Advancing Tribal Law Through "Treatment as a State" Under the Obama Administration: American Indians May Also Find Help from Their Legal Relative, Louisiana—No Blood Quantum Necessary

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I. INTRODUCTION

> There are Indian nations. They exist, they thrive, and like any sovereign society, they wish to preserve their laws, their traditions, their values. . . . And sometimes they conflict with the states or the federal government . . . . People need to be aware of the rightful place of Indian nations.[1]

It is well-established that American Indian jurisdictions are distinct nations, separate but dependent upon the United States, whose sovereignty is embodied in the people and power of the tribe since time immemorial.[2] However, states have consistently challenged American Indians' inherent, court-enforced, and legislatively endowed autonomy to make and enforce their own laws regarding environmental protection, distinct from laws of the state within which the reservation is located.[3] Evincing the propriety of American Indian sovereignty, the federal government has deliberately afforded American Indians "Treatment in the Same Manner as a State" (TAS) under some of the most substantive federal environmental statutes, including the Clean Water Act (CWA).[4] Though the federal judiciary has effectively thwarted attempts to whittle away at the TAS doctrine, President Obama and his administration continue to recognize and emphasize the indispensable role of tribal

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1. Victoria Boggiano, *Navajo Nation Holds Court at College*, DARTMOUTH, Feb. 13, 2007, *available at* http://thedartmouth.com/2007/02/13/news/Navajo (quoting Chief Justice Yazzie of the Navajo Nation Supreme Court).

2. *See* Kathleen A. Kannler, *The Struggle Among the States, the Federal Government, and Federally Recognized Indian Tribes To Establish Water Quality Standards for Waters Located on Reservations*, 15 GEO. INT'L ENVTL. L. REV. 53, 55 (2002).

3. *See* Robert Erickson, Comment, *Protecting Tribal Waters: The Clean Water Act Takes Over Where Tribal Sovereignty Leaves Off*, 15 TUL. ENVTL. L. J. 425, 427 (2002).

4. *See* Envtl. Prot. Agency (EPA) Am. Indian Tribal Portal, Am. Indian Envtl. Office, Laws and Regulation, http://www.epa.gov/tribal/laws/tas.htm (last visited Mar. 5, 2010).

governments in environmental protection.[5] Accordingly, the United States Environmental Protection Agency (EPA) diligently supports American Indian rights to regulate and set independent water quality standards under the CWA.[6]

Because Indian life is centered around the environment, its preservation is of the utmost importance. Indians are seen as "ideal guardians of the natural environment."[7] However, because tribal law is derived from Indian custom, tradition, religion, and other pervasive beliefs, tribal law is falsely assumed to be adverse to state and federal law.[8] Ironically, the principles that are used to discount the validity of tribal law are the same principles that the EPA encourages American Indians to use when setting water quality standards and that the Obama Administration has deemed necessary to achieve national goals under the CWA.[9] Less than three percent of the world's legal systems possess the same mix of customary and common law as American Indians.[10] Therefore, states may be more apt to recognize the legitimacy of Indian legal systems when they see that Louisiana possesses a similar legal construct.

Because water is the lifeblood of American Indians and their culture, it is imperative that tribes protect the quality of reservation waters.[11] Therefore, tribes should take their rightful place as coequal sovereigns under the TAS doctrine of the CWA and protect reservation waters by setting stringent water quality standards.

Part II of this Comment will briefly discuss the unique parameters of tribal sovereignty, how the EPA has supported American Indians via the TAS doctrine under the CWA, and how the courts have paved the way for tribal control over water quality, both within and without reservation borders. Then, Part III explains how the pervasive conceptions of custom and tradition holistically form the basis of tribal law and how they support tribal sovereignty. Part III also reveals that American Indian

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5. *See infra* Part II.B.; EPA, Memorandum on Tribal Consultation (Nov. 5, 2009); EPA, Memorandum Reaffirming EPA Indian Policy (July 22, 2009), *available at* http://www.epa.gov/indian/pdf/reaffirmation-memo-epa-indian-policy-7-22-09.pdf.

6. *See* EPA, Am. Indian Tribal Portal, Am. Indian Envtl. Office, Mission Statement, http://www.epa.gov/aieo/ (last visited Mar. 15, 2010).

7. *See* Robert D. Cooter & Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 AM. J. COMP L. 29, 47 (2008).

8. *See id.* at 48.

9. *See* Kannler, *supra* note 2, at 63-64.

10. *See* Esin Örücü, *What Is a Mixed Legal System: Exclusion or Expansion?*, ELECTRONIC J. COMP. L. (May 2008), http://www.ejcl.org/121/art121-15.pdf.

11. *See* Jana L. Walker & Susan M. Williams, *Indian Reserved Water Rights*, *in* THE NATURAL RESOURCES LAW MANUAL 434 (Richard J. Fink ed., 1995).

legal systems developed under the same pattern and process as the third legal family, which demonstrates that the difference between Louisiana law and American Indian jurisdictions may be more a matter of degree than kind.[12] Finally, Part IV analyzes how the EPA, through the CWA and its TAS doctrine, has provided a conduit for the federal judiciary to recognize and support the legitimacy of tribal law.

II. BACKGROUND

A. Tribal Sovereignty and the Federal Government's Fiduciary Duty as Trustee

When Chief Justice Marshall penned the seminal case on American Indian tribal status, the United States Supreme Court acknowledged that tribes are political entities who possess inherent sovereignty, separate and apart from both the federal government and states.[13] Though Marshall declared that tribes are "capable of managing [their] own affairs and governing [themselves]," he explained that tribes are more appropriately deemed "domestic dependent nations" because of the ward-like relationship and territorial congruence between tribes and the United States.[14] However, tribes have retained all sovereign rights not ceded under treaty nor diminished by the United States, including the power to make and enforce their own laws within tribal jurisdiction.[15]

In fact, tribes have always maintained their sovereign right to protect the environment through tribal law.[16] For example, once a tribe demonstrates that it has authority over waters and the EPA grants TAS status, the CWA acts as a vehicle to enforce the tribe's sovereign right to regulate and set water quality standards, which states must respect.[17] Consequently, the CWA is not a *grant* of conferred authority; rather, the CWA is a federal *acknowledgement* that tribes possess inherent authority due to their status as sovereigns.[18] Conversely, as trustee for American Indian tribes, the United States may preempt tribal authority.[19] Pursuant

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12. Vernon Valentine Palmer coined the term "third legal family," which he uses in reference to the categorization of classical mixed jurisdictions. *See* VERNON VALENTINE PALMER, MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 3-10 (Vernon Valentine Palmer ed., Cambridge Univ. Press 2006) (2001).

13. Cherokee Nation v. Georgia, 30 U.S. (1 Pet.) 1, 16 (1831).

14. *See id.* at 16-18; FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 234-35 (1982).

15. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

16. *See* Montana v. United States, 450 U.S. 544, 566 (1981).

