Protecting Tribal Waters: The Clean Water Act Takes over Where Tribal Sovereignty Leaves Off

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I. INTRODUCTION

Native Americans face unique challenges in the area of clean water. Tribes once had virtually unlimited land and water which they could use for subsistence.[1] Unfortunately, in many cases, tribal lands are now limited to reservations.[2] Reservation water quality and water access rights have been very important topics for reservations, especially in the context of the drought that has plagued much of the western United States for the past two years.[3] Of particular importance are the recent attempts of tribes to regulate the activities of non-Indians upstream from reservation lands.[4] While the roles played by tribal sovereignty and traditional tribal rights are important in preserving some areas of reservation life, the Clean Water Act (CWA or Act) has recently proven to be tribes' most effective weapon in battling reservation water pollution. The CWA amendments that allow the Environmental Protection Agency (EPA) to put tribes on equal footing with states for purposes of the Act are particularly significant for the control of

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1. *See* Janet K. Baker, *Tribal Water Quality Standards: Are There Any Limits?*, 7 DUKE ENVTL. L. & POL'Y F. 367, 368 (1997).

2. *See id.*

3. *See, e.g.*, *Tribe Backs Cutting Off Klamath Water*, COLUMBIAN, Sept. 5, 2001, at C2.

4. *See* City of Albuquerque v. Browner, 97 F.3d 415, 419 (10th Cir. 1996); *see also* Montana v. EPA, 137 F.3d 1135, 1138 (9th Cir. 1998).

upstream polluters.[5] This Comment will discuss historical tribal sovereignty as it relates to water quality, and traditional tribal water rights as they compare to the evolution of the current scheme under the CWA.

II. TRIBAL SOVEREIGNTY AND EARLY RESERVATION WATER RIGHTS

Several basic principles involved in the idea of tribal sovereignty impact the methods through which reservations deal with water pollution.[6] The Supreme Court articulated the initial principles of tribal sovereignty in the early 1800s.[7] In three opinions authored by Chief Justice John Marshall,[8] the Court explained that tribes are political entities with *inherent* sovereignty that is derived from their relationship with North America prior to the formation of the United States.[9] In theory, the tribes retained sovereignty independent of not only the United States, but also the individual states within the union.[10] Marshall further indicated that because the tribes were now somewhat dependent upon the union, certain features of true sovereignty necessarily had been diminished, but all those powers not lost at that time were to be retained by the tribes.[11] Finally, and perhaps most significantly, the Court held that one of the principles of tribal sovereignty not diminished by the United States is the ability of the tribes, and not the states, to pass and enforce the laws within tribal territory.[12] Although altered over time, this principle would prove especially important, as the United States made the transition from states bordered by Indian Country to Indian reservations surrounded by states.[13]

Tribal governmental authority, and the ability to make the laws enforced within reservations, still derives from tribes' status as sovereign entities.[14] As a result, tribes have always retained some ability to make

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5. *See Albuquerque*, 97 F.3d at 419; *see also Montana*, 137 F.3d at 1137 (both holding that the EPA has enforcement authority to act on behalf of tribes recognized for treatment as a state).

6. *See* Edmund J. Goodman, *Indian Tribal Sovereignty and Water Resources: Watersheds, Ecosystems and Tribal Co-Management*, 20 J. LAND RESOURCES & ENVTL. L. 185, 186 (2000).

7. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

8. *See Worcester*, 31 U.S. (6 Pet.) at 515; *Cherokee Nation*, 30 U.S. (5 Pet.) at 1; *Johnson*, 21 U.S. (8 Wheat.) at 543.

9. *See Worcester*, 31 U.S. (6 Pet.) at 542-43, 559-60.

10. *See id.* at 542.

11. *See id.* at 560-61; *see also Johnson*, 21 U.S. (8 Wheat.) at 574.

12. *See Worcester*, 31 U.S. (6 Pet.) at 552-59.

13. *See* Goodman, *supra* note 6, at 188.

14. *See* Montana v. United States, 450 U.S. 544, 565-66 (1981); *see also* Goodman, *supra* note 6, at 186.

and enforce their own laws, including environmental laws.[15] However, whether these laws had any impact upon the conduct of non-Indians, or upon individuals taking action on non-Indian land, has been strenuously contested over the course of the last century.

