GOOD ALLIANCES MAKE GOOD NEIGHBORS: THE CASE FOR TRIBAL-STATE-FEDERAL WATERSHED PARTNERSHIPS

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SUMMARY

This paper suggests that, under the Clean Water Act of 2002,[1] Native American tribal areas increasingly will be subject to state-imposed water quality standards and management plans. The following premises support this suggestion:

- Across the United States, streams, rivers, lakes, and estuaries are impaired to an unacceptable degree.[2]
- This impairment results from the insufficiency of the technology-based controls of nonpoint sources mandated by the Clean Water Act.[3]
- Given this failure, it will be necessary to impose water quality-based standards.[4]
- For this purpose, the watershed planning and management provisions of section 303 of the Clean Water Act will be instituted.[5]
- Such watershed planning and management will encompass tribal areas.
- Two scenarios are foreseeable:
  1. Tribes will not have their own water quality standards and management plans in place, and states will feel obligated to impose their own standards and planning requirements on the tribes; or
  2. Tribes will institute their own standards and plans, but they will be inconsistent with those of the state. Hence, harmonization of state and tribal water standards will be necessary.

The federal Clean Water Act allows Indian tribes to be treated as though they were states for the purposes of the Act.[6] However, significant obstacles face tribes that seek.treatment-as-state status. States may

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1 Clean Water Act §§ 101–607, 33 U.S.C. §§1251–1387 (2002).

2 *See* Robert W. Adler, *Integrated Approaches to Water Pollution: Lessons from the Clean Air Act*, 23 HARV. ENVTL. L. REV. 203, 203 (1999).

3 *See infra* notes 49–53 and accompanying discussion.

4 *See infra* notes 68–72 and accompanying discussion.

5 *Id.*

6 Clean Water Act § 518(e), 33 U.S.C. § 1377(e) (2002).

challenge tribal jurisdiction in court[7] and through the political branches of government.[8]

Tribes that remain undeterred by these obstacles would be well-served by preparing and adopting their own water quality standards and planning. Such plans would serve as a basis for harmonizing state and tribal standards and would meet the interests of both states and tribes.

INTRODUCTION

Environmental law in the United States continues to develop through "environmental federalism."[9] Until recently, since the 1970s, the federal government has dominated environmental protection in the United States. This federalization was motivated by the "long history of state failure to protect what had come to be viewed as nationally important interests."[10] This failure prompted the federal government to enact legislation to provide a cohesive and coherent body of environmental law:[11]

First, the history of environmental regulation demonstrates that state regulation has been uneven and unreliable, a situation that is not likely to improve as environmental issues become more difficult, and hence more controversial and expensive, to resolve. Second, many remaining environmental problems, such as nonpoint source pollution and coastal pollution, are difficult in part precisely because they require coordination at a multi-state, watershed, or regional level; individual state regulation is simply insufficient.[12]

That coordination is essential in environmental law, especially given "our commitment to decentralized government and federalism, dividing sovereign responsibilities between the federal, state, tribal, and, to a lesser extent, local governmental entities."[13] Dealing with the fragmentation that can result from division of responsibilities in the environmental context is a challenge for water law generally, and for the Clean Water Act in particular. It presents special difficulties for Indian tribes in part because of the potential for competing jurisdictional interests of the states and the federal government. These difficulties could increase

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[7] *See infra* notes 182–98 and accompanying discussion.

[8] *See infra* notes 271–74 and accompanying discussion.

[9] Dean B. Suagee & John P. Lowndes, *Due Process and Public Participation in Tribal Environmental Programs*, 13 TUL. ENVTL. L.J. 1, 3 (1999).

[10] Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1144 (1995).

[11] *See id.*

[12] ROBIN KUNDIS CRAIG, THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC'S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT 3–4 (2004).

[13] RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 30 (2004).

if the current trend towards environmental federalism tips the balance of responsibility back from the federal government to the states.[14]

I. THE CLEAN WATER ACT

A. ORIGINS OF THE CWA IN THE FWPCA

The passage of the Federal Water Pollution and Control Act (FWPCA) amendments specifically reflected the extension of federal intervention into water pollution controls to fill "the gaps in pollution control, to which local efforts either could not or would not respond effectively."[15] Implementation of the Water Quality Act of 1965[16] and the Clean Water Restoration Act of 1966[17] primarily relied on cooperative compliance, using grants as incentives to states interested in improving water quality.[18] Unfortunately, this was ineffective.[19]

Prior to 1970, for example, the Secretary of the Interior had initiated only fifty enforcement actions, only one of which went to court.[20] Hence, five years after the passage of the Water Quality Act, "most of the rivers that were dirty at the time of its passage were noted 'discernibly cleaner.'"[21]

In addition to the difficulties associated with dependence on voluntary compliance, another important reason for this failure was that the FWPCA relied on ambient water quality standards as the basis for controlling pollution.[22] Three factors contributed to the ineffectiveness of this ambient water quality standards program.[23] First, water quality standards focused on the effects of water pollution rather than its causes;[24] second, responsibility for the program was awkwardly divided between state and federal governments;[25] and third, the enforcement procedures were "cumbrous."[26] Therefore, to restore the nation's rivers, lakes and estuaries, "[f]ederal superintendence was viewed as the cure for frag-

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14 Percival, *supra* note 10, at 1165.

15 N. William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality. Part III: The Federal Effort*, 52 IOWA L. REV. 799, 860 (dated incorrectly as 1957, actually published in 1967).

16 Pub. L. No. 89-234, 79 Stat. 903 (1965).

17 Pub. L. No. 89-753, 80 Stat. 1246 (1966).

18 *See* Water Quality Act of 1965 § 3, 79 Stat. at 905-06; Clean Water Restoration Act of 1966 § 201(a), 80 Stat. at 1246.

19 Envtl. Prot. Agency v. California ex rel. State Water Res. Control Bd., 426 U.S. 200, 202 (1976).

20 Marc J. Roberts, *River Basin Authorities: A National Solution to Water Pollution*, 83 HARV. L. REV. 1527, 1528 n.5 (1970).

21 *Id.* at 1529.

22 *State Water Res. Control Bd.*, 426 U.S.at 202.

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

mented jurisdictions and uneven regulation."[27] The 1972 amendments to the FWPCA were designed to provide such superintendence.[28]

B. BASIC FUNCTION OF THE FWPCA AMENDMENTS OF 1972

The basic purpose of the FWPCA, now termed the Clean Water Act, is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[29] The FWPCA attempts to achieve this by regulating the discharge of pollutants into the waters of the United States to ensure that designated uses of the waters can continue.[30] Such uses include protection and propagation of fish, shellfish, and other wildlife, public water supplies, and various recreational, industrial, and agricultural uses, "and also taking into consideration their use and value for navigation."[31] To ensure protection of these uses, a specific amount of pollutants that can be discharged must be set.[32] Water quality standards or criteria are the mechanism by which this set level of acceptable pollution is determined.[33] Water quality standards are developed from scientific data that ascertains what level of pollution, defined either by numerical limits or narrative criteria, a body of water can tolerate while still sustaining a given use.[34] Thus it follows that the quality of regulated discharges must be such that the standards of the receiving water bodies are not compromised.

Under the FWPCA discharges are distinguished according to whether they are point or nonpoint sources.[35] As defined under the Act, a point source is "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."[36] For these sources, the FWPCA "introduced a variety of carrot and stick policies aimed at revolutionizing waste treatment technologies and practices."[37]

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27 A. Dan Tarlock, *The Potential Role of Local Governments in Watershed Management*, *in* NEW GROUND: THE ADVENT OF LOCAL ENVIRONMENTAL LAW 213, 213 (John Nolon ed., 2003).

28 *See State Water Res. Control Bd.*, 426 U.S. at 203.

29 Clean Water Act § 101, 33 U.S.C. § 1251(a) (2002).

30 *See* 33 U.S.C. § 1311(a).

31 33 U.S.C. § 1313(c)(2)(A).

32 *See id.*

33 *See id.*

34 33 U.S.C. § 1313(c)(2)(B).

35 33 U.S.C. § 1362(14).

36 *Id.*

37 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER 16 (1986).

