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Tribal Sovereignty Over Water Quality

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TRIBAL SOVEREIGNTY OVER WATER QUALITY

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I. INTRODUCTION

Indian tribes are independent sovereigns located within the United States. As sovereign entities, they have the same rights and responsibilities that apply to nations of the world. However, this sovereignty is limited by the unique relationship between tribes and the U.S. government. Not fully independent, tribes are under the protection of the federal government in a type of ward-guardian status. The federal government draws on this relationship to exercise power over tribes including regulating activities on tribal land and removing tribal jurisdiction over certain offenses. Despite congressional control, tribes consistently exercise jurisdiction over the natural resources on their lands. Recently, Congress has begun to acknowledge that there is a gap between tribal sovereignty over natural resources and tribal ability to exert jurisdiction with respect to those resources under existing federal statutes. In response to this realization, Congress has added provisions to many environmental laws clarifying the rights of tribes to control their natural resources and prevent pollution on their lands. These tribal rights are similar to the rights exercised by states with relation to their natural resources.

One of the most far-reaching environmental laws is the 1972 Clean Water Act (CWA or "the Act"). In 1987, Congress amended the Act to include a provision whereby tribes can attain the same status as states for the purpose of implementing and enforcing the Act. This article specifically examines the Clean Water Act and this "Treatment As State" status provision of that law.

Section I of this article begins by addressing tribal sovereignty over natural resources. Control over natural resources is an essential element of sovereignty for all nations. Water in particular plays a vital role in the lives of tribal members and control over

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water resources is an essential element of tribal sovereignty. Tribal sovereignty over water resources fundamentally includes control over water quality, including regulation of water pollution. Section III sets the stage for tribal regulation of water quality by describing the federal water quality laws. This section explains the Clean Water Act's history and goals. Specifically addressing the framework of the Act, Section III also explains the preference for states as the primary enforcer of water quality and permit programs and shows how this preference extends to tribes. Section IV explains the role of tribes within the Clean Water Act and the recent statutory changes recognizing tribal sovereignty over water quality embodied in section 518 of the Act.

Because one of the main concerns with tribal water quality enforcement is tribal jurisdiction over non-members, Section V of this article examines civil and criminal jurisdiction over tribal lands. Since violations of the Clean Water Act give rise to both civil and criminal penalties, the evolving and uncertain nature of tribal jurisdiction must be understood to address the concerns of states and non-Indians engaging in activities that may pollute tribal waters. Section VI specifically examines case law that deals with tribal enforcement of environmental laws and shows the patterns that are developing in federal courts. Section VII then examines the Environmental Protection Agency's current practices, including a close look at the Agency's reluctance to assist tribes in taking full advantage of the opportunities that the statute allows.

The article concludes by explaining that tribes already have inherent control over their water quality based on their status as sovereign nations. The federal regulation in the Clean Water Act merely acknowledges a power that tribes already hold and helps establish programs to assist them in exercising their sovereignty over their natural resources. Accordingly, section 518, the "Treatment As State" (TAS) provision, exists to clarify tribal jurisdiction, not to create it.

Tribal sovereignty over water quality is well established, but the ability of tribes to prosecute water quality offenses and polluters has not been clear. Section 518 addresses that problem by delegating federal enforcement authority to tribes. Unfortunately, the EPA, the entity charged with promulgating regulations to carry out the CWA, has been hesitant in carrying out its duties to tribes as described by the Act. Of particular concern is the EPA's interpretation of the TAS provision. It fails to read the Act as either an acknowledgement of tribal power or a delegation of federal power. Instead, the EPA draws upon complex language provided in Supreme Court decisions to determine whether it is appropriate for tribes to regulate their water quality. This interpretation is unnecessarily complex and

contorted. Such an analysis is not needed in light of the clear congressional language delegating CWA enforcement authority to tribes. Thus, the Environmental Protection Agency's reading of the statute as not a clear delegation is incorrect. Even if one were to view Congress' 1987 TAS amendment to the Clean Water Act as an abrogation of tribal rights over water quality, the tribes' rights would then fall to the federal government. If the federal government has the power to regulate and enforce water quality, then it has the power to delegate that authority to a capable sovereign. The Act should be viewed as a clear delegation of federal authority to tribes based on their capacity to govern as sovereign nations.

With a clear delegation of federal authority, the Bill of Rights takes full effect on Indian land for cases involving Clean Water Act offenses. Extending these rights to tribal courts should alleviate some of the concerns about tribal enforcement. A non-Indian brought before a tribal court would be treated just as if she were brought before any state court where she was a non-resident. Additionally, the same possibilities for removal to federal court would operate in tribal actions as in state court actions.

The course that may prove easiest for tribes, allow for fuller participation in the section 518 program, and address the concerns of both states and dischargers would be to remove all enforcement actions related to tribal water quality programs to federal courts. There is nothing in either the Clean Water Act or any other statute that would require the enforcement to be in tribal courts. Instead, the federal courts could try the cases applying tribal law. This solution, however, is not without its own problems. Tribes may not want federal courts interpreting their law. The tribe would not be bound to interpret its law in the same way as the federal court did - just as federal interpretation of state law does not set precedent in state courts. This article concludes that tribes have *not* abrogated their sovereign right to control their water quality and that the EPA should not see any impediment to tribes setting their own water quality standards and operating their own permit systems.[1]

II. TRIBAL SOVEREIGNTY OVER NATURAL RESOURCES AND THE ROLE OF WATER IN THE LIVES OF TRIBES

Tribes are sovereign entities much like any foreign nations. As an element of this sovereignty, it is axiomatic that tribes should

1. Although this article discusses the routes available to tribes and non-Indians assuming abrogation of the tribal right to regulate water quality, it does so merely to reflect the discussions in current cases and language used by the EPA; not because the author believes that there has been a clear abrogation.

have control over their natural resources as long as they manage them in such a way as to not harm neighboring sovereigns.[2] Control over natural resources is especially important for communities and cultures that have a close relationship with their land, water, and the natural world around them. Because of the tribal cultural traditions and the development of tribes within the American context, many tribes are particularly dependent on water.[3] Water plays a vital role in the lives of tribes whose economic base is rooted in agriculture and fishing. As tribal sovereignty and culture is passively eroded and actively attacked, basic control over natural resources remains standing as one of the fundamental attributes of sovereignty tribes have retained.

A. The Beginning of American Indian Law

Federal Indian law has gone through a strange and tragic evolution. In colonial and pre-colonial days, tribes governed their entire territory. They were sovereign nations; all persons entering their lands were subject to their laws and customs. This situation did not last. When Europeans began to settle the "New World," things began to change. When they first arrived, the newcomers, including the British, treated tribes as sovereign nations and made treaties with them. With the establishment of the United States, however, the new government gained the rights and privileges that had formerly been associated with the British colonizers and disputes arose over whether the state or federal government was the more appropriate holder of those rights. Because of concern over the potential of Indian wars in light of settler thirst for Indian land, the framers of the Constitution placed Indians under the purview of the federal government. This relationship is not — so-clearly established in what is now known as the Indian Commerce Clause.[4]

Johnson v. M'Intosh,[5] *Cherokee Nation v. Georgia*,[6] and *Worcester v. Georgia*[7] firmly established the federal government as the entity

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2. DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW & POLICY 379-81 (2d ed. 2002). A cornerstone principle of sovereignty is the notion that all states enjoy sovereignty over natural resources occurring within their territory. *Id.* at 380. An extension of this sovereignty over resources affirms the right to control the terms and conditions of resource exploitation. *Id.*; *see also* G.A. Res. 2158, GAOR. 21st Sess. (1966).

3. *See generally* JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES: CASES & MATERIALS 830-63 (3d ed. 2000).

4. "The Congress shall have the Power ... to regulate Commerce with the foreign Nations, and among the several States, *and with the Indian Tribes*...." U.S. Const. art I, § 8 (emphasis added).

5. 21 U.S. 543 (1823).

6. 30 U.S. 1 (1831).

7. 31 U.S. 515 (1832).

with the right and responsibility to legislate activities on Indian country and with Indians.[8] In *Worcester*, the Court held that state law is not applicable to affairs within Indian territory, clearly establishing Indian affairs and conduct on tribal land as a matter of tribal and federal concern.[9] This supported the earlier decision in *M'Intosh,* which held that the federal government was the only entity that could acquire tribal lands.[10] *M'Intosh* also explicitly recognized a legal right of Indians in their lands, good against all third parties.[11] Chief Justice John Marshall first articulated the federal trust responsibility to Indians in *Cherokee Nation*. He ruled that although tribal governments were not sovereign governments equal to foreign nations, tribes have their own unique status as "domestic dependent nations."[12] He also explained that the federal government owed a special responsibility to tribes including general protection and insurance of tribal economic security.[13]

Generally, Chief Justice Marshall seemed to view tribes along the same lines as states. He specifically recognized the Cherokee tribe as a body capable of managing its own affairs, explaining that the tribe had been uniformly "treated as a state from the settlement of our country."[14] Although this mirrors the current treatment of tribes as states for the purpose of environmental regulation, tribes were not often viewed or treated this way.

Since those early judicial decisions, much has changed on Indian land. The rules that once seemed so clear proved opaque to subsequent courts. Decision by decision, and law by law, the jurisdiction of tribes has been whittled away. Beginning with explicit congressional actions diminishing Indian sovereignty and the right to regulate their own lands, tribes lost power. The courts, not to be outdone by Congress, have continued this piecemeal

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8. This firm establishment of course is only how we view the cases today. At the time, the decisions seemed far from forceful. Although the Court was adamant in asserting federal power, a lack of enforcement by the Jackson administration gave these decisions diminished meaning for the parties involved. The nature of the federal government's power over Indian affairs has changed over time. During the Marshall era, judicial decisions were largely based in the Constitution and in the treaties made between the Indians and either the Executive Branch or the British. By the end of the 1800s, treaty making had ended and Congress began to exert a plenary power over Indian affairs. This framework is still in place today and Congress legislates what can and cannot occur on Indian land. Despite their strong desire, the states have never been very successful in securing much power over tribes.

9. *Worcester*, 31 U.S. at 557.

10. *Johnson*, 21 U.S. at 592.

11. This right is usually called either "aboriginal title" or Indian title and will be discussed in more detail in *infra* Section VIII.A.1.

12. *Cherokee Nation*, 30 U.S. at 17.

13. *Id.* Marshall explained specifically that the Indians' "relation to the United States resembles that of a ward to his guardian." *Id.*

14. *Cherokee Nation*, 30 U.S. at 16.

crusade. Through a series of decisions throughout the later half of the twentieth century, judge-made law chipped away at what notions of tribal sovereignty had remained.

The picture has not been entirely bleak however. History has been punctuated by instances of congressional turn-around and judicial softening. Congress sometimes acknowledges that it is not going down the correct road and makes a u-turn. Such was the case with the repeal of the termination laws[15] and the end of the Indian allotment policies. In the late 1800s, the federal government's main goal concerning Indians was to assimilate them into American society. Thus, it seemed important to get Indians off reservations and begin integrating them into the rest of the country. Congress decided to stop making treaties and granting reservations and instead began to allot land to tribal members individually.[16] Many existing reservations were broken up into 160-acre plots, which were then given to tribal members. Any remaining land was sold to settlers.[17] The combination of sale to settlers, and Indians selling their plots or portions of their plots led to a dramatic decrease in Indian-held land.[18] The 160-acre plot size was often too small to be productive, and the individualization of tribal lands disrupted traditional ways of life in both nomadic and agricultural communities.[19] By the 1920s, Congress realized that this assimilation and allotment policy was detrimental to Indian society. In a dramatic policy shift, Congress passed the 1934 Indian Reorganization Act (IRA).[20] The Act represented an attempt to encourage tribal economic development and self-determination.[21] The goal of the IRA was to allow tribes to govern themselves with some help from the federal government.[22] This major departure from earlier policy put an end to the Indian allotment. Tribes that had not yet been broken up remained whole. Beginning with that law

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15. In 1953, Congress adopted an official policy of terminating Indian tribes with the goal of integrating individual tribal members into larger society. H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953); *see also* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 25-28 (1998). By the late 1960s, this policy was widely viewed as a failure and Congress began to rethink its policy towards tribes. Termination stopped and some tribes even had their status reinstated in the 1970s. *Id.* at 26-32.

16. Dawes General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §331 (2003)).

17. *Id.*

18. ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 151 (3d ed. 1991).

19. *Id.*

20. Indian Reorganization Act (Wheeler- Howard Act), ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (2003)).

21. *See* Douglas A. Brockman, Note, *Congressional Delegation of Environmental Regulatory Jurisdiction: Native American Control of the Reservation Environment*, 41 WASH. U. J. URB. & CONTEMP. L. 133, 139 (1992).

22. *Id.*

and continuing to present day, Congress has been passing laws creating reservations and allowing tribes to take land back into trust. The notion of tribal ownership instead of individual tribal member ownership is now well recognized.

This example of federal recognition of tribal rights and sovereignty has also been seen in relation to natural resources.[23] There is now a legislative movement towards protecting sovereignty and recognizing tribal rights in natural resources. Congress has constructed environmental laws that expressly allow tribes to assert authority over their natural resources and environmental quality on Indian land. Several laws now grant tribes specific status:[24] viewing tribes as equal to states or creating separate obligations and rights based on the unique character of tribes as domestic dependent nations.[25]

B. Over Water is Especially Important to Tribal Governments

Water is an integral component of Indian social, cultural, and spiritual life.[26] Many tribal nations have a strong cultural and spiritual affiliation with water.[27] Many tribes also assert that water plays a special role in the spiritual lives of their people. Water quality in particular is a critical natural resource issue for tribes because so many of them depend on fisheries and irrigation. By being able to set their own standards of water quality, they can assure that the levels will be appropriate for religious or cultural needs.[28]

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23. Of course, the allotment policy also directly addressed a natural resource — land.

24. *See, e.g.*, Safe Drinking Water Act § 1451(b)(1), 42 U.S.C. § 300j-11(b)(1) (2003); Clean Air Act § 301(d)(2), 42 U.S.C. § 7601(d)(2) (2003). The Comprehensive Environmental Response, Compensation, and Liability Act (also called CERCLA or Superfund) authorizes the EPA to treat Indian tribes as states for specific purposes, and contains additional provisions specifically addressed to tribes. 42 U.S.C. § 9604(d) (2003).

25. The term "domestic dependent nation" originated with Chief Justice John Marshall and has remained a key element of the federal/tribal relationship. Cherokee Nation v. Georgia, 30 U.S. 17 (1831). This dependent status has often been likened to the relationship between a ward and a guardian. *See, e.g.*, United States v. Kagama, 118 U.S. 375 (1886). The tribe is dependent on the federal government. For example, the federal government holds title to tribal land and other property. It holds these things in trust for tribal members, with the same obligations any trustee owes to trust property and beneficiaries. These unique fiduciary and moral duties owed to the tribe may create unusual structures, laws, and relationships between tribes and government entities.

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

27. *See, e.g.*, United States v. Washington, 384 F. Supp. 312, 364 (W.D. Wash. 1974) (discussing the Makah Tribe's long history of connection to water, whaling, and a marine lifestyle).

