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NO. STATE OF NEBRASKA
OFFICIAL
AUG 3 1992
DEPT. OF JUSTICE

DATE: July 27, 1992

SUBJECT: Authority of the Santee Sioux Tribe to Regulate the Application of Farm Chemicals and Pesticides.

REQUESTED BY: Senator Elroy M. Hefner
Nebraska State Legislature, District 19

WRITTEN BY: Don Stenberg, Attorney General
Linda L. Willard, Assistant Attorney General

You have asked several questions regarding the Federal Insecticide, Fungicide, Rodenticide Act (FIFRA) and the Santee Sioux Tribe which we will attempt to address separately. The relationship among state, federal and tribal governments is complicated and varies from tribe to tribe. Your questions are addressed specifically to the Santee Sioux Tribe of Nebraska and therefore our response is limited to relations with the Santee Tribe. The answers given could be very different if the same questions were asked of relations with the Winnebago or Omaha Tribes of Nebraska.

In order to understand the current relationship between the state and the Tribe, it may first be helpful to have a general background history of governmental involvement with the Santee Tribe. During the 1800's the United States government entered into a series of "peace and friendship" treaties with the various Indian tribes reserving certain areas for exclusive use and occupation by the tribe. The essence of the treaties was that the Indian tribes relinquished their aboriginal sovereignty and acquiesced to a dependent status under the United States government in exchange for lands being set aside specifically for their use and for government protection of such lands and Indian peoples. Thereby the United States became the trustee of the Indian tribes.

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Another general provision of these treaties was that no person, not of Indian heritage, shall enter or reside in such territory without the express consent of the tribal authority. This provision gave the Indian tribes total power to exclude nonmembers and to regulate all affairs within the reservation boundaries. However, this ability to regulate and exclude was subject to Congressional mandate.

The first "peace and friendship" treaty with the Santee Sioux was signed in 1830. 7 Stat. 328. This treaty initially brought the Santee Sioux under the protection of the United States. Subsequent treaties later relinquished a greater part of the Indian lands held by the Santee. See 7 Stat. 524 and 15 Stat. 635. The relations with the Santee Sioux Indians and the United States government were stable until the Santee uprising of 1862. Subsequently the Santee were moved to the Crow Creek Indian Reservation in Dakota Territory. Then by executive order on August 31, 1869, President Andrew Johnson created the Santee Indian Reservation at its present location in Knox County, Nebraska. 1 Kappler 864.

The most significant Congressional mandate affecting tribal authority was the General Allotment Act of 1887. 24 Stat. 388. It was an effort to assimilate the Indian people into the Anglo Saxon culture by issuing land patents to individual Indian allottees within the reservation. Under the Act, an allottee could alienate his land to a non-Indian after holding it for 25 years. 24 Stat. at 389. Many individual Indians either sold their land to non-Indians or the land was condemned by the government for failure to pay taxes and then sold to non-Indians. The Santee Sioux Indians came under the General Allotment Act of 1887, and also were affected by the Sioux Allotment Act of March 2, 1889. 25 Stat. 888. A great amount of the land held in trust for the Santee Tribe was allotted to individual Santee Indians. A significant percentage of the land allotted to individual Indians was subsequently alienated to non-Indians. Today nearly 91 percent of Santee reservation land in Nebraska is held in fee by non-Indians. Realty Division, bureau of Indian Affairs, Winnebago, Nebraska and Indians of Nebraska: Santee Sioux, Nebraska Indian Commission. The General Allotment Act indirectly reduced the tribal authority. Indian tribes no longer could exclude nonmembers and it became increasingly difficult to define or limit the internal affairs.

The General Allotment Act was repealed by the Indian Reorganization Act of 1934. 48 Stat. 984. However, this act was not retroactive and the lands held in fee by non-Indians did not return to the United States to hold in trust for the Indian tribes. The presence of non-Indians within reservation boundaries has created a problem of competing jurisdictions between the Indian tribes and the states.