Unfortunately, these policies failed to reach myriad minor point sources of pollution such as small feedlots and stormwater sewers.[38] As William Rodgers, Jr. put it, "It is clear that the NPDES [FWPCA's point source] program runs up against some kind of impossibility theorem in its aspirations to reach dischargers in the nethermost territory close to nonpoint sources."[39]

In keeping with its focus on point source pollution, the Act fails to specifically define nonpoint sources of pollution.[40] Instead, nonpoint sources are implicitly defined with reference to point sources. For example, agricultural stormwater discharges and return flows from irrigated agriculture are specifically excluded from the definition of point sources with the result that farm sources of pollution fall into the category of nonpoint sources.[41] This category also includes runoff from paved areas, and other sources of pollution not specifically defined as point sources.[42]

The FWPCA is structured so as to achieve its purposes through federal-state partnerships. The Environmental Protection Agency (EPA), which administers the Act,[43] is authorized to suspend its federal program under the Act upon approving a state program.[44] Thus, governors of each state, desiring to administer their own programs for discharges into navigable waters within their jurisdictions, can submit to EPA a descriptions of their proposed programs together with affirmations that state laws provide adequate authority for the programs.[45] Following EPA review and approval, the state acquires permitting authority with associated inspection and enforcement responsibilities,[46] while EPA retains responsibility for oversight of the state program.[47] The primary regulatory function of the state's program so approved is to control point discharges.[48]

C. CURRENT INADEQUACIES OF THE CWA

The Act's emphasis on point source discharges has had a doubly unfavorable consequence: nonpoint sources have remained unregulated, and the emphasis on controlling chemicals from the "end of the pipe" has thus come at the expense of "the overall health of water and aquatic

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38 *See id.*

39 *Id.*

40 *See* 33 U.S.C. § 1362.

41 33 U.S.C. § 1362(14).

42 ROBERT W. COLLIN, THE ENVIRONMENTAL PROTECTION AGENCY: CLEANING UP AMERICA'S ACT 23 (2006).

43 *See* 33 U.S.C. § 1251(d).

44 33 U.S.C. § 1342(c).

45 33 U.S.C. §§ 1342(b), 1344(g).

46 33 U.S.C. §§ 1342(c), 1344(h)(2)(a).

47 33 U.S.C. §§ 1342(c)(3), 1344(i).

48 33 U.S.C. § 1342(b).

ecosystems."[49] Rights of use for water that is not drinkable, swimmable or fishable are of little value. Unfortunately, that is the status of many of the nation's waters.[50] As Robert Adler noted a quarter century after the passage of the Clean Water Act, significant problems of water pollution prevail throughout the United States.[51]

EPA's National Water Quality Inventory Report to Congress in 2000 stated that about 40% of the assessed river and stream miles, 46% of assessed lake areas and more than 50% of assessed estuarine square miles failed to support designated water standards.[52] These assessments indicate that, as recently as 2000, close to 50% of the nation's waters are impaired with respect one or more designated use.[53] These statistics register the failure of the application of the Clean Water Act.

Scholars have noted the failures of the Clean Water Act. As Rodgers stated in 1986, "Measured against the standard of its own ambitions, the Clean Water Act has not been a success."[54] Lawrence Bazel echoed this verdict seventeen years later when he said, "[T]he act does not score very highly when tested against its own goals and aspirations, even though it is more than thirty years old."[55]

This failure extends into Indian territory and affects the waters Indians share with the rest of the United States. Addressing the failure will require the restoration and maintenance of the integrity of the nation's waters—an unfinished task demanding "ingenuity, courage, innovation, a few incentives, more regulations, more federal involvement, more public education, and above all, a much more mature sense of civic responsibility."[56] This responsibility must fall to all communities within the each watershed, including, as will be argued below, American Indian communities.

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49 Reed D. Benson, *Pollution Without Solution: Flow Impairment Problems Under Clean Water Act Section 303*, 24 STAN. ENVTL. L.J. 199, 215 (2005).

50 *See* Robert W. Adler, *Integrated Approaches to Water Pollution: Lessons from the Clean Air Act*, 23 HARV. ENVTL. L. REV. 203, 203 (1999).

51 *Id.*

52 ENVTL. PROT. AGENCY, OFFICE OF WATER, EXECUTIVE SUMMARY, 2000 NATIONAL WATER QUALITY INVENTORY 3 (2002), *available at* http://www.epa.gov/305b/2000report/execsum.pdf.

53 *Id.*

54 2 RODGERS, *supra* note 37, at 17.

55 Lawrence S. Bazel, *The Clean Water Act at Thirty: A Failure After All These Years?* 18 NAT. RESOURCES & ENV'T. 46, 46 (2003).

56 William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 593 (2004).

II. EMERGENCE OF CWA SECTION 303 (WATERSHED MANAGEMENT)

A. THE PRIMARY ROLE OF THE WATERSHED IN WATER RESOURCES MANAGEMENT

The watershed is the fundamental hydrological unit for managing water. There are multiple alternate terms for this unit, including river basin, catchment area, drainage area, gathering ground, hydrographic basin and waterscape.[57] In international law, the term watercourse system is commonly used.[58] In the United Nations Convention on the Law of Non-Navigational Uses of International Watercourse, watercourse is defined as "a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus."[59]

This latter definition captures very well the concept of a watershed. A watershed encompasses all components of the hydrological system, including overland and sub-surface flows, groundwater, wetlands, lakes and streams.[60] These components are interconnected. For example, diverting surface runoff may diminish groundwater resources; lower groundwater levels can, in turn, cause wetlands to dry up and stream flows to be seriously reduced or even extinguished.[61] More broadly, events and land uses in one part of a watershed can adversely affect the quantity and quality of water elsewhere in the watershed.[62] For these reasons, the watershed is the logical unit for the planning and management of water resources.[63]

A watershed is a unitary drainage system.[64] Hence, the alternative term for a watershed is "drainage basin."[65] Following its deposition on land through precipitation, water drains across or through the land.[66] As

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57 Keith S. Porter, *Fixing our Drinking Water: From Field and Forest to Faucet*, 23 PACE ENVTL. L. REV. 389, 394 (2006).

58 *See* STEPHEN C. MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES: NON-NAVIGATIONAL USES 23–24 (2001).

59 Convention on the Law of the Non-Navigational Uses of International Watercourses art. 2(a), May 21, 1997, 36 I.L.M. 700.

60 Porter, *supra* note 57, at 394.

61 This description corresponds to the basic water balance equation in hydrology. *See, e.g.*, KEVIN HISCOCK, HYDROGEOLOGY: PRINCIPLES AND PRACTICE 278 (2006).

62 DANIEL P. LOUCKS & EELCO VANBEEK, WATER RESOURCES SYSTEMS PLANNING AND MANAGEMENT: AN INTRODUCTION TO METHODS, MODELS AND APPLICATIONS 23 (2005).

63 *Id.*

64 Porter, *supra* note 57, at 393 (quoting COMMITTEE ON WATERSHED MANAGEMENT, NEW STRATEGIES FOR AMERICA'S WATERSHEDS 5 (1999)).

65 *Id.* at 394 (quoting MCGRAW-HILL DICTIONARY OF SCIENTIFIC AND TECHNICAL TERMS 2049 (Sybil Parker ed., 3d ed. 1984)).

66 LUNA B. LEOPALD, WATER, RIVERS AND CREEKS (1997), provides a very clear and accessible summary of the basic hydrological processes in a watershed. A more advanced treatment is given by DANIEL HILLEL, INTRODUCTION TO ENVIRONMENTAL SOIL PHYSICS

such, the drainage water is intimately connected to the land and soil. Therefore, land uses have a significant impact on drainage water before it reaches groundwater or other water bodies, such as streams.

The quantity of water may be changed by diversions from the hydrological paths that the drainage water would otherwise naturally follow. Also, the quality of drainage water can be substantially impaired by the addition of chemical, physical and biological constituents. These additions, especially if they occur at unnatural levels as a result of human activities, can readily amount to pollution. Thus, the quantity and quality of water produced by a watershed depend upon land use management within that watershed.[67]

B. THE PROSPECT OF TMDLs

Addressing the broad range of impairments caused by land uses "suggests the need for a comprehensive, watershed-based approach to aquatic ecosystem restoration and protection to augment the nation's water pollution control strategy."[68] The CWA provides for such an approach in section 303(d). EPA initially "took § 303(d) by the horns very gently."[69] The consequence was inaction. EPA "delayed, soft-pedaled, and understated the § 303(d) requirements to a remarkable degree."[70] However, the failure of the CWA to achieve its objectives refocused attention on the potential role of § 303(d).

"Section 303 is central to the Act's carrot-and-stick approach to attaining acceptable water quality without direct federal regulation of nonpoint sources of pollution."[71] Section 303(d) requires states or EPA to identify those water bodies in which the discharge limitations required by section 303(b)(1) are found to be insufficient to meet any applicable standard.[72]

For each standard not met, section 303(d)(1)(C) requires that the state establish a total maximum daily load (TMDL) for that pollutant.[73] A TMDL "is a calculation of the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards, and an allo-

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(2004). VLADIMIR NOVOTNY, WATER QUALITY: DIFFUSE POLLUTION AND WATERSHED MANAGEMENT (2d ed. 2003), provides a comprehensive account of the causes of pollution of drainage waters.