17. *See* Kannler, *supra* note 2, at 58-59.

18. *Id.*

19. *See* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764 (1985); United States v. Wheeler, 435 U.S. 313, 319 (1978).

to its fiduciary duty to protect Indian interests, the EPA may set water quality standards for reservations and specify how tribes are to regulate water quality.[20] The Obama Administration, however, has proposed a $41.4 million increase in tribal funding for fiscal year 2011 because the federal government prefers that tribes set their own standards, yet recognizes that tribes may lack the resources to support reservation water quality programs.[21] Additionally, as a result of President Reagan's 1983 Federal Indian Policy and corresponding Executive Order, in 1984, the EPA became the first federal agency to adopt a formal Indian Policy.[22] On July 22, 2009, the Obama Administration reaffirmed this policy, noting that the EPA recognizes tribal sovereignty, the "federal government's trust responsibility to tribes," and that the EPA will work "with tribes on a government-to-government basis to protect" water quality on reservations.[23]

In sum, the EPA will uphold its fiduciary duty to protect and regulate water quality on reservations by ensuring that reservation waters meet federal water quality standards.[24] However, by qualifying for TAS status under the CWA, a tribe may assert its inherent authority to set more stringent standards.[25] While the latter is preferable, the former at least protects the water that is essential to tribal culture and life.[26]

B. "Treatment in the Same Manner as a State" Really Means Treating Tribes as States

While Congress entrusted the EPA to administer the CWA, and specifically to uphold stringent federal water quality standards, Congress also protected federalism by explicitly reserving state sovereign rights to regulate water quality.[27] Though conditioned on EPA approval, the

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20. *See* Kannler, *supra* note 2, at 62-64.

21. *See id.* at 64; Press Release, EPA, EPA's Budget Proposal Provides Millions in Increased Environmental Protection for Tribal Nations throughout U.S. (Feb. 4, 2010), *available at* http://www.epa.gov/newsroom/newsreleases.htm (search by date).

22. *See* Presidential Commission on Indian Reservation Economies, 48 Fed. Reg. 2309 (Jan. 18, 1983); EPA, EPA Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984), *available at* http://www.epa.gov/superfund/community/relocation/policy.htm.

23. *See* Memorandum Reaffirming EPA Indian Policy, *supra* note 5.

24. *See* Kannler, *supra* note 2, at 62.

25. *See* City of Albuquerque v. Browner, 97 F.3d 415, 423 (10th Cir. 1996); AMERICAN INDIAN LAW DESKBOOK: CONFERENCE OF WESTERN ATTORNEYS GENERAL 290 (Joseph P. Mazurek et al. eds., 2d ed. 1998)).

26. *See* Kannler, *supra* note 2, at 64.

27. *See* Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended at 33 U.S.C. §§ 1251-1387, 1251(b) (2006)); Christopher Rycewicz & Dan Mensher, *Growing State Authority Under the Clean Water Act*, 22 NAT. RESOURCES & ENV'T 57, 57 (2007).

primary vehicle for state regulation of water quality is through the issuance of National Pollution Discharge Elimination System (NPDES) permits, via Section 404 of the CWA.[28] Because the CWA prohibits "the discharge of any pollutant by any person . . . except as in compliance with" an otherwise authorized permit under the CWA, these state permits are essentially "permits to pollute" that recognize technological limitations on the complete eradication of pollution.[29]

The 1987 Amendments to the CWA marked a pivotal moment in the recognition of tribal sovereignty because the EPA was required to treat federally recognized and statutorily approved tribes in the same manner as a state (i.e., TAS status) "to the degree necessary to carry out the objectives" of the CWA.[30] While TAS status is not automatic, once granted, it places tribes on equal footing with states and allows tribes to set enforceable water quality standards under the CWA.[31] Accordingly, tribes may adopt the EPA's standards or set water quality standards that are more stringent than federal mandate.[32] This has become the primary point of contention for states because tribal water quality standards may limit or prohibit the ability of upstream states to issue NPDES permits.[33]

Nevertheless, it is clear that the TAS doctrine under the CWA establishes tribes as coequal sovereigns and solidifies tribal rights to set stringent water quality standards for national waters affecting American Indian reservations.[34]

C. Courts Carefully Lengthen the Arm of Tribal Jurisdiction under the TAS Doctrine

Unlike states, whose sovereignty is not limited by property rights, tribes historically only had jurisdiction to enforce environmental laws within their reservation.[35] However, in recognition of tribes' inherent

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28. 33 U.S.C. §§ 1342(b), 1344(g); *see* Victor B. Flatt, *A Dirty River Runs Through It: The Failure of Enforcement in the Clean Water Act*, 25 B.C. ENVTL. AFF. L. REV. 1, 7 (1997).

29. 33 U.S.C § 1311(a); *see* Natural Res. Def. Council, Inc. v. Costle, 568 F.2d 1369, 1374 (D.C. Cir. 1977); RICHARD CAPLAN, PERMIT TO POLLUTE: HOW THE GOVERNMENT'S LAX ENFORCEMENT OF THE CLEAN WATER ACT IS POISONING OUR WATERS 7 (2002).

30. 33 U.S.C. §§ 1377(a), 1377(e).

31. *See* Erickson, *supra* note 3, at 432.

32. 40 C.F.R. 131.4(a) (2000).

33. *See* 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, 332-34 (2002).

34. *Id.* at 347; *see* City of Albuquerque v. Browner, 97 F.3d 415, 423 (10th Cir. 1996).

35. *See* H. Scott Althouse, *Idaho Nibbles at Montana: Carving Out a Third Exception for tribal Jurisdiction Over Environmental and Natural Resource Management*, 31 ENVTL. L. 721, 747 (2001); Kannler *supra* note 2, at 58.

authority to protect their members and the mobile nature of water pollution, the Supreme Court and circuit courts have created exceptions that allow tribes to exercise jurisdiction over nonmembers on non-Indian land.

For example, in *Winters v. United States*, the Supreme Court first recognized that tribes retain water rights even when a treaty does not expressly reserve said rights.[36] According to the *Winters* doctrine, ambiguity should be interpreted in accordance with the Indian perspective of the situation.[37] Therefore, when a treaty or statute does not include an explicit divesting provision, tribes indefinitely retain reserved water rights because of their inherent authority as sovereigns.[38]

One of the most significant expansions of tribal jurisdiction was announced in *Montana v. United States*.[39] The Court provided an exception to the general rule that tribes may not regulate nonmember activity on non-Indian land.[40] According to the exception, tribes may exercise authority to regulate upstream nonmember polluters on non-Indian land when their conduct threatens or could adversely affect the "health or welfare of the tribe."[41] Additionally, the United States Court of Appeals for the Ninth Circuit upheld the EPA's presumption that tribes possess inherent authority over regulating water quality.[42] Because the mobility of pollutants within a unitary water system *could* create a serious and substantial threat to the health and welfare of a tribe, the *Montana* exception permits the EPA to enforce reservation water quality standards as a valid exercise of inherent tribal authority over nonmembers under the TAS doctrine.[43]

As a further expression of inherent power, in *City of Albuquerque v. Browner*, the United States Court of Appeals for the Tenth Circuit made two significant findings.[44] First, section 518 of the CWA allows tribes to establish water quality standards more stringent than federal minimums.[45]

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36. 207 U.S. 564, 565-67 (1908).