The matter is complicated even more by the federal government's enactment of Public Law 280 (PL-280) in 1953. PL-280 transferred complete criminal and limited civil jurisdiction over the reservations regardless of the Tribal preference for continued autonomy. Nebraska was one of the states required to accept criminal and civil jurisdiction over all Indian country within the state. A subsequent amendment in 1968 allowed the transfer of criminal and limited civil jurisdiction back to the federal government. 25 U.S.C. § 1323. Nebraska took this opportunity and retroceded jurisdiction back to the Omaha Tribe in 1969, see LR 37 80th Legis. Sess., Neb. Legis. J. v.1, p. 1467 (1969), and the Winnebago Tribe in 1986, See LR 303 89th Legis., 2nd Sess., Neb. Legis. J. v.1, p. 91 (1986). State jurisdiction of the Santee Tribe has not retroceded.

Your question is whether the Santee Tribe has the legal capability to regulate the application of farm chemicals and pesticides under FIFRA or other laws. As a general proposition, Indian tribes hold certain powers in the area of civil jurisdiction, powers which are inherent by virtue of their quasi-sovereign status. These attributes of sovereignty extend over both their members and their territory, United States v. Mazurie, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed. 2d 706 (1975), and is generally retained by way of tribal self-government and control over other aspects of its internal affairs. Montana v. United States, 450 U.S. 544, 564, 101 S.Ct. 1245, 1257 67 L.Ed.2d 493 (1981). This sovereign status gives the Indian tribes broad powers in areas of self government and regulating the affairs of their members and Indian lands within the reservation.

This sovereign status is likely to translate into authority regarding environmental regulation of tribal members and Indian trust land. Under the current EPA policy, tribal governments are recognized as independent sovereigns with authority and responsibility over reservations roughly analogous to that of state governments. See Office of the Administrator, United States Environmental Protection Agency, Indian Policy Implementation Guidance (November 8, 1984) and EPA Policy for the Administration of Environmental Programs on Indian Reservations (November 8, 1984) (together referred to as "EPA Indian Policy"). In fact, the "federal government has a policy of encouraging tribal self government in environmental matters." Washington Department of Ecology v. United States Environmental Protection Agency, 752 F.2d 1465, 1471 (9th Cir. 1985). FIFRA contains a specific provision allowing the Indian tribes to negotiate agreements with the Administrator of the Environmental Protection Agency. Under 7 U.S.C. § 136(u) the Administrator of the EPA may enter into cooperative agreements with states and Indian tribes to carry out the enforcement of the FIFRA regulations. This section is

consistent with the federal government policy encouraging of the tribes to participate in environmental matters.

The policies and practices of the EPA reflect the federal commitment to tribal self regulation in environmental matters. In November, 1984, the EPA issued a policy directive for the administration of its responsibilities on Indian reservations. Included in the policy statement was the intention to involve Indians in environmental decision-making by recognizing tribal governments as the primary parties for making environmental policy decisions and managing environmental programs for reservations consistent with EPA standards and regulations. See "EPA Indian Policy" supra.

We conclude that the federal proposition that Indian tribes possess an inherent sovereignty is likely to allow the Santee Tribe to enter into a cooperative agreement with the EPA Administrator to carry out enforcement of regulations under FIFRA. Current EPA policy and amendments to federal regulations have included tribal participation in environmental matters. The Courts are also leaning toward increased tribal participation in environmental matters within reservation borders. However, the extent of tribal authority to enact regulations may be limited as discussed below.

Your second question is whether the Santee Tribe may promulgate regulations which are stricter than the federal government requires. Although the Santee tribe may participate in enforcement of FIFRA regulations, they do not possess the power to promulgate regulations under FIFRA. However, the courts tend to interpret an implied authority within the tribe unless Congress explicitly indicates to the contrary.

The federal government has placed primary enforcement responsibility for pesticide use violations under FIFRA with the states. Although the Indian tribes are included in 7 U.S.C. § 136(u), this provision only provides that a cooperative agreement concerning funding, training, and certification programs may be entered into between the Administor of the EPA and the states or Indian tribes. Indian tribes are not mentioned in any other provision of FIFRA, and it contains no express provision for "the treatment of Indian tribes as states." Glover and Walker, Tribal Environmental Regulation, 36 Fed.B. & News 438, 444 (1989). It appears from the face of FIFRA, that the power of the tribal authority is limited under the Act. The tribe may not have the power to promulgate regulations beyond the federal mandates currently in force. The authority may be limited to training, certification, and enforcement.