67 *See id.*

68 Adler, *supra* note 2, at 204.

69 OLIVER A. HOUCK, THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY, AND IMPLEMENTATION 49 (2d ed. 2002).

70 *Id.* at 51.

71 Pronsolino v. Nastri, 291 F.3d 1123, 1127 (9th Cir. 2002).

72 *See* Clean Water Act §§ 303(b)(1), (d), 33 U.S.C. §§1313(b)(1), (d) (2002).

73 *See* 33 U.S.C. § 1311(d)(1)(C).

cation of that amount to the pollutant's sources."[74] Determining a TMDL requires estimating all the point and nonpoint sources in the watershed of the waterbody in question.[75] This estimation represents a summation of all the point loads, termed the waste load allocation, and nonpoint loads, termed the load allocation.[76]

The final TMDL is the sum of the waste load allocation and the load allocation plus a specified margin of safety to allow for uncertainty in the estimation of the loads.[77] In practice, this procedure is driven by the specific need to set water quality objectives that are then sought by applying load restrictions on all significant point and nonpoint sources.[78]

According to Nina Bell, "we have the citizens' group litigation to thank for delivering the TMDL program to the United States."[79] Bell noted that, as of 2001, twenty citizen actions had been taken in eighteen states; the consequence being that EPA was under court orders to establish TMDLs in those various states.[80]

TMDLs have provoked a great deal of hostility as demonstrated by the immense volume of negative responses to EPA regulations proposing to develop TMDLs to remedy pollution in 1999.[81] These opponents included landowners and farmers. Their objections are well-illustrated by *American Farm Bureau Federation v. Whitman* (filed July 18, 2000).[82] Citizen groups brought lawsuits in thirty-eight states seeking to establish the duty of EPA to take action under section 303(d).[83] "Citizen suit law is the engine that propels the field of environmental law."[84] To this assertion, TMDLs are no exception.

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74 EPA, Introduction to TMDLs, TMDL Definition, http://www.epa.gov/owow/tmdl/intro.html#definition (last visited Apr. 6, 2008).

75 *Id.*

76 *See* Mary E. Christopher, *Time to Bite the Bullet: A Look at State Implementation of Total Maximum Daily Loads (TMDLs) Under Section 303(d) of the Clean Water Act*, 40 WASHBURN L.J. 480, 484 (2001).

77 EPA, Overview of Current TMDL, http://www.epa.gov/owow/tmdl/overviewfs.html (last visited Apr. 5, 2008).

78 *See, e.g.*, WU-SENG LUNG, WATER QUALITY MODELING FOR WASTELOAD ALLOCATIONS AND TMDLS (2001).

79 Nina Bell, Keynote Address at the Public Land and Resources Law Review Conference, *TMDLs at a Crossroads: Driven by Litigation, Derailed by Controversy?*, 22 PUB. LAND & RESOURCES L. REV. 61, 62 (2001).

80 *Id.* at 63.

81 *Id.* at 65.

82 American Farm Bureau Federation v. Whitman, Nos. 00-1320, 001341, 00-1353 and 00-1384 (D.C. Cir. consolidated) (filed July 18, 2000).

83 Bell, *supra* note 79, at 62; *see also* HOUCK, *supra* note 69, at 51n

84 James R. May, *Now More than Ever: Environmental Citizen Suit Trends*, 33 ENVTL. L. REP. (ENVTL. L. INST.) 10704, 10706 (2003).

C. THE TECHNICAL REQUIREMENTS OF INTEGRATED WATERSHED MANAGEMENT

The CWA section 303(d)(1)(A) requires states to identify those waters within their state boundaries where technology-based requirements on the point-source discharges are insufficient "to implement any water quality standard applicable to such waters."[85] This requirement appears to omit nonpoint sources. Such omission was the primary issue in *Pronsolino v. Nastri*.[86] This case considered the question: does EPA have authority, under section 303(d) of the CWA, to establish a TMDL for a river that was only subject to nonpoint sources?[87] The Court answered in the affirmative.[88] It further affirmed a state's ability to require a permit that contains provisions designed to meet a TMDL by reducing loading from a nonpoint source.[89]

This incorporation of nonpoint sources within the reach of CWA section 303 has a critical consequence for water quality protection. Nonpoint sources are a direct result of farming and other land uses, and human activities on the land.[90] Therefore, management of these nonpoint sources, as required by the TMDL process, equates to comprehensive land management to protect water bodies.[91] Unfortunately, there are few examples of successful comprehensive watershed management conducted in order to satisfy TMDLs.

The New York City Watershed Program serves as an outstanding national and even international example of comprehensively integrated watershed management.[92][93] Delaware County, New York comprises about 50% of the nearly two thousand square miles that make up the New York City watershed.[94] In 1999, the County adopted its Delaware County Action Plan (DCAP).[95] The overall aim of DCAP is to protect the integrity of the water supply of New York City.[96] This aim is achieved through the County Departments of Planning, Public Works,

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85 33 U.S.C. § 1313(d)(1)(A) (2001).

86 291 F.3d 1123 (9th Cir. 2002).

87 *Id.* at 1126.

88 *Id.*

89 *Id.* at 1140.

90 *See generally* Keith S. Porter, *Protecting a 'Necessity of Life': Water Supplies Protected at Their Watershed Source*, 14 J. WATER L. 61, (2003).

91 Christopher, *supra* note 76, at 530–31.

92 There is a prolific literature describing the New York City Watershed. *See, e.g.*, Porter, *supra* note 57.

93 *See id.* at 391.

94 *Id.* at 390–91.

95 DELAWARE COUNTY ACTION PLAN (DCAP) (adopted as DEL. COUNTY BD. OF SUPERVISORS RES. NO. 229 (1999)), *available at* http://www.co.delaware.ny.us/depts/h2o/docs/dcap.pdf.

96 *See id.* at 5–6.

and Economic Development, the County Soil and Water Conservation District, and Cornell Cooperative Extension. Cornell University and other state, federal and New York City partners provide scientific and institutional support to the program.[97] The components of the program principally include: animal manure and farm nutrient management; county-wide planning; on-site wastewater treatment; community stormwater and highway drainage; stream corridor protection and rehabilitation; composted municipal waste and manure; economic and land development; and scientific support through monitoring, mathematical modeling and research.[98]

The experience of Delaware County in the New York City Watershed Program demonstrates the scale and scope of what is required to meet TMDL targets. Notably, Delaware County is largely rural and maintains a small population.[99] It is also one of the poorest counties in New York State. Its median household income in 1999 was $32,461, the eighth lowest of the sixty-two counties in the state.[100] A key aspect of the success of DCAP is the manner in which it sought, and sustainsthen was able to sustain, institutional support at all levels.[101]

A leading example of watershed management in the West, bearing some similarities to DCAP, is the Lake Tahoe Watershed Program.[102] This program also demonstrates the necessity for "decentralized, collaborative approaches to resource management.ë[103] Inter-jurisdictional cooperation is an essential component of comprehensive watershed management and is especially important in the West where it is necessary to defeat the deficiencies of the West's fundamentally ungovernable "box-shaped jurisdictions."[104]

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97 *See* Porter, *supra* note 57, at 413.

98 *Id.*aata413–19.

99 According to the census, the population of Delaware County was 43,540 in 1960. RICHARD L. FORSTALL (U.S. CENSUS BUREAU), NEW YORK POPULATION OF COUNTIES BY DECENNIAL CENSUSa 1900 TO 1990, http://www.census.gov/population/cencounts/ny190090.txt. The census bureau estimated the population in 2006 to be 46,977. Delaware County QuickFacts from the U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/36/36025.html (last visited Mar. 5, 2008).

100 U.S. DEP'T OF COMMERCE, ECONOMICS, AND STATISTICS ADMINISTRATION & U.S. CENSUS BUREAU, CENSUS OF POPULATION AND HOUSING (2000), *available at* http://factfinder.census.gov (search "Delaware County, New York" in "Get a Fact Sheet for Your Community").

101 *See* Porter, *supra* note 57, at 420–21.

102 *See* Mark T. Imperial and Derek Kauneckis, *Moving from Conflict to Collaboration: Watershed Governance in Lake Tahoe*, 43 NAT. RESOURCES J. 1009, 1010 (2003).

103 *Id.*

104 Ann J. Morgan, *Perspectives of a Manager of the "Pasturage Lands Between": Comparing Current Notions of Community Based Watershed Groups with Powell's Proposal for Hydrographic Districts*, 23 J. LAND RESOURCES & ENVTL. L. 25, 26 (2003).