Most of the treaties the United States formed with Indian tribes did not specifically mention on- or off-the-reservation water rights.16 In many instances, this is because the Native Americans entering into the treaties assumed—as they always had—that rivers, lakes, and other waters belonged to people as a whole and were not attributable to a certain entity, sovereign or otherwise.[17] Special canons of construction have been established for the courts to interpret treaties with Indian tribes, many of which recognize not only the great disparity in bargaining power that existed between the United States and the tribes, but also that the United States negotiated and wrote treaties in a language that in many cases tribal people did not fully understand.[18] For these reasons, the Supreme Court has indicated that it will interpret the treaties liberally in favor of the tribes and, if necessary, will look behind the actual language of the documents.[19]

Following these basic principles, over the course of the last century, the Supreme Court developed provisions detailing the reserved tribal water rights on reservations.[20] In 1908, the Supreme Court decided *Winters v. United States* which began the establishment of reserved water rights for Indian tribes.[21] This doctrine is now commonly known as the *Winters* doctrine.[22] In *Winters*, the United States sued various upstream landowners along the Milk River in central Montana, including cattle and irrigation companies, to enforce the 1888 treaty creating the Fort Belknap Reservation.[23] In affirming a decree that enjoined the defendants from infringing upon river waters intended for the reservation, the Court held that the tribe retained implied water rights although the treaty did not contain an express water rights reservation provision.[24] The Court further held that "ambiguities . . . will be resolved

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15. *See Montana*, 450 U.S. at 566.
16. Goodman, *supra* note 6, at 192.
17. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 175-76 (1999).
18. Goodman, *supra* note 6, at 192.
19. *See, e.g.*, Carpenter v. Shaw, 280 U.S. 363, 367 (1930).
20. Goodman, *supra* note 6, at 193.
21. 207 U.S. 564, 565-67 (1908).
22. Goodman, *supra* note 6, at 193.
23. *Winters*, 207 U.S. at 565-67.
24. *See id.*

from the standpoint of the Indians."[25] This doctrine, which retains implied water rights where a tribe implicitly understood them to exist, has been repeatedly affirmed.[26]

The *Winters* doctrine also helped establish the unique system under which reservations retain their existing water rights.[27] Most western states have an appropriations rights doctrine, a system that allocates prior water rights with a requirement that the tribes show a continuing beneficial use of the waters in question.[28] The *Winters* doctrine, however, recognizes that tribal rights are not subject to the laws of the states that surround them.[29] Thus, tribes are not subject to the common "use it or lose it" system to which most states are subject.[30] Rather, their water rights are reserved regardless of previous use or lack thereof.[31] In this aspect, tribes seem to enjoy a significantly beneficial departure from many state methods of determining riparian rights.

The *Winters* doctrine has been extended to other natural resource rights relating to reservation waters.[32] Tribal sovereignty continues to be used as a means to enforce the rights of Native Americans, both on and off reservations. However, the ideas of tribal sovereignty and superior Indian water rights have not been particularly effective means to abate the pollution of reservation waters. Instead, and only relatively recently, tribes have successfully resorted to the CWA under the enforcement of the EPA.

Tribes have always had a very limited ability to exercise civil regulatory authority over non-Indians, both on and off reservation land, as it relates to tribal natural resources.[33] Tribes cannot generally regulate the conduct of non-Indians on non-Indian land, even on reservations.[34] However, the Supreme Court has indicated that when the conduct of non-Indians goes so far as to threaten, or have some "direct effect on the political integrity, the economic security, or the health or welfare of the tribe," Native Americans may have the power to regulate non-Indians on

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25. *Id.* at 576-77.
26. Goodman, *supra* note 6, at 193 n.45.
27. *See id.* at 193.
28. *Id.* at 193-94.
29. *Id.*
30. *Id.*
31. *See id.*
32. *See, e.g.*, United States v. Adair, 723 F.2d. 1394, 1395 (9th Cir. 1983) (protecting tribal fisheries even where the fisheries no longer exist).
33. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330-31 (1983) (holding that the exclusive authority to regulate fishing and hunting on tribal lands lies with the tribe).
34. *See* Montana v. United States, 450 U.S. 544, 565-66 (1981).

non-Indian lands.[35] This has obvious water quality implications, both on and off reservations.

The courts have held on several occasions that tribes have reserved particular natural resource rights off current reservation boundaries by virtue of their grant of those rights via their sovereign immunity.[36] Recent decisions included the Supreme Court's holding in *Minnesota v. Mille Lacs Band of Chippewa Indians*, that the Mille Lacs Band of Chippewa Indians did not relinquish its rights guaranteed under the 1837 treaty to hunt, fish, and gather on ceded lands, although the tribe subsequently entered into an 1855 treaty stating that the tribal members had fully and entirely relinquished and conveyed any and all right, title, and interest of whatsoever nature they might have in designated lands.[37] The Court again indicated that Indian treaties are interpreted to give effect to the terms as the Indians themselves would have understood them, which in some cases appears to be the opposite of what is actually written.[38] Similarly, the Supreme Court has recently held that the principle of sovereign immunity of Native American tribes applies to contract activities, even if undertaken outside the boundaries of the reservation.[39] In the case of tribal off-reservation reserved rights, some courts have further held that the tribal government should control the exercise of these rights in natural resources contexts.[40] These decisions indicate that the principle of sovereignty may bolster tribes' position vis-à-vis water rights, but in recent years, the CWA is the primary method through which tribes will deal with enforcement of off-reservation water pollution.[41]