28. City of Albuquerque v. Browner, 97 F.3d 415, 427-29 (10th Cir. 1996).

To reflect their concerns about water, a number of tribes have enacted comprehensive water codes that regulate water use on reservations.[29] These codes address both allocation and water quality concerns. Courts have also recognized the importance of water in the lives of tribal members. In *Colville Confederated Tribes v. Walton*, the Ninth Circuit suggested that the State of Washington could not regulate waterways on a reservation because the regulation of water is critical to tribes.[30]

There is a significant tribal interest in environmental and natural resource management on reservations.[31] First, Indian tribes have a unique relationship with the natural environment. Often their culture and history are rooted in the land. For example, the Chief Justice of the Navajo Nation's Supreme Court explained that the natural world is an essential part of the Navajo way of life:

> We refer to the earth and sky as Mother Earth and Father Sky. These are not catchy titles; they represent our understanding of our place. The earth and sky are our relatives...Understanding this relationship is essential to understanding traditional Navajo concepts which may be applied in cases concerning natural resources and the environment.[32]

Second, tribal governments are directly responsible for the health and welfare of tribal members. As the political bodies closest to a reservation's population, they are best able to determine their community's needs and the condition of their natural resources. The federal government has explicitly recognized this tribal right and the desirability of having tribes oversee their activities on tribal lands. President Reagan explicitly recognized the rights of tribes to control their natural resources, stating "[t]ribal governments have

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29. Michael C. Blumm, *Unconventional Waters: The Quiet Revolution in Federal and Tribal Minimum Streamflows*, 19 ECOLOGY L. Q. 445, 477–78 (1992).

30. Colville Confederated Tribes v. Walton, 647 F.2d 42, 52 (9th Cir. 1981); *see also* Segundo v. City of Rancho Mirage, 813 F.2d 1387, 1393 (9th Cir. 1987) (striking down state rent control ordinances on tribal land after taking into consideration the tribe's interest in land use regulation).

31. *See, e.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 322 (1983) (discussing the federal government's recognition of the importance to the tribe to regulate game and establish hunting regulations); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (discussing the importance of timber resources in the life of the tribe).

32. Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 233-34 (1989). In his dissent in *Brendale*, Justice Blackmun noted that Indians have a "unique historical and cultural connection to the land." Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408, 458 (1989).

the responsibility to determine the extent and methods of developing the tribe's natural resources."[33]

Third, control over resources is important to tribes politically as well. Courts have found that when there is a lack of Indian traditions in a particular activity, the arguments for tribal sovereignty are given less weight when balanced against competing federal and state interests.[34] Tribes are particularly interested in ensuring that reservations do not become dumping grounds for hazardous wastes and pollutants or a regulation free sanctuary for enterprises looking for loopholes around state and federal pollution control laws. Because tribal governments operate under a different set of laws than state governments, many polluters see tribal lands as an attractive possibility for managing their waste outside of many environmental laws and regulations. This difference in laws combined with the tribes' historical lack of political power make environmental concerns especially poignant and problematic on these lands.[35]

C. *Control Over Natural Resources is an Essential Element of Sovereignty*

Sovereignty is the inherent right or power to govern. The inherent rights of all sovereign nations include the right and responsibility to exert control over their natural resources. The ability to control land and water is fundamental. Tribes have traditionally had sovereignty over their natural resources. Even when tribal authority has eroded in other areas, control over water, soil, forests and animals remained secure.[36] In *Albuquerque v. Browner*, the Tenth Circuit specifically acknowledged the sovereign interest in water. The court identified four essential elements of tribal sovereignty as: water rights, government jurisdiction, land, and mineral rights.[37]

As explained below, however, at present, federal, state and tribal governments each have jurisdiction over some element of Indian

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33. Ronald Reagan, *President's Statement on Indian Policy*, 1983 PUB. PAPERS 96, 98 (Jan. 24, 1983).

34. *See, e.g.*, Rice v. Rehner, 463 U.S. 713, 720 (1983).

35. Allowing tribes a voice in these matters and giving them the power to invoke federal laws has helped tribes to more effectively manage hazardous waste. *See* Beth Rose Middleton, *Contested Authority over Dumps on Tribal Lands: The Regulation of Solid Waste in Indian Country* (unpublished manuscript on file with author).

36. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Central Machinery Co. v. Ariz. State Tax Comm'n, 448 U.S. 160 (1980); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

37. City of Albuquerque v. Browner, 97 F.3d 415, 418-19 & n.2 (1996). It is not clear how the court determined that these were the four critical elements for tribal sovereignty.

lands. All three governments understandably have substantial interest in regulation of environmental pollution, because air, water, and land pollution do not pay attention to political boundaries. Federal, state, and tribal governments all have an interest in protecting their citizens from the dangers of pollution.

III. THE CLEAN WATER ACT

Because Indian nations are within United States borders and Congress has plenary power[38] over entities within its borders, including tribes, tribes must adhere to federal environmental laws. In terms of water quality, this means that tribes must follow the programs and requirements laid out by the Clean Water Act. This section describes the Clean Water Act's general requirements, including its preference for allowing states and tribes to administer their own water quality programs.

A. History

Congress first began to regulate water quality seriously in 1948 with the Federal Water Pollution Control Act (FWPCA).[39] The FWPCA protected water quality through ambient water quality standards.[40] These standards focused on "tolerable effects rather than the preventable causes of pollution."[41] Cumbersome enforcement procedures combined with "awkwardly shared federal and state responsibility for promulgating . . . standards" to create an act lacking the effectiveness needed to improve the quality of the nation's waters.[42] Since 1948, the FWPCA has gone through

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38. Congress has nearly complete power over Indian tribes. It can pass any law affecting tribes as long as the law does not violate constitutional requirements. This power has allowed Congress to create reservations, terminate tribes, take over tribal resources, and to remove adjudicatory power among other things. As the Court explained in *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903), "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

39. Act of June 30, 1948, 62 Stat. 1155. Congress had been regulating navigable waters since the Rivers and Harbors Act of 1899 (RHA), ch. 425, 30 Stat. 1121 (1899) (codified as amended at 33 U.S.C. §§ 401-418 (2003)). Section 13 of the RHA, commonly called the Refuse Act, limited what citizens were allowed to dump into navigable waters and place on the banks of waterways. Thus, RHA was the first federal law regulating water pollution. Courts interpreted the act to regulate the dumping of anything that could have a deleterious impact on navigable waters. Although an important statute on the books, it was not widely enforced until more recently. Moreover, despite the fact that the RHA did keep channels clear for navigation, the congressional interest in water quality problems did not blossom until the 1948 Act.

40. For a comprehensive history of the Clean Water Act see EPA v. State Water Res. Control Bd., 426 U.S. 200, 202-05 (1976) [hereinafter *SWRCB*].

41. *Id.* at 202.

42. *Id.*

frequent revisions. Most significantly, in 1972 a series of amendments created what is more commonly known as the Clean Water Act (CWA or "the Act").

The 1972 Amendments came about during a time of intensified environmental interest in response to growing environmental hazards.[43] After examining the state of environmental law, the Senate Committee on Public Works concluded that "the Federal Water Pollution Control Program . . . has been inadequate in every vital aspect."[44] The sense of emergency combined with this sense of inadequacy to inspire Congress to enact far-reaching comprehensive legislation to combat water pollution. The dire problems of pollution across the nation, including on tribal lands, showed that a national system of regulation was necessary.

B. Purpose

Although the Act has gone through further amendments and reauthorizations since 1972, its purpose and justification remain the same. The Act's main goal is to restore and maintain the chemical, physical, and biological integrity of the nation's waters.[45] It calls for the eventual elimination of the discharge of any pollutants into navigable waterways.[46]

When Congress enacted the 1972 Amendments, it declared the national goal that "the discharge of pollutants into navigable waters be eliminated by 1985."[47] These ambitious goals were accompanied by new enforcement procedures to help meet them. Not only does the Act establish a system of minimum water quality standards, it also describes mechanisms to enforce those water quality standards. Of particular note is the Act's regulation of entities discharging into navigable waters, creating a permit system for water polluters. The

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43. One of the key events that led to this legislation for example was when the Cuyahoga River caught fire in 1969. *See, e.g.*, ROBERT ADLER ET AL., THE CLEAN WATER ACT 20 YEARS LATER 5 (1993).

44. S. Rep. No 92-414, *reprinted in* 1972 U.S.C.C.A.N. 3674.

45. 33 U.S.C. § 1251(a) (2003). The CWA delineates its jurisdiction based on "navigable waters" which it defines as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The Act derives its justification from the federal government's authority to regulate navigable waters, which is based in the Commerce Clause of the Constitution.

46. *Id.* § 1251(a)(1). The CWA describes several subsidiary goals as well, the most well known being the "fishable and swimmable water" standard. *Id.* § 1261(a)(2). The Act specifically states "it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July1, 1983." Although the statute does not use the words "fishable and swimmable," this goal is widely referred to using those terms. *See, e.g.*, ADLER, *supra* note 43, at 8.

47. 33 U.S.C. §1251(a)(1) (1972).

Act imposes maximum effluent limitations on point sources[48] as well as a requirement to achieve acceptable water quality standards.[49]

C. Regulation

The Clean Water Act regulates discharges of pollutants through two main avenues. The first aspect harkens back to pre-CWA state regimes where states set their own water quality standards. Based on this tradition and a desire to protect and endorse federalism, the Act allows states to regulate their own waters for the most part. This relationship serves as a basic model of cooperative federalism. Waterways must meet the called-for levels of water quality, which differ based on the type of waterway.[50] The Environmental Protection Agency, as authorized by the Act, sets federal water quality standards.[51] At a minimum, states must comply with these federal levels. Thus, although the states set their own standards for the most part they must comply with the federal floor established by the EPA. States may, however, go beyond these requirements and set standards that are more stringent.

Acknowledging that an immediate cessation of pollutant discharge was unrealistic, the 1972 Congress created this system to regulate facilities and activities with the goal of eventually eliminating all point source pollution in navigable waters. Thus, as a second aspect of its water pollution regulation program, the Act contains permitting programs that directly regulate the discharge of pollutants into navigable waters.[52] These programs are embodied in the National Pollutant Discharge Elimination System (NPDES) permit program described in section 402 and the Dredge and Fill permit program of section 404. NPDES permits regulate discharges from point sources. The statute calls on the EPA to create and administer the NPDES system[53] and the Army Corps of Engineers to manage the section 404 permits.[54] NPDES permits list types and amounts of pollutants that entities are allowed to discharge.[55]

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48. Point sources describes "[s]pecific point of origin of pollutants, such as factory drains or outlets from sewage treatment plans." RICHARD T. WRIGHT & BERNARD J. NEBEL, ENVIRONMENTAL SCIENCE: TOWARD A SUSTAINABLE FUTURE 661 (8th ed. 2002). On the flip side of point sources are "non-point sources," which, as their name suggests, are sources of pollution that are hard to identify. Nebel & Wright describe these as "[s]ources of pollution such as general runoff of sediments, fetrilizer, pesticides, and other materials from farms and urban areas . . . [a]lso called diffuse sources." *Id.* at 659.

49. *SWRCB, supra* note 40, at 204.

50. 33 U.S.C. § 1313 (2003).

51. *Id.* § 1313(b).

52. *Id.* § 1342.

53. *Id.*

54. *Id.* § 1344(d).

55. 33 U.S.C. § 1342 (2003).

States can also administer their own permit programs as described below.[56] However, because of the importance of federal oversight and coordination, the EPA retains ultimate authority. Today forty-five states and one territory (the U.S. Virgin Islands) have their own NPDES programs.[57]

D. States Have Primary Jurisdiction

Despite congressional concerns over state-based regulation, the Clean Water Act establishes a pollution control regime where the states act as the primary enforcers. [58] The CWA institutes a program of statutory federalism, clearly establishing which activities and responsibilities are federal and which can be delegated to the states. Congress recognizes the interest that states have in the waters of their jurisdiction and the importance of local regulation.

States are generally more aware of the local environmental and industrial conditions. Accordingly, states may set their own water quality standards.[59] State standards must comply with all federal minimum requirements, but can be more stringent in their regulatory scheme if a state so desires.[60] Further, section 101 of the Act recognizes states as the preferred enforcers of both standards and permit programs.[61] Because of this status as "preferred" enforcers, the EPA works with states to help them create acceptable regulation and permitting programs. When operating with approved programs, states take on the work of running permit programs, monitoring water quality, and ensuring that the waterways of the state meet both the state and federal water quality standards. Under the framework of the CWA, states can attain the authority to administer both the NPDES permit program and a dredge and fill permit program laid out by section 404. EPA decides whether to delegate administration of a permit system to a state based on the state's capacity (adequacy of staff and funding) and its experience regulating in the area (state water pollution laws and programs).[62]

Although the Act acknowledges the desirability of state power, its existence is rooted in the previous inadequacies of state

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56. *Id.* §§ 1342(b), 1370.

57. EPA webpage, *State Program Status, at* http://cfpub2.epa.gov/npdes/statestats.crm?program_id=45 (last updated Apr. 14, 2003).

58. 33 U.S.C. § 1251(b) (2003).

59. *Id.* § 1313 (2001).

60. 40 C.F.R. § 131.4(a) (1994).

61. 33 U.S.C. § 1251(b) (2004).

62. Robert H. Wayland III, *Building an EPA/State Relationship for the Changing Management of Environmental Programs,* C352 ALI-ABA 83, 89 (1988).

regulation. Because of overarching federal concerns about water quality, the EPA sets minimum standards for state permit programs, detailing even technology requirements. Additionally, the EPA retains full authority over the permits, polluters, and states at all times. Despite the fact that the EPA has never done so, it has the right to revoke a state's ability to administer the regulation program.[63] The EPA also reviews all controversial permits and can require states to reevaluate or change any permits that the EPA administration does not deem adequate. Thus, the EPA acts as a watchdog overseeing all the state programs and stepping in when it spots an area or permit of concern. Because water quality regulation stems from the CWA, it is a federal regulatory scheme even when states are the ones enforcing the law. This means that litigation arising out of such disputes can usually be removed to federal courts based on federal question subject matter jurisdiction.

Congress made sure that states retained much of the administrative power because, in many ways, the state is a more efficient regulator of the environment.[64] Disaggregating government powers reduces pressures on federal government spending.[65] Some scholars argue that special interests can get a stronger hold in the federal government where they only need money and one legislator in their pocket; this is easier at the federal than at the state level.[66] It is harder to spend money at the state level. State governments are much better at balancing their budgets. They are more connected to the funds they spend and take more care when allocating monies. Additionally, states can monitor costs more closely.[67] When regulating environmental conditions, states exert control over land use and protect the health and welfare of their citizens. Because environmental conditions vary greatly among the states, local control over resource use and regulation makes more

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63. *See, e.g.*, 33 U.S.C. § 1342(c) (2003).

64. The capability of states to make and enforce environmental law has changed over time. State governments are larger than they were in the past with many states having significant environmental departments. When states were seen as not having the capacity to administer environmental programs, it was easier to argue that federal oversight was necessary. This argument has become less persuasive. Today states have been delegated most of the operation and responsibility for carrying out environmental laws. Robert H. Wayland III, *Building an EPA/State Relationship for the Changing Management of Environmental Programs,* C352 ALI-ABA 83, 85 (1988).