Recognizing this necessity for inter-jurisdictional cooperation posed by the CWA raises the question: what is the role of the American Indian tribes within the scope of the Act?

III. OMISSION OF TRIBES FROM THE CWA

Environmental statutes enacted in the 1970s largely omitted Indian Tribes.[105] The Clean Water Act was no exception, and tribal areas, or as frequently termed, "Indian country,"[106] therefore did not fall within the scope of the CWA."[107] Rodgers suggests that this was due to congressional staffers' ignorance of Indian law."[108] Regardless of the reason for it, the omission left open the question of how the FWPCA would apply to Indian reservations in practice.

Today, concern about "rapid development of Indian reservations" and the consequent risk of pollution"[109] could prompt states to seek jurisdiction over the tribal lands and waters.[110] Lynne Petros suggests that sections of the 1972 FWPCA could be "interpreted to allow delegation of jurisdiction [over tribes] to the states."[111] These include:

> Section 303, on submission by the state to the Administrator of water quality standards; Section 306(c), authorizing the state to develop a procedure for enforcing standards of performance for new sources; Section 308(c), authorizing the development of procedures for inspection, monitoring and entry of point sources; and

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105 Dean B. Suagee, *Tribal Self-Determination and Environmental Federalism: Cultural Values as a Force for Sustainability*, 3 WIDENER L. SYMP. J. 229, 232 (1998) ("In the 1970s, Congress enacted a host of environmental statutes, most of which either ignored Indian tribes altogether or barely mentioned them.").

106 "Indian country" means:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1976).

107 *See* William H. Rodgers, Jr., *Treatment as Tribe, Treatment as State: The Penobscot Indians and the Clean Water Act*, 55 ALA. L. REV. 815, 816 (2004).

108 *Id.* (noting that an exception to congressional "oversight" was the 1976 Resource Conservation & Recovery Act, 42 U.S.C. §§ 6901–6992k (2006), that provided for treating tribes as municipalities).

109 Lynne E. Petros, *The Applicability of the Federal Pollution Acts to Indian Reservations: A Case for Tribal Self-Government*, 48 U. COLO. L. REV. 63, 63 (1976).

110 *Id.* at 64. EPA recognized the omission and began confronting the congressional oversight in the 1970s. *See* James M. Grijalva, *The Origins of the EPA's Indian Program*, 15 KAN. J. L. & PUB. POL'Y 191, 209–94 (2006) [hereinafter *Origins*].

111 Petros, *supra* note 109, at 77.

> Section 208, requiring each state to identify areas having substantial water quality problems.[112]

However, Petros concludes that, given the absence of express language in the FWPCA giving jurisdiction to the states over Indian reservations, assumption of jurisdiction "violates basic principles of Indian law."[113]

Since the origin of the CWA, EPA has been convinced that the act did not give states jurisdiction over tribal reservations.[114] EPA's position in *Washington Department of Ecology v. EPA* reflects that understanding.[115] In 1982, the State of Washington sought approval from EPA to treat Indian activities on trust and tribal lands as within the scope of its hazardous waste program under the Resource Conservation and Recovery Act of 1976 (RCRA).[116]

Washington state's application presumed that it, as a state, had authority to regulate hazardous waste-related activities of Indians on reservation lands.[117] Following review and public comment, EPA approved the application for authorization "except as to Indian Lands."[118] EPA took the position that the State had not demonstrated that it had legal authority to exercise jurisdiction over Indian Lands.[119] On the contrary, EPA determined that RCRA failed to give Washington jurisdiction over Indian lands.[120] EPA concluded that such jurisdiction could only be conferred through an express act of Congress or by treaty.[121] Following EPA's reasoning, because Washington had no independent authority for its jurisdictional claim, EPA retained the jurisdiction on Indian lands.[122] The Ninth Circuit approved EPA's interpretation of the RCRA as failing to grant jurisdiction to states over the activities of Indians on their reservations.[123] The court reaffirmed that the retention by EPA of regulatory authority "can promote the ability of the tribes to govern themselves by allowing them to participate in hazardous waste management."[124]

Despite the holding in *Washington Department of Ecology v. EPA*, the status of Tribes under the FWCPA remained unclear after the decision. In particular, tribes could not assume that they were immune from

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112 *Id.*
113 *Id.* at 93.
114 Grijalva, *supra* note 110, at 282.
115 752 F.2d 1465 (9th Cir. 1985).
116 42 U.S.C. §§ 6901–6992k (2006).
117 *Wash. Dep't of Ecology*, 752 F.2d at 1467.
118 *Id.*
119 *Id.*
120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.*

the Act.[125] Indeed, pressure on Congress to take a more explicit position appeared to grow. In the early 1980s, Americans for Indian Opportunity conducted a survey of reservations conducted under EPA auspices.[126]

The report, based on forty-eight reservations that responded to the survey, found major deficiencies in water quality, management of solid and hazardous wastes, and treatment and disposal of wastewater.[127] The survey found that only eight reservations had their own water quality standards for reservation streams and lakes.[128] Low levels of oxygen, fecal coliform bacteria, eutrophication, and sediment impaired waterbodies on many of the reservations.[129] The study discovered violations of standards governing drinking water quality on seventeen of the forty-eight reservations.[130] Nine reservations reported outbreaks of waterborne diseases during the five years prior to the survey.[131] Incursions on tribal sovereignty in the context of environmental law became increasingly likely as Indian reservations became serious sources of pollution.[132]

The undecided question facing tribes was if and how they could determine their own pollution controls. In 1970, President Richard Nixon advocated for allowing tribes to exercise their right to control and operate federal programs, thus introducing the "Self-Determination Era."[133] However, it was unclear how such self-determination was to apply in this newly developing body of environmental law.

In seeking an answer, Leigh Price proved to be "a great friend and tireless advocate for tribes."[134] In 1977, EPA invited Price to join EPA. Then, in 1983, the federal government issued a policy statement to its agencies directing them to encourage tribal self-government,[135] and EPA

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125 *See* Judith V. Royster & Rory Snow Arrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 591 (1989) (noting that Indian Americans are not immune from generally applicable federal laws).

126 EPA PUBL'N NO. 100R86103, SURVEY OF AMERICAN INDIAN ENVIRONMENTAL PROTECTION NEEDS ON RESERVATION LANDS: 1986 (1986).

127 *Id.* at v.

128 *Id.* at 7.

129 *Id.* at 8.

130 *Id.*

131 *Id.*

132 *See* Stephen M. Feldman, *The Developing Test for State Regulatory Jurisdiction in Indian Country: Application in the Context of Environmental Law*, 61 OR. L. REV. 561, 562–63 (1982).

133 William C. Galloway, *Tribal Water Quality Standards Under the Clean Water Act: Protecting Traditional Cultural Uses*, 70 WASH. L. REV. 177, 179 (1995).

134 AM. INDIAN ENVTL. OFF., TRIBAL PROGRAM UPDATE: SPRING-SUMMER 2006, at 16 (July 2006) [hereinafter TRIBAL PROGRAM UPDATE], *available at* http://www.epa.gov/indian/pdfs/aieo-update-july06.pdf.

135 "Tribal governments, like state and local governments, are more aware of the needs and desires of their citizens than is the Federal Government and should, therefore, have the

responded quickly by adopting a new Indian policy in November 1984.[136] Price was the major force in developing EPA's Indian policy established in 1984.[137] This policy and its implementation guidance described EPA's government-to-government relationship with tribes and its commitment to environmental protection for them.[138] The policy recognized "[t]ribal governments as the primary parties for setting standards, making environmental policy decisions, and managing [environmental] programs . . . consistent with Agency standards and regulations."[139]

Christine Todd Whitman reaffirmed EPA policy for the Administration of Environmental Programs on Indian Reservations on July 11, 2001:

It is the purpose of this statement to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal "self-government" and "government-to-government" relations between Federal and Tribal Governments.[140]

Price was also instrumental in forming EPA Indian Program and National Tribal Operations Committee in 1994.[141] This Committee, together with EPA's Indian Policy, were "firsts for a federal agency."[142]

IV. CONGRESSIONAL ACTS

Congress finally addressed reservation waters in its 1987 amendments to the CWA.[143] Section 518, in particular, sought to incorporate

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primary responsibility for meeting those needs. The only effective way for Indian reservations to develop is through tribal governments which are responsive and accountable to their members." Statement on Indian Policy, Ronald Regan, (issued Jan. 24, 1983), *available at* http://www.ihs.gov/AdminMngrResources/legislativeaffairs/documents/Statement-IndianPolicy-1983.pdf.

