribal implementation of air regulation.90 "Environmental justice demands that public policy be based on mutual respect and justice for all peoples, free from any discrimination or bias."91 In 1994, the Clinton administration issued an executive order regarding environmental justice; it requires federal agencies to demonstrate that their programs and policies do not inflict unfair harm on minorities and low-income people.92 The environmental justice movement has two characteristics: a grass-roots composition and a politicizing effect.93

Generally, environmentalists claim that environmental degradation harms all of society equally.94 Nevertheless, environmental justice focuses on the suffering of environmental risks, which are skewed to the persons least able to afford protection from the degradation.95 Environmental risks are also defined as the costs which result from the exploitation of a natural resource.96

Costs and benefits of pollution are not distributed equally in society.97 The environmental justice movement has attempted to re-frame the debate to focus on reducing waste production at the source of its origin. This new focus is a change from the traditional

92. See Exec. Order No 12, 898, 3 C.F.R. § 859-63 (1995) (requiring federal agencies to demonstrate that their programs and policies do not unfairly inflict environmental harm on poor and minorities).
94. See id. at 22. A “grass-roots composition” can also be thought of as the groundwork or origin meaning the most basic level of organization run by citizens. See id. The “politicizing effect” in this context means that the movement must have an effect or influence over politics in order to enact change. See id.
95. See id. at 19 (contesting notion that certain discrimination is to blame for current environmental disparity).
96. See Eldon D. Enger et al., Environmental Science: The Study of Interrelationships 519 (2d ed. 1986) (referring to definition of “environmental cost” as “perceived degradation of the environment resulting from the exploitation of a natural resource”).
97. See Grant, supra note 5, at 539 (quoting Bob Edwards, “With Liberty and Environmental Justice for All: The Emergence and Challenge of Grassroots Environmentalism in the United States” 36 (1995)).
idea which merely regulated the disposal of waste.98 The environmental justice movement differs from environmentalism in that the former does not intend or pretend to address the full range of environmental concerns.99

The view of Indians as the first ecological conservationists has been widely promoted by the environmental movement.100 Yet, Chief Seattle's famous environmental speech was, in fact, found to be mostly fictional.101 In reality, the history of Indian resource use is not at all compatible with the spiritual connection attributed to Indians and the natural resources.102 Indians used the resources available to them whether or not they were "living in harmony with nature."103 In the present day though, positive incentives for good stewardship are the best method of resource conservation in Indian Country.104 In contrast to yesteryear, environmental issues are just

98. See Grant, supra note 5, at 590.
99. See id. at 545. Environmental justice addresses primarily social, economic and health concerns of persons affected by pollution. See id. Environmentalism goes further in addressing the actual effects of the pollution, such the groundwater table and vegetation. See id.
101. See Fergus M. Bordewich, Killing the White Man's Indian, a Book 131-33 (1996) (stating "[Chief] Seattle is said to have delivered this speech in response to President Franklin Pierce's offer to buy the tribe's land near Puget Sound in 1854"). Chief Seattle is quoted as saying, "We are part of the earth and it is part of us. The perfumed flowers are our sisters; the deer, the great eagle, these are our brothers. The rocky crests, the juices in the meadow, the body heat of the pony, and man all belong to the same family." Id. at 132. Bordewich remarks that Seattle's speech has lent credence to the romantic notion that Indians view the land in "poetic passivity" and are opposed to any commercialization of the earth. See id. at 132. "The speech as it is known to most Americans is, quite simply, an invention, a fact that seems to make little difference to well-meaning whites who are determined to portray Indians as Icons of ecological correctness." Id. at 133.
102. Id. (dispelling the myth of Indians as "icons of ecological correctness").
To claim that Indians lived without affecting nature is akin to saying that they lived without touching anything, that they were a people without history. Indians often manipulated their local environments, and while they usually had less impact on their environments than European colonists would, the idea of 'preserving' the land in some kind of wilderness state would have struck them as impractical and absurd. More often than not, Indians profoundly shaped the ecosystems around them.
Id.
104. See id. at 18 (discussing Indian culture can manage resources without constraints and myths of non-Indians).
as important to a tribe’s economic viability as it is to a tribe member’s quality of life and health.105