37. *See id.*

38. See Edmund J. Goodman, *Indian Tribal Sovereignty and Water Resources: Watersheds, Ecosystems and Tribal Co-Management*, 20 J. LAND RESOURCES & ENVTL. L. 185, 193-94 (2000).

39. 450 U.S. 544 (1981).

40. *See id.* at 565-66.

41. *See id.*

42. *See* Montana v. EPA, 137 F.3d 1135, 1138-41; Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,878-79 (Dec. 12, 1991) (codified at 40 C.F.R. § 131 (2000)) [hereinafter Standards on Indian Reservations].

43. *See Montana*, 137 F.3d at 1138-42.

44. 97 F.3d 415 (10th Cir. 1996).

45. *Id.* at 423.

Tribes are not to be treated as second-class sovereigns; rather, the TAS doctrine places tribes and states as coequals under the CWA.[46] Second, the EPA may enforce tribal water quality standards beyond reservation territory.[47] According to its statutory authority to promulgate and enforce regulations or NPDES permits, the EPA may require upstream point source dischargers of pollution to comply with downstream water quality standards.[48] Though stringent tribal water quality standards may affect extraterritorial activities, the TAS doctrine enables tribes to protect their people, culture, and environment by regulating reservation waters.[49]

Consequently, the federal judiciary has in essence served tribes TAS status to administer water quality standards on a silver platter. It is now up to federally recognized tribes to serve themselves.

III. AMERICAN INDIAN LEGAL SYSTEMS: NEW GROWTH ON THE MIXED JURISDICTION FAMILY TREE

The thesis presented in this Part traces its roots to the groundwork of tribal law, but begins to branch out through the concept of mixed jurisdiction. To avoid getting lost in the dense forest of mixed jurisdictions, it is important to understand where tribal law fits in the specific environment of mixed jurisdictions. In subsequent discussions, civil law is uprooted from the classical theory and tribal law is planted in its place. The rationale behind this transplant is the postulation that these two seemingly disparate legal systems are actually of the same flora. Thus it is believed that American Indian legal systems can be effectively analogized to Louisiana's legal structure and corresponding legitimacy to set water quality standards under the CWA.

A. Tribal Law Concepts: Custom Is Law

There are some very important factors that led early scholars to assume American Indians were lawless. First, Indian tribes are traditionally oral societies.[50] Consequently, their law lives in oral tradition, and those tribes that did reduce tribal law to writing did not do so until the 1960s.[51] As one tribal judge said, "In a culture in which so

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46. *See* Drucker, *supra* note 33, at 374; Standards on Indian Reservations, 56 Fed. Reg. 64,876.
47. *Albuquerque*, 97 F.3d at 424 (noting the EPA, not tribes, seeks enforcement of CWA).
48. Arkansas v. Oklahoma, 503 U.S. 91, 105 (1992).
49. *Albuquerque*, 97 F.3d at 424.
50. *See* Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL'Y 17, 26 (1997).
51. *See id.*; Cooter & Fikentscher, *supra* note 7, at 30.

much rests on oral tradition, a given word weighs much more than in a culture that writes."[52] Because custom cannot always be accurately put into written words, Indians fear the dangers of "freezing" tribal law or "getting it wrong."[53] Additionally, many Indian ideas and words are impossible to explain in English because there is no equivalent thought.[54] Second, culture was not recognized as law because it was not conceived within the typical confines of formal rulemaking and enforcement.[55] In fact, the 1971 Restatement (Second) of Conflicts of Law refused to recognize custom as law, and instead categorized American Indian tribal law as religion.[56] Ironically, common-law laws developed in part from custom, and civil law identifies custom as a source of law, second only to legislation.[57] Therefore, it is anomalous for states to contend that water quality standards based on Indian custom are per se arbitrary and capricious.[58]

Despite governmental efforts to conquer and confine American Indians, their customs and traditions, both of which embody legal concepts of justice and fairness, have prevailed.[59] Custom, as it refers to tribal law, is more than a commonly held belief or value that influences social behavior; it is law.[60] For example, if custom is commonly recognized and given unvaried authority within a tribe, it can form the *ius*, or law, before the custom is officially codified.[61] Under this principle, custom is more than mere group values.[62] Because Indian custom may embody a more general goal of reaching harmony or of following a common tenet, it has been viewed as *leges*, or abstract rules.[63] Literate societies may put *leges* in the form of legal codification, whereas

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52. *See* Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts* (pt. 1), 46 AM. J. COMP. L. 287, 313 (1998).

53. Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness-[Re]Incorporating Customs and Traditions into Tribal Law*, 1 TRIBAL L.J. (2000-2001), *available at* http://tlj.unm.edu/tribal-law-journal/articles/volume_1/zuni_cruz/index.php.

54. *See* Zuni, *supra* note 50, at app. A; *see also* Cooter & Fikentscher, *supra* note 52, at 312.

55. *See* Cooter & Fikentscher, *supra* note 52, at 315.

56. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 2 cmt. C (1971).

57. LA. CIV. CODE ANN. arts. 1, 3 (2009); BLACK'S LAW DICTIONARY 313-14 (9th ed. 2009).

58. *See* City of Albuquerque v. Browner, 97 F.3d 415, 426 (10th Cir. 1996).

59. *See* Cooter & Fikentscher, *supra* note 52, at 313.

60. *See* Zuni, *supra* note 50, at 22-23.

61. Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319, 352 (2007-2008); *see* Zuni, *supra* note 50, at 22-23.

62. *See* Sekaquaptewa, *supra* note 61, at 352.

63. *See* LEOPOLD POSPISIL, ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY 2, 37 (1971).

leges are embodied through verbalized ideas in oral or preliterate societies.[64] Whether written or oral, *leges* are considered *ius* when their authority is recognized through long-established usage and practice.[65] Therefore, custom does not automatically become law solely because it exists and is accepted within an Indian tribe.[66] Rather, custom remains a value or moral belief until a tribe gives it authority through legal use or practice.[67] However, custom did not need the Western import of a formalized court system to become enforceable law.[68] Tribes used custom as the means to resolve conflict well before any contact with Europeans.[69] Additionally, because custom promotes efficiency and fairness without ignoring the larger context of societal unity, tribal law is well-served by its judges' reliance on custom to render decisions.[70] In fact, the Navajo Tribal Code mandates the use of custom as the primary source of law, save any federal law prohibitions.[71]

Whereas custom is a source of law, tradition may speak more to the method or process by which tribal law is administered and handed down through the generations.[72] Tradition may not be *something* or a specific process, but rather a *way* of looking at a situation.[73] In this respect, Western legal systems would demand a rule, such as an ordinance that prohibits dumping within one mile of a river. Tribal law, however, may not be so explicit, but may still reach the same conclusion. Through the principle of maintaining holistic harmony, Indians may forbid such dumping because it would create an imbalance in nature.