136 Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, 54 Fed. Reg. 39,098 (Sept. 22, 1989) (to be codified at 40 C.F.R. pt.131) [hereinafter EPA 1989 Indian Policy Amendments]; *see also* Envtl. Prot. Agency, News for Release, *EPA Reaffirms 20 Years of Partnership with Indian Tribes*, Sept. 24, 2004, *available at* http://www.epa.gov/tribalportal/pdf/indian-policy-leavitt-pr.pdf.

137 TRIBAL PROGRAM UPDATE, *supra* note 134, at 16.

138 EPA 1989 Indian Policy Amendments, 54 Fed. Reg. at 39,098.

139 EPA, PROTECTING PUBLIC HEALTH AND WATER RESOURCES IN INDIAN COUNTRY: A STRATEGY FOR EPA/TRIBAL PARTNERSHIP 3 (1998), *available at* http://www.epa.gov/owm/pdfs/aggud.pdf.

140 Memorandum from Christine Todd Whitman, to All EPA Employees (July 11, 2001) [hereinafter Whitman Memorandum], *available at* http://www.epa.gov/ne/govt/tribes/policy.html (reaffirming the EPA's commitment to the right of tribes as sovereign governments to self determination).

141 TRIBAL PROGRAM UPDATE, *supra* note 134, at 16.

142 *Id.*

143 An Act to Amend the Federal Water Pollution Control Act, Pub. L. No. 100-4, 101 Stat. 7 (1987).

tribes into the CWA and encourage tribal participation.[144] As Senator Inouye stated,

> All too often in the past, Congress has enacted broad national legislation without specifying the role to be played by Indian tribes vis-à-vis the Federal and State governments. That has led to a lot of uncertainty, confusion, and litigation and has hindered the execution of important national policies on the Nation's Indian reservations.[145]

Section 518 authorizes EPA to treat an Indian tribe as a state if:

- The Indian tribe has a governing body carrying out substantial governmental duties and powers;
- The functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by the Indian tribe, held by the United States in Trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and
- The Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms of this chapter and of all applicable regulations.[146]

With the promulgation of this section, Congress apparently intended to give tribes the same authority to set water quality standards as states.[147] Most importantly, the section notes that:

> The Administrator shall, in promulgating such regulations, consult affected States sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water. Such mechanism shall provide explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic im-

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144 *See* ENV'T & NATURAL RES. POLICY DIV. OF THE CONG RESEARCH SERV. OF THE LIBRARY OF CONG. 100TH CONG., A LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987, at 487 (Comm. Print 1988) [hereinafter LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987].

145 *Id.*

146 Clean Water Act § 518(e), 33 U.S.C. § 1377(e) (2002).

147 LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987, *supra* note 144, at 376 (citing EPA 1989 Indian Policy Amendments, 54 Fed. Reg. at 39,098).

> pacts, and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objectives of this chapter.[148]

EPA recognized a need to develop criteria to assess tribal preparedness to administer such important environmental programs.[149] Tribes would have to demonstrate that they were able to administer their own programs before EPA would hand over control.[150]

Section 518 authorizes tribes to apply for treatment-as-states (TAS) under a variety of sections in the CWA.[151] Tribes may apply for TAS grants for research, training, and reports on water quality.[152] More controversially, section 518 also allows them to apply for grants for water quality programs under section 303(c).[153] Many tribes choose to apply for grants under these provisions in order to assess their reservation waters in terms of determining both the boundaries of those waters and their quality.[154]

The standards are not the same for tribes applying for TAS under section 303(c) as they are for tribes applying under other sections because EPA is more lenient with respect to tribal grants than water quality programs.[155] As a result, some tribes might opt to apply under the other sections before they apply for water quality standards programs because they want to develop a more comprehensive understanding of their waters. In the alternative, a tribe may decide that it never wants to develop a water quality standards program, and only wishes to seek money under the other programs. Of course, a tribe with its own resources might choose a third way: bypassing the other funding and seeking only TAS under section 303(c).

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148 33 U.S.C. § 1377(e).

149 *Id.*

150 *Id.*

151 *See id.* (referencing 33 U.S.C. §§ 1281, 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, 1344, and 1346).

152 *See, e.g.*, 33 U.S.C. § 1324(b).

153 *Id.*

154 By evaluating their waters under the TAS program, tribes can obtain federal funding to finance these activities.

155 *See* GAO, INDIAN TRIBES: EPA SHOULD REDUCE THE REVIEW TIME FOR TRIBAL REQUESTS TO MANAGE ENVIRONMENTAL PROGRAMS 11 (2005) [hereinafter GAO REPORT]; *see also EPA Guidance May Speed Creation of Tribal Water Quality Standards*, WATER POLICY REPORT, June 12, 2006, Vol. 15, No. 12 (available through Environmental NewsStand at InsideEPA.com) [hereinafter WATER POLICY REPORT] ("The [tribal] source says it is 'a little easier' to get TAS for programmatic sections—such as section 106—than it is to get TAS approval for regulatory sections—such as section 303.").

A. ACCEPTANCE BY TRIBES: WATER QUALITY STANDARDS

Water quality standards are the foundation of the Clean Water Act.[156] Under section 303, states (and tribes with TAS) have the principal responsibility for establishing water quality standards.[157] EPA's own rule, 40 C.F.R. § 131.5(a), provides that "EPA is to review and to approve or disapprove State-adopted water quality standards."[158] The review involves a determination of:

> (1) Whether the State has adopted water uses which are consistent with the requirements of the Clean Water Act;
> (2) Whether the State has adopted criteria that protect the designated water uses;
> (3) Whether the State has followed its legal procedures for revising or adopting standards;
> (4) Whether the State standards which do not include the uses specified in section 101(a)(2) of the Act are based upon appropriate technical and scientific data and analyses; and
> (5) Whether the State submission meets the requirements included in § 131.6 of [the Water Quality Standards Regulations].[159]

EPA reviews the state (or tribe) water quality standards program, and if it determines that it meets those the five factors of section 303(c), EPA will approve that program.[160]

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156 *See generally* Clean Water Act § 303, 33 U.S.C. § 1313 (2002).

157 *See* 33 U.S.C. § 1313(a)–(b).

158 Water Quality Standards, 40 C.F.R. § 131.5(a) (2005).

159 *Id.*

160 40 C.F.R. § 131.5(b). In addition to the section 303(c) requirements imposed on states, tribes wishing to administer a water quality standards program must comply with additional requirements. A tribe must meet the following additional criteria:

1. The Indian Tribe is recognized by the Secretary of the Interior and meets the definitions in §131.3(k);
2. The Indian Tribe has a governing body carrying out substantial governmental duties and powers;
3. The water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian Tribe, and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation; and
4. The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

40 C.F.R. 131.8(a).

Under the Act, the standards adopted by such a program incorporate the uses or objectives for the waters concerned.[161] "The strategic management of water quality requires the setting of objectives which are to be achieved."[162] Such objectives, as specifically enumerated in the Clean Water Act, include protection and propagation of fish, shellfish and wildlife, public water supplies, recreational, industrial and agricultural uses, "and also taking into consideration their use and value for navigation."[163] The setting of such standards is a complex and lengthy procedure. In the United Kingdom, the Royal Commission on Environmental Pollution undertook a comprehensive review and analysis of the setting of environmental standards and concluded that the stages of the "policy process" for setting standards are:

- Rigorous and dispassionate investigation and analysis;
- Deliberation and synthesis, informed by people's values;
- Deciding whether to set a standard, and if so what type of standard;
- Specifying the content of the standards;
- Monitoring and evaluating its effectiveness.[164]

Further, the Commission noted that:

> The analytical stage of the policy process has several complementary and closely inter-related components:
> - Scientific assessment;
> - Analysis of technological options;
> - Assessment of risk and uncertainty;
> - Economic appraisal; and
> - Analysis of implementation issues, including the geographical scope of standards.[165]

B. TRIBAL APPLICATIONS UNDER SECTION 518

Multiple levels of communications are required between tribes, neighboring states, other local governments, and EPA when tribes apply for treatment as states. The state or tribe advancing a particular water quality program must hold public hearings and solicit public comment on

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161 33 U.S.C. § 1311(c)(2)(A) (2002).

162 WILLIAM HOWARTH & DONALD MCGILLIVRAY, WATER POLLUTION AND WATER QUALITY LAW 799 (2001).

163 33 U.S.C. § 1311(c)(2)(A) (2002).

164 *Setting Environmental Standards*, Twenty-First Report (Royal Commission on Environmental Pollution, London, England) Oct. 1998, at 129–30.