III. THE CLEAN WATER ACT

All current federal water pollution legislation is based primarily upon the Federal Water Pollution Control Act Amendments of 1972 (FWPCA).[42] The 1977 amendments renamed the FWPCA the Clean Water Act, and it remains the principal federal statute regulating water

35. *See id.*
36. *See* Goodman, *supra* note 6, at 190.
37. 526 U.S. 172, 175-76 (1999).
38. *See id.* at 195-96.
39. *See* Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 760 (1998).
40. *See, e.g.*, United States v. Oregon, 699 F. Supp. 1456 (D. Or. 1988), *aff'd*, 913 F.2d 576 (9th Cir. 1990) (approving Management Agreement between tribes, states and federal government for the Columbia river fisheries).
41. *See* Goodman, *supra* note 6, at 190-92.
42. Clean Water Act (CWA), 33 U.S.C. § 1251-1387 (1994).

pollution.[43] The CWA is designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters through the reduction and eventual elimination of pollutant discharge into those waters."[44] To achieve this goal, the Environmental Protection Agency (EPA) strictly enforces certain technology-based effluent limitations in an attempt to eliminate the discharge of pollutants into the nation's waters.[45]

The CWA prohibits the discharge of any pollutant into the nation's navigable waters.[46] The CWA defines a discharge as "any addition of any pollutant to navigable waters from any point source."[47] A pollutant is defined, inter alia, as "dredged spoil, solid waste, . . . sewage, . . . [and] chemical waste."[48] The Act defines "navigable waters" as "the waters of the United States, including the territorial seas."[49] The Supreme Court has shown that they interpret the term "navigable waters" broadly.[50] Recently, however, the Court has shown that the term is not without limit.[51]

The Army Corps of Engineers has attempted to further refine the definition of navigable waters by issuing 33 C.F.R. § 328.3.[52] In relevant part, these regulations define the term "waters of the United States" as all waters which were, are, or could be, "susceptible to their use in interstate commerce . . . all interstate waters . . . and all other intrastate waters such as lakes, rivers, streams (including intermittent streams) . . . the use . . . of which could effect interstate commerce, including recreation, fishing, and industry."[53] Significantly, the CWA covers all tributaries of these waters as well.[54] In *Riverside Bayview Homes*, the Supreme Court interpreted the nation's waters to include wetlands adjacent to navigable waters.[55] Wetlands are defined by the Corps' regulations as areas "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated

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43. *Id.*
44. *Id.* § 1251(a).
45. *See* City of Albuquerque v. Browner, 97 F.3d 415, 419 n.4 (10th Cir. 1996).
46. 33 U.S.C. § 1311(a).
47. *Id.* § 1362(12).
48. *Id.* § 1362(6).
49. *Id.* § 1362(7).
50. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132-34 (1983).
51. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 171-72 (2001) (holding that the EPA's authority must fall within the restraints of the Commerce Clause).
52. 33 C.F.R. § 328.3 (2001).
53. *Id.* § 328.3(a)(1)-(3).
54. *Id.* § 328.3(a)(5).
55. *Riverside Bayview Homes*, 474 U.S. at 132-34.

soil conditions."[56] Recently, the Supreme Court rejected the Corps' rule extending the definition of "navigable waters" under the CWA to include intrastate wetlands used as habitat for migratory birds as exceeding the authority granted the Corps under the commerce clause.[57]

Section 301(a) of the Act provides that the discharge of a pollutant by any person is unlawful unless done in accordance with the Act's permit requirements under § 404.[58] A "discharge" is "any addition of a pollutant to navigable waters from any point source."[59]

The CWA establishes two categories of discharges: point sources and nonpoint sources. A "point source" includes "any discernible, confined and discrete conveyance" such as a ditch, channel or conduit.[60] Nonpoint source pollution is pollution that occurs as water naturally drains across land and absorbs contaminants along the way, depositing the contaminants in bodies of water.[61] However, nonpoint sources such as field runoff or leach fields may be controlled by imposing water quality-based effluent standards (WQS) upon designated waters to protect them from deterioration.[62]