65. Charles Fried, *Federalism — Why Should We Care?,* 6 HARV. J.L. & PUB. POL'Y 1, 3 (1982).

66. *Id.*. This argument seems particularly unpersuasive — conventional knowledge argues that the lower the level of government the more corruptible and susceptible to external pressures. This is one of the reasons that we have federal laws and one of the reasons why local planning boards tend to be so corrupt.

67. Fried, *supra* note 65, at 3.

sense.[68] All of these state-based arguments are equally salient when addressing the concerns and strengths of tribes.

States often lobby to have increased control over their resources and environmental amenities. States are not generally required to administer environmental programs; they can leave it to the federal government. However, despite the cost, time, and energy involved, states generally take on any environmental programs available to them.[69] For example, only five states have chosen not to administer their own NPDES program.[70] States have made huge advances in staffing levels and expertise since the Act first passed in 1972.[71] Many believe that the only way to meet the broad goals of our environmental laws is by having a successful concerted effort with both the states and the federal government.[72]

The CWA encourages states to create their own programs that adhere to federal standards and that are designed to meet national goals. This interaction seemed appropriate for adapting national water quality goals to local economic and ecological conditions.[73] If states do not set their own water quality standards or develop a state-enforcement program, the Environmental Protection Agency administers its own standards and program. Thus, the EPA is the default enforcer. As such, the EPA also serves as the enforcer and standard setter for lands outside of state regulatory authority. Because of this framework, the EPA also administers the Act's programs on tribal lands for tribes who have not yet structured full

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68. General federal laws have often shown to be inadequate at taking local conditions into account. Although there is a need for uniformity and nation-wide standards, it is also important to allow states to create protocols that make sense for their citizens. The differences in environmental conditions have been recognized by Congress since the first Homesteading Acts. The ignorance of western water conditions to eastern politicians led to homesteading acts that did not fit the land. One hundred and sixty acre plots in the East or Midwest are more profitable than plots of the same size in the arid west. Notably, John Wesley Powell pointed out this discrepancy and Congress passed laws that allowed larger plots on drier lands, the Indian Allotment Act granted tribal members 160 acres regardless of their land conditions. DONALD J. PISANI, WATER, LAND & LAW IN THE WEST 11-16 (1996).

69. Robert H. Wayland III, *Building an EPA/State Relationship For the Changing Management of Environmental Programs,* C352 ALI-ABA 83, 89 (1988). The fact that states chose to take on water quality regulation programs despite the cost of implementation and enforcement shows that states regard the ability to regulate their water resources as an important one. As sovereign entities, states, like tribes, seek to exert jurisdiction over as many areas as possible.

70. EPA, State and Federal Authorization Status, *at* http://cfpub1.epa.gov/npdes/states tribes/astatus.cfm (last updated June 28, 2002).

71. Wayland, *supra* note 69, at 86.

72. *Id.*

73. Sally K. Fairfax et al., *Federalism and the Wild and Scenic Rivers Act: Now You See It, Now You Don't,* 59 WASH. L. REV. 417, 424 (1984).

tribal water quality regulation programs or who have not yet attained "Treatment as State" status as will be discussed below.[74]

It is important to recognize that pollution does not stop at state borders. Conflicts often arise between states that share waterways. This concern is especially salient when upstream and downstream users have different water quality standards. The EPA has had to deal with such situations many times. When states set conflicting requirements of water quality, downstream water users receive special consideration.[75] Although the Act does not specifically require upstream dischargers to comply with downstream water quality standards, the EPA has the authority to direct such compliance when it feels it is warranted.[76] This example of EPA power and the concern of national coordination demonstrate the need for the federal water regulation scheme developed by the Act.

IV. TREATMENT AS STATE (TAS) STATUS

Originally, only states with approved programs and the federal government had the ability to administer Clean Water Act programs. In 1987, however, a new actor entered the scene. In response to a desire to acknowledge tribes' sovereignty over their own resources and affirm tribal administration of laws on Indian lands, Congress passed an amendment to the CWA that requires the EPA to treat tribes as states for the purposes of meeting the broad goals of the Act.

When Congress originally enacted the CWA, it did not specifically identify the governmental entity with authority to set standards for waters on Indian lands within states.[77] In the late 1960s, tribal self-determination emerged as the dominant federal Indian policy. Statements by both Presidents Johnson and Nixon established tribal self-determination as a goal of the executive

74. *See infra* section IV.

75. 40 C.F.R. §§ 122.4(d) (2000). This regulation applies irrespective of who administers the permit program.

76. Arizona v. Oklahoma, 503 U.S. 91, 105 (1992). The CWA requires upstream users to inform the regulating governmental agency downstream that could be affected by any permitted discharges. 33 U.S.C. §1342(b)(3) (2003). The EPA's regulations state that no permit may be issued "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states." 40 C.F.R. § 122.4(d) (2000). This regulation applies irrespective of who administers the permit program.

77. City of Albuquerque v. Browner, Brief for the Respondent in Opposition, 1997 WL 33561568 (U.S. 1997).

branch.[78] Additionally, several congressional acts from the 1960s and 1970s solidified this policy.[79]

Section 518 was added to the statute in 1987 to explain the possibilities for tribes.[80] This section of the statute describes two main strategies for tribes: Cooperative Agreements (§518(d)) and Treatment As State (TAS) status (§518(e)). The Cooperative Agreements provision authorizes states and tribes to work together to negotiate agreements about state program requirements and implementation procedures. These agreements resemble interstate compacts in that they are negotiated contracts between two sovereigns within the United States. Section 518(d) gives a broad sweeping approval for agreements of this type so that Congress need not review each individual document. In these agreements, which are subject to the approval of the EPA Administrator,[81] tribes may, for example, agree to allow states to operate Clean Water Act programs on their land.

More importantly, the 1987 amendments authorize the EPA Administrator to treat tribes as states for the purposes of carrying out the goals of the CWA.[82] The CWA further directs EPA in "consultation with Indian tribes, [to] promulgate final regulations which specify how Indian tribes shall be treated as States" under the Act.[83] In 1991, after a full notice and comment rulemaking, the EPA issued a final rule implementing the provision and setting forth the requirements tribes must meet in order to obtain TAS status.[84]

TAS status acknowledges the equal footing tribes have with states with regard to natural resources. Tribes can exercise the same rights and responsibilities as states if they so desire. Tribes

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78. Lyndon Johnson, *President's Special Message to the Congress on the Problems of the American Indian: The Forgotten American*, PUB. PAPERS 355 (March 6, 1968); Richard Nixon, *President's Message to Congress on Indian Affairs*, PUB. PAPERS 564 (July 8, 1970).

79. *See, e.g.*, Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 (2004); Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n, 455-458(e) (2004).

80. 33 U.S.C. § 1377.

81. *Id.* § 1377(d).

82. *Id.* § 1377(e). Notice that this granting of "treatment as state" status could actually be insulting to tribes. In essence, these sovereign nations which in theory should be considered an equal power with the federal government are being down-graded to the role of a mere state, a subsidiary to the federal government. Of course, in general, tribes are used to being treated as lesser entities and thus they welcome this level of statutory security over their right to govern their own water quality. *See* James M. Grijalva, *Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters*, 71 N.D. L. Rev. 433, 440 (1995); EPA Website, *Laws, Regulations & Guidance, at* http://www.epa.gov/indian/treatst.htm (last updated Aug. 30, 2004); Improving EPA's Indian Program Operations, 59 Fed. Reg. 38,460 (July 28, 1994); Indian Tribes: Eligibility of Indian Tribes for Program Authorization, 59 Fed. Reg. 13,829 (to be codified at 40 C.F.R. pts. 123, 124, 131, 142, 144, 145, 233, and 501).

83. 33 U.S.C. § 1377(e) (2003).

84. 40 C.F.R. § 131.8 (1994).

can act as states in the realm of grants,[85] setting water quality standards,[86] administering permits,[87] non-point source management,[88] and other programs.[89] Like the system for states, tribes can apply for TAS status for all permissible programs or they can get partial TAS status and only administer certain elements of the CWA.[90] In general, tribes appear most interested in the ability to set their own water quality standards. There are currently twenty-three tribes approved to establish water quality standards for their territories.[91]

TAS status is an element now included in several environmental laws: the Clean Water Act, Safe Drinking Water Act, the Clean Air Act and to some extent the Superfund Act.[92] Tribes must apply for TAS status for each law. But, after the first successful application, the rest will be easier.

A. TAS Requirements

To be able to obtain TAS status, tribes have to meet several requirements established by EPA regulations. They must be a

85. For waste management treatment works (33 U.S.C. §§ 1281-1289 (2003)), for research and training programs (§ 1254), or for pollution control (§ 1256).

86. They must establish water quality standards pursuant to § 303, comply with reporting, recordkeeping and inspections requirements described in §§ 305 and 308, and enforce water quality standards and other provisions according to § 309. 33 U.S.C. §§ 1313, 1315, 1318, 1319 (2003).

87. 33 U.S.C. § 1342.

88. *Id.* § 1329.

89. Any provision of the CWA that applies to states can now also be read as pertaining to tribes, including sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, 1344, and 1346. 33.U.S.C. § 1377(e). EPA has not treated the CWA's list as exhaustive.

90. Paul M. Drucker, *Wisconsin v. EPA: Tribal Empowerment and State Powerlessness Under §518(e) of the Clean Water Act*, 5 U. DENV. WATER L. REV. 323, 341 (2002). No tribe has applied for TAS status for all permissible programs. *Id.* at 394, n.127.

91. EPA, *Tribal Water Quality Standards, available at* http//www.epa.gov/waterscience/standards/wqslibrary/tribes.html (last updated Nov. 2, 2004).

92. Safe Drinking Water Act § 1451(b)(1), 42 U.S.C. § 300j-11(b)(1) (2002); Clean Air Act § 301(d)(2), 42 U.S.C. § 7601(d)(2) (1995). The Comprehensive Environmental Response, Compensation, and Liability Act (also called CERCLA or Superfund) authorizes the EPA to treat Indian tribes as states for specific purposes, and contains additional provisions specifically addressed to tribes. 42 U.S.C. § 9604(d) (1995). There are also environmental laws that do not expressly treat tribes as states, such as the Resource Conservation Recovery Act, the Federal Insecticide, Fungicide, and Rodenticide Act, the Toxic Substances Control Act, Emergency Planning and Community Right-to-Know Act and the Pollution Prevention Act. However, tribes have been successfully asserting authority over the areas those laws regulate by drawing on traditional common law and notions of tribal sovereignty giving them the right to regulate their own resources.

recognized tribe[93] with a functioning governmental body[94] who has clear jurisdiction over the waters they seek to regulate.[95]

The CWA defines tribe as an entity with a reservation.[96] The Act defines reservation to include "all lands 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."[97] It is important to note that based on this definition, even land owned by non-Indians in fee-simple can be covered by the Act's jurisdiction if it is within the borders of a reservation. This is especially important when it comes to regulation of waterways. Tribes do not necessarily own the land beneath the navigable waters on the reservations. Based on the Equal Footing Doctrine, many states received title to the land beneath navigable waters when they entered the Union. In some cases, this included waters on tribal lands.[98] If a state is able to successfully establish ownership to navigable waters and lands beneath them, this would make those areas fee lands[99] within reservation boundaries. EPA has concluded that it will define the term "reservation" consistently with relevant statutes and case law. This means that trust lands formally set apart for the use of tribes may meet the CWA definition of 'reservation' even where those lands have not been formally designated as reservations.[100]

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93. 40 C.F.R. § 131.8(a)(1) (2003).

94. 33 U.S.C. § 1377(e)(1), (3) (2003).

95. *Id.* § 1377(e)(2); 40 C.F.R. §131.8 (2003).

96. 33 U.S.C. § 1377(h)(2) (2003) (defining "tribe" as a "tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation").

97. *Id.* § 1377(h)(1). Deciding whether something is in Indian Country or on Indian land can be tricky. The term "Indian Country" was given its present definition by Congress in 1948. 18 U.S.C. § 1151 (1948). The definition used by the CWA is part (a) of that definition.

98. Ownership of submerged lands within reservation boundaries must be decided on a case-by-case basis because many factors must be analyzed to reach a determination. For details about ownership and jurisdiction over tribal lands, see Jessica Owley, California's Public Trust Responsibility on Tribal Lands (2004) (unpublished manuscript, on file with author).

99. Meaning that the lands would be privately held by non-Indians within the boundaries of an Indian reservation. This status could be important for determining jurisdiction over those lands. It is not always clear whether tribes have the power to regulate on such lands. *See, e.g.* Strate v. A-1 Contractors, 520 U.S. 438 (1997).

100. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,881 (Dec. 12, 1991) (relying on Okla. Tax Comm'n v. Citizens Band Potawatami Indian Tribes, 498 U.S. 505 (1991)); David F. Coursen, *Tribes as States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Laws and Regulations,* 23 ENVTL. L. REP. 10,579, n.13 (Oct. 1993). Also interesting to note is that the CWA's definition apparently does not apply in Alaska or Hawaii, where, with one exception, there are no reservations.

The second requirement for TAS status is that the water in question must be subject to inherent tribal jurisdiction.[101] The Act calls for the water resources to be "held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation."[102] It is not entirely clear what this requirement means. Often, title to navigable waters and the lands beneath them lie with the states. This could mean that neither the federal government nor the tribe technically hold title to the submerged lands within the boundaries of a reservation. State ownership of such lands could mean that a tribe does not have inherent jurisdiction over the waterways in question.[103] Thus, as a preliminary step to obtaining TAS status, tribes often commence quiet title actions to assert either tribal or federal ownership of the submerged lands on their reservations and jurisdiction over the waters. This additional step can add several years on to the tribes' process for attaining TAS status. This burden further delays and hinders the ability of tribes to regulate their own water resources.[104]

The Supreme Court clarified and affirmed tribal water rights in two important cases: *Winters v. United States*[105] and *Arizona v. California*.[106] The *Winters* case involved a reservation whose boundaries reached to the middle of the Milk River.[107] When off-reservation settlers attempted to appropriate water from the river for agricultural use, the tribe protested.[108] The Supreme Court found that when the reservation had been established, it included an implied reservation of water rights to sources within or bordering

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101. 33 U.S.C. § 1377(e)(2) (2003). *See infra* Section V for discussion of jurisdiction on tribal lands.

102. *Id.* If this language can be used to establish inherent jurisdiction, then tribes should be able to successfully assert jurisdiction over any lands within the metes and bounds of their reservation.

103. *See generally* Owley, *supra* note 98.

104. The Coeur d'Alene Tribe of Idaho ended up in court when it tried to assert title to the navigable waters on its reservation. The tribe was trying to establish title in order to gain TAS status. Although the case went all the way to the Supreme Court, title to the submerged lands was never clearly established. The Supreme Court never reached the ownership question because the case was decided based on the state's sovereign immunity. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997). When the tribe tried again to assert jurisdiction in the Ninth Circuit, the court upheld tribal ownership of the lakebed in question and tribal jurisdiction over the water. United States v. Idaho, 210 F.3d 1067 (9th Cir. 2000) (quieting title to land underlying portions of Lake Coeur d'Alene and the St. Joe River in the United States as trustee for the Coeur d'Alene tribe which was categorized as a beneficial owner).