165 *Id.* at 130.

its proposed program.[166] The public comment process is briefly described in *City of Albuquerque v. Browner*:

> [P]ublic participation in the establishment of water quality standards occurs when states and tribes review or revise water quality standards. All comments submitted to a state or tribe during the comment period become part of the administrative record and are reviewed by the EPA in determining whether to approve the state's or tribe's proposed standards. Consequently, the purpose of public notice and comment under the APA is satisfied under the Clean Water Act without requiring the EPA to receive additional comments.[167]

EPA does not appear to consider comments from adjacent states or local governments on the TAS application itself. Rather it only considers their comments regarding jurisdictional issues that may arise over the waters or from the water quality programs.[168]

Such issues are potentially the most litigated and contentious aspect of TAS.[169] States have opposed tribal jurisdiction over standards for reservation waters since Congress amended the Clean Water Act to include treatment-as-states for tribes under sections 518(e) and 303(c).[170] Section 518(e) confers upon tribes a degree of sovereignty in preserving any culturally or historically significant use of the reservation waters.[171] States, unfortunately, may view tribal water quality programs as an imposition on their prerogatives, or regard tribal jurisdiction over the waters as interfering with their own jurisdiction.

For such disputes, EPA and the CWA provide a dispute resolution framework between tribes and states.[172] EPA's Regional Administrator, after determining that criteria are met to become involved, will solicit public comment as appropriate, and may appoint a neutral mediator or arbitrator to resolve the dispute.[173] Such a resolution may be satisfying under many circumstances, but the prospect of a long fight is understandably unappealing to many tribes.

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166 33 U.S.C. § 1313(c)(1).

167 97 F.3d 415, 425 (10th Cir. 1996).

168 Water Quality Standards, 40 C.F.R. § 131.8 (2005).

169 Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001); Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996).

170 *See* 33 U.S.C. §§ 1313(c), 1377(e).

171 *See* 33 U.S.C. §§ 1313(c), 1377(e).

172 *See* 40 C.F.R. § 131.7.

173 40 C.F.R. §§ 131.7(d), (f).

V. THE SURVIVAL OF TRIBAL JURISDICTION

A. A BRIEF HISTORY OF TRIBAL, STATE, AND FEDERAL SOVEREIGNTY

When the Marshall Court decided *Johnson v. M'Intosh*,[174] *Cherokee Nation v. Georgia*,[175] and *Worcester v. Georgia*[176] in the 1820s and 1830s, "the laws and treaties of the United States contemplated that Indian territory would be completely separate from the state,"[177] but did not take a firm stance on whether the tribes had inherent sovereignty."[178] In *Johnson v. M'Intosh*, Chief Justice Marshall, writing for the court, determined that Indians had a right to their land, but this right was subordinate to the United States' title to the lands.[179] In *Cherokee Nation v. Georgia*, Chief Justice Marshall, writing for the majority, held that the Cherokee Nation, and other Indian tribes, were domestic dependent nations rather than foreign nations.[180] In *Worcester v. Georgia*, Marshall again wrote the opinion of the court, this time reversing the

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174 21 U.S. 543 (1823).

175 30 U.S. 1 (1831).

176 31 U.S. 515 (1832).

177 L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 818 (1996).

178 *Id.* at 818–22.

179 Marshall wrote:

> [The original inhabitants'] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

M'Intosh, 21 U.S. at 574. He also wrote:

> The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.
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> . . . .
>
> An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

Id. at 587–88.

180 According to Marshall:

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations.

Cherokee Nation, 30 U.S. at 17.

State of Georgia's conviction of a white man by a Georgia court under penal codes outlawing residence in the Cherokee Nation and striking down the Georgia law under which he was convicted.[181]

The rights and duties conferred upon the tribes by these decisions did not explore sovereignty to the extent that later courts would.[182] The courts did not need to consider whether tribes had jurisdiction over non-nonmembers or the extent of their sovereignty because geographic and demographic realities did not require such a determination.[183] Today, that is no longer the case. Tribes and states share waters, and courts have delved into the controversial area of tribal sovereignty more deeply; for all purposes, including water law, the thinking that guided the justices who decided this trilogy of cases no longer controls the courts.[184]

A century later, the Court revisited sovereignty and tribal jurisdiction. In *Williams v. Lee*,[185] the court considered whether an Arizona court had jurisdiction to hear a suit between a non-native store owner and his Navajo customers on the reservation.[186] The Supreme Court held that the Arizona Courts did not have that jurisdiction.[187] The unanimous

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[181] Marshall stated:

> The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. . . . The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

Worcester, 31 U.S. at 560–61.

[182] Gould asserts:

> Taken together, [*McIntosh*, *Cherokee Nation*, and *Worcester*] delineate the nature and extent of the doctrine of inherent sovereignty. Tribes are domestic dependent nations whose right to occupy their lands is subject to the 'ultimate domain' of the federal government; they may not form treaties with foreign nations, but may govern their affairs without interference from the states, except when limited by treaties or by the acts of Congress.

Gould, *supra* note 177, at 817.

[183] *Id.* at 820. Nonetheless, as Gould details, two justices, Johnson dissenting in *Cherokee Nation* and *Fletcher v. Peck*, 10 U.S. 87, 143–48 (1810) and M'Lean in *Worcester*, 31 U.S. at 560–61, did discuss tribal sovereignty over non-members. *Id.* at 820–21. Both concluded that there were limits to tribal sovereignty: Johnson concluded tribes had sovereignty only over members and no territorial sovereignty, and M'Lean concluded that tribes could only maintain their sovereignty while they were separate from non-tribal members. *Id.*

[184] As Gould points out, this mode of thought would not work today as it did then when "only a fraction of the country had been settled." *Id.* at 819.

[185] 358 U.S. 217 (1959).

[186] *Id.* at 218.

[187] *Id.* at 222.

Court's holding meant that tribes had inherent sovereignty unless Congress took it away.[188]

This decision was modified in the landmark case for Indian law, *Montana v. United States*.[189] In *Montana*, the Crow Tribe of Montana sought to prohibit non-Indians from hunting and fishing on reservation lands.[190] At the same time, the state of Montana claimed authority to regulate the hunting and fishing activities of non-Indians within the reservation.[191] The Supreme Court held that the Crow treaties and federal trespass statute did not give the Tribe jurisdiction over land owned by non-Indians.[192] Additionally, the Court determined that inherent tribal sovereign power does not extend to regulation of nonmembers on land owned by nonmembers except (a) when nonmembers enter into consensual relationships with the tribe or its members or (b) when non-Indian's actions have a direct effect on the health and welfare of the tribe, in which case tribes may exercise civil authority over the conduct of such non-Indians on fee lands within the reservation.[193] The Court's opinion eliminated the once-necessary "appeal to inherent sovereignty as a basis for a tribe's civil regulatory jurisdiction."[194] Although later decisions confirmed the health and welfare exception for tribal government, they narrowed the scope of this exception.[195]

In the twenty-six years since the *Montana* decision, the Supreme Court has decided a variety of cases regarding the extent of tribal sovereignty; in all those years, it "has never decided a case in favor of a tribe on the basis of health and welfare."[196] Instead, subsequent cases have

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188 *Id.*; *see also* Gould, *supra* note 177, at 823.

189 450 U.S. 544 (1981).

190 *Id.* at 547.

191 *Id.* at 549.

192 *Id.* at 555–57.

193 *Id.* at 555.

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

195 *See, e.g.*, *id.* at 730–31 (citing Strate v. A-1 Contractors, 520 U.S. 438 (1997)).

196 James M. Grijalva, *The Tribal Sovereign as Citizen: Protecting Indian Country Health and Welfare Through Federal Environmental Citizen Suits*, 12 MICH. J. RACE & L. 33, 36 (2006). Grijalva goes on to explain that:

> [T]he Supreme Court] has consistently rejected tribes' claims across a broad range of subjects, including the power to prescribe general zoning requirements, impose wildlife management restrictions, tax businesses serving tribal citizens and other reservation residents and visitors, decide wrongful death cases arising from car accidents on reservation roads, and decide property damage cases arising from the on-reservation conduct of state officials. In each case, the Court acknowledged the general subject matter implicated legitimate tribal welfare interests, but found these interests inadequately impacted by the on-reservation activities of non-members. Simple threats to tribal health or welfare were insufficient; the real question was whether the Court felt tribal control over the activity was necessary to protect tribal self-government. . . . [T]he Court seems to expect evidentiary proof of an actual, direct and significant connection with the specific non-Indian activity at issue.

divested tribes of their jurisdiction and further diminished tribal sovereignty.[197] Nonetheless, as will be discussed below, the three circuit courts that have heard TAS challenges by states have all decided in favor of tribes (and EPA) by relying to a large extent on the health and welfare exception.[198]

B. TRIBAL JURISDICTION, EPA, AND THE COURTS

Denise Fort points out that recognizing tribes as equivalent to states increases the potential for inter-jurisdictional disputes at the state level ten-fold.[199] This claim is disturbing because "[i]nterstate waters have been a font of controversy since the founding of the Nation."[200] This prospective contentiousness is in the context of the frequent occurrence of jurisdictional confrontations between tribes and states.[201] Therefore, "American Indians have reason to be suspicious of intergovernmental agreements."[202]

1. City of Albuquerque v. Browner[203]

In December 1992, EPA approved the water quality standards of the Pueblo Indian Tribe of Isleta, New Mexico.[204] This was the first such approval of a tribe's water quality standards,[205] and it prompted the first major court challenge to Indian water quality standards, *City of Albuquerque v. Browner*.[206] The City of Albuquerque challenged EPA's approval of the Pueblo of Isleta's water quality standards on numerous

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Id. at 36–37.