Environmental protection for indigenous people is a human right beyond a regulatory regime imposed by a national government.106 Tribal officials have balanced issues of sovereignty and economic development in environmental policy. In New Mexico, the Mescalero Apache, after some lengthy debate, accepted a proposal to locate U.S. Department of Energy nuclear wastes at a temporary site on their tribal lands.107 The Mescalero contend the issue is an expression of their sovereignty, and they have the right to store nuclear waste on tribal lands.108 Critics state that tribes are selling their sovereignty.109 Critics also state the issue is not sovereignty, but preservation of ecology, survival, and environmental racism.110 Tribal environmental policy should be sensitive to ecological concerns, economics, contemporary scientific knowledge, and tribal systems of ethics.111 The goals of economic development should be balanced with environmental concerns. “The goal is to minimize error and to maximize adaptation to move forward to reduce the ravages of poverty and stasis.”112 Environmentalism upholds Indians as guardians of the earth but “finds no way to prevent the indus-

105. See Fritschler, supra note 28, at 51.
106. Dean B. Suagee, Human Rights and Environmental Protection in Indian Country 9 NAT. RESOURCES & ENV'T 74, 75 (1995) (discussing that Indian people have human rights which should not be ignored in resolving conflicts with non-Indians over governance of Indian reservations).
108. See id. at 53 (noting that this argument is based on tribal sovereignty and right of tribal government to govern itself and use of its lands).
109. See id. at 53-54 (noting that tribes supporting nuclear sites are selling tribal sovereignty by using tribal governments and trust lands to by-pass environmental regulations).
110. See id. at 55 (stating “it is the worst kind of environmental racism” to force tribes to live with nuclear waste due to their rural locations).
trial machine from grinding up both people and habitat in its insatiable need for raw materials." There are more questions than answers with regard to how Indians view their environment. The conclusion affirms that Indians should continue to be given the opportunity and resources to define their concept of the environment and of how to manage their own resources.

IV. **EPA Establishment of Tribal CAA Management: Will it Succeed or Fail?**

EPA, under the authority of CAA, promulgated its Final Rules on tribal management of air pollution. The intended result for independent tribal regulation of air pollution is inconsistent with a national system of air pollutant regulations. Tribal governments lack the resources required for implementation or accountability. To receive federal funding for air management programs, CAA's 1990 Amendments require a five percent matching rate for tribes. Without adequate resources tribal management of air pollution amounts to another unfunded mandate of the federal government. The infrastructure in some tribal governments, however, lacks the resources needed to enforce CAA regulations. Without the proper infrastructure in tribal governments, EPA TAS provisions are merely "smoke and mirrors."

In issuing the final TAS rule, EPA was aware that the tribes lacked the resources to carry out CAA and stated that, "the biggest problem is limited resources in EPA and the tribes." Tribes do not have the same basic law of regulation and infrastructures as state governments. The Environmental Protection Agency report *Environmental Equity: Reducing the Risk for all Communities* (1992) creates the impression that communities are actively trying to re-

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113. Vine Deloria, Jr., *Indians and Anthropologists: The Critique of Anthropology*, (Thomas Biolsi & Larry J. Zimmerman, eds.) 211, 213 (1997) (stating "American Indian delegations have been active in world environmental movements but have brought only a romantic sentimentalism as their contribution"). Indians are interviewed on numerous documentaries discussing "mother earth" only to have the destruction continue. See id.

114. See 63 Fed. Reg. at 7259 (intending to treat Indian tribes in same manner as states).

115. See Grant, *supra* note 5, at 543.


117. See Fritschler, *supra* note 28, at 48 (discussing opportunities for EPA to help tribal environmental regulatory programs in Indian Country).