105. 207 U.S. 564 (1908).

106. 373 U.S. 546 (1963).

107. *Winters*, 207 U.S. at 565.

108. *Id.* at 567.

the reservation.[109] Additionally, *Winters* established that tribal water rights are a matter of federal, not state, law.[110] Although *Winters* makes it clear that tribal users have rights to water, it was not clear how much water they had rights to. The *Arizona* case involved determining the quantity of the water reserved. In *Arizona*, the Court declared that the quantity reserved for Indian use is that amount sufficient to irrigate all the practicably irrigable acreage on the reservation.[111] Read narrowly, this case explains that tribes are only entitled to the amount of water necessary for irrigation. This narrow reading stereotypes all tribes as agriculturally based groups and does not allow for expansion of tribal practices and economies. A better reading of *Arizona* however draws upon the purpose of the reservation. A federal reservation should be seen as reserving sufficient water to meet the needs of that reservation. Thus, the amount of water needed will differ based on tribal culture and economy instead of simply on the number of acres of the reservation. Because tribes grow and change, the amount of water reserved should naturally expand to meet tribal needs. However, despite the importance of the *Winters* and *Arizona* cases for establishing tribal rights to water and determining the quantity of the water that tribes have rights to, neither case touched upon what quality of water tribes have rights to. Expanding the ideas presented in these two cases though, water quality should also be protected under this rubric. The *Arizona* reasoning can be expanded to protect the water *quality* necessary to carry out the purposes of the reservation. For example, because Indian reservations are there to meet the needs of tribal members and entities, this need should automatically encompass any cultural, religious, or health needs. Thus if tribes assert that they need high quality water to meet spiritual needs, that level of water quality was reserved at the time of reservation creation.

To qualify for TAS status, a tribe must have a functioning governing body that has the ability to enforce the CWA.[112] This essentially means that the tribe must have a political or bureaucratic infrastructure and funding.[113] Additionally, the tribe must be capable of any activities it proposes to undertake.[114] And of

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109. *Id.* at 577.

110. Unlike other water rights, tribes do not lose their rights established by *Winters* for non-use. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 405 (1998).

111. Arizona v. California, 373 U.S. 546, 600-01 (1963).

112. 33 U.S.C. § 1377(e)(1) (2003); 40 C.F.R. § 131.8(a)(2) (2003).

113. However, tribes with TAS status can also apply for grants from the EPA. Joe W. Stuckey, *Tribal Nations: Environmentally More Sovereign Than States*, 31 ENVTL. L. REP. 11,198 (Oct. 2001).

114. 33 U.S.C. § 1377(e)(3) (2003).

course, like the states, a tribe must apply to the EPA to attain TAS status.[115] Thus, tribes must be proactive in addressing self-regulation in the environmental arena. This is easier for some tribes than others largely because of the disparity of financial resources among tribes.[116]

B. Procedures for Approval

Tribal applications for TAS status go through a modified notice and comment rulemaking process. EPA only allows a limited number of groups to comment on TAS applications and individual notice is not given.[117] Officially, only states contiguous to tribal lands and relevant federal agencies (those that would be impacted by the granting of TAS status) may file comments.[118] Programmatically however and with the EPA's approval, states collect comments from interested citizens and submit many people's comments to the EPA along with their own.[119]

C. Implications of TAS Status

Once a tribe obtains TAS status, it has the right to set its own water quality standards or develop permitting programs. Each step of the process has to be approved by the EPA. After obtaining TAS status, a tribe sets water quality standards. If a tribe wishes to set standards that are more stringent than the federal minimums, the EPA must approve the standards before they can go into effect. This is the same process that a state must go through. Further, if, for example, a tribe would like to administer an NPDES discharge permit program, it will have to create a program and then obtain

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115. 40 C.F.R. § 131.8(b) (2003).

116. Stuckey, *supra* note 113 (also noting, however, that the EPA assists the tribes with their programs including providing staff support when requested). In his recent keynote address at the 2003 Public Interest Environmental Law Conference, John Echohawk stated that he believes that the sole reason that tribes have not attained TAS status is because they do not have adequate funding. Although he acknowledges that there is funding available from the EPA, he views this as either inadequate or too difficult to obtain. *Public Interest Environmental Law Conference*, Eugene, OR (March 7, 2003).

117. However, the EPA does publish notice in local newspapers. Drucker, *supra* note 90, at 359; Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,884 (Dec. 12, 1991) (to be codified at 40 C.F.R. § 131).

118. 40 C.F.R. § 131.8 (c)(2)(ii) (1994).

119. This makes little sense and deprives the state-only commenter requirement of any real meaning. It is not clear though what problems this might create. Generally, there are high tensions between tribes, states, and private landowners. This is nowhere more true than where people are disputing water use and quality. Allowing everyone to comment may bring in comments that are more personal, bitter. Usually only people who are against the status will bother to comment.

EPA approval for that program. Thus, the tribe must stop and check in with the EPA every step along the way.

If tribes gain TAS status for either CWA permit programs or setting water quality standards, permit holders may have to reapply for their discharge permits following the tribal processes and adhering to tribal standards.[120] Permit holders may see this as a significant additional burden. Because polluters are most commonly industry and municipalities, tribes may have influential groups opposing approval of tribal CWA programs. Although several tribes have established their own water quality standards, as of February of 2004,[121] EPA had not authorized any tribe to issue discharge permits.[122]

In the absence of TAS status, the EPA bears the burden of administrating all CWA programs on tribal lands.[123] When tribes only take partial advantage of the TAS status, the EPA administers the programs that the tribes do not take on. Because Congress has plenary power over tribal land, the federal government, not the states, should manage CWA programs. Thus, the EPA should be the enforcement authority on tribal land. This would hold true whether the tribe had no TAS status or only partial TAS status. This would be the same power and enforcement authority exercised by the EPA for states that do not have approved programs or have only partial programs. However, the EPA retains the ability to delegate this enforcement and standard setting authority to states.[124] But, if the EPA delegates the authority to administer permit programs to

120. Montana v. EPA, 941 F. Supp. 945, 947 (D.N.M. 1996).

121. The EPA currently lists twenty-three tribes as having set their own EPA-approved water quality standards. U.S. Environmental Protection Agency, *Tribal Water Quality Standards Available Through EPA, at* http://www.epa.gov/waterscience/standards/wqslibrary/tribes.html (last updated Nov. 2, 2004).

122. Drucker, *supra* note 90, at 344. Only two tribes had even applied and those applications are still pending. Due to the current backlog of permits, the EPA estimates that approval of NPDES permits will take five years. EPA, *NPDES Backlog Information, at* http://cfpub.epa.gov/npdes/permitissuance/backlog.cfm (last updated Oct. 17, 2003). The Navajo Nation has structured an NPDES program and is working to obtain EPA approval of their program. The Navajo nation would be the first tribal entity with an NPDES system of their own. U.S. Environmental Protection Agency, *Navajo Nation Environmental Protection Agency — Water Quality Program, at* http://www.epa.gov/owm/mab/indian/navajo.htm (last updated June 28, 2002).

123. This is because tribal lands are subject to federal, not state, regulation unless the federal jurisdiction is specifically ceded to the state by statute. However, as is evident by the Clean Water Act cases discussed in *supra* section V, states often assume that they can assert sovereignty over tribal lands within their borders. However, if a state is able to successfully assert ownership over submerged lands on a reservation, they may be able to regulate the waterway despite the fact that it is on tribal land. *See* H. Scott Althouse, Comment, *Idaho Nibbles at Montana: Carving Out a Third Exception for Tribal Jurisdiction Over Environmental and Natural Resource Management*, 31 ENVTL. L. 721, 726-28 (2001).

124. *Id.* at 730-31.

states where tribes have set their own tribal water quality standards, the states still must comply with those tribal standards when administering the program.

The EPA must consider tribal water quality standards during its permitting process and the EPA must ensure that discharges do not violate tribal goals. For example, when tribes set water quality standards, it may affect the requirements of NPDES permits even where the tribes are not the administrators of that program. Additionally, upstream water users must ensure that their discharges will not exceed tribal water quality minimums. This holds true whether or not the dischargers are on Indian land. At times, this can mean increased regulation if tribes have more stringent standards than the state, which they usually do.[125]

From the EPA's point of view, there are benefits and drawbacks for granting tribes TAS status. The benefits include the avoidance of patchwork regulation and an assertion of tribal sovereignty. When tribes regulate Indian lands, they can create a coherent regulatory system and avoid a pastiche that would only control on member or tribally owned land within a reservation. As the EPA explained when promulgating its rules, the mobile nature of water pollutants makes it impracticable to try to separate water quality impairment of tribal waters from impairment of non-Indian waters.[126]

D. Concerns of States

States are one of the most powerful opponents to tribal regulation. They frequently oppose any efforts to either recognize or expand tribal sovereignty. Indeed, the EPA's slow approval of TAS programs might reflect concern over state displeasure.[127] States may have valid concerns about tribal regulations of water resources, but generally their arguments are either not well-founded or could apply equally to state regulation.

1. Spillover Effects

States are be concerned about spillover effects from pollution on tribal lands. If tribes have more lenient standards than states, then state governments might worry about the ability of tribes to effectively control pollution. Many reservations have significant

125. Drucker, *supra* note 90, at 342.

126. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,878 (Dec. 12, 1991) [hereinafter Amendments].

127. *See infra* sections VII and VIII.

water quality problems.[128] However, because of the federal minimum standards set by the Act, this should not be a significant concern. Additionally, the EPA has established methods for negotiating between states and tribes with differing water quality standards.[129] Although not specifically bound by downstream users' standards, the EPA considers differing water quality standards when approving permits. Because of these concerns, EPA specifically reviews such controversial permits.[130]

2. Patchwork Regulation

States are also concerned about patchwork regulation.[131] Instead of believing that exercise of tribal authority will solve the dilemma of hodgepodge regulation, states argue that it actually increases the problem.[132] If Indian tribes achieve TAS status, instead of states administering one program for an entire area, there might be a mixture of managing agencies and the standards could change as one crosses borders into various Indian lands. Additionally, states worry that they lose sovereignty when tribes gain the right to regulate water.[133]

There is some support for this because many reservations have a checkerboard ownership pattern as a result of early allotment policies; there are often many parcels of land within reservations that are owned by non-Indians. Tribes always have the right to regulate their own lands and their own members, but problems could occur when states seek to separately regulate the non-Indian parcels within the borders of reservations. Allowing states to regulate the non-Indian fee simple parcels while either the federal government or tribal governments regulate the Indian owned land would lead to even greater concerns about patchwork regulation.

Checkerboard jurisdiction is worrisome in general because of its potential to lead to applications of inconsistent standards, which could undermine comprehensive environmental planning and encourage enterprises to locate in areas with the most relaxed standards.[134] This is the classic race to the bottom argument where tribal or local governments could be tempted to relax their standards in order to lure businesses onto their land to create jobs

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128. *See, e.g.*, EPA Surveys Indian Tribes for First Look at Environmental Problems on Reservations, 17 Env't Rep. (BNA) 1424 (Dec. 19, 1986).
129. 40 C.F.R. § 131.7 (a), (c) (2004).
130. *Id.*
131. Amendments, *supra* note 126.
132. *Id.* at 64,889-90.
133. *See, e.g.*, Wisconsin v. EPA, 266 F.3d 741, 746-49 (7th Cir. 2001).
134. Brockman, *supra* note 21, at 154.

and tax revenue. This concern seems less valid given the national minimum standards for water quality. In fact, this concern represents one of the key reasons behind the 1972 Clean Water Act.

It is unclear which regulator will best reduce the harms of patchwork regulation. In some areas of the country, the boundaries of Indian reservations are large and tribes could coherently govern large acreage. Elsewhere tribal trust property may be small and separate tribal regulation may not make sense. Generally, tribes acknowledge when state regulation is best. In those situations, tribes enter into cooperative agreements with states to allow state regulation and standard setting. Additionally, both state and tribal plans are still required to go through an EPA approval process and the agency is unlikely to approve of any programs that would result in degraded waterways.

3. Concern About Tribal Courts

More importantly, states worry that their citizens will be disadvantaged and denied due process in tribal courts.[135] Non-members are not participants in the tribal political structure. This means that they cannot vote in tribal elections, run for tribal office, or even sit on tribal juries. As mentioned above, they are not even officially allowed to participate in the notice and comment rulemaking process that granted TAS status to the tribe. This means Clean Water Act violators may be subject to courts that do not operate under the full U.S. Constitution.

In order to administer these environmental laws properly, tribes must be able to enforce the laws in court. Tribes must be able to assert both civil and criminal jurisdiction over offenders. Specifically, to administer the Act tribes must put in place enforcement procedures, which include methods of imposing both civil penalties and, where necessary, criminal sanctions. This raises not only the ire of private individuals and companies being regulated, but also that of the states. In particular, many state officials worry about what they see as an extension of civil and criminal jurisdiction granted by the Clean Water Act.

Many believe that this is an improper extension of tribal jurisdiction and use that basis to protest the granting of TAS status to even the most organized and consolidated tribes.[136] TAS jurisdiction results in tribes regulating both members and non-members, including non-Indians. The conflict is not about tribal

135. *Montana,* 941 F. Supp. at 947.

136. This is one of the main complaints of the State of Montana in *Montana v. EPA*, 941 F. Supp. 945, 947 (D.N.M. 1996).

jurisdiction over tribal members, but over tribal jurisdiction over non-Indians. The events at issue generally occur in Indian country. They may be on tribal lands, member lands, or even non-member fee lands.[137] Additionally, depending upon the state and tribal programs involved, there may be requirements placed upon users located upstream from tribal lands.

V. CIVIL AND CRIMINAL JURISDICTION

Logically, tribes would have both criminal and civil jurisdiction over all people and events on their land. This is analogous to the power that states have. Even if you are not a California resident, if you break a law while in the State of California, you will be subject to its laws. Initially, tribes did have both civil and criminal jurisdiction over their lands. This did not last long however. In the Marshall trilogy of cases, as we have seen, the federal government established its right to make decisions and create laws for tribes and on tribal lands.[138] At present, subject matter jurisdiction of federal, tribal or state courts usually depends heavily upon three issues: (1) Whether the parties involved are Indians; (2) Whether those Indians are members of the tribe asserting jurisdiction; and (3) Whether the events took place on Indian land. All of these elements, moreover, are surrounded by uncertainty. The following sections explain the gradual erosion of tribal criminal jurisdiction via both congressional and judicial action.

A. General Tribal Jurisdiction

1. Criminal Jurisdiction

Tribes long ago lost their jurisdiction over crimes committed by non-Indians against non-Indians when they occur on Indian lands.[139] That attrition of tribal sovereignty prevented jurisdiction

137. Tribal lands are lands that are held by the tribe as an entity. Member lands are parcels owned by individual tribal members. Non-member fee lands are parcels owned by non-members (usually non-Indians) within the borders of a reservation. The member lands and non-member fee lands are generally the result of an earlier allotment process that divided up the reservation, putting land in the hands of individuals.