While custom and tradition can form disparate roles in the tribal legal construct, these words may not accurately account for the multifarious nature of tribal law among American Indians. For example, a tribal judge deferring either to what is customary or to what is in accordance with tradition are both examples of how tribal law can

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64. *See id.* at 19 (citing KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 20-22 (1961)); Zuni, *supra* note 50, at 22-23.

65. *See* POSPISIL, *supra* note 63, at 37; Zuni, *supra* note 50, at 22-23.

66. *See* Sekaquaptewa, *supra* note 61, at 351-52.

67. *See id.* at 352; Zuni, *supra* note 50, at 22.

68. *See* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 12 (1994) ("There is no question that these societies had sophisticated legal traditions, bodies of unwritten law that were understood by all the people and applied through tribal legal processes.").

69. *See* Cooter & Fikentscher, *supra* note 52, at 299.

70. *See id.* at 315-16.

71. NAVAJO NATION CODE tit. 7 § 204.

72. *See* Zuni, *supra* note 50, at 23.

73. *See* JUSTIN B. RICHLAND, ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT 157-59 (2008).

function, but neither encompasses the totality or complexity of tribal law. Some scholars have broken tribal law into three components, namely norms, structures, and practices.[74] Norms are the "*values* and *beliefs* held by a community" that dictate how to act in everyday life or within the legal realm. A tribe's commonly held norm of creating balance in all instances therefore may emerge as custom and tradition in the wholeness of tribal law.[75] Structures are both the roles of legal actors and the body in which they act. However, custom and tradition may control not only who is the decision maker in a case, but also what forum is appropriate.[76] Because what is actually done by the legal actors may be controlled by a tribe's pervasive principled objectives, practices could also embody custom and tradition.[77] Thus, the predominant role of custom and tradition in tribal law is neither easily reduced to the Western conception of these words nor compartmentalized into one area of tribal law.[78] It seems that custom and tradition constitute law on a more holistic level, where American Indians do not look to a specific *rule* as law.[79] Rather, tribal law is more of a fundamental *way*, applicable to various situations, that ultimately creates justice through enforcement of pervasive tribal norms.[80]

B. Mixed Jurisdictions: Indian Legal Systems, Louisiana, and the Third Legal Family—Cut From the Same Cloth

The uniquely distinct realm of mixed jurisdictions presents a curious study of the complex interplay of political, economic, and cultural influences on the legal system of a given sovereign.[81] While mixed jurisdictions formed at different points in history and under diverse circumstances, there are certain common characteristics that transcend space and time to bond them into a metaphoric family.[82] Seemingly unrelated to one another, American Indian jurisdictions are sovereign entities that possess their own legal systems.[83] However, early tribal law of many American Indian tribes and nations shared

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74. *See* Justin B. Richland & Sarah Deer, *Notes on Law, Non-Indian Anthropologists, and Terminology*, *in* INTRODUCTION TO TRIBAL LEGAL STUDIES 4 (Jerry Gardner ed., 2004).
75. *See id.* at 4-5.
76. *See id.* at 5-8.
77. *See id.*
78. *See* Zuni Cruz, *supra* note 53.
79. *See, e.g.*, Cooter & Fikentscher, *supra* note 52, at 326.
80. *See id.* at 314; Zuni Cruz, *supra* note 53.
81. *See* PALMER, *supra* note 12, at 3-10.
82. *See id.* at 7-14.
83. *See* Cooter & Fikentscher, *supra* note 52, at 293-94.

fundamental principles with civilian law and experienced substantially similar common law pressures as Louisiana and other classical mixed jurisdictions.[84] The resulting American Indian legal system appears to contain a genetic structure akin to the rest of the classical mixed jurisdiction family, particularly Louisiana.

At first glance, tribal law may not appear to fit the scope of a classical mixed jurisdiction because much of its early fundamental laws were based on a delicate interplay of tradition and culture with what could be considered natural law. However, many American Indian tribunals defer to these pervasive principles and objectives when rendering a decision, much like civilian jurisdictions defer to their codified laws.[85] In this respect, American Indian principles of custom, tradition, and balanced relationships are used as the primary source of law.[86] Though American Indians were mandated to adopt Anglo-American common law structure and practice in some respects, American Indians have battled to retain their own legal systems and judicial practices.[87] Traditional tribal courts, and some specially designed courts, are mandated to render decisions based solely on tradition, custom, or whatever would create balance and harmony under the unique facts of each case.[88] Thus tribes not only recognized their roots, but also resisted further import of Anglo-American law.[89] The resulting American Indian legal systems possess a bijural mixture of tribal law and common law. However, the tribal law component seems exceedingly analogous to Civilian Law and its corresponding role in the classical mixed jurisdiction. From this premise, what separates the "mixity" of tribal law and Common Law from the third legal family may be more a matter of degree than a matter of kind.[90]

Vernon Valentine Palmer pioneered a comparative law movement to study mixed jurisdictions in terms of what he calls the "third legal

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84. *Compare* PALMER, *supra* note 12, at 3-76 (explaining the formation of the classical mixed jurisdiction), *with id.* at 290-99, 325-29 (describing the role of custom in tribal law and how it is similar or dissimilar from Civil or Common Law).

85. *See* Cooter & Fikentscher, *supra* note 7, at 32; Cooter & Fikentscher, *supra* note 52, at 294.

86. *See* NAVAJO NATION CODE tit. 7, § 204 (1995) (mandating custom as the primary source of law); Cooter & Fikentscher, *supra* note 52, at 315-16.

87. *See* Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 238-44 (1994).

88. *See* Cooter & Fikentscher, *supra* note 52, at 314-16.

89. *See id.* at 291.