However, the courts have a tendency to interpret an implied authority invested in the Indian tribes where there is no express

provision to the contrary. See Nance v. EPA, 645 F.2d 701 (9th Cir. 1981). This is a continuation of the tribal sovereignty principle. Thus, while tribal authority to enact stricter regulations is not explicit within FIFRA, the courts could grant an implied authority in the absence of an express Congressional mandate to the contrary.

You next ask whether the tribe can enforce such regulations on non-Indians owning fee lands within the reservation boundaries. The extent of tribal authority must be read in light of the alienation of Indian trust lands. However, it is possible that non-Indians owning fee lands will be affected by tribal regulation under FIFRA. The Supreme Court has recognized that tribal power can extend to activities of non-members on fee lands if there is a tribal interest sufficient to justify the exercise of tribal authority. Yet, another line of authority turns on the nature of the land affected and the percentage held in fee.

A leading case determining the Tribe's power to regulate is Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). In Montana, the Crow Tribe of Montana sought to prohibit hunting and fishing within its reservation by anyone not a member of the tribe. They asserted that the treaties which created the reservation and its inherent powers of sovereignty gave the tribe the authority to prohibit hunting and fishing by non-members of the tribe even on lands within the reservation held in fee simple by non-Indians. The Supreme Court did not agree with this rationale. The Court determined that treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands under the General Allotment Act of 1887. Id. at 561. The alienation of lands to non-Indians, served to divest the sovereignty held by the Indian tribes. The Montana court reiterated the holding of United States v. Wheeler, 435 U.S. 313, 326, 98 S.Ct. 1079, 1087, 55 L.Ed.2d 303 (1978) that,

> "an implicit divesture of sovereignty has been held to occur in those areas involving the relations between an Indian tribe and non-members of the tribe. These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations."

The Montana Court determined that regulation of hunting and fishing rights on fee lands held by non-Indians was determined to be a matter of external relations. Thus, the tribe no longer possessed the authority under its sovereignty to regulate hunting and fishing by non-Indians on fee land.

In the current situation, the treaties with the Santee Tribe must be read in light of the subsequent alienation under the General Allotment Act of 1887. Such allotment divested the Santee Tribe of the inherent ability to exclude non-members from the reservation. Also the Nebraska Legislature has never retroceded jurisdiction to the Santee Tribe. This divesture of sovereignty can be taken further to conclude that the Santee Tribe does not have the authority to regulate non-Indians on lands held in fee on the Santee Reservation. This is consistent with the Montana Court's reiteration of McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 171, 93 S.Ct. 1257, 1261, 36 L.Ed.2d 129 (1973), holding that, "exercise of tribal power beyond what is necessary to protect tribal self government or to control internal relations is inconsistent with the dependant status of the tribes, so cannot survive without express congressional delegation."

The express congressional delegation may however be found in the FIFRA Act. The Act specifically has a section allowing tribal governments to carry out the enforcement of the FIFRA regulations. 7 U.S.C. § 136(u). However, the extent of this tribal authority is likely to be limited to enforcement rather than promulgation of environmental regulations.

The court in the Montana case at 566 stated that, "the tribe may also retain inherent power to exercise civil authority of the conduct of non-Indians on fee lands within this reservation if the conduct threatens or has some direct effect on the political integrity, economic security, the health or welfare of the tribe." The chemicals regulated under FIFRA are dangerous in nature. They generally are used to kill various types of plants, insects, and rodents. Some of these chemicals are poisonous and dangerous to humans. The regulation and use of such chemicals may be seen to effect the health and welfare of the tribe and its members.

One argument against Indian tribal authority to regulate non-Indians is that non-Tribal members cannot participate in tribal government and thereby are denied a form of due process. The 10th Circuit addressed this argument in Knight v. Shoshone and Arapahoe Indian Tribes, 670 F.2d 900 (1981). The court in Knight determined that a non-Indian developer was subject to the tribal zoning code and "[t]he fact that the code applies to and affects non-Indians who cannot participate in tribal government is immaterial." Id. at 903. The actions of the developer were found to directly affect tribal and allotted lands by changing the nature of the area from rural to urban. The court also justified their holding by the fact that no zoning ordinance other than the tribe's was in effect. Neither the State of Wyoming nor any of its political subdivisions had exercised the power of land use control within the exterior boundaries of the reservation.

The decision in Knight supra is important for the State of Nebraska. The State of Nebraska does not have any program to enforce FIFRA regulations. In the absence of State regulations, federal officials may give the tribe authority to regulate non-Indians under FIFRA regardless of the inability of non-Indians to participate in tribal government.