138. The Court made it clear in this period that the federal judiciary would oversee any disputes involving tribes or tribal lands, but Congress did not clearly give judicial jurisdiction over events occurring solely on tribal lands until later.

139. United States v. McBratney, 104 U.S. 621 (1881) (confusedly holding that the State of Colorado had jurisdiction over the Ute reservation because when Colorado was admitted to the Union its enabling act put it "upon an equal footing with the original States" and no exception was made for the Ute reservation); Draper v. United States, 164 U.S. 240 (1896) (acknowledging that the Montana Enabling Act might have foreclosed jurisdiction over crimes by or against Indians, but refused to believe that Congress could have intended to prevent

questions from ever again being answered on purely geographical terms. Within fifty years, *Worcester* began to lose its bite and the straightforward rule that accompanied it[140] gave way to complex case-by-case decision making that gradually eroded tribal jurisdiction.

a. General Crimes Act of 1817

Congress passed the first federal law governing jurisdiction on Indian land in 1817 in the form of the General Crimes Act, also known as the Federal Enclaves Act.[141] Congress passed this law to provide federal prosecution of crimes by non-Indians against Indians and of non-major crimes by Indians against non-Indians. Because tribes were under federal authority, it was originally assumed that such crimes were not under state jurisdiction. The act imported into Indian country the body of criminal law applicable in areas under exclusive federal jurisdiction. The original intention was to apply federal law to all crimes committed by non-Indians; however that was frustrated by later Court decisions. A trilogy of cases created an exception to the General Crimes Act. In *United States v. McBratney*, *Draper v. United States*, and *New York ex rel. Ray v. Martin*, the Supreme Court declined to extend federal jurisdiction over crimes committed on Indian lands between non-Indians.[142] In each case, the Court placed jurisdiction in the state courts. Rather than relying on state sovereignty, the cases suggest that the non-ward status of the accused and victim divests the federal government of any interest in prosecuting, despite the fact that the crime is in Indian country.[143] Accordingly, *McBratney*, et al. are expressly limited to crimes between non-Indians on Indian lands.

b. Assimilative Crimes Act of 1825

In 1825, Congress incorporated lesser state crimes into the federal criminal code and applied those crimes to federal enclaves, including Indian lands within the states.[144] The act adopts the state definition and sentence prescribed of lesser crimes for prosecutions

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states from punishing wholly non-Indian crimes merely because they take place on Indian country). Courts have consistently upheld these decisions despite their lack of clear logic. *See, e.g.*, New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).

140. *Worcester* held that states had no power to regulate activities on Indian land or to enforce state laws on Indian lands. *See supra* note 9 and accompanying text.

141. General Crimes Act, 3 Stat. 383 (1817) (now codified at 18 U.S.C. § 1152 (2003)).

142. *See supra* note 139 and accompanying text.

143. CANBY, *supra* note 110, at 123-32.

144. Assimilative Crimes Act, 18 U.S.C. § 13 (2003).

and applies them in the federal courts. These rules were extended to Indian country through the General Crimes Act. Crimes of this nature on Indian lands were brought in federal court whether committed by an Indian or non-Indian as long as the event occurred on Indian land. This law expanded on the jurisdictional restrictions from *McBratney* by including a wider variety of crimes under the federal government's purview without regards to the perpetrators of the crimes.

c. Major Crimes Act of 1885

Eventually the federal government gained authority over crimes between non-Indians and Indians while maintaining exclusive tribal jurisdiction over all Indian crimes. This continued until Congress modified it in reaction to *Ex parte Crow Dog*.[145] *Crow Dog*[146] involved the conviction of an Indian in a territorial court for the murder of another Indian in Indian country. The murder was alleged to have violated the general federal statute against murder extended to Indian Country by the General Crimes Act.[147] The Court held that there was no jurisdiction because the General Crimes Act excluded from coverage crimes by an Indian against an Indian.[148] Those crimes were thought to be under the clear jurisdiction of tribal governments. Congress reacted by passing the Major Crimes Act.[149] This was the first systematic intrusion by the feds into the internal affairs of the tribes. The Court later upheld this exercise of congressional power as justified by the ward status of tribes in *United States v. Kagama*.[150]

The Major Crimes Act[151] provides federal jurisdiction for fourteen[152] listed Indian offenses. This act represents the first significant federal intrusion into internal tribal matters including

145. The Major Crimes Act, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2003)) was seen by many as a direct response to the Court's decision in *Crow Dog*. CLINTON, *supra* note 18, at 37.

146. Ex Parte Crow Dog, 109 U.S. 556 (1883).

147. *Id.* at 558.

148. *Id.* at 572.

149. Major Crimes Act, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2003)).

150. 118 U.S. §§ 375, 383-384 (1886) (explaining that "[t]hese Indian tribes are the wards of the nation. They are communities dependent on the United States, -- dependent largely for their daily food; dependent for their political rights. They own no allegiance to states, and receive from them no protection. ... From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.").

151. 18 U.S.C. § 1153 (2003).

152. The Major Crimes Act originally contained seven offenses. CANBY, supra note 110, at 154.

issues of self-governance. All persons prosecuted under the Major Crimes Act are held in the courts used for other federal offenses. [153]

Despite the Major Crimes Act, tribes continue to exercise substantial jurisdiction over Indians in Indian country for non-major crimes and civil actions.[154] Non-major crimes by Indians against Indians are within the exclusive jurisdiction of tribes, who also retain jurisdiction to punish non-major crimes by Indians against non-Indians, a jurisdiction shared with federal government under the General Crimes Act. Tribal jurisdiction over non-Indians, embodied in several early treaties, ceased to be exercised as the federal government assumed primary responsibility under the General Crimes Act. Recently, in *Duro v. Reina*, the Supreme Court held that tribes have no power to exercise criminal jurisdiction over nonmember Indians.[155] That decision was promptly reversed by Congress in what has come to be known as the "*Duro* fix."[156]

In the 1970s, several tribes became dissatisfied with the state of law enforcement against non-Indians on Indian land and responded by asserting tribal jurisdiction over crimes committed by them. The tribes contended that such jurisdiction was inherent in tribal self-government. This tribal position was rejected in *Oliphant v. Suquamish Indian Tribe* when the Court held that the tribe lacked criminal jurisdiction over non-Indians.[157] That case raised the issue of the tribe's right to exercise criminal jurisdiction over non-Indians on a reservation. The tribe argued that status as a sovereign nation granted it jurisdiction. Additionally, the tribe pointed out they had not abrogated the authority in any treaty nor were there any federal statutes explicitly removing its jurisdiction.[158]

d. Public Law 280 of 1953

Public Law 280 (PL 280) changed the face of both criminal and civil jurisdiction on Indian lands. Most notably, PL 280 granted specific states civil and criminal jurisdiction over Indian country.[159]

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153. This Act was tested in 1896 with *Talton v. Mayes*. The Supreme Court sustained the murder conviction of an Indian imposed by the court of the Cherokee Nation. Cherokee court was based on a model and a written criminal code similar to that of the U.S. While the opinion never cites the Federal Major Crimes Act and there is some question as to whether the Act applied in that particular Indian territory, the decision may indicate the concurrent jurisdiction of tribal courts over MCA offences.

154. This holds true for all areas except those specifically exclude by Public Law 280, discussed *infra.* section V.A.1.d.

155. Duro v. Reina, 495 U.S. 676 (1990).

156. 25 U.S.C. § 1301(2) (2001).

157. 435 U.S. 191 (1978).

158. *Id.* at 195-96.

159. Pub. L. No. 280, 67 Stat. 588 (1953) (in five specific states (California, Nebraska, Minnesota (except the Red Lake reservation), Oregon (except the Warm Springs Reservation),

The law made jurisdiction mandatory for some states and optional for others. Any state could assume jurisdiction by statute or state constitutional amendment. Several states assumed complete or partial jurisdiction under this law. Consent of tribes was not required. This law is directly in contradiction with Marshall's decision in *Worcester*.[160] However, it did not terminate the federal trust relationship. The act specifically disclaimed any grant to the states of power to encumber or tax Indian properties held in federal trust or to interfere with treaty hunting and fishing rights.

Originally, tribal consent to jurisdiction was not required, but in 1968 Congress passed the Indian Civil Rights Act.[161] That law not only required tribal consent, but also allowed retrocession of jurisdiction undertaken by either mandatory or discretionary states under PL 280.[162] This means that states that had exercised jurisdiction over tribes could lose their ability to exercise such jurisdiction. Tribal consent becomes the cornerstone of state ability to regulate on tribal lands. No tribe has ever formally consented to state criminal jurisdiction over its lands.

The effect of voluntary assumption of state jurisdiction under PL 280 on the federal jurisdiction conferred by the Major and General Crimes Act is unclear. Arguably, the state jurisdiction conferred is exclusive. In enacting PL 280, Congress did not expressly preserve federal jurisdiction. In general, Congress has frowned on concurrent jurisdiction because of the Fifth Amendment double jeopardy implications. Section 7 of PL 280 originally indicated that jurisdiction could be assumed by the states "not having jurisdiction with respect to criminal offenses" as provided for by this Act.[163] This suggests discretion and exclusive jurisdiction for mandatory states. The Court later held that the Act did not confer upon the state general regulatory power within Indian country in *Bryan v. Itasca County*.[164]

e. Williams v. Lee

In 1959, Justice Black asserted that despite the subsequent changes in law, the basic policy of *Worcester* remained. In *Williams v. Lee*, Black explained, "[e]ssentially, absent governing Acts of Congress, the question has always been whether the state action

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Wisconsin; Alaska was added in 1958)).

160. Worcester v. Georgia, 31 U.S. 515, 557 (1832).

161. Indian Civil Rights Act of 1968, 25 U.S.C. § 1301; 18 U.S.C.A. § 1162(a) (2000).

162. CANBY, *supra* note 110, at 217.

163. 18 U.S.C. § 1162 (1953).

164. 426 U.S. 373 (1976) (holding that states lack general powers of taxation and regulation in Indian Country).

infringed on the right of reservation Indians to make their own laws and be ruled by them."[165] The Court further explained that PL 280 provided the *sole* means for states to acquire civil and criminal jurisdiction over a tribe, and if they had not availed themselves of that method, they could not gain jurisdiction through other routes.[166] Notably, the Court assumed that even concurrent jurisdiction with states would unduly interfere with the powers of tribal courts.[167]

f. Summary

Both Congress and the courts have continually changed the complex world of criminal jurisdiction on tribal land. Both entities slowly removed tribal jurisdiction over acts committed on tribal lands, eroding tribal sovereignty along the way. Today, tribes are left only with criminal jurisdiction over Indians who have committed minor offenses on their lands. The major offenses are matters of federal jurisdiction because of the Major Crimes Act. Indeed, it seemed as though tribes would only be left with criminal jurisdiction over minor crimes committed on tribal lands by tribal members. In its "*Duro* fix" however, Congress expanded this to include all Indians regardless of which tribe they are members of. This small piece of tribal criminal jurisdiction was recently upheld in *United States v. Lara*.[168] There the Court held that tribes had inherent authority to bring criminal misdemeanor actions against non-member Indians.[169] The Court acknowledged that Congress' "*Duro* fix" was a legitimate method for recognizing tribal rights holding that the congressional action was not a federal delegation of power, but a relaxation of earlier restriction on *inherent* tribal sovereignty.[170]

2. Civil jurisdiction

a. Over Members

Despite changes in jurisdictional rules, tribes have always retained the right to exercise civil jurisdiction over tribal members. This includes clear authority to regulate the actions of tribal members on-reservation.

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165. 358 U.S. 217, 220 (1959).
166. *Id.* at 223.
167. *Id.*
168. United States v. Lara, 124 S. Ct. 1628 (2004).
169. *Id.* at 1628.
170. *Id.* at 1631.

b. Over Non-Member Indians

Federal case law had developed to generally remove tribal jurisdiction over non-Indians and further to non-member Indians.[171] That would leave tribes only with jurisdiction over their own members.[172] For purposes of civil adjudication, the Court has made clear its preference for drawing jurisdictional lines between members and non-members, rather than between Indians and non-Indians. Congress, however, recognizes an inherent authority of tribes over all Indians, and passed a statute in 1990 to establish tribal jurisdiction over all Indians.[173]

Another important factor in determining jurisdiction is w*hether the events took place in Indian country*. The present definition of Indian Country came from Congress in 1948. The definition is from the criminal code, but is also used for civil jurisdiction:

> [A]ll 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
>
> All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[174]

When a reservation is diminished, the land is no longer "Indian country." Although a mere opening up of lands to settlement by non-Indians does not remove the lands from Indian country, a congressional decision to abandon the reservation status of those

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171. This basic element of sovereignty was called in to question in 1990 with *Duro v. Reina*, 495 U.S. 676 (1990). In that case, the Court held that tribes were precluded by their domestic dependent statues from exercising criminal jurisdiction over non-member Indians. Congress quickly overturned *Duro* by statute. 25 U.S.C. § 1301(2) (2003) (recognizing and affirming the "inherent power of Indian tribes ... to exercise criminal jurisdiction over all Indians.").

172. For example, in *Colville*, the Court permitted a state to impose sales tax on Indians making purchases on a reservation other than their own. Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980).

173. Pub. L. No. 101-511, § 8077(b), Nov. 5, 1990, 104 Stat. 1893 (codified at 25 U.S.C. § 1301(2) (2004)).

174. 18 U.S.C. § 1151 (2003).

lands does. In cases where Congress has opened up lands to heavy settlement, there is often a difficult question of fact of whether the intent was to permit non-Indians to live and own land on a reservation or whether it was to extinguish a portion of the reservation. Cases have gone both ways.

In *Solem v. Bartlett*, the Court looked for magic language or an explicit reference to cession or other language evidencing total surrender of all tribal interest.[175] The Court found diminishment because it recognized that there had been a commitment to compensate tribes for land opened up to settlement. Compensation thus became evidence of diminishment. However, the Court still asserted that diminishment "will not be lightly inferred."[176] The Court looked at contemporaneous circumstances and subsequent treatment of the area along with the character of the land.[177] In general, it appears that congressional decisions to open land to settlement show congressional intent to diminish tribal land.