197 *See* Ann E. Tweedy, *Using Plenary Power as a Sword: Tribal Civil Regulatory Jurisdiction Under the Clean Water Act After* United States v. Lara, 35 Envtl. L. 471, 477 (2005).

198 Tweedy asserts:

> [D]espite the Supreme Court's increasingly narrow reading of the so-called Montana exceptions and an EPA pledge to interpret the TAS provisions according to evolving case law, EPA has ameliorated this burden somewhat by effectively creating a presumption in favor of tribal jurisdiction under the CWA, because of the obviously strong potential for water quality to directly affect a tribe's health and welfare and the fact that the threat posed to tribal health and welfare is serious and substantial. [*Id.*]

199 Denise D. Fort, *State and Tribal Water Quality Standards Under the Clean Water Act: A Case Study*, 35 NAT. RESOURCES J. 771, 772 (1995). This is an estimate based on the five hundred fifty-three tribes recognized by the Bureau of Indian Affairs on EPA's mailing list. *Id.* at n.3.

200 Arkansas v. Oklahoma, 503 U.S. 91, 98 (1992).

201 Royster & Fausett, *supra* note 125, at 582.

202 John E. Thorson, *Resolving Conflicts Through Intergovernmental Agreements: The Pros and Cons of Negotiated Settlements*, *in* INDIAN WATER 1985: COLLECTED ESSAYS 25, 25 (Christine L. Miklas & Steven J. Shupe ed., 1986).

203 97 F.3d 415 (10th Cir. 1996).

204 *Id.* at 419.

205 5 WATERS AND WATER RIGHTS 563 (Robert E. Beck ed., 2006).

206 97 F.3d at 418–19.

grounds.[207] EPA had set permit discharge limits for waste treatment facilities to satisfy state water quality standards. Subsequently, the City of Albuquerque filed suit because EPA had sought to revise the city's NPDES permit to meet the Isleta Pueblo's water quality standards.[208] Although it acknowledged the 1987 amendment to the Clean Water Act authorizingEPA to treat tribes as states,[209] the city contended that 33 U.S.C. § 1377 did not allow tribes to establish water quality standards more stringent than those imposed by federal law, nor did it extend those tribal standards beyond reservation boundaries.[210] However, the Tenth Circuit Court of Appeals affirmed that tribes could adopt standards that were more stringent than those promulgated by the federal government.[211] Additionally, the court concluded that EPA had the authority to require the City to comply with such standards in its discharge permit.[212]

This decision prompted unfavorable comment.[213] A particular objection was that the standard for arsenic established by the Pueblo was below that naturally occurring in the river in which the City discharged its wastewater.[214] As commentator Cyndi Mojtabi observede

> An arsenic standard that is below natural levels regulates constituents naturally preexisting in the waters of the United States, not just added pollutants. Thus, approval of an arsenic standard that is below the natural levels of water constituents within waters of the United States is in excess of the CWA's limitations.[215]

Since the Clean Water Act regulates pollution from human activities, argued Ms. Mojtabi, such a standard is beyond its scope.[216] Ms. Mojtabi also notes that in this particular case the Pueblo standard was a thousand times stricter than the federal Safe Drinking Water Standard.[217]

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207 *Id.* at 419.

208 *Id.*

209 *See* Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (codified as amended at 33 U.S.C. § 1377).

210 *Browner*, 97 F.3d at 421.

211 *Id.* at 423.

212 *Id.* at 422–23.

213 *See, e.g.*, Cyndi Mojtabi, Case Note, *Arsenic and Old Lace: The EPA Should Not Have Approved a Water Quality Standard for Aarsenic that Is Below Natural Background Levels in City* of Albuquerque v. Browner, 35 NAT. RESOURCES J. 997 (1995).

214 *See id.* at 1001.

215 *Id.*

216 *Id.* at 1016.

217 *Id.* at 998.

2. Montana v. EPA[218]

In *Montana v. EPA*, the State of Montana opposed the decision of EPA to grant TAS status to the Confederated Salish and Kootenai Tribes proposing to develop water quality standards.[219] In particular, the state objected to the Tribes being empowered to control sources of pollutants discharged from land owned by non-members.[220] This latter objection raised questions as to the tribe's "inherent power," a concept "developed by the Supreme Court to define when tribes may engage in nonconsensual regulation of activities of non-members."[221]

> To demonstrate authority over the activities of non-members on non-Indian fee lands, EPA requires a tribe to show that the regulated activities affect "the political integrity, the economic security, or the health or welfare of the tribe." The potential impacts of regulated activities on the tribe must be "serious and substantial."[222]

The Court conceded that the Supreme Court's "fractured decision" in *Brendale* left some confusion over the correct standard to apply in determining the effect of the activities.[223] It nevertheless affirmed that EPA had correctly determined that the potential impact of the activities of the non-nonmembers posed such serious and substantial threats that regulation by the tribes was essential.[224] The Court therefore affirmed "that EPA's regulations pursuant to which the Tribe's TAS authority was granted are valid as reflecting appropriate delineation and application of inherent Tribal regulatory authority over non-consenting non-members."[225]

3. Wisconsin v. EPA

In 1994, the Mole Lake Band of the Sokaogon Chippewa Community applied to EPA for TAS status under the Clean Water Act.[226] The State of Wisconsin opposed their application on the grounds that the state was sovereign over the navigable waters of Wisconsin.[227] "Nevertheless,

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218 137 F.3d 1135 (9th Cir. 1998).

219 *Id.* at 1138.

220 *Id.*

221 *Id.* at 1139 (citing Montana v. United States, 450 U.S. 544, 565–66 (1981)).

222 *Id.* (quoting *Montana*, 450 U.S. at 566) (citing Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,877 (1991) (to be codified at 40 C.F.R. pt. 131)).

223 *Montana*, 137 F.3d at 1140–41 (citing Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989)).

224 *Id.* at 1140–41.

225 *Id.* at 1141.

226 Wisconsin v. Envtl. Prot. Agency, 266 F.3d 741, 745 (7th Cir. 2001).

227 *Id.*

after elaborate administrative proceedings, on September 29, 1995, EPA approved the Band's application, finding that the tribe had satisfied all of the requirements of 40 C.F.R. § 131.8.[228] The court concluded that EPA's approval of the Band's TAS status was reasonable and consistent with the law:

> Because the Band has demonstrated that its water resources are essential to its survival, it was reasonable for the EPA, in line with the purposes of the Clean Water Act and the principles of *Montana*, to allow the tribe to regulate water quality on the reservation, even though the power entails some authority over off-reservation activities.[229]

C. A POTENTIAL FOR MORE LITIGATION

In these three cases the Court upheld tribal authority as approved by EPA. In each case, state objections to tribal authority to establish water quality standards prompted litigation. No legal challenges appear to have been made because of conflicts over TMDLs in watersheds that include Indian country. Still, the following hypothetical illustrates that such challenges are readily foreseeable:

> Assume that a waterbody, equally shared by state jurisdictions A and B, is impaired by an excess amount of phosphorus. Measurements show that the total average annual loading of phosphorus is 50,000 kg. This total comprises 32,000 kg that originates from farms lying entirely within State A and producing animal products including beef and milk. Additionally, point source discharges lying entirely within state B amount to 8,000 kg. Further, assume that the water quality criterion for phosphorus is 20µgm/l.
>
> A TMDL calculation shows that to achieve the water quality criterion for phosphorus it is necessary to reduce the load of phosphorus annually delivered into the water body annually by 10,000 kg.[230] This means that in the unlikely event that all 8,000 kg could be removed from the point sources in state B, it would still be necessary to reduce the loading by 2,000 kg coming from state A. However, it is economically desirable to take the relative

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228 *Id.*

229 *Id.* at 750.

230 The EPA acts reasonably when it allows TMDLs to be calculated on an annual basis. *See* Friends of the Earth v. Envtl. Prot. Agency, 346 F. Supp. 2d 182, 183 (2004).