Water quality standards, like effluent limitations, are primarily governed by the NPDES permit program.[63] NPDES permits incorporate, inter alia, effluent limitations for point sources based on guidelines promulgated by the EPA on industry-wide bases as well as water quality standards.[64] The permit guidelines do not specify the use of particular technologies, but instead establish effluent limitations that can be achieved only through the use of a certain *quality* of technology.[65] NPDES permits can either be issued through state or tribal permitting programs, or in the absence of such a program, by the EPA under 33 U.S.C. § 1342.[66] Negligent failure to abide by these guidelines can result in administrative penalties up to $10,000 per violation, civil and criminal penalties up to $25,000 per day, and imprisonment of up to one year.[67] Knowing violations are considered felonies and can result in fines up to

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56. 33 C.F.R. § 328.3(b).
57. *See* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 170-72 (2001).
58. 33 U.S.C. § 1311(a) (1994).
59. *Id.* § 1362(12).
60. *Id.* § 1362(14).
61. *See* Baker, *supra* note 1, at 371.
62. *See* City of Albuquerque v. Browner, 97 F.3d 415, 419 n.4 (10th Cir. 1996).
63. *See id.*
64. *See id.*
65. 33 U.S.C. § 1314(b)(1).
66. *Id.* § 1342.
67. *Id.* § 1319 (c)-(g).

$50,000 per day and imprisonment of up to three years.[68] The EPA also can recover any economic benefit entities may have gained from their violations.[69] Penalties increase for subsequent violations.[70]

IV. TREATING TRIBES AS STATES

While the CWA has always protected reservation waters to a degree, in 1987 Congress responded directly to the problem of enforcing on-reservation water quality standards by enacting legislation that enabled the EPA to treat tribes in the same manner as states for purposes of administering particular environmental statutes.[71] By virtue of this legislation, the EPA promulgated regulations detailing in what manner it would treat tribes as states under the CWA.[72] The amendments and regulations give the EPA the authority to "treat an Indian tribe as a State for" certain purposes listed in the CWA.[73] In short, these amendments put reservations on equal footing with the states that surround them concerning enforcement of the CWA.

The opportunity to receive this "tribe as state" treatment (called TAS), however, is not automatic.[74] Tribes must comply with certain procedural requirements as set out by EPA regulations.[75] Tribes applying for TAS status must submit a detailed application to the EPA showing that prescribed criteria have been met.[76] The EPA then provides notice of the application to all involved governmental entities and individuals, and allows for a comment period.[77] After comments, the EPA determines whether the tribe's application meets several requirements enumerated in the CWA.[78]

The CWA initially requires that Indian tribes seeking TAS status have a governing body which is primarily responsible for managing the tribe's interests and carries out "substantial governmental duties and powers."[79] Second, the actions proposed by the tribes must relate to the protection of water resources *within* the borders of the reservation or

68. *Id.*
69. *See* 60 Fed. Reg. 66,706, 66,712 (1995).
70. 33 U.S.C. § 1319(c).
71. *See id.* § 1377(e).
72. *Id.*
73. *Id.*
74. 40 C.F.R. § 131.8(c)(3) (2001).
75. *Id.*
76. *Id.* § 131.8(b).
77. *Id.* § 131.8(c)(4).
78. *Id.* § 131.8(c)(2).
79. 33 U.S.C. § 1377(e) (1994).

otherwise within the tribe's jurisdiction.[80] Finally, the EPA must ensure that the tribe can manage their regulations consistently with the CWA and other applicable regulations.[81] All of these criteria require an adequate description of the pertinent areas of the tribal program.[82] CWA regulations further require the tribe to be federally recognized.[83] If the EPA finds that the tribe's application meets these requirements, TAS status will be granted for the administration of specific portions of the CWA.[84] In 1994 the EPA refined the TAS process to allow tribes to submit water quality regulations for approval without having already qualified for TAS.[85] Further, a tribe's lack of previous environmental management programs does not automatically exclude it from demonstrating a capability to manage reservation waters.[86]

The EPA will likely not allow a tribal entity to create standards that it could not itself maintain because of their high cost.[87] A particular use designated by the tribe will be deemed unattainable if the tribe lacks the money or the technology to impose the standard necessary to achieve it.[88] However, the EPA's evaluation of cost-effectiveness does not allow upstream polluters to disobey properly implemented rules, regardless of the cost to the upstream polluter.[89]

The code specifically allows tribes to use TAS status for § 303 of the CWA.[90] This section allows a state, or a tribe being treated as a state, to set water quality standards within its jurisdiction.[91] Significantly, this gives tribes much stronger procedural rights under the CWA against upstream polluters that impact reservation waters.[92] As a result, treatment of a tribe as a state for purposes of the CWA authorizes the EPA to enforce tribal standards outside of the reservation to enforce on-reservation standards.[93] In short, this allows the exercise of tribal authority over non-Indians, including other state and municipal entities.[94]