118. See *id.* at 49 (recognizing tribal limitations in meeting EPA standards).
cruit noxious facilities. Native Americans are prime targets for the waste disposal industry. Both the U.S. Department of the Interior and the Bureau of Indian Affairs are promoting economic development of the Indian lands through the construction of waste facilities. Indians are not recruiting pollution industries to their tribal lands. Tribes are concerned about the cumulative effects of air permits and the need for timely environmental assessments. Despite the lack of resources EPA provides to the tribes, the agency is thinking about using the federal government as a neutral vehicle to manage programs and facilitate discussions between states and tribes.

V. ALTERNATIVE APPROACHES

There are three approaches to the management of the environment, including ecosystem management, environmental enterprise zones and environmental federalism. Ecosystem management encompasses the effects of alterations to one part of the ecosystem, and it induces changes throughout the ecosystem. Ecosystem management is a collaborative approach integrating ecological, economic and social factors as well as partnerships with federal, state and local governments, Indian tribes, private landholders and other stakeholders. "The notion that humans threaten their own survival by their exploitation of nature is a theme that predates the Industrial Revolution." Critics of the ecosystem management

119. See Robert Bullard, Confronting Environmental Racism: Voices from the Grassroots, 200-01 (1993) (discussing and analyzing EPA’s failure to grasp how interplay of race and class bias environmental decision-making).
120. See id. The governments of more than a hundred reservations have been approached by waste disposal firms. See id. at 201 (citation omitted).
121. See id.
122. See id. (discussing that Native Americans are targets, not recruiters for location of waste industry on their lands).
124. See 63 Fed. Reg. at 7258 (discussing the possibility of EPA as a mediator in discussion between tribes and states).
126. See id. The objectives of ecosystem management are offered by the Interagency Ecosystem Management Task Force: “The goal of the ecosystem approach is to restore and sustain the health, productivity, and biological diversity of ecosystems and overall quality of life through a natural resource management approach that is fully integrated with social and economic goals.” Id. at 28.
127. See id. at 27 (noting that concerns over finite land base, long-term supply of natural resources and growing population date to late sixteenth century writings of Mathus).
model suggest that the supporters of the model are suffering under the delusional belief that restoration of natural environments will lead to economic growth.128 Legitimately, greater economic growth affects the environment in a positive way. For example, in a good economy people have disposable income which they can devote to more abstract concerns, such as the environment, and worry less about affording the basic necessities.129 Ecosystem management consists of a multi-specialty approach which must be further defined, and perhaps modified, if implemented in the tribal environmental management context.

Environmental Enterprise Zones (hereinafter EEZ) are suggested as one potential avenue for environmental management in the tribal environmental management context. EEZs would operate as market forces, property rights, and decentralized regulations.130 "Environmental protection can rest on either side of the fence, which is to say control is either a matter of law and market forces or a struggle with the rule of politics."131 The "fence" referred to is the "constitutional fence that separates private and public decision making."132 European countries, such as France and Germany, protect water quality through the use of quasi-public river basin associations.133 These associations provide for water quality rights of every member (industry, residents and municipalities); but require payments from dischargers based on the quality of their discharge.134 In the United States, similar examples of environmental regulations exist which are not limited by monopolistic control by regulators.135 For example, California developed an air emissions trading market, where "credits for emissions are bought

128. See id. at 33.
129. See id. at 35 (discussing meritorious hypothesis that "high income countries do more to clean and maintain the environments than do poorer countries").
131. See id. at 142 (discussing "constitutional fence" that separates public and private environmental decision making).
132. See id. The "public fence" is the U.S. Constitution, which protects citizens from "the unrestrained forces of government." Id. at 143. The "private fence" is the common law as established by the judiciary, market forces, opportunity costs and also embodied in property rights. Id. at 144.
133. See id. at 154 (discussing that European countries use economic incentives to manage environment by requiring "all dischargers to make payments on the basis of the quality of their discharge" assuming it is a permitted type).
134. Id. (stating "Some discharge is not allowed at all").
135. See Yandle, at 161 (examining North Carolina Tar-Pamlico Association, water-pollution trading community which was formed to share costs and reduce discharges into river basin).
and sold."\textsuperscript{136} The proponents of EEZ state that the role of "centralized" authorities should be limited to setting standards for environmental problems which are national in scope, monitoring outcomes and working with national industries to streamline their production processes.\textsuperscript{137}