Ten years later in *Hagen v. Utah,* the Court rejected the contention that Congress was required to state its intention of modifying the reservation boundaries.[178] Contemporary understanding and later demographics supported diminishment and subsequent treatment of the area by the government was not illuminating.[179] Most important were the words of an act directing that surplus land "be restored to the public domain."[180] The Court held that such language denoted a congressional intent to end the reservation status of those lands.[181] The Court did not state that the language was conclusive, but it put heavy stress on the wording.[182]

Clear statutory language of cession combined with a commitment by the federal government to pay for the ceded lands shows diminishment. In *South Dakota v. Yankton Sioux Tribe*, the Court presumed diminishment based on the manner of negotiations and the assumption of jurisdiction by South Dakota immediately after cession.[183] The Court rejected the tribe's claim that the 1894 Surplus Land Act,[184] by disclaiming any abrogation of the treaty establishing the reservation, compelled a finding of no

175. 465 U.S. 463, 469 (1984).
176. *Id.* at 470.
177. *Id.* at 471-73.
178. 510 U.S. 399 (1994).
179. *Id.* at 410-12 (quoting 32 Stat. 263).
180. *Id.* at 412.
181. *Id.* at 412-13.
182. *Id.*
183. 522 U.S. 329, 344-46 (1998).
184. The significant portions of the Act can be found in *Yankton Sioux Tribe*, 522 U.S. at 337 n.1.

diminishment.[185] Because the act clearly modified some portions of the treaty, the Court concluded that the disclaimer applied primarily to payments promised in the treaty.[186]

The Supreme Court delineated the elements of a dependent Indian community in *Alaska v. Native Village of Venetie Tribal Government.*[187] The two essential characteristics of a dependent Indian community are that the land be set aside for the use of Indians and the land must be under the superintendence of the federal government.[188] Federal superintendence means that the community must be sufficiently dependent upon the federal government and that the federal government and Indians, rather than the states, are involved in exercising primary jurisdiction over the land in question.[189] Other factors may be considered, but other factors cannot be balanced against the first or be used to dilute the primary requirements.[190]

c. Over Non-Indians

Today, it is generally accepted that tribes do not have the right to exercise criminal jurisdiction over non-Indians. In *Montana v. United States*, the Court qualified the limits of *civil* jurisdiction over nonmembers on reservations.[191] The Court held that the tribe had no power to regulate hunting and fishing by non-Indians on non-Indian-owned fee land within the reservation boundaries.[192] The Court drew on the status of the tribe as a domestic dependent nation to strip it of this power. Despite this damaging decision and later decisions that followed the *Montana* model to limit tribal jurisdiction, tribes still have the ability to exercise jurisdiction over nonmembers in a few situations. The Court in *Montana* specifically delineated exceptions to its holding, explaining that in some instances tribes do have the right to exercise civil jurisdiction.[193] Additionally, tribes can exercise jurisdiction when the federal government delegates the power to tribes. This section explores and explains the exception laid out by the Court in *Montana*. The next section explains the federal government's ability to delegate jurisdiction to tribes.

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185. *Id.* at 342.
186. *Id.* at 341-42.
187. 522 U.S. 520 (1998).
188. *Id.* at 527.
189. *Id.* at 521.
190. *Id.* at 526.
191. 450 U.S. 544 (1981).
192. *Id.* at 557.
193. *Id.* at 565-66.

When the Court ruled in *Montana* that the tribe could not exercise jurisdiction over nonmembers, at the same time it established key exceptions to the rule.[194] The Court in *Montana* made it clear that tribes retain the ability to control internal relations and self-governance and they can make tribal laws governing those areas. When non-Indians enter into consensual relationships with the tribe or its members, they essentially agree to tribal jurisdiction.[195] And more importantly, tribes can regulate when the conduct of non-members threatens or directly affects the "political integrity, the economic security, or the health or welfare of the tribe."[196] These two elements have become known as the *Montana* exceptions. Thus, if a tribe can show either the presence of a consensual relationship or conduct that threatens core interests of the tribe, the tribe may regulate a non-Indian on Indian land.

(1) Montana Exception #1

Tribes may regulate non-members who enter into consensual relationships with tribes. This is known as the first *Montana* exception. It applies to nearly all reservation enterprises that are subject to federal environmental laws. There does not need to be a nexus between the consensual agreement and the regulated activity.[197] Additionally, if a non-Indian has commercial dealings with a tribe, there does not need to be an explicit arrangement or contract in order for a tribe to successfully assert jurisdiction.[198] In *FMC v. Shoshone-Bannock Tribes*, the Ninth Circuit explained that a non-native company subjects itself to the tribal civil jurisdiction when it actively engages in commerce with a tribe.[199]

194. *Id.*

195. *Id.* "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.*

196. *Id.* at 566. This ruling has been extended to preclude tribal court jurisdiction over a dispute between nonmembers arising from a traffic accident on a state highway within the reservation. The state highway right-of-way has been regarded as the equivalent of non-Indian fee land. Strate v. A-1 Contractors, 520 U.S. 438 (1997).

197. FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1315 (9th Cir. 1990).

198. *See, e.g.*, Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 593 (9th Cir. 1983) (upholding Navajo regulation of non-Indians because of their business dealings with tribal members on the reservation).

199. *FMC*, 905 F.2d at 1315.

(2) Montana Exception #2

The second *Montana* exception is especially important, and at the same time, open to interpretation. Whether an action or tribal law relates to political integrity, economic security, or health or welfare is not always clear. Indeed tribes could argue that allowing enforcement of laws in their courts is *always* necessary for helping to retain and establish the political integrity of their sovereign nation. Courts however have not expanded the ruling that far. However, the second *Montana* exception always applies to enterprises subject to federal pollution control laws. Water pollution is unquestionably a direct threat to tribal health and welfare.[200] Additionally, degradation of tribal waters can affect tribal economic security by decreasing the value of tribal lands located near polluted waters. Further, pollution can affect a tribe's political integrity when states refuse to recognize tribal power.

The Court specifically discussed the limitations of the second *Montana* exception in *Brendale v. Confederated Tribes,* a case about tribal zoning laws.[201] Two non-members owning property on the reservation sought to subdivide their parcels. Although they both proposed actions permissible under County zoning laws, the subdivisions would have violated the tribal zoning ordinances.[202] There was no one clear decision in *Brendale.* A combination of Justice White's plurality opinion and Justice Stevens' concurrence, led to an unusual outcome. The Court made a distinction among land types on the reservation. Parts of the reservation that had at one point been opened up for non-Indian settlement were referred to as "open areas" while sections that were owned by the tribe were "closed areas." Because tribes did not have the ability to exclude non-members from these open areas, they lost some of their sovereignty over these areas. The Court considers the right to exclude the essence of sovereignty over tribal lands. When tribes are unable to exclude people from their land, the Court regards tribal authority as eroded. In *Brendale,* the ability to exclude was used to determine the lands where tribes could not regulate.

In *Brendale,* Justice White writing for a plurality narrowly interpreted the second *Montana* exception, concluding that it did not

200. Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. Naman, 665 F.2d 951 (9th Cir. 1982) (holding that the tribe had authority to regulate riparian water rights for both everyone owning property either on or bordering the reservation because of the potential impacts of tribal health and welfare).

201. 492 U.S. 408 (1989).

202. Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408, 418 (1989).

apply to *every* situation where a tribe is adversely affected.[203] The Court found it significant that the language referred now referred to as the second *Montana* exception, was prefaced by the word "*may*."[204] To the Court, this indicated that a tribe's authority need not extend to all conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[205]

The *Brendale* decision could be harmful for tribes seeking to regulate activities on non-Indian fee lands within their reservations. If the reservations have been opened to settlement, have the tribes lost the ability to exclude and therefore their ability to regulate the activities of non-Indians on these lands?

Of particular note, though, is the way the Court treated a tribe's ability to zone. Justice White did not believe that the county's zoning ordinance seriously threatened tribal interests. Under that framework, tribes would have to show that both state and federal water quality regulation would threaten key tribal interests. That would likely be hard to establish, but could be done if the tribe had significantly higher water quality standards than the federal or state standards. This may occur with tribes who draw upon their waters for religious and cultural uses.

Several years after *Brendale*, the Court again looked at the relationship between the second Montana exception and a tribe's ability to exclude nonmembers. In 1997, the Court whittled away at tribal jurisdiction even more in *Strate v. A-1 Contractors.*[206] The case involved a car accident on a state highway that traversed tribal lands. Although the state highway was on tribal land, the tribe had granted a right-of-way to the state. This right-of-way precluded the tribe from exercising proprietary rights of exclusion. Because the tribe could not exclude non-Indians from the land, the Court viewed the land as similar to non-Indian fee land within a reservation.[207]

This case could be especially harmful for examining ownership of riverbeds. Not only has the Court limited realms of tribal jurisdiction, it has set a dangerous precedent by making the ability to exclude the test for tribal jurisdiction. Thus, even if a tribe can show ownership of navigable waters and submerged lands, it may not have jurisdiction to try cases arising out of activities or incidents on these lands. Because navigable waters are subject to a federal navigational servitude, a tribe may not be able to restrict who can

203. *Brendale*, 492 U.S. at 431.
204. *Id.* at 428.
205. *Id.* at 428-29 (citing Montana v. United States, 450 U.S. 544, 566 (1981)).
206. 117 S. Ct. 1404 (1997).
207. *Id.* at 1413.

use waters running through its land for navigation. If a tribe cannot bar boats from using a river, it may have lost their ability to exclude and therefore lost jurisdiction over those areas based on *Strate*. The Court specifically limited the second *Montana* exception, explaining that the key level of analysis is determining whether state regulation in the area would "trench unduly on tribal self-government."[208] Referring to *Montana*, the Court explained that a tribe's power does not reach "beyond what is necessary to protect tribal self-government or to control internal relations."[209]

Even with *Strate*, a tribe can try to invoke one of the *Montana* exceptions in order to regulate activities on navigable waters and submerged lands within their jurisdiction. It will depend on how the tribe is able to define its interest in regulation. In *Strate*, the tribe's interest in safe driving was not sufficient to qualify for the second *Montana* exception. This requirement may be more easily satisfied when tribes are seeking to retain their ability to fish or to protect waterways based on cultural and religious motivation. Because each tribe will have to individualize the reasoning for regulation of water quality, there is no clear answer to the jurisdictional problem. Each tribe will have to go through case-by-case adjudication. However, the Ninth Circuit did recently state that it would be "difficult to imagine how serious threats to water quality could not have profound implications for tribal self-government."[210]

The combinative force of *Montana* and *Strate* show that it will be difficult for a tribe to regulate activities affecting waters if the state is deemed to own the land. If a tribe owns the land subject to a state public trust servitude, it could also lose jurisdiction over non-Indian activities affecting water quality under *Strate*.

After *Strate* and *Montana*, we see that the general background Indian law presumptions have changed. Instead of presuming tribal power exists and looking for specific federal language abrogating tribal authority, the Court presumes the power is absent. Now the analysis begins by looking for specific grants of authority to tribes instead of specific language overriding tribal power.

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208. *Strate*, 520 U.S. at 458. In *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 1220 (9th Cir. 2000), the Ninth Circuit also emphasized that the second *Montana* exception be narrowly construed. Otherwise, the exception would "swallow the rule because virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the tribe." *Bugenig*, 229 F.3d at 1220. The *Bugenig* Court limited the exception to the extent that tribal jurisdiction is "necessary to protect self-government or to control internal relations." *Id.*

209. *Strate*, 520 U.S. at 459 (quoting *Montana*, 450 U.S. at 564).

210. *Bugenig*, 229 F.3d at 1222.

3. Expressly Delegated Jurisdiction

Congress may expressly authorize tribal jurisdiction over fee lands. In *Montana*, the Court noted that Congress has the power to grant or delegate jurisdiction over nonmembers to tribes, but such jurisdiction will not be presumed.[211] There must be an express statement by Congress that it intends the tribe to exercise such authority. The federal government can delegate anything within its power to tribal governments. Although Congress cannot delegate its duties and responsibilities to private entities, tribes are viewed differently. Because tribes are sovereign entities, they have the ability to take on governmental powers.

With section 518 of the CWA, Congress expressly delegated tribes the authority to enforce water quality standards. This is a way that the situation in *Brendale* can be further distinguished from the tribal rights to regulate water quality. The *Brendale* Court stressed the fact that Congress did not expressly delegate the power to zone fee lands to tribes.[212]

4. Summary

It is clear that tribes have the right to regulate activities of tribal members on-reservation. Tribes can assert both criminal and civil jurisdiction over their members. Additionally, as a result of the "*Duro* fix," tribes can assert jurisdiction over non-member Indians for minor criminal offenses. Tribes do not have the ability to exercise criminal jurisdiction of any kind over non-Indians even when offenses occur on tribal lands.

Tribes have retained the ability to assert civil jurisdiction over non-Indians and non-member Indians in several situations. Tribal civil laws can be upheld against non-Indians under the two situations laid out by *Montana*: (1) when the non-Indian and the tribe have entered into a contractual agreement; and (2) when the tribal regulation is necessary to protect the political integrity, economic security, or health and welfare of the tribe.

Additionally, tribes can assert either civil or criminal jurisdiction over non-Indians when the federal government has delegated them the power to do so. The federal government may delegate the ability of tribal governments to regulate anything that the federal government had the authority to regulate. Tribes have the ability to exercise meaningful jurisdiction over their water quality because such jurisdiction fits within the *Montana* exceptions

211. *Montana*, 450 U.S. at 564.
212. *Brendale*, 492 U.S at 428.

and because the federal government has specifically delegated authority to tribes.

B. Tribal Jurisdiction under the Clean Water Act

The Clean Water Act's grant of authority to tribes arises in the midst of this complex jurisdictional history. A plain reading of the Clean Water Act shows both an acknowledgement of already existing tribal sovereignty and an unambiguous delegation of federal authority to tribes. Although tribes already had sovereignty over their water quality and hence the right to set water quality standards, section 518 solidified the right and the process. Although tribal sovereignty in this area was clear before the change to the CWA, tribal jurisdiction over non-members was not, as demonstrated above. This is why section 518 provides tribes with federally delegated jurisdiction over non-Indians.[213]

The Supreme Court has actually cited the CWA as an example of express delegation to tribes.[214] The Montana District Court acknowledged that the CWA shows a clear federal intention to delegate jurisdiction.[215] Some also argue that common sense requires a full delegation of CWA authority to tribes.[216] Without full ability to enforce CWA regulations, tribal administration of permit programs becomes meaningless.[217] Congress would not have intended to grant such piecemeal jurisdiction.[218]

The EPA, however, has been unwilling to read the CWA as a clear delegation of federal authority to tribes.[219] Instead of stopping with the plain language of the Act, the EPA draws upon legislative history. When the EPA reviewed the legislative history, it found it to be conflicting. "Given that the legislative history ultimately is ambiguous and inconclusive, EPA believes that it should not find that the statute expands or limits the scope of Tribal authority beyond that inherent in the Tribe absent an express indication of

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213. Montana v. EPA, 941 F. Supp. 945, 951 (D.N.M. 1996). This is clear when examining subsection (h), which expressly defines Indian reservation to include all lands "notwithstanding the issuance of any patent." And when subsection (e) specifies which resources tribes can hold, it outlines areas "within the borders of an Indian reservation."

214. *Brendale*, 492 U.S. at 428.

215. *Montana*, 941 F. Supp. at 951.

216. *Id.* at 952.

217. However, the tribes still gain something by being able to set water quality standards as long as they can ensure enforcement of those standards by either state or federal courts which at the moment is still uncertain.

218. *Montana*, 941 F. Supp. at 952.

219. This is especially curious because the EPA does rely on congressional delegation for justifying the tribal authority in the Clean Air Act. Perhaps this is because the CWA statute was early on the scene and the CAA did not incorporate tribal authority officially until 1991 after several court cases had already addressed the issue.