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80. *Id.* § 1377(e)(2).
81. *Id.* § 1377(e)(3).
82. *See* City of Albuquerque v. Browner, 865 F. Supp. 733, 737-38 (D.N.M. 1993).
83. 40 C.F.R. § 131.8(a)(1) (2001).
84. 33 U.S.C. § 1377(e).
85. James M. Grijalva, *Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters*, 71 N.D. L. REV. 433, 440 (1995).
86. *Id.* at 442.
87. Baker, *supra* note 1, at 384.
88. *Id.*
89. *See* City of Albuquerque v. Browner, 865 F. Supp. 733, 741 (D. N.M. 1993).
90. *See* 33 U.S.C. § 1337 (1994).
91. *Id.* § 1313.
92. *See* Goodman, *supra* note 6, at 205-06.
93. *See id.* at 204-05.
94. *See id.*

The 1987 amendments also treat Indian tribes as states for purposes of issuing and challenging permits under the CWA.[95] This allows tribes to create and implement on-reservation NPDES permitting agencies.[96] The CWA's NPDES permitting system specifically deals with the downstream movement of water and water pollutants across governmental boundaries.[97]

The issuance of such permits by the federal, state, or tribal authority in upstream states must meet particular provisions protecting downstream states.[98] For instance, a downstream state—and by extension, a downstream tribe—has a right to notice and comment procedures for the permitting process.[99] Furthermore, like states, tribes must hold public hearings when reviewing or revising water quality standards.[100]

Additionally, under 33 U.S.C. § 1342(d)(4), the EPA may deny upstream states' ability to issue permits if doing so would fall outside "the requirements" of the CWA.[101] As a result, and as the Supreme Court indicated in *Arkansas v. Oklahoma*, the EPA can deny an upstream state from authorizing a permit for a point-source discharge if the EPA determines that such a permit would compromise downstream reservation water quality standards.[102] In *Arkansas*, the state of Oklahoma challenged an NPDES permit issued to a Fayetteville, Arkansas water treatment plant, the discharge of which eventually entered the Illinois River which flows into Oklahoma.[103] Oklahoma contended that the discharge violated Oklahoma water standards.[104] The Court explained that EPA regulations require an NPDES permit to comply "with the applicable water quality requirements of all affected states."[105] As a result, the Court explained, state water quality standards developed by foreign states become a part of the federal law of water pollution control, and their federal character must be honored by

95. 40 C.F.R. § 131.8(a) (2001).
96. *See* 33 U.S.C. § 1377(e).
97. *Id.* § 1341(a)(1).
98. *Id.* § 1341(a)(2).
99. *Id.* § 1342(b)(3).
100. *Id.* § 1313(c)(1).
101. *Id.* § 1342(d)(4).
102. 503 U.S. 91, 104-07 (1992).
103. *Id.* at 95.
104. *See id.*
105. *See id.* at 105-06 (quoting 40 C.F.R. § 122.4(d) (1991)).

upstream states.[106] This principle has been extended to tribes acting as states.[107]

The legislation allowing treatment of tribes as states has survived several recent court decisions. In *Albuquerque v. Browner*, the EPA's ability to treat tribes as states was affirmed for purposes of setting clean water standards under the CWA.[108] The Tenth Circuit found that the EPA's authorization for the Isleta Pueblo Tribe to establish water quality standards under the CWA was "in accord with power inherent in Indian tribal sovereignty."[109] The suit arose from the City of Albuquerque's challenge to the EPA's approval of the tribe's water standards, which would limit the amount of water the city could emit from its wastewater treatment plants into the Rio Grande River.[110] The city asserted that the EPA-approved standards were "arbitrary and capricious" under the Administrative Procedure Act (APA) because compliance with the Pueblo standards could have potentially cost hundreds of millions of dollars.[111] The Court explained that the EPA is not authorized to deny proposed standards simply because they are more stringent than the standards imposed by the CWA.[112] The city also claimed that the EPA had violated the CWA.[113] In rejecting these arguments, the court explained, with TAS status, the tribe could impose stricter water standards than the federal government, which must be honored by upstream polluters, just as another state's standards would be honored.[114] While the court acknowledged that only in limited circumstances can tribes impose restrictions on the conduct of non-Indians outside of reservations, the court explained that, in this case, it was not the tribe enforcing their water quality regulations beyond the boundaries of the reservation.[115] Rather, the EPA was exercising its own federally mandated authority to require upstream NPDES discharges to abide by downstream standards under the NPDES permit system.[116] The court gave deference to the EPA's approval of the more stringent standard imposed by the Pueblo as a permissible construction of the CWA under *Chevron*.[117]

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106. *See id.* at 110.
107. *See* City of Albuquerque v. Browner, 97 F.3d 415, 422 (10th Cir. 1996).
108. *See id.*
109. *Id.* at 423.
110. *Id.* at 418.
111. *Id.* at 424-26.
112. *Id.* at 426.
113. *Id.*
114. *Id.* at 427.
115. *Id.* at 429.
116. *Id.*
117. *Id.* at 423.