The principle of environmental federalism may "maximize the costs of monitoring regulatory agencies", and "authority to [do so] should devolve to the lowest level of government that also allows for control of pollution or other spillover effects."\textsuperscript{138} Critics of environmental federalism state that returning environmental regulation to state and local control would destroy the progress made in the last three decades.\textsuperscript{139} Proponents of environmental federalism see the increased role of the states as "breaking the yoke of a monopoly regulator" who applies uniform rules for varied situations.\textsuperscript{140} The monopoly regulator is the federal government. A case study of eight states west of the Mississippi River demonstrated a successful history of dealing with water and water pollution issues.\textsuperscript{141} If regulatory control of the environment were given to the states, with full EPA approval as to water quality management, the states would continue to emulate the command and control process of EPA.\textsuperscript{142} Conversely, those states without EPA approval would continue their individual approaches to water quality management.\textsuperscript{143} The ideal regulation of the environment "differs from place to place and os-

\textsuperscript{136} Id. at 161 (citing Benjamin A. Holden, "Dirt in Hollywood? Californians Have Pollution-Rights Market Ready For It," \textsc{Wall Street Journal}, April 12, 1995 at B 3).

\textsuperscript{137} See id. at 163-64 (noting that market forces and flexibility should be preeminent in facing challenges with limited resources).


\textsuperscript{139} See Karol Ceplo and Bruce Yandle, \textit{Western States and Environmental Federalism}, in \textit{Environmental Federalism}, 225, 226 (Terry L. Anderson and Peter J. Hill, eds.) (1997) (noting that critics of environmental federalism view EPA as omnipotent regulator of environment).

\textsuperscript{140} See id. (discussing that environmental regulation return to state and local control would offer opportunities for protection and encourage reliance on market forces).

\textsuperscript{141} See id. at 226-27 (analyzing statistics, administrative law, common law and property rights for eight states). The states examined were: Arizona, California, Idaho, Kansas, Louisiana, New Mexico, Oregon, and Texas. See id. at 228-42.

\textsuperscript{142} See id. at 243 (predicting gradual adjustment to more flexible and innovative regulation).

\textsuperscript{143} See id. (predicting tighter standards where benefits are highest and more relaxed standards where ecosystems are not as threatened).
cillates within any one."144 In contrast, centralized command and control regulation, as exercised by the federal government, "tends toward homogeneity and stability" because of insufficient data gathering and the lack of incentives for remotely located bureaucrats to act on behalf of the client.145 Additionally, the property rights protection movement seeks to limit the role of the federal government in property rights, and is linked to movements to decentralize control of environmental protection from the federal to local governments.146 States are ideologically more attuned to their citizens and can facilitate these property rights discussions in the venue of their state legislatures. In the same vein, tribal governments are ideologically attuned to the needs of the tribal members.

There are several models of delegation of authority of federal environmental regulations. Dual federalism is the traditional federal-state model.147 The dual federalism model finds both state and federal governments supreme in their respective arenas.148 Many environmental acts, including the CWA, have shifted from dual federalism toward delegation of authority of programs to tribal governments. Cooperative federalism involves the partnership of federal, state, and tribal governments regulating the environment.149 This new brand of federalism, manifested in the "block grant" aid programs which evolved during the Reagan Administration, shunts the authority and responsibility of the federal government to state and


145. See id. (noting that centralized regulation is costly and in many cases inappropriate).

146. See id. at 252.

Concern over property rights protection led to failed efforts in the early 1990's to gain federal legislation. Later, the 104th Congress added property rights protection to its Contract with America. . . . [n]o action was taken. . . . By September 1995, property rights bills had been introduced in forty-three states and passed in eleven of them. At the time, every state west of the Mississippi except Arizona, Oklahoma, and North Dakota was either debating or had passed legislation.

Id. at 252-53.