90. *See* Christopher J. Roederer, *Working the Common Law Pure: Developing the Law of Delict (Torts) in Light of the Spirit, Purport and Objects of South Africa's Bill of Rights*, 26 ARIZ. J. INT'L & COMP. L. 427, 433 (2009).

family."[91] Palmer recognized the possibility that mixed jurisdictions and their study could be dismissed as a result of their marginalization in recent works and by comparative law writers' failure to classify them.[92] In fact, some modern comparatists completely abandon the classical framework, which "makes the mixing process itself the centerpiece of analysis [and] destroys any assurance that fruitful comparisons can be made between [the] *neo*-mixed and classically mixed systems."[93] Palmer therefore not only gave mixed jurisdictions an identity, but he also set forth three fundamental features that characterize mixed jurisdictions and distinguish them from other legal systems.[94] First, civil law and common law form the sole legal foundations upon which the jurisdiction was built.[95] This feature creates a narrow focus on the specific legal mixture to which mixed jurisdictions refer.[96] Therefore, the third legal family is more than a mere mixing of legal systems or legal pluralism.[97] Second, the presence of both civil law and common law must be *obvious* to the ordinary observer.[98] Palmer posits that recognition of the mixture depends on the quantitative presence of each system and the jurisdiction's own acknowledgement of its bijurality.[99] Third, civil law controls the realm of private law, whereas common law dominates the realm of public law.[100] Palmer's proffered characteristics emphasize the *nature* of the mixture rather than the mere *presence* of a bijurality.[101]

Many comparative law scholars echo Palmer's cry for classification and praise his work for advancing the study of mixed jurisdictions, yet some criticize the narrow scope of Palmer's criteria or the nameplate he adopted. Professor Christopher J. Roederer, for example, points out that many jurisdictions are excluded from the family solely because their

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91. *See* PALMER, *supra* note 12, at 4.

92. Vernon V. Palmer, *Two Rival Theories of Mixed Legal Systems*, vol. 12 ELEC. J. COMP. L. 2 (May 2008), http://www.ejcl.org/121/art121-16.pdf.

93. *See* PALMER, *supra* note 12, at 11.

94. *See id.* at 7-9.

95. *See id.* at 7-8.

96. *See id.* at 7.

97. *See id.*; Roederer, *supra* note 90, at 433-34. Pluralist systems are generally considered systems in which two or more legal traditions coexist within a jurisdiction, yet apply to separate classifications of the population and do not mix. Roederer, *supra* note 90, at 432 n.13.

98. *See* PALMER, *supra* note 12, at 8.

99. *See id.*

100. *See id.* Palmer concedes that neither legal sphere is purely Civil nor Common, but emphasizes that each sphere is predominantly Civil or Common respectively. In fact, indigenous law, Palmer states, may be present in either sphere. *Id.* at 9.

101. *See* Kenneth G.C. Reid, *First Worldwide Congress on Mixed Jurisdiction: Salience and Unity in the Mixed Jurisdiction Experience: Traits, Patterns, Culture, Commonalities: The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 5, 10 (2003).

legal foundation is a mixture of some other legal system and civil or common law.[102] This narrow interpretation, Roederer argues, "implies that there are only two great [legal] families" and undeservedly excludes jurisdictions where the mixture is between indigenous or religious law and colonial law.[103] Palmer acknowledges that there are many jurisdictions that possess a mixture of legal systems; however, Palmer's third legal family refers explicitly to the "classical" mixed jurisdiction.[104] The term "classical" demarcates the well-known and historically accepted group of jurisdictions with *numerus clausus* and Western-centric legal foundations.[105]

The objectives and perspective of the individual jurist dictate how one defines a mixed jurisdiction, but ultimately, classification should "cut through to the really essential distinctions" that form the basis of comparison.[106] Historically, Western comparatists, steeped in the traditions of civil and common law, have studied mixed jurisdictions.[107] Consequently, it is not surprising that the classical mixed jurisdiction classification is well-justified by the genetic similarities between the recognized members of the third legal family.[108] Professor Ignazio Castellucci gives a genteel curtsey to the classical mixed jurisdiction by acknowledging its classificatory relevance, but fears that such a classification simply enumerates a list of *items* required for acceptance by the third family and ignores common *features* of the family that would metaphorically sign the adoption papers for other jurisdictions.[109] Palmer's perspective on the classical theory appears to have broadened ever so slightly, which almost seems to come as an answer to the taxonomy proposed by other comparatists.[110] When explaining new classifications or the current jurisdictional remixing, Palmer states that pluralistic comparatists should be guided by the concept of finding our neighbors in law.[111]

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102. *See* Roederer, *supra* note 90, at 433.

103. *See id.* at 433-34.

104. *See* PALMER, *supra* note 12, at 7-9.

105. *See* Palmer, *supra* note 92, at 6; Ignazio Castellucci, *How Mixed Must a Mixed System Be?*, ELECTRONIC J. COMP. L. (2008), http://www.ejcl.org/121/art121-4.pdf.

106. *See* Palmer, *supra* note 92, at 6.

107. *See* Roederer, *supra* note 90, at 433.

108. *See id.*; Palmer, *supra* note 92, at 4.

109. *See* Castellucci, *supra* note 105, at 3.

110. *Compare* Palmer, *supra* note 12, at 7-9 (adopting strict criterion for the classical theory), *with* Vernon Valentine Palmer, *Mixed Legal Systems . . . and the Myth of Pure Laws*, 67 LA. L. REV. 1205, 1218 (2007) (acknowledging that a factual approach reveals that mixed jurisdictions are a living process), and Palmer, *supra* note 92, at 22-23 (inviting a pluralistic approach as a compliment to the classical theory, but denying the current feasibility).

111. *See* Palmer, *supra* note 92, at 22.

C. Tribal Law in Practice: Drawing the Analogy

When considered within the specific context of this Part's analogous supposition, the classical mixed jurisdiction would not be bastardized by the familial addition of most American Indian jurisdictions.[112] Instead, tribal law functions so similarly to civil law within the classical mixed jurisdiction construct, that neither a new classification nor a pluralistic approach is necessary for the fruitful comparative study of American Indian jurisdictions. Some American Indian legal systems contain a mixity where tribal law may sufficiently supplant the Civil Law component of the classic dual legal foundation without compromising mixed jurisdiction classification.[113]

The use of analogy in this Part is, by no means, intended to indicate that tribal law is somehow dependant on mixed jurisdictions for validation, nor vice versa. However, their inherent similarities affords tribal law the benefit of identification and validity.[114] In regard to mixed jurisdictions,

> [t]he challenge that demands our attention is to contribute to the quality of our respective systems by making the most of what a newfound awareness of our shared experiences has to offer. It is hoped that a greater understanding of the patterns and processes that formed our systems can contribute to this end.[115]

1. Twins or Identical Cousins: Tribal Law's Mirroring of Civil Law

Most American Indian legal scholarship is intended to create a greater understanding of tribal law or discuss pervasive issues

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112. Palmer explains that classification:

> '[A]ll depends on the point of view adopted by the writer in question and the aspects of the matter which interest him most.' If a grouping is well-justified, a presumption of similarity may ensue. . . . Further, the criteria may lead us to comparable systems never previously considered as being similar to ones we already know, and thus we may discover a new field of comparative law.

Id. at 3-4 (quoting RENÉ DAVID, LES GRANDS SYSTEMES DE DROIT COMPARÉ 22 (2002)).

113. *See* PALMER, *supra* note 12, at 7.