Because the court found the EPA was taking the action, and not the tribe, the Tenth Circuit held that the tribe's water quality standards could be imposed upon non-Indians on land outside of the reservation by the authority of the federal government.[118]

Similarly, in *Montana v. EPA*, the Ninth Circuit affirmed a decision to uphold water quality standards established by the Salish and Kootanai Tribes on the Flathead Reservation in northwest Montana.[119] "The Flathead Reservation's dominant geographic feature is Flathead Lake, which provides the reservation with water for domestic, industrial, and agricultural uses."[120] The plaintiffs included state and municipal entities owning land located within the boundaries of the reservation.[121] The plaintiffs contended that the new regulations, treating tribes as states, permitted tribes to exercise authority over non-members in a fashion that was overly broad.[122] In denying the facial challenge to 33 U.S.C. § 1377, the portion of the CWA that authorizes the EPA to treat tribes as states, the court held that the regulations the tribe intended to implement were an appropriate exercise of their inherent tribal power over non-Indians.[123] The Court noted that the scope of inherent tribal authority is a determination of law for the courts, and not the EPA.[124] The court explained that, as established in *Montana v. United States*, as a general rule, Indian tribes lack the civil authority to enforce rules of conduct over non-members on non-Indian land located within a reservation.[125] Regulating the quality of its water, however, fell within an exception to this rule.[126] As long as the tribe could show that the water regulations restricted activities that could affect the political integrity, the economic security, or the health or welfare of the tribe, the EPA would allow the tribe to exercise authority over non-members on non-Indian land.[127] Allowing an exception for water quality issues under the previous

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118. *Id.* at 423-24.

119. 137 F.3d 1135, 1138-41 (9th Cir. 1998).

120. Andrea K. Leisy, *Inherent Tribal Sovereignty and the Clean Water Act: The Effect of Tribal Water Quality Standards on Non-Indian Lands Located Both Within and Outside Reservation Boundaries*, 29 GOLDEN GATE U. L. REV. 139, 171 (1999).

121. *See Montana*, 137 F.3d at 1138.

122. *Id.*

123. *Id.* at 1138-41.

124. *Id.* at 1138-40.

125. *Id.* at 1140; *see also* Montana v. United States, 450 U.S. 544, 545 (1981) (establishing the proposition that tribes generally do not have the ability to exercise authority over nonmembers on non-Indian lands, with two exception: when nonmembers have entered into a consensual contract with the tribe, or when the regulated activity affects the "political integrity, the economic security or the heath or welfare of the tribe").

126. *Montana*, 137 F.3d at 1141-42; *see also Montana*, 450 U.S. at 565.

127. *See Montana*, 137 F.3d at 1142.

Montana v. United States rule, which appeared to generally prevent this exercise of authority, will likely prove very important in subsequent enforcement rulings for upstream off-reservation polluters.[128] The EPA had always been of the opinion that tribes would normally be able to demonstrate that the reservation water quality standards imposed would prevent substantial harms to human health and welfare.[129] The Ninth Circuit's holding indicates this to be the case, and further indicates that challenges to the EPA's ability to treat eligible Indian tribes in the same manner as states in order to enforce upstream water pollution will likely fail.[130]

Both *Albuquerque* and *Montana* indicate that tribes can impose water quality standards upon upstream polluters and have the EPA enforce regulations that will help tribes protect and maintain the quality of reservation waters.[131] The decisions, however, stem from slightly different legal reasoning.[132] While *Albuquerque* holds that the Pueblo have inherent authority to establish water quality regulations for tribal and Indian trust lands only, *Montana* allows the tribes to exercise civil jurisdiction over non-Indians on non-Indian land as a "health and welfare" exception to the general rule that tribes cannot regulate non-member conduct.[133] Both cases indicate that if a tribe obtains TAS status, upstream NPDES point-source permits on non-Indian lands will require compliance with downstream reservation water quality standards. According to the Supreme Court's decision in *Arkansas v. Oklahoma*, states must comply with downstream states' standards.[134] By extension, states must now comply with approved downstream tribal standards as well.[135] Where sovereignty and water-rights laws have left tribes with little recourse in the area of water quality, the Clean Water Act appears to be taking over.