Another important case to consider in determining whether the regulations will affect non-Indians is Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989). This case deals with two conflicting zoning ordinances. The County of Yakima and the Yakima Indian Tribes both enacted zoning ordinances dealing with certain lands held by Brendale and another affected party Wilkinson. The zoning ordinances conflicted with each other and a lawsuit followed. In split decisions, the Court held that the tribe did have the authority to regulate the Brendale property located in the reservation's "closed area" and at the same time held that the tribe lacked the authority to zone the Wilkinson property which is located in the reservation's "open area." This case largely turned on the distinction between the reservation's open and closed area. The reservation was divided into two parts; a closed area and an open area. The closed area consisted of 807,000 acres of land of which 25,000 acres, 3 percent, were held in fee by non-Indians. The District Court also found a number of places of religious and cultural significance located in the closed area. 492 U.S. at 419, 109 S.Ct. at 3002, n.5. Also the closed area had been closed to the general public since 1972 when the Bureau of Indian Affairs restricted the use of federally maintained roads in the area to members of the Yakima Nation and to its permitees, who must be record land owners associated with the tribe. In contrast, the general public was not restricted from owning land in the open area and almost half of the land in the open area was land owned in fee. Nor did the District Court find a unique religious or spiritual importance to the open area of the Yakima Reservation. 492 U.S. at 419, 109 S.Ct. at 3002, n.5.

Currently there are no lands on the Santee Reservation which are "closed" to the general public. In fact, nearly 91 percent of the land on the Santee Reservation is owned in fee by non-tribal members. The policy of preserving the integrity of the reservation behind the Brendale decision does not appear to be present on the Santee Reservation. There is no "closed area" on the Santee Reservation where the cultural, religious, and tribal sovereignty are predominant. The Santee Reservation more closely resembles the "open area" found in Brendale. The percentage of land owned in fee by non-Indians is significantly higher than the approximate 50% on the Yakima Nation's open area. Only 10,000 acres of the original 115,075 are currently held in trust for individual Indians or the Santee Tribe. Therefore, if a court interprets the situation to

turn on the percentage of land owned in fee by non-Indians, they may determine that the Santee Tribe cannot exercise power over non-Indians concerning FIFRA regulation.

The power and authority of the Santee tribe must be read in light of the alienation of the Indian lands. Over 91 percent of the lands on the Santee reservation have been alienated and are now held by non-Indians in fee. It is possible that enforcement of FIFRA regulations will be seen to fall under the exception noted in Montana. Although environmental regulation does not fall under the general rule, it is possible that the regulation of pesticides will be seen to effect the health, safety, welfare, and political integrity of the tribe. Also the fact that non-Indians are not allowed to participate in tribal government is irrelevant. However, the nature of the land distinction made in Brendale is closely related to the current situation and favors the position that the tribe should not have authority to regulate non-Indians on the reservation.

Your final question is whether the State of Nebraska would supersede the tribal authority if it enacted FIFRA legislation. It is unlikely that the State of Nebraska will supersede the tribal authority as to member Indians or trust land in enforcement under FIFRA. "State laws generally are not applicable to tribal Indians on an Indian reservation except where congress has expressly provided that state laws shall apply." McClanahan v. Arizona State Tax Commission, 411 U.S. at 170-171, 93 S.Ct. at 1261. See also Bryan v. Itasca County, 426 U.S. 373, 376, 96 S.Ct. 2102, 2105 n.2 (1976). In Washington Department of Ecology, 752 F.2d 1465, the State of Washington filed a petition for review of an Environmental Protection Agency decision to exclude Indian lands from the approved State hazardous waste program under the Resource Conservation and Recovery Act (RCRA). The EPA concluded that RCRA does not give State jurisdiction over Indian lands, and that States could possess such jurisdiction only through an express act of Congress or by treaty. The Resource Conservation and Recovery Act of 1976, 42 U.S.C.A. § 6901 et seq., does not expressly provide that States can exercise jurisdiction over Indians in Indian country. Without such consent, the State of Washington could not supersede tribal authority over member Indians or trust lands.