Congressional intent to do so."[220] Instead, the EPA draws upon common law to establish a case-by-case framework. The EPA prefers a case-by-case determination over nonmember fee lands so it can examine the "potential threats against water quality as they relate to a particular Tribe's health or welfare."[221]

When promulgating its regulations for the TAS process, the EPA used *Montana* and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation* to analyze inherent tribal authority.[222] To gain TAS status, tribes must show that the second *Montana* exception applies to them. Thus, a tribe must demonstrate that regulation over water quality relates to "conduct [that] threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe."[223] Relying heavily on *Montana*, the EPA concluded that the CWA statute was neither a plenary delegation of inherent authority to tribes to regulate all reservation waters, nor a standard that precluded tribal regulation of any non-member or off-reservation activity.[224] The EPA also acknowledged, however, that the *Montana* exception and the standards for gaining TAS status would generally be easy to meet because the determination will "be an easy showing, based on 'generalized findings' that water quality is related to human health and welfare."[225] Once a tribe has shown that impairment of the waters on their reservation would have a serious and substantial effect on the health and welfare of the tribe, the EPA presumes that there has been an adequate showing of inherent authority.[226]

VI. ENVIRONMENTAL CASES

Since EPA's promulgation of Clean Water Act regulations pertaining to tribes in 1991, there have been a few significant federal court cases reviewing the validity of these rules and the extent of tribal jurisdiction under the CWA. Additionally, some non-Clean Water Act cases also explain tribal sovereignty in relation to natural resources and environmental laws. These general cases combine with the recent Clean Water Act cases to give broad scope to tribal regulation of water resources. In each case, the federal courts deferred to EPA interpretation of federal law and upheld tribal jurisdiction over water resources.

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220. Amendments, *supra* note 126, at 64,880.
221. *Montana*, 941 F. Supp. at 953.
222. Amendments, *supra* note 126, at 64,876.
223. *Montana*, 450 U.S. at 577-79.
224. Amendments, *supra* note 126, at 64,877.
225. Wisconsin v. EPA, 266 F.3d 741, 744 (7th Cir. 2001) (citing 56 F.R. at 64,878).
226. Amendments, *supra* note 126, at 64,879.

A. Resource Conservation and Recovery Act

In *Washington Department of Ecology v. EPA*, the Ninth Circuit held that a tribe's sovereignty does not disappear when the federal government takes responsibility for management of a particular federal program on Indian lands.[227] In this 1985 decision, the court found EPA justified in blocking the inclusion of tribal lands in a state's waste management program under the Resource Conservation and Recovery Act (RCRA).[228] This decision reaffirmed the federal policy of encouraging "[t]ribal self-government in environmental matters."[229] The court held that RCRA did not authorize states to regulate Indians on Indian lands, but did not answer the question of whether the state could properly regulate a program over non-Indians in Indian country.[230] The court deferred to the decision of the agency because the EPA's reasoning was supported by "well-settled principles of federal Indian law."[231] The court further explained that states are "precluded from exercising jurisdiction over Indians in Indian country unless Congress has clearly expressed an intention to permit it."[232]

B. Clean Air Act

In *Washington Department of Ecology*, the Ninth Circuit relied on its 1981 decision in *Nance v. EPA*[233] to uphold Congress' delegation of environmental regulatory jurisdiction on tribal lands, stating that tribal interests in managing reservations and the federal policy of encouraging tribes to either assume or share in responsibility for environmental jurisdiction were controlling.[234] The *Nance* decision, which came ten years before the addition of TAS status to the Clean Air Act, was pivotal. The Clean Air Act permits the EPA to allow tribal nations to set air quality goals on their reservations. Despite the absence of any specific delegation language within the Clean Air Act, the EPA promulgated regulations deferring to tribes[235] based on congressional intent.[236]

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227. 752 F.2d 1465, 1471 (9th Cir. 1985).
228. *Id.* at 1469-70.
229. *Id.* at 1471.
230. *Id.* at 1467-68.
231. *Id.* at 1469.
232. *Id.* at 1469.
233. Nance v. EPA, 645 F.2d 701, 714 (9th Cir. 1981).
234. *Wash. Dep't of Ecology*, 752 F.2d at 1471-72.
235. 40 C.F.R. § 52.21(c) (1975) (outlining specific procedures whereby a tribal governing body could redesignate its reservation as requiring higher air quality standards).
236. Congress was well aware of the tribal issue and specifically intended redesignation to occur on tribal lands. *See, e.g.*, S. REP. NO. 95-127, *reprinted in* Senate Committee on Environment and Public Works, A Legislative History of the Clean Air Act Amendments of

Delegation language, however, should not have been necessary anyway because tribes have inherent sovereignty over their natural resources, including the air they breathe.

The court did not appear to find the absence of a specific provision delegating authority to tribes troublesome. Acknowledging that both courts and the federal government have traditionally recognized tribes as "possessing important attributes of sovereignty,"[237] the Ninth Circuit refused to subordinate the tribal interests to the state interest, stating, "within the ... context of reciprocal impact of air quality standards on land use, the states and Indian tribes occupying federal reservations stand on substantially equal footing."[238] The court also dismissed any notion that tribal power should be curtailed because a tribe's decision could have impacts beyond the borders of its reservation.[239] Although the court recognized that some tribal attributes of sovereignty had been diminished by clear congressional action, the tribal right to exclude non-members from reservations remains strong.[240] If a tribe may exercise control over entrance of people onto their reservation, the court reasoned that a tribe should also have the authority to exercise control over the entrance of pollutants onto its reservation.[241]

In 2000, the D.C. Circuit decided *Arizona Public Service Co. v. EPA*.[242] In that case, the court held that Congress had delegated air quality authority to tribal nations over privately owned fee lands located within a reservation as long as the tribe has inherent jurisdiction over them.[243] Additionally, the court found that the Clean Air Act allows the EPA to treat a tribal nation in a manner similar to that of a state for regulating air resources "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction."[244]

1977, 1409 (1977) (explicitly stating that "Indian Tribes are authorized" to redesignate lands as requiring higher air quality standards).

237. *Nance*, 645 F.2d at 713 (citing Bryan v. Itasca County, 426 U.S. 373, 392 (1976) and Williams v. Lee, 358 U.S. 217, 220 (1976)).

238. *Id.* at 714.

239. *Id.* at 714-15.

240. *Id.* at 715 (citing Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 410-11 (9th Cir. 1976)).

241. *Id.*

242. 211 F.3d 1280 (D.C. Cir. 2000).

243. *Id.*

244. 42 U.S.C. § 7601(d)(2)(B) (2003).

C. Clean Water Act

In *City of Albuquerque v. Browner*, the Tenth Circuit held that the EPA reasonably interpreted Section 518 of the Clean Water Act to permit tribes to adopt water quality standards more stringent than federal standards and to enforce those standards against upstream point sources located beyond tribal boundaries.[245] The EPA granted the Isleta Pueblo Indian Tribe TAS status to administer water quality standards and to certify compliance with such standards.[246] When the court ruled in favor of the tribe, this case made it clear that TAS tribes would be afforded rights and powers identical to those of states for the purposes of the CWA within the Tenth Circuit.

In *Montana v. EPA*,[247] (discussed above) the Ninth Circuit upheld EPA regulations granting Indian tribes authority to promulgate water quality standards applicable to effluent sources controlled by non-Indians owning fee interests in land located within the reservation. The Ninth Circuit drew heavily upon the second exception established by the *Montana v. U.S.* case in 1981 and subsequent cases that applied that decision.[248]

The court felt a particular need to distinguish its decision from *Brendale v. Confederated Tribes & Bands of the Yakima Nation*.[249] *Brendale* was decided eight years after *Montana v. U.S.* and none of the three opinions in *Brendale* agreed on an approach for applying the second *Montana* exception. In light of this confusion, some scholars felt that *Brendale* abrogated *Montana*.[250] The Ninth Circuit however, distinguished its decision in *Montana v. EPA* from *Brendale,* explaining that *Brendale* was about zoning where "impacts are normally discrete and localized, whereas water pollution creates environmental health risks that may affect many people miles from the source."[251] Thus, the second *Montana*

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245. 97 F.3d 415 (10th Cir. 1996).

246. As outlined in sections 303 and 401 of the CWA. 33 U.S.C. §§ 1313, 1341 (2003). Albuquerque ("the City") was running a waste treatment facility operating under a federal permit (New Mexico is one of the states not authorized to administer its own NPDES permit system. EPA, *State Permit Status, at* http://cfpub.epa.gov/npdes/statestats.cfm (last updated Apr. 14, 2003)) that discharged effluent into the Rio Grande five miles north of the reservation. *City of Albuquerque,* 97 F.3d at 419. The City filed suit against the EPA challenging the tribe's ability to set standards more stringent than the federal limits and the application of tribal standards beyond the reservation's boundaries. *Id.*

247. Montana v. EPA, 941 F. Supp. 945 (N.D.M. 1996).

248. *See, e.g., id.*

249. 492 U.S. 408 (1989).

250. Regina Cutler, Comment, *To Clear the Muddy Waters: Tribal Authority Under Section 518 of the Clean Water Act*, 29 ENVTL. L. 721, 728 (1999).

251. *Montana*, 941 F. Supp. at 953 n7. The EPA reads *Brendale* as not abrogating the *Montana* test. The court simply did not reach a consensus on how to apply the facts of

exception applies because pollution of non-Indian lands within the reservation could have a grave impact upon tribal health and environmental interest.

In *Wisconsin v. EPA*, the state brought an action against the EPA challenging their granting of TAS status to the Mole Lake Band of Lake Superior Chippewa Indians.[252] The tribe applied for TAS status in 1994 and Wisconsin opposed the application on the grounds that the state was "sovereign over all of the navigable waters in the state, including those on the reservation, and that its sovereignty precluded any tribal regulation."[253] Nevertheless, the EPA approved the tribe's application in September 1995 and Wisconsin filed suit soon thereafter.[254]

Wisconsin challenged only one requirement of the TAS status — the tribe's inherent authority to regulate water quality.[255] Specifically, the state was concerned about lakes on the reservation. The State of Wisconsin owns the lakebeds, but they are surrounded by reservation land. The Seventh Circuit held that despite the fact that the land under the water was not Indian-owned land, the tribes still had the right to regulate the water because it was within the borders of the reservation.[256] The court explained that the CWA "explicitly gives authority over waters within the borders of the reservation to the tribe and does not even discuss ownership rights."[257]

The Seventh Circuit is the first thus far to explicitly note that in the absence of TAS status, the federal government would have jurisdiction over tribal lands, not states. In dicta, the court draws on *California v. Cabazon Band of Mission Indians*[258] to assert that "the EPA and not the state of Wisconsin might well be the proper authority to administer Clean Water Act programs for the reservation because state laws may usually be applied to Indians on their reservation only if Congress so expressly provides."[259]

It seems clear that the EPA has jurisdiction in the absence of an approved TAS program as acknowledged by the EPA and several scholars.[260] However, in general, states enforce their permit

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Brendale to *Montana*. Amendments, *supra* note 126, at 64,877.

252. 266 F.3d 741 (7th Cir. 2001).

253. *Id.* at 745.

254. Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001).

255. Interestingly, this is the only issue states are allowed to comment on during the Notice and Comment period for a TAS application, Amendments, *supra* note 126. It is unclear however whether states can bring up additional issues in judicial challenges.

256. *Wisconsin*, 266 F.3d at 747.

257. *Id.*

258. 480 U.S. 202 (1987).

259. *Wisconsin*, 266 F.3d at 747.

260. *See, e.g.*, Grijalva, *supra* note 82, at 437.

programs and water quality standards on tribal land. The Clean Air Act is more explicit in recognizing potential federal program implementation. It provides that "in any case in which [the EPA] determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, [the EPA] may provide, by regulation, other means by which [the EPA] will directly administer such provisions so as to achieve the appropriate purpose."[261] The CWA in section 518(e) addresses direct implementation only by authorizing treatment of tribes as states "to the degree necessary to carry out the objectives" of the Act.[262] Supposedly, absent federally approved tribal programs, the EPA does implement and enforce programs.[263]

D. Summary

Congress has clearly been working to expand environmental laws to acknowledge tribal sovereignty over natural resources. In nearly every case, Congress has delegated authority to the EPA to promulgate regulations to help carry out these congressional goals of promoting tribal sovereignty. Generally, when courts review these laws and their accompanying regulations, they defer to agency interpretation. This consistent pattern of deference may not always be appropriate, however. Courts are stopping their analysis at the agency interpretation instead of more fully exploring congressional intent. Deferring to agency interpretation is easier for courts than interpreting the complex area of law known as tribal sovereignty. Because of this morass created by decades of conflicting laws and policies, courts can simplify their analysis by deferring to agencies. At times agency deference leads to a result that benefits tribes, but it still ignores the basic congressional acknowledgment of tribal sovereignty accompanied by clear delegation of authority to exercise jurisdiction over their natural resources.

VII. EPA ADMINISTRATION OF TAS PROGRAM

Despite the benefits to tribes, very few tribal governments are presently administering their own programs or setting their own water quality standards. Only twenty-three tribes have set their own water-quality standards and no tribes administer permitting programs.[264] This is alarming given that over 145 tribes are

261. 42 U.S.C. § 7601(d)(4) (2003).
262. 33 U.S.C. § 1377(e) (2003).
263. Charlotte Uram & Mary J. Decker, *Jurisdiction Over Water Quality on Native Lands*, 8 J. NAT. RESOURCES ENVTL L. 1, 9 (1992/1993).
264. EPA website, *Repository of Documents*, *at* http://www.epa.gov/ost/standards/wqslibrary/

approved for TAS status under the Clean Water Act.[265] There are multiple points in the process where tribes meet roadblocks. First tribes must obtain TAS status. Although 145 tribes have gained TAS status, this is but a fraction of the number of tribes in the United States. Once tribes obtain TAS status, they must then apply for approval of water quality standards. This process is rather straightforward and undemanding. Tribal standard setting does not require a complex permitting program. It does not require much infrastructure. Additionally, there is not much incentive for tribes to attain TAS status unless they intend to either set their own water quality standards or administer their own permitting programs. Thus, it seems that the key stage where tribes endure delay is in the conversion of TAS status into something meaningful.

It is not clear why more tribes have not obtained TAS status or why TAS applications are being delayed. In general, the EPA is slow to process applications. For example, NPDES permits take an average of five years to gain approval.[266] The tribal applications may be delayed because the EPA is uncertain what it wants to do with them, not because the tribes do not meet the necessary requirements. In essence, there seems to be a freeze on applications right now because the EPA is still developing its policy.[267]

Some speculate that the EPA's hesitance is due to a fear of the patchwork nature of allotted lands.[268] Because the EPA does not believe that there has been a clear federal delegation of authority, the extent of tribal jurisdiction is not immediately evident to it. The EPA may be worried about the actual make-up of the population on reservations. The *Wisconsin* case was easy because the reservation was largely unallotted and nearly all inhabitants were tribal members. The discussion gets trickier, however, when lands are heavily allotted. In *Montana v. EPA* however, the court declined to draw a distinction based upon the ethnic make-up of the reservation, instead deferring to EPA's drawing of simple geographical lines for jurisdictional purposes.[269]

(last updated Nov. 2, 2004).