V. IMPROVING AND PRESERVING RESERVATION WATER QUALITY

Both the *Albuquerque* and *Montana* decisions show that more approved tribes will likely receive TAS to enforce newly created

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128. *See* Grijalva, *supra* note 85, at 448-50.

129. *See Montana*, 137 F.3d at 1139.

130. *See* Baker, *supra* note 1, at 389-90.

131. *See id.*

132. *See* City of Albuquerque v. Browner, 97 F.3d 415, 419 (10th Cir. 1996); *see also Montana*, 137 F.3d at 1142.

133. *See* Leisy, *supra* note 120, at 169.

134. 503 U.S. 91, 106 (1992) (holding that the state of Arkansas must comply with Oklahoma's water quality standards).

135. *See* Leisy, *supra* note 120, at 169.

regulatory programs under 33 U.S.C. § 1369, which allows states, and tribes treated as states, to pass and enforce pollution control laws as long as they prove at least as stringent as the existing limitations enforced by the EPA.[136] In order to exploit TAS treatment, tribes need to first develop strategies and programs to abate water pollution on their respective reservations.[137] Approved programs will likely not be preempted by the CWA, as long as the bottom line is the same as, or more stringent than, that of the Act.[138] As a result, not only will tribal programs exercise water quality regulatory authority in lieu of the EPA, but also the EPA will enforce those standards on lands that watershed onto the reservation.[139]

Under the CWA, the EPA has developed guidance criteria for the development of state and tribal programs.[140] The EPA's water quality criteria must accurately reflect "the latest scientific knowledge."[141] States and tribes have the option to use the EPA's recommended criteria, but can also rely upon other applicable criteria.[142]

Tribes, like the EPA, would measure water quality under the CWA through two different methods: Effluent limitation guidelines and water quality standards.[143] "'Effluent limitation' means any restriction established by a State or the Administrator [of the EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters. . . ."[144] These limitations provide uniform technology-based standards across the nation through which the EPA can monitor the additions of pollutants to navigable waters, regardless of the condition of the waters receiving them.[145] Through these limitations, the CWA prohibits the discharge of any pollutant from a point source into navigable waters absent a permit from the National Pollutant Discharge Elimination System.[146] Effluent limitations apply only to point sources, or discrete conveyances of pollution, where discharges can be

136. *See Albuquerque*, 97 F.3d at 426; *Montana*, 137 F.3d at 1141.
137. *See* Grijalva, *supra* note 85, at 450.
138. *See Albuquerque*, 97 F.3d at 426.
139. *See id.*
140. 33 U.S.C. § 1314(a)(1) (1994).
141. *Id.*
142. *See* City of Albuquerque v. Browner, 865 F. Supp. 733, 738 (D.N.M. 1993).
143. *Albuquerque*, 97 F.3d at 419 n.4.
144. 33 U.S.C. § 1362(11).
145. *See id.*
146. *See id.* §§ 1311, 1314.

measured.[147] Non-point sources, on the other hand, must be regulated by different means, including the use of water quality standards.[148]

Water quality standards attack the problem of water pollution from a different angle than effluent limitations.[149] Rather than prohibit the material that enters into navigable waters through a discrete conveyance, water quality standards indicate what the desired water quality of a given body of water should be.[150] The EPA establishes these standards for particular water bodies, or portions of particular water bodies, by analyzing site-specific factors unique to those waters. Under § 303 of the CWA, water quality standards adopted by a state (or a tribe acting as a state according to 33 U.S.C. § 1377(e)) must consist of the "designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses."[151] As a result, tribes acting as states must first designate the "use" of the navigable water which must prove consistent with the goals of the CWA, and second, must issue water quality criteria in the form of numerical standards and narrative explanations.[152] When combined with designated uses, water quality criteria create water quality standards, creating some form of limits on ambient concentrations of pollutions in particular waters.[153]

As it develops the objectives of the water pollution abatement, the designation of uses proves to be one of the most important steps in developing water quality standards.[154] The tribe must identify all surface waters or groundwaters upon the reservation that require regulation.[155] The tribe must then develop "a use classification system, which assigns specific uses to the identified waters."[156] These detail how the tribe currently utilizes or desires to utilize the applicable waters.[157] Tribes and states have some flexibility when they establish designated uses as long as the uses "protect the public health or welfare, enhance the quality of water and serve the purposes of [the Act]."[158] Under the CWA, the "uses"

147. *See Albuquerque*, 865 F. Supp. at 738.
148. *See id.*
149. *See* 33 U.S.C. § 1313(c)(2)(A).
150. *See id.*
151. *See id.*
152. *See Albuquerque*, 865 F. Supp. at 738.
153. *See* Grijalva, *supra* note 85, at 451.
154. *Id.* at 451.
155. *Id.* at 450.
156. *See id.* at 451.
157. *Id.*
158. 33 U.S.C. § 1313(c)(2)(A) (1994).