114. *See* Dale Beck Furnish, *Sorting Out Civil Jurisdiction in Indian Country After Plains Commerce Bank: State Courts and the Judicial Sovereignty of the Navajo Nation*, 33 AM. INDIAN L. REV. 385, 455 (2008-2009) (indicating the possibility of evaluating American Indian legal jurisdictions as mixed jurisdictions); *see also* Dale Beck Furnish, *The Navajo Nation: A Three-Ingredient Mix*, 12.1 ELECTRONIC J. COMP. L., *available at* http://www.ejcl.org/121/art121-8.pdf [hereinafter Furnish, *Three-Ingredient Mix*] (discussing the mixity of Navajo Nation law).

115. Jacques du Plessis, *First Worldwide Congress on Mixed Jurisdiction: Salience and Unity in the Mixed Jurisdiction Experience: Traits, Patterns, Culture, Commonalities: Common Law Influences on the Law of Contract and Unjustified Enrichment in Some Mixed Legal Systems*, 78 TUL. L. REV. 219, 256 (2003).

surrounding tribal life. It seems that Indian scholars believe tribal law would benefit from an associative relationship with American common law. This conclusion is drawn from the abundance of articles and books aimed at defining tribal law in terms of Indian common law. As James Zion wrote,

> For the purpose of a rational discussion of Indian customary law, it is best to use the term "Indian Common Law." Indian government, law and daily life are founded upon long-standing and strong customs, and since the stated rationale for the English Common Law is that it is a product of custom, that approach may be used for Indian law as well. Indians have every right to assert that their law stands on the same footing as the laws of the United States . . . . It is unfortunate that the term "custom" implies something that is somehow less or of lower degree than "law."[116]

Because a wholesale adoption of the indigenous—common law mixity is currently too peripheral for Palmer's classical mixed jurisdiction classification, the subsequent discussion develops the parallel features of tribal law and civilian law.[117]

Civil law, as Professor Rene David describes it, "consists essentially of a 'style': it is a particular mode of conception, expression and application of the law, and transcends legislative policies that change with the times in the various periods of the history of a people."[118] Like civil law, tribal law applies broad principles of law and consistently defers to the law anew in each case.[119] Though tribal law uses custom as the primary source of law and most civilian jurisdictions use code, the *way* each system applies the law is of the same style. Essentially, the comparison of tribal law and civil law is based on the similarity of their process, not appearance. In other words, tribal law may be viewed as civil law's fraternal twin. While they may not look alike, they share the same functional genetic makeup.

2. Mirroring: Obligations and Delict

The civil law concept of obligations, which embodies the enforceability of promises, is grounded in the principle *solo consensus obligat*.[120] Unlike common law, consideration is not a factor.[121] Under

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116. James W. Zion, *Searching for Indian Common Law*, *in* INDIGENOUS LAW AND THE STATE 121-48 (B.W. Morse & G.R. Woodman eds., 1988).

117. *See* Palmer, *supra* note 92, at 15, 23.

118. William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 683 n.21 (2000).

119. *See id.* at 683.

120. PALMER, *supra* note 12, at 9.

tribal law of the White Mountain Apache, Jicarilla Apache, Kaibob Painte, Acoma, and Tesuque tribes, mutual consent will form a binding promise.[122] Similarly, mere offer and acceptance is all the Rio Grande Pueblos require for an enforceable agreement.[123] When breach of contract becomes an issue, tribes use the Indian custom of repairing relationships to demand specific performance, not damages.[124] Likewise, civil law favors the remedy of specific performance in breach of contract actions.[125]

Additionally, American Indians' pervasive beliefs in harmony and balance meld with the civil law concept of *obligatio*.[126] Many American Indians believe *obligatio* is the hallmark of custom, which forms tribal law.[127] In fact, *obligatio* is recognized in both private and public delict.[128] For example, a Hopi woman possesses the requisite *culpa* for breach if she does not plant and supply certain crops for ceremonies.[129] Her *culpa* extends to both her husband (private delict) and the clan (public delict) for breaching her duty to support ceremonial functions, which is tied to personal rights.[130] While this duty may seem trivial to non-Indians, a Hopi woman's role and corresponding efforts are essential to Hopi life.[131] The damage caused by her breach is recoverable under tribal law, much as it is under civilian law.[132] Though violations of natural obligations may not be recoverable under some civilian codes, American Indian conceptions of custom impute some obligations that would not be recognized by non-Indian jurisdictions.[133] This is more a matter of a

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121. *See* Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts* (pt. 2), 46 AM. J. COMP L. 509, 547, 549 (1998).

122. *Id.* at 548 ("Neither writing, nor consideration, nor witnesses is required.").

123. *Id.*

124. *Id.* at 549 (quoting Chief Judge Carey Vicenti of Jicarilla Apache tribe).

125. *Id.*

126.

> [Obligatio] refers to that part of a decision which states the rights of one party to a dispute and the duties of the other. . . . It also describes the delict, showing how the relations became unbalanced by the act of the defendant. Thus the concept is a statement about a social relationship.

POSPISIL, *supra* note 63, at 81-82.

127. *See* Sekaquaptewa, *supra* note 61, at 356.

128. *See id.* at 256-65 (citing various Hopi hearing transcripts, statements, and judicial opinions).

129. *See id.* at 357-59.

130. *See id.*

131. *See id.* at 359-60.

132. *See, e.g.*, LA. CIV. CODE ANN. art. 2315 (2010).

133. *See* LA. CIV. CODE ANN. art. 1761 (refusing to recognize natural obligations).

difference in substantive law than practice, and therefore does not impact the similarity in function.

3. Mirroring: Stare Decisis

Most tribal courts have little incentive to record case opinions because judges base their decisions on pervasive tribal custom or tribal code and rarely refer to precedent.[134] When deciding a case, common law judges focus on the facts of the case before them and evaluate the facts in relation to prior cases.[135] Conversely, civilian judges use legal principles, irrespective of codification, and determine their relevance to the specific case.[136] As Cooter and Fikentscher observed, judges write their orders, but they seldom write their opinions.[137] However, when opinions are recorded, they are typically concise, like civilian jurists'. Those judges who do write their opinions will initially describe the operable facts of the case and enunciate the applicable law, then render their opinion on how the law should be applied.[138] This process is significant because of the *way* tribal judges apply the law.[139] A tribal judge's methodology exemplifies the Continental European theory of subsumption, placing something specific under something general.[140] Under both tribal law and civil law, the specific element refers to the facts of the present case, and the general element refers to the civil law code and the tribal law code, if enacted, or the pervasive customary practice.[141]

For example, the practice of a Cherokee judge seems to embody the tenants of subsumption. Under tribal law, a judge defers to behavioral norms that personify the law and makes a decision based on how the facts of the case apply to the norm.[142] Similarly, a civilian judge defers to the code and evaluates how the specific facts of the case fit under the applicable section or article.[143] The comparable nature of these processes furthers the argument that some tribal law deference is analogous to civilian jurisdictions. How the norms (laws) are articulated provides another interesting facet to this argument. The tribal orator, a priest

134. *See* Cooter & Fikentscher, *supra* note 52, at 294, 326-28 (noting that Navajos use precedent as a resource, but it is not the basis of decision nor is it binding).
135. *See* Tetley, *supra* note 118, at 702.
136. *Id.*
137. *See* Cooter & Fikentscher, *supra* note 7, at 32.
138. *See* Richland & Deer, *supra* note 74, at 12.
139. *See* Cooter & Fikentscher, *supra* note 7, at 29, 32.
140. *See id.* at 56.
141. *See id.*
142. *See id.*
143. *See id.*

referred to as the beloved man, reads the law in a public forum once a year.[144] Though man announces the law, the orator is "reading the meaning of history and tradition," which is documented on a wampum.[145] The wampum is an ancient belt strung with colored beads, symbolizing a chronology of events and customs, which correspondingly state the law.[146] Though not all civilian or mixed jurisdictions are formally codified, the wampum may be evidence that some American Indians possess unique forms of *codes* that embody their law.