265. Drucker, *supra* note 90, at 343-44.

266. EPA website, *Backlog Reduction*, *at* http://cfpub.epa.gov/npdes/permitissuance/backlog.cfm (last updated Oct. 17, 2003).

267. Conversation with Curtis Berkey, Bay Area Federal Indian Law Practitioner (November 2002) (on file with author).

268. *Id.*

269. Stuckey points out that the EPA's declining to consider the make-up of reservation inhabitants is well in keeping with the notion of treating tribes as states. "This also seems consistent with the manner in which other states are treated since ethnic populations are not a typical consideration in EPA's regulatory scheme on environmental issues." 31 ELR 11,198.

Some may argue that the EPA does not go far enough in assisting tribes to gain TAS status and thus frustrates congressional intent. Others would likely argue that it goes too far by misreading case law and giving too much power to tribes. The first reading is the most appropriate in light of the plain language of the statute and the history of Indian law. Principles of judicial review require courts to defer to agency experience, expertise, and interpretation of governing statutes when statutes and congressional intent are ambiguous.[270] By creating an established system for tribal administration of programs and declaring that tribes can attain the same status as states, the congressional delegation to tribes is unquestionable here.

In the classic *Chevron* case, the Supreme Court explained that when interpreting a statute, a court should look first to the clear congressional intent.[271] If congressional intent is not clear, courts defer to the reasonable interpretations of the agencies that enforce the Act.[272] In this case, it is not necessary to reach the agency deference question because the congressional intent is clear. Although Congress does not delegate its duties beyond federal bodies lightly and delegation should never be assumed, it is present here. This finding is unsurprising in light of the inherent characteristics of sovereignty possessed by tribes. Courts have recognized congressional delegation to tribes based upon the established nature of tribes, their stand-alone governments, and their status as domestic dependent nations.[273]

VIII. RECOMMENDATIONS FOR IMPROVING TAS PROGRAMS

Tribal governments are the appropriate entities to regulate water quality on reservations. They have inherent sovereignty over their natural resources and as the most local unit of government, they are most familiar with tribal needs and challenges. The Treatment as State provision of the Clean Water Act can be viewed two ways: (1) as a congressional recognition of tribal authority over on-reservation waterways; or (2) a congressional delegation of federal power to regulate waterways. The first view is the most appropriate. Tribes have consistently exercised authority over their natural resources and have not clearly ceded the right to control water quality to the federal government. Additionally, the language of section 518 can be read as a recognition of already existing

270. *See, e.g.*, Chevron, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
271. *Id.*
272. *Id.*
273. *See, e.g.*, Nance v. EPA, 645 F.2d 701, 714-15 (9th Cir. 1981).

authority. If however, section 518 is seen as a delegation of tribal authority, there will be several implications for tribal courts enforcing the Clean Water Act.

A. Tribes have Inherent Authority Over Water Quality

The CWA does not give tribes something that they did not already have, rather it merely recognizes inherent tribal authority. Tribes have authority over their water resources based on: (1) aboriginal title; (2) their inherent sovereign powers; and (3) the failure of tribes to cede that power (also called the "reserved rights doctrine"). These three elements of Indian law provide alternative means of asserting sovereignty over water quality in the absence of federal delegation.

1. Aboriginal Title

Tribes retain title to their water and submerged lands and sovereignty over natural resources unless they have specifically ceded these lands and rights to others. Even absent treaties and statutes, tribes have the right to possess and occupy their ancestral homelands. This property right is different from a fee simple right to land and is called "aboriginal title."[274] The federal government is the only entity that may extinguish aboriginal title, and it must do so explicitly with a clear, unambiguous statement of intent to extinguish.[275]

Aboriginal title is rooted in the idea that the tribes inhabited this land before European settlers arrived. Chief Justice John Marshall described this concept in the 1832 *Worcester v. Georgia* case.[276] There, Justice Marshall indicated that tribes had always been considered distinct and independent political communities. They were the "undisputed possessors of the soil, from time immemorial."[277] The Court had earlier, in 1823, defined Indian property rights as a right of occupancy.[278] However, there was little distinction made between an Indian right of occupancy and the fee title ownership settlers enjoyed. Indeed, the Court referred to these property rights as equally sacred.[279]

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274. Fee title to the land generally remains in the federal government or, in the case of the original thirteen states, in the state. 42 C.J.S. *Indians* § 69 (2002).
275. *Id.*
276. 31 U.S. 515 (1832).
277. *Id.* at 559.
278. Johnson v. M'Intosh, 21 U.S. 543, 587 (1823).
279. Mitchel v. United States, 34 U.S. 711, 746 (1835).

The right of occupancy need not be specifically recognized in a statute or formal government action or declaration to be enforced.[280] To establish aboriginal title, tribes much occupy lands identified as their ancestral home.[281] An Indian tribe must show that it actually, exclusively, and continuously used the property for an extended period.[282] This means that tribes without a reservation or tribes that have been relocated will be unable to assert aboriginal title successfully. Additionally, because tribes must have exclusively and continuously used the property,[283] it may be difficult for traditionally nomadic tribes to show continual occupancy of the land in question.

Although not all tribes will be able to assert aboriginal title for their reservations or in particular for their waterways, it is a doctrine that many tribes can invoke to lend credence to their claims of inherent sovereign authority over the waterways on their lands. The concept of aboriginal title has been used to support claims to other Indian lands. For example, the Oneida tribe successfully invoked this theory to bring an action against the State of New York. Tribal representatives had ceded lands to the state without federal consent. The Supreme Court held that the federal government protects the Oneida's "possessory right" to tribal lands.[284]

Additionally, aboriginal title can assist tribes in securing TAS status. One of the difficulties for tribes who are trying to draw upon TAS opportunities is the showing that the land and waters in question are under their inherent authority. Aboriginal title settles this question by acknowledging that tribes hold clear title to their resources where the title has not been ceded by the tribe or explicitly extinguished by Congress.[285]

2. Inherent Sovereign Rights over Natural Resources

Different views of reservations affect the status of tribal rights. If one looks at tribal lands and rights as something granted by the federal government, then a tribe is less likely to have the right to

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280. Cramer v. United States, 261 U.S. 219 (1923).

281. Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335 (1945); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941).

282. Sac & Fox Tribe of Indians v. United States, 383 F.2d 991, 998 (1976).

283. Yankton Sioux Tribe of Indians v. South Dakota, 796 F.2d 241 (8th Cir. 1986).

284. County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985).

285. Congress does have the right to extinguish this right of occupancy and with it any remnants of aboriginal title. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 669 (1974); *see also* United States v. Wheeler, 435 U.S. 313, 319 (1978). Additionally, if Congress does extinguish title, there is no legal obligation to compensate the tribe. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).

control their water quality. However, this is not the general view of tribal reservations. Indeed, reservations are not grants *by* the federal government but grants by the tribes *to* the federal government.[286] Under this lens, the tribes hold all rights not specifically given away. Thus, unless a treaty or agreement specifically relinquishes water quality rights, the tribe retains rights of ownership and control. Because tribes generally did not cede the ability to exercise sovereignty over their water quality, that sovereignty is still present.[287]

3. Treatment as State = Treatment as a Sovereign

The phrase "treatment as state" which is used in the Clean Water Act and other environmental statutes indicates that Congress was recognizing inherent tribal authority. In the absence of congressional action based on constitutional provisions, state control their natural resources and regulate water on their lands. There is no need for the federal government to delegate enforcement power to states because state have that power. As explained by the Tenth Amendment, all power not explicitly granted to the federal government remains with the states.[288] Thus, viewing tribes through the same lens we view states yields not a federal delegation of power, but a recognition of already existing power. Section 518 is clear from its very title that it is about a sovereign power. These CWA amendments served to promote a cooperative federalism relationship between tribes and the federal government to mirror the one that exists between states and the federal government.

B. Congress Has Delegated Clean Water Act Authority to Tribes

Although tribes have inherent authority over their water quality, their ability to enforce standards and permitting programs in the absence of congressional action has not been not clear. The purpose of section 518 of the CWA is to safeguard tribes' rights to enforce their water quality standards. The EPA has not read this statute or the congressional intent behind it correctly. The EPA has neither recognized the congressional recognition of inherent tribal

286. For a clear expression of this notion, often called the "reserved rights doctrine," see United States v. Winans, 198 U.S. 371, 381 (1905) (explaining that a treaty is not "a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted.").

287. Some commentators have asserted that the Ninth Circuit established a new *Montana*-type exception allowing for exercise of tribal jurisdiction over waterbodies on Indian reservations created before statehood for tribes that are historically dependent on fisheries. This newly created exception, however, would only help a limited number of tribes who meet those specific requirements.

288. U.S. CONST. amend. X.

authority nor found a delegation of federal law. The EPA should issue new guidance documents and regulations. There is no need for the EPA to draw upon *Montana* to justify a tribe's right to enforce water quality standards because Congress clearly explained that enforcement authority belongs with tribes under section 518. The EPA should issue a new rulemaking reflecting this understanding. Establishment of tribal authority should then accelerate the process of EPA approval of tribal standards and permitting programs.

The EPA's current reading overlooks the plain language of the Act and thereby limits the ability of tribes to gain TAS status. Further, once tribes gain TAS status, the EPA has been reluctant to make that status meaningful by approving the water quality standards set by tribes. This frustrates the intent of Congress, which is evident from the small number of tribes who have attained TAS status compared to the long waiting list of tribes who desire the status. Congress was clear in its intent to establish a program whereby tribes could regulate their own resources, but agency frustration of purpose has led to narrow regulations.

If there is the inherent tribal authority to regulate water quality is not recognized, the only other possible reading of section 518 is as a clear delegation of federal enforcement authority. At a minimum, the EPA should recognize the congressional intent to allow tribes full exercise of potential CWA enforcement authority.

1. Congressional Delegation Invokes the Full Bill of Rights

If the TAS status and the rights and responsibilities that accompany it are a congressional delegation of power to the tribe, tribes should be operating under federal authority. When Congress delegates federal authority, tribes must operate as the federal government would operate in the situation.

Although the Indian Civil Rights Act of 1968[289] imposes most of the requirements of the Bill of Rights upon the tribes in the exercise of their jurisdiction, it did not extend the full Bill of Rights requirements to tribal governments.[290] This single fact, combined

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289. 25 U.S.C.A. §1301 (2004).

290. This law was specifically designed to bring most of the provisions of the Bill of Rights to tribes. The principle guarantees of the act are in section 1302. Although the act adopts most of the rights verbatim, it leaves out some notable areas. (1) There is no provision prohibiting the establishment of religion by a tribe. (2) Tribes are not required to supply counsel to indigents at tribal expense even if prosecution may result in imprisonment. *See also* Argersinger v. Hamlin, 407 U.S. 25 (1972). Additionally, although ICRA may contain the same language as the Bill of Rights, tribal courts are not bound by Supreme Court precedents and they may interpret the provisions differently. *See, e.g.*, Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079 (8th Cir. 1975); Randall v. Yakima Nation Tribal Court, 841 F.2d 897 (9th Cir. 1988). ICRA has also been interpreted to require exhaustion of tribal

with the inapplicability of the Fourteenth Amendment in tribal actions,[291] leads states and non-members to worry about their potential treatment in tribal courts. However, this concern falls by the wayside with the acknowledgement that tribal enforcement under the Act is a delegation of federal power to tribes. If a tribe is acting under the aegis of the federal government, it must enforce accordingly to federal standards. Thus, tribal courts must observe due process and enforce all other constitutional rights. If the federal government were enforcing the Clean Water Act, it would of course be operating under the Constitution. If tribes are acting under congressional authority, the Constitution is also triggered. This possibility has not yet been discussed seriously or put into play by tribes or federal officials. A concern that would arise, of course, would be funding. Currently, for example, tribal governments do not provide court appointed lawyers. Although most dischargers are larger companies and municipalities and would not likely desire or qualify for court appointed attorneys, tribal governments would need to request more resources from the federal government to ensure that all parties' constitutional rights are upheld.

2. Venue Options

a. Removal

Removal is possible in federal tribal actions in the same way it could be used when a non-resident is called before a state court. This means that many parties brought before a tribal court could petition for removal to a federal court because there would be diversity of citizenship and the case would turn upon a federal law (the Act). This change of venue should alleviate concerns about non-Indians being subjected to tribal courts.

b. Enforcement of Tribal Laws in Federal Courts

One solution to this dilemma is for tribes to bring enforcement actions directly in federal courts bypassing their own tribal systems. Tribes could bring enforcement actions in federal courts and based on choice of law rules the court should be required to apply tribal

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remedies before parties can seek redress in federal courts. *E.g.*, O'Neal v. Cheyenne River Sioux Tribe, 482 U.S. F.2d 1140 (8th Cir. 1973); McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974).

291. Because tribes are not "states," the Fourteenth Amendment is not triggered. However, courts have acknowledged that non-Indians in tribal courts are protected by the guarantees of ICRA. Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz. 1969). However, the Supreme Court has held that habeas corpus is the sole remedy by which federal courts could enforce ICRA. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

law. The Clean Water Act does not require tribes to bring actions in tribal courts. Indeed, diversity jurisdiction would likely be a common occurrence. When the EPA approves water quality standards set by tribes, those standards become enforceable federal law.[292] When non-tribal members are prosecuted in federal court, concerns about constitutional rights and judicial prejudice disappear.

Tribal governments may not be amenable to this solution. Besides the clear insulting suggestion that tribal courts as inadequate, tribes would be forced to submit to a different sovereign's interpretations of its law. Although the tribes should not be bound by a non-tribal courts interpretation, in reality federal courts will end up building up a federal tribal common law. Tribal laws and traditions are not necessarily rooted in the same common law tradition as the courts of the federal government and the states. Thus, federal interpretation of tribal law may be both inappropriate and insulting.

IX. CONCLUSION

The move to recognize tribal sovereignty within environmental laws is a good one. Tribal sovereignty over air and water quality is not something to be bestowed by the federal government. As independent nations with their own land and governance structure, tribes should not have to invoke U.S. laws to assert their right to regulate their land and resources. Some commentators have argued that tribal rights to govern their land, air, and water are inherent rights of a sovereign that the tribes have retained in absence of treaties clearly ceding these rights. Although this is persuasive, tribes are much more likely to win the legislative battle over control of their resources by invoking positive federal environmental laws. These sentiments and concerns inspire the suggestions presented in this article. This article offers suggestions and recommendations to make tribal governance more palatable to courts, states, and the federal government. While these recommendations can lead to a smoother system were tribes can more easily set their own water quality standards and establish permitting programs, the suggestions are in some ways offensive. Much as a resident of California must submit to Arizona laws while in that state, non-tribal members should be required to submit to tribal laws while on tribal land. Tribal courts should be recognized as valid courts. This

292. Arkansas v. Oklahoma, 503 U.S. 91, 104-10 (1992); Dean B. Suagee & John P. Lowndes, *Due Process and Public Participation in Tribal Environmental Programs*, 13 TUL. ENVTL. L.J. 1 (1999).

article instead, however, presents a compromise. By allowing their laws to be enforced in federal courts, tribal governments can observe their laws and standards gain deference. That is at least some victory.