must, at a minimum, obtain the fishable/swimmable standard articulated in the goals of the CWA.[159]

If a tribe opts to designate a use for other than fishable/swimmable uses, the tribe must conduct a "use attainability analysis."[160] A "use attainability analysis" is "a scientific assessment of the physical, biological, and economic factors affecting whether a use can be attained."[161] "The assessment consists of a survey and assessment of the relevant water body, a wasteland allocation, and, if appropriate, an economic analysis."[162] Those analyses help tribes determine whether particular uses of reservation waters are plausible, and the relative need to protect those uses when compared to their harms.[163] According to CWA regulations, uses are deemed attainable if they can be achieved by "cost effective and reasonable best management practices for non-point source control."[164] Tribes need to identify uses carefully, however, because it is difficult to remove uses absent a substantial showing of an inability to obtain the standard.[165]

After designating uses, tribes must develop water quality criteria that specify the maximum ambient levels of pollution to ensure that designated waters can be utilized for their particular uses.[166] The EPA assists states and tribes to develop water quality criteria that involve some of the most recent pollution control technology.[167] In fact, under 33 U.S.C. § 1314, the EPA is required to create water quality criteria, which tribes use for assistance in developing their own criteria.[168] The EPA's criteria offer information on scientific data on the effects of particular pollutants, and the chemical limits required to achieve the water quality adequate for the designated uses.[169]

CWA regulations require the tribes to take into consideration for their own regulations "the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters."[170] Water quality criteria are often specific limits on

159. *See* Grijalva, *supra* note 85, at 451.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. 40 C.F.R. § 131.10(d) (2001).
165. Grijalva, *supra* note 85, at 452.
166. *See id.*
167. *See id.* at 377.
168. *See* 33 U.S.C. § 1314(a) (1994).
169. *See* Grijalva, *supra* note 85, at 452.
170. 40 C.F.R. § 131.10(b) (2001).

particular pollutants, but "effective criteria usually contain both narrative and numerical water quality criteria."[171] Under the Act, numerical criteria may include "total maximum daily load" (TMDL) limitations.[172] TMDLs exist for waters where the effluent limitations are not stringent enough to implement any water quality standards applicable to such waters.[173] Narrative criteria explain acceptable pollutant concentrations without using defined numerical parameters.[174] Where numerical criteria for certain pollutants are not available, narrative criteria are used.[175] Both numerical and narrative criteria establish the maximum concentration levels of pollutants in the designated waters.[176] If the criteria are properly selected and complied with, the tribe's regulations will achieve a sufficiently high level of water quality to protect the identified uses of the waters.[177]

Additionally, the EPA regulations require states and tribes to develop certain antidegradation programs to maintain the current quality of water.[178] These programs are primarily designed to protect existing waters and to prevent further deterioration of waters that already meet the CWA's goals or that would threaten existing uses.[179] The antidegradation policy would usually be enforced across the reservation, with the goal of preserving already high-quality waters.[180] Whenever a use has been eliminated from high quality water on a reservation due to a discharge, the tribe must undertake an antidegradation policy review to make sure that its actions are consistent with the goals of the CWA.[181]

After approval by the EPA and implementation by the tribes, adjacent states cannot second-guess the quality standards imposed on waters upon which the tribes subsist, nor can they question the criteria utilized to implement them.[182] As a result, the CWA has empowered tribes with some measure of the inherent tribal sovereignty they had in generations past, at least in the context of clean water.

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171. Baker, *supra* note 1, at 373.
172. 33 U.S.C. § 1313(d)(1)(C).
173. *Id.* § 1313(d)(a)(D).
174. *See* Grijalva, *supra* note 85, at 452-53.
175. *See id.*
176. *See id.* at 452-53.
177. *See id.* at 453.
178. 40 C.F.R. § 131.12(a)(2) (2001).
179. *Id.*
180. *See id.*
181. Grijalva, *supra* note 85, at 453.
182. *Id.* at 461.

VI. CONCLUSION

Although the principles of traditional Native American water rights and of tribal sovereignty have much value when determining many issues in favor of tribal members, the Clean Water Act, enforced by the EPA, has become the primary tool for tribes to enforce clean water standards. Only recently has the EPA begun active enforcement on behalf of tribes that have applied for and received "treatment as a state" status. Cases like *Albuquerque* and *Montana* indicate that the EPA will continue to enforce tribal water quality standards for non-reservation polluters, overshadowing the advantages of tribal sovereignty in this important area of environmental law.