Additionally, Cherokee norms of behavior, such as harmony and compromise, are law.[147] The Cherokee view these laws as an "earthly representation of divine spirit order" of the "sovereign command from the Spirit World."[148] Consequently, the Western conception of law cannot control tribal law in some respects, because man is incapable of making law.[149] Thus, it would be out of the question for the Cherokee to have judge-made law.[150] From this principle, it may be assumed that the common law concept of *stare decisis* is inapposite to tribal law, at least with respect to those tribes and nations that adhere to similar foundational principles of law. In fact, judges are expected to use their own knowledge of tribal custom in the "righting of relationships" by either completely disregarding Western-styled legal practice or by incorporating a civilianesque process similar to that used in civil law, whereby the judge, within his own discretion, applies facts to the relevant custom.[151] This expectation bolsters the proposition that even when a tribe does not adopt a formal code, custom or another pervasive belief is the source of judicial deference. Though dissimilar in form, the practice is analogous to the way a civil law judge defers to the civil code.

The general comparison between tribal and civilian codes is that most tribes who adopt a written code follow the continental approach of adhering to the code as law.[152] In the case of tribal law, this deference may be attributable to the code's embodiment of preexisting custom. Those tribal codes that are merely reproductions of another jurisdiction's code typically mandate that custom remain the primary source of law.

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144. RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 11-12 (1975).

145. *Id.*

146. *Id.* at 11.

147. *Id.* at 10-11.

148. *See id.*

149. *See id.*

150. *Id.* ("Man might apply the divinely ordained rules, but no earthly authority was empowered to formulate rules of tribal conduct.").

151. *See* Sekaquaptewa, *supra* note 61, at 320.

152. *See* Cooter & Fikentscher, *supra* note 7, at 60.

Therefore, such codes appear to be intended to appease external pressures to codify. When a tribe chooses not to codify their laws, custom operates similarly to legal principles in other jurisdictions with uncodified civil law, such as Scotland and South Africa. This comparison exemplifies the fact that tribal law need not be codified to operate in a civilian fashion. The mirroring effect of civil law in tribal practice is essentially a product of style.

In sum, American Indian legal systems are an undeniable mix of tribal law and Anglo-American common law. An essential element of the third legal family's composition is a mixity of civil and common law. Tribal law, however, shares so many characteristics with civil law that tribal law may possess a civilian genetic makeup. In this respect, what separates the mixity of tribal law and common law from the third legal family may be more a matter of degree than of kind. From this premise, it seems that the classical mixed jurisdiction theory would not be bastardized by the inclusion of some American Indian jurisdictions.

IV. THE TAS DOCTRINE: PROTECTING SOVEREIGNTY AND THE LIFEBLOOD OF TRIBES

Water is the lifeblood of tribes.[153] In fact, "no activity on the reservation has more potential for significantly affecting" fundamental aspects of tribal life "than water use, quality and regulation."[154] It is important to note that the CWA's TAS doctrine empowers tribes to regulate and set stringent water quality standards for reservation waters.[155] Furthermore, sovereignty depends on the preservation of tribal custom, religion, health, and economy.[156] Because water is intrinsically intertwined with these fundamental aspects of tribal life, tribes must protect their water to protect their sovereignty.[157] Tribes are thus well-served by the TAS doctrine because it recognizes their inherent authority as sovereigns to protect reservation water quality, which in turn preserves tribes' culture.[158]

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153. Walker & Williams, *supra* note 11, 437.

154. *See id.*

155. *See* City of Albuquerque v. Browner, 97 F.3d 415, 423 (10th Cir. 1996); 40 C.F.R. 131.4(a) (2000).

156. *See* JEANETTE WOLFLEY & SUSAN JOHNSON, TRIBAL SOVEREIGNTY 1-2 (1996).

157. *See id.* at 5; Walker & Williams, *supra* note 11, at 437.

158. *See* WOLFLEY & JOHNSON, *supra* note 156, at 5; *Albuquerque*, 97 F.3d at 423-24.

A. Water Quality Standards: The Gateway to Protection of Tribal Culture

> From time immemorial, the original inhabitants of the North American continent have maintained a close physical and spiritual connection with the natural world. Their vision that humans are caretakers and guardians of nature implies an individual and governmental responsibility to use nature's resources with respect and reverence. For thousands of years, that responsibility was discharged within the framework of custom and tradition guiding the tribe's citizenry on tribal lands.[159]

States have challenged the EPA's approval of strict tribal water quality standards as being irrational, arbitrary, and capricious when the standards are not premised on scientific data.[160] While national technology-based effluent standards are set by the EPA and must be justified by the best available technology to control discharges, water quality standards are not.[161] Tribes need only designate a use for the water and criteria that is sufficient to preserve that use.[162] Therefore, it appears that tribes are given great deference to decide what is protected and how it must be protected.

1. Uses: What Is Protected?

American Indians are inescapably entwined with nature and view water as their lifeblood. It is not surprising then that tribes *use* water as an essential component in their customs, religion, economy, and medicine.[163] The CWA requires certain use categories to be protected, but tribes may establish other categories, provided the use and corresponding water quality standards are consistent with the CWA.[164] Presumably, if a tribe uses a river for important ceremonies and the tribe sets a strict water quality standard associated with that use, the use should be protected under the CWA because it helps "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[165] Because the EPA's presumption that the health and welfare of tribes is affected by

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159. James M. Grijalva, *Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters*, 71 N.D. L. REV. 433, 434 (1995).

160. *See Albuquerque*, 97 F.3d at 426.

161. *See* 33 U.S.C. § 1316 (2006); 40 C.F.R. §§ 405-471 (1994); EPA, REFERENCE GUIDE TO WATER QUALITY STANDARDS FOR INDIAN TRIBES, at 1 (1990).

162. *See* EPA, *supra* note 161, at 1, 6.

163. *See* Walker & Williams, supra note 11, at 437; *see also* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1099 (9th Cir. 2008).