148. See id. (noting that national government became more powerful than states due to difficulty in regulating interstate commerce).

local governments. A federalism model, based on cooperative management, rests as a superior stance to implement environmental regulation of air pollution. Cooperative federalism is a particularly functional model for tribes to carry out CAA’s objectives. Tribes have entered into Memoranda of Understanding with state environmental departments to coordinate regulation and enforcement activities. Memoranda of Understanding can serve as training opportunities for tribal governments. Interests of states and tribes are optimal if both parties work together in cooperation. For example, New Mexico entered into agreements with twenty-two tribes whose lands are within state borders. The parties agreed to establish a procedure to resolve environmental issues. Agreements with tribal governments provide the necessary resources, expertise, and testing facilities which the state can provide. The most applicable solution to the tribal management of environmental programs is cooperative management federalism. The management regime is a policy which involves a number of social partners in an collaborative attempt to resolve specific environmental problems. These cooperative regimes have two characteristics. First, a process of consensus through a series of exchanges and interactions with social organizations and administrations to reach a

150. See John Harrigan, Politics and Policy in States and Communities, 45 (1988) (noting that another solution is to enact a tribal mini-NEPA); see generally Dean B. Suagee and Patrick A. Parenteau, Fashioning A Comprehensive Environmental Review Code For Tribal Governments: Institutions and Process, 21 AMER. INDIAN L.REV. 297, 298 (1997) (explaining that EPA issued numerous amendments to its regulations to establish procedures for tribes to be treated as states).

151. See Daniel J. Fiorino, Environmental Policy and the Participation Gap, in DEMOCRACY AND ENVIRONMENT: PROBLEMS AND PROSPECTS (William Lafferty and James Meadowcraft, eds. 1996) 194 (stating that consequences of few opportunities for democratic participation in environmental policy decisions are public protest and dissatisfaction).

152. See Grant, supra note 5, at 545 (noting that Memoranda of Understanding are common way for states and tribes to work out jurisdictional disputes in regulating environment).

153. See William H. Gelles, Tribal Regulatory Authority under the Clean Air Act, 3 ENVTL. LAW 363, 402 (1997) (explaining that interests of states and tribes are best served when both parties cooperate).

154. See id. at 403 (discussing State of New Mexico’s Government-to-Government Policy Agreement with twenty-two tribes within state borders).

155. See id. (explaining that both parties have committed to address environmental issues and problems through cooperative procedures predicated on mutual respect and sovereignty).

156. See id. at 404 (noting that because many tribes lack resources to regulate effectively, several states offer tribes their expertise, testing facilities, and testing programs to evaluate compliance with tribal environmental standards).

negotiated solution must exist. Second, each participant assumes some responsibility for the implementation of the negotiated solution. The implementation may involve selling the plan to the group membership or entering into legal covenants with state or local governments for implementation.

VI. CONCLUSION

The EPA Final Rule established tribal implementation of CAA provisions through its TAS rule. CAA, a unique environmental regulatory act due to the mobile nature of the pollutant, presents special problems for tribal implementation. As a result, legal concerns need to be remedied prior to full implementation. These concerns include the unclear tribal authority, jurisdiction over non-Indians, and issues of environmental justice. Challenges to tribal sovereignty should remain the jurisdiction of the courts. Moreover, jurisdictional concerns of non-Indians and the immunity of tribes from suit can be negotiated by the entities. Additionally, concerns of environmental justice should be discussed in the regulatory process. Overall, legal precedent regarding any of the preceding issues will also need to be examined.

These undefined areas can be illuminated by public participation of the tribes, states, and regulated entities in the decision making process. Contrary to the opposition's views, tribal sovereignty will remain intact and not be diminished by the cooperative agreements with other entities. EPA suggests establishing the agency in the role of negotiator and/or facilitator in the TAS regulatory process as a solution. In addition, tribal governments should be given the resources and clear authority to implement CAA TAS rules. Consequently, the best method to remedy these undefined areas is to use a cooperative management model. Most importantly, the tribal governments can enter into cooperative agreements with states and regulated entities to resolve these issues on a case-by-case basis.

158. See id. at 257 (noting that cooperative management regime is model which encourages participation of wide range of environmental organizations while avoiding problems such as polarization of interests).

159. See id. at 258 (stating “At its simplest this may involve 'selling it' to their broader constituency”).