However, a state may effectively regulate non-Indians on fee lands within reservation boundaries. Generally, in the absence of federal legislation to the contrary, state law reaches within the exterior boundaries of an Indian reservation only if it would not infringe on the right of reservation Indians to make their own laws and be ruled by them. Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 99 S.Ct. 740, 439 U.S. 463, 58 L.Ed.2d 470 (1979) rehearing denied 99 S.Ct. 1290, 440 U.S. 440, 59 L.Ed.2d 500, or remand 608 F.2d 750. This case involved Washington's

assumption of civil and criminal jurisdiction over Indians and Indian territory within the State, subject to consent of the Indian tribes affected. The Yakima Nation did not consent. As a result the State's authority depended on the nature of the property on which the offense or transaction occurred. The Supreme Court upheld the State's assumption of complete criminal and civil jurisdiction over non-Indians and fee lands despite the checker board jurisdiction which resulted. The enforcement of jurisdiction over non-Indians on fee lands was found not to infringe on the rights of self government of the Yakima Nation. 99 S.Ct. at 762.

Additionally, the Santee Tribe has not received the benefit of retrocession. As such, the state still exercises criminal and limited civil jurisdiction over the Santee reservation. This fact, combined with the decision in Confederated Bands of Yakima supra, favor the state's authority over non-Indian and fee lands. Therefore, the State of Nebraska should be able to assert its jurisdiction over non-Indians and fee lands should it enact FIFRA regulations, despite a checker board pattern on the reservation.

In the current situation, Congress expressly provides for Indian tribes to take authority for enforcement of FIFRA regulation within reservation boundaries under the FIFRA Act, 7 U.S.C. § 136(u). This section takes away from the states any power to regulate Indians or Indian trust land within reservation boundaries without EPA approval. The State may petition the EPA for authority to enforce regulations on a state wide basis to include member Indians, and Indian trust lands within the reservation. However, it is unlikely it will be approved. See Washington Depart. of Ecology, discussion supra. Congress has treated both the states and Indian tribes as equals regarding FIFRA. Yet, the authority of the State to regulate non-Indians on fee lands within the reservation is most likely to be unaffected. The regulation does not infringe upon the tribes right to make their own laws and be ruled by them and imposes only a minimal burden. Also, jurisdiction over the Santee has not been retroceded to the federal government, leaving complete criminal and limited civil jurisdiction with the State of Nebraska.

In conclusion, the Santee Tribe does have the authority to enforce certain chemical regulations under FIFRA. The Santee Indian Tribe does possess an inherent sovereignty over tribal members and Indian trust lands. The current EPA policy also encourages tribal participation in environmental matters. Therefore, should the Santee Indian Tribe seek authority to enforce chemical regulations under FIFRA, the EPA would probably grant such authority in line with their policy of encouraging tribal participation and sovereignty.

However, the extent of such authority would probably be limited to training, certification, and enforcement. Unless the courts interpret an implied authority vested in the tribe, they will be unable to promulgate stricter regulations than those currently in effect.

It is possible that the Santee Tribe would have the authority to enforce FIFRA regulations against non-Indians and on fee lands within the reservation. The chemicals regulated are such that they may threaten the political integrity, economic security, the health or welfare of the tribe. However, the large percentage of reservation land held in fee by non-Indians does weigh against the position of tribal authority over all reservation lands.

The State of Nebraska would not supersede tribal authority if it enacts FIFRA legislation without an express grant of authority from the federal government. However, the state would have control over non-Indians and fee lands within the reservation should it enact FIFRA legislation.

Sincerely,

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cc: Patrick J. O'Donnell
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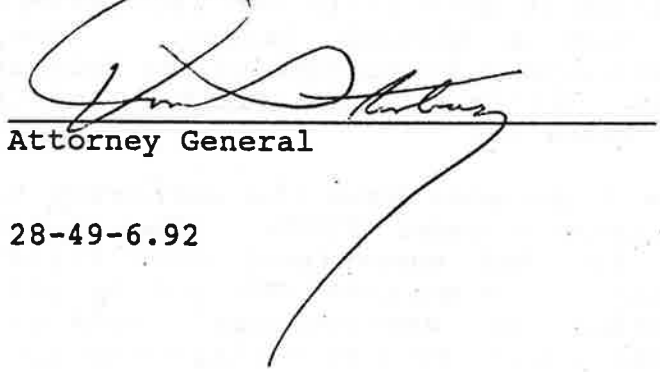

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