164. *See* EPA, *supra* note 161, at 1, 7.

165. *See* 33 U.S.C. § 1251(a).

water virtually secures TAS status, cultural water uses identified by tribes will be protected under the CWA.[166] Therefore, the TAS doctrine is important not only to the protection of tribal waters, but also to the recognition of tribal law's foundation in custom and religion.

It is ironic that some federal statutes specifically designed to protect religion have failed to provide a reliable resource for Indians to protect their religion, but that the CWA, an environmental statute, has proven successful. The following cases are both from the Ninth Circuit and demonstrate how differently the court considered religion.

In *Navajo Nation v. United States Forest Service*, the Ninth Circuit refused to stop a ski resort expansion that included the daily spraying of 1.5 million gallons of treated sewage effluent on the tribe's most sacred land.[167] The effluent would render the tribe's religion impracticable, but the court reasoned that the only harm was to the "subjective spiritual experience" of the tribe.[168] Ultimately, the Ninth Circuit held that the effluent did not impose a substantial burden on the exercise of religion under the Religious Freedom Restoration Act (RFRA) because the tribe still had access to the land.[169] While it is arguable whether the court reached the correct decision, for this Comment, *Navajo Nation* shows how Indian principles of custom and tradition were not sufficient to set the standard for determining a substantial burden on the exercise of religion under the RFRA.[170]

The CWA appears to be a better vehicle to protect tribes' religion. In *City of Albuquerque v. Browner*, the Ninth Circuit upheld the EPA's approval of the tribe's water quality standard designated to protect "the use of a stream, reach, lake, or impoundment for religious or traditional purposes," which may or may not involve ingestion of water.[171] Though the city of Albuquerque claimed that the EPA's approval violated the Establishment Clause, the court denied this claim because the EPA's approval had a secular effect of advancing the CWA's goals.[172] In reaching its decision, the court focused on the EPA's purpose for approving the use, not the tribe's designation of the use for religious or

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166. EPA, Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,881 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131).

167. *See Navajo Nation*, 535 F.3d at 1070.

168. *See id.* at 1063.

169. *See id.* at 1070.

170. *See id.* at 1099-06 (Fletcher, Pregerson & Fisher, J., dissenting) (detailing the burden on tribes' customs, beliefs and way of life).

171. City of Albuquerque v. Browner, 97 F.3d 415, 423 (10th Cir. 1996).

172. *See id.*

other purposes associated with tradition.[173] Unlike *Navajo Nation*, religion and tradition were sufficient to serve as the framework for setting water quality standards under the CWA.[174]

2. Criteria: How To Protect It?

The ultimate goal of setting water quality standards is protecting its associated use. Though numeric water quality standards are more easily enforced, tribes may employ narrative statements to set standards.[175] Narrative statements may require that water be free from "discharges in amounts sufficient to be unsightly or deleterious" or that "render the waters injurious to public health" or "impair the waters for any designated use."[176] As long as the water quality standard is sufficient to put a party on notice, there is a strong presumption that narrative statements are not unconstitutionally vague.[177] Additionally, the EPA provides an administrative process through which clarification may be sought.[178] The EPA is not required to review the scientific support of narrative statements as long as the standard is more stringent than federal minimums.[179] Therefore, water quality standards based on narrative statements open the door for tribes who lack funds and infrastructure for elaborate water quality programs.

B. Legitimizing Culture: The TAS Doctrine Supports Tribal Law

The TAS doctrine accepts custom, tradition, religion, and other holistic conceptions as legitimate *uses* under the CWA. As discussed above, these fundamental principles are the basis of tribal law.[180] The EPA decides to approve or reject a use by evaluating whether it is attainable and consistent with the CWA's objective, not by evaluating the principles behind the use.[181] Additionally, water quality standards must simply be sufficient to protect the use.[182] Analogously, tribal law should

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173. *See id.*

174. *See* City of Albuquerque v. Browner, 865 F. Supp. 733, 740 (D.N.M. 1993), *cert. denied*, 522 U.S. 965 (1997).

175. *See* 40 C.F.R. 131.11(a) (2000).

176. *See* State of Mississippi Water Quality Criteria for Intrastate, Interstate, and Coastal Waters, Secs. II(2), (3) (adopted Aug. 23, 2007), *available at* http://www.deq.state.ms.us/mdeq.nsf/page/wmb_water_quality_standards?opendocument (click on "State of Mississippi Water Quality Criteria for Intrastate, Interstate, and Coastal Waters" hyperlink).

177. *See Albuquerque*, 97 F.3d at 429.

178. *See id.*

179. *See id.* at 426; Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,886 (1991).

180. *See supra* Part III.A.

181. *See* EPA, *supra* note 161, at 7-8.

182. Standards on Indian Reservations, 56 Fed. Reg. 64,876.

be accepted as coequal law because it is what American Indians decided was consistent with their objectives and the resulting legal systems are what Indians felt were sufficient to enforce tribal law. As sovereigns, they have this right. Therefore, the legitimacy of tribal law should not be evaluated on its foundational principles. Rather, the EPA accepts these foundational principles as a legitimate means to advance CWA objectives, and the TAS doctrine demonstrates that tribes, as coequal sovereigns, may have them enforced.

V. CONCLUSION

The CWA and its TAS doctrine have effectively made people aware of American Indians' rightful place as coequal sovereigns that can preserve their laws, traditions, and values. Pursuant to the TAS doctrine, the federal judiciary has recognized tribes' inherent authority as sovereigns and has solidified their right to set stringent reservation water quality standards, regardless of whether the standards affect non-Indian activities on non-Indian land.[183] While federal Indian law has not typically supported tribes' development and acceptance as independent legal systems, the CWA and its TAS doctrine are substantive acknowledgements of American Indian sovereignty.[184]

Like Louisiana, Indian jurisdictions are members of the third legal family. When evaluated juxtaposed to one another, tribal law *implicitly* gains credence through its shared pattern and process with other mixed jurisdictions. However, the CWA and other federal environmental statutes that include the TAS doctrine provide an *explicit* conduit for pervasive American Indian principles of law to stand as coequals to state law. In fact, it seems the EPA will enforce water quality standards that advance CWA goals, regardless of the tribes' basis for setting the standard.[185] Therefore, given the present dearth of statutory, judicial, and executive support, the TAS doctrine may be the most viable means to bolster the validity of tribal law. If a change in office or Supreme Court ruling alters the TAS landscape, American Indians can always turn to their relatives of the third legal family for support.

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183. *See* Montana v. United States, 450 U.S. 544, 565-66 (1981); *Albuquerque*, 97 F.3d at 423-24.

184. *See* Furnish, *Three-Ingredient Mix*, *supra* note 114, at 2.

185. *See* Janet K. Baker, *Tribal Water Quality Standards: Are There Any Limits?*, 7 DUKE ENVTL. L. & POL'Y F. 367, 385-88 (1997).