> costs of load reduction from different sources into account. Reducing the loading of phosphorus from farms is likely to be far less costly than removing phosphorus through wastewater treatment.
>
> Therefore, states A and B will need to work together to achieve an equitable remedy. In order for the waterbody to be fully restored, neither state may decline to take remedial action. Hence, the potential for conflict exists since one state may not want to take the necessary measures.

This extremely simplified example also demonstrates the challenges that may arise when one of the bargaining "states" is a tribe. Of course, there may be differences in the formulation and definition of standards, and as a result, standards may be mutually inconsistent or incompatible. This is especially likely when tribes adopt standards intended to meet their cultural objectives.[231] Thus, the application of section 303 may challenge tribal cultural sovereignty, as states, tribes and the federal government begin to negotiate TMDLs.

The issue of preemption is a matter of balancing tribal and state interests. In *New Mexico v. Mescalero Apache Tribe*,[232] the Supreme Court stated:

> State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority.[233]

Where both the state and tribal interests arise under the auspices of the Clean Water Act, it is unclear how the balance will prevail. However, as Feldman states, "Despite congressional fluctuations, states have consistently attempted to exercise jurisdiction in Indian country."[234] As *Montana* and *Wisconsin* demonstrate, states often determine that it is in their interest to resist the extension of tribal authorities over the activities

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231 For example, the Grand Portage Reservation standards provide for Wild Rice Areas—a stream, river, lake, wetland or impoundment, or portion thereof, historically or with the potential to be vegetated with wild rice. GRAND PORTAGE BAND OF CHIPPEWA, GRAND PORTAGE RESERVATION WATER QUALITY STANDARDS 10 (2005) (rev. 2006), *available at* http://www.epa.gov/waterscience/standards/wqslibrary/tribes/grand-portage-band.pdf. Some tribes, such as the Pueblo of Acoma, prescribe ceremonial uses of the water. *See* PUEBLO OF ACOMA, WATER QUALITY STANDARDS, 16 (1998), *available at* http://www.epa.gov/waterscience/standards/wqslibrary/tribes/acoma.pdf.

232 New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

233 *Id.* at 334.

234 Feldman, *supra* note 132, at 561.

of non-members[235] and off-reservation activities.[236] States may believe they have a strengthened legal position when their watershed plans, prepared under the Clean Water Act section 303, already incorporate desired controls over the polluting effects of those activities.

Boundaries of reservations sever watersheds.[237] As Janet Baker indicates, potential difficulty exists where the protection of tribal water uses requires that expensive management measures be adopted by non-tribal dischargers upstream.[238] Section 518 of the Clean Water Act suggests that Congress clearly anticipated such disputes between states and tribes. Section 518 states in pertinent part:

> The Administrator shall, in promulgating such regulations [which specify how Indian tribes shall be treated as States for purposes of this chapter] consult affected States sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water. Such mechanism shall provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards.[239]

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235 A considerable body of with the issue of regulation of non-members, especially with respect to which entity can apply taxation. *See, e.g.*, Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) (holding that the *Montana* exceptions were not applicable); Montana v. Blackfeet Tribe, 471 U.S. 759, (1985) (holding that State of Montana could not tax Indian tribe's royalty interests under oil and gas leases issued to non-Indian lessees pursuant to Indian Mineral Leasing Act); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (holding that imposition of state cigarette and sales taxes on on-reservation purchases by nonmembers was valid, and that state lawfully assumed civil and criminal jurisdiction over reservations); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (holding state taxes preempted by federal law); Bryan v. Itasca County, 426 U.S. 373, (1976) (holding that a state cannot impose taxes on Indians on-reservation absent congressional intent otherwise); McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973) (appearing to assume that states have power unless preempted by federal law in holding that state law applies in Indian country under two conditions: first, that it does not interfere with tribal self-government, and second, that non-Indians are involved); Warren Trading Post v. Arizona State Tax Commission, 380 U.S. 685 (1965) (holding that imposition of state tax on Indian tribe would be inconsistent with federal statutes applicable to Indians on reservation).

236 *See supra* Part V.B.2–3.

237 Janet K. Baker, *Tribal Water Quality Standards: Are There Any Limits?*, 7 DUKE ENVTL. L. & POL'Y F. 367, 367 (1996).

238 *Id.*

239 Clean Water Act,a§ 518(e)(3), 33 U.S.C. § 1377(e)(3) (2002).

Clearly, the services of this mechanism are imperative where disparities in standards and different regulatory positions are likely to be applied to upstream and downstream discharges, as is readily anticipated when watershed TMDLs are developed by neighboring states and tribes.

Further, it seems prudent for tribes to disfavor court actions to resolve state-tribal disputes, as it is likely the legal resolution would align with state interests. As David Getches points out, "[t]he Supreme Court has made radical departures from the established principles of Indian law."[240] Getches further states that Indian cases are used by the Court, among other things, as a "crucible" to further commitments to protect state interests.[241] Tribes, therefore, are understandably wary of using the courts to protect their interests.[242]

Though states are not often inclined to wage their inter-state environmental battles in the courts, litigation may be more appealing when their dispute is with a tribe. For example, William Hines notes that states rarely resort to the courts to resolve their differences regarding water pollution.[243] Rather, they prefer to seek solutions through negotiation and cooperation.[244] Hines also recognizes the importance of uniform standards and enforcement procedures as a condition of interstate agreements.[245] Unfortunately, reticence to employ legal measures does not typically occur where one of the disputants is a tribe rather than another state.

VI. PROGRESS TO DATE

A. FAILURES AND SUCCESSES

1. *When Tribes Do Participate, the Resulting Policies Are Impressive*

Water quality standards of tribes with accepted programs propose high quality in the waterbodies and ambitious objectives. Their water quality objectives, which may include cultural beneficial uses or ceremonial and religious water uses.[246] Many of the policy statements represent

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240 David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 267 (2001).

241 *Id.* at 360.

242 *See infra* notes 256–67 and accompanying text.

243 N. William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality, Part II: Interstate Arrangements for Pollution Control*, 52 IOWA L. REV. 432, 434 (1966). However, for an example of a case in which two states did litigate an environmental issue, see Arkansas v. Oklahoma, 503 U.S. 91 (1992), involving a dispute about the validity of an EPA issued discharge permit held by a sewage treatment plant.

244 Hines, *supra* note 243, at 434.

245 *Id.*

246 *See, e.g.*, 40 C.F.R. § 131.35 (2005) (detailing water quality standards adopted by the Colville Confederated Tribes Indian Reservation); BIG PINE PAIUTE TRIBE OF THE OWENS

a rigorous approach to water quality protection. For example, the policy of the Miccosukee Tribe states:

> The Tribe, recognizing the complexity of water quality management and the necessity to temper regulatory actions with technological progress and social and economic well-being of Tribal members, vows that there will be no compromise with respect to discharges of pollutants which constitute a valid hazard to human health or the preservation of the Everglades ecosystem contained within the Water Conservation Area 3-A and Everglades National Park. Furthermore, the Tribe will seek to use the best environmental information available when making decisions on the effects of chronically and acutely toxic substances and carcinogenic, mutagenic, and teratogenic substances.[247]

The Fort Peck Tribes also use biological criteria in their water quality standards based on reference conditions determined by monitoring.[248] These bio-criteria are based on the types and numbers of plants and aquatic animals expected to be present in the stream.[249] The Hoopa Valley Tribe similarly includes in its statement of Beneficial Uses:

> Virtually all activities for both consumptive and non-consumptive uses of the Reservation waters center on satisfaction of domestic, aquatic, industrial, irrigation, recreational and cultural needs. Additional quantities of water are expected to be required for all consumptive and nonconsumptive uses over the next several years. Specifically, there has been a marked increase over the last several years in concern over some of the non-consumptive uses that water can serve, notably the growing importance given to the habitat for anadromous fish, principally chinook salmon, coho salmon and steelhead trout. More interest is also being shown in the benefit of water-orientated recreational activities. Other non-consumptive beneficial uses of growing concern include

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VALLEY, WATER QUALITY STANDARDS, BIG PINE INDIAN RESERVATION (2005), *available at* http://www.epa.gov/waterscience/standards/wqslibrary/tribes.html.

247 MICCOSUKEE TRIBE OF INDIANS OF FLA., ENVIRONMENTAL PROTECTION CODE SUBTITLE B: WATER QUALITY STANDARDS FOR SURFACE WATERS OF THE MICCOSUKEE TRIBE OF INDIANS OF FLORIDA 3 (1997) (amended 1998), *available at* http://www.epa.gov/waterscience/standards/wqslibrary/tribes/fl_4_miccosukee.pdf.

248 ASSINIBOINE & SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION, WATER QUALITY STANDARDS 4, *available at* http://www.epa.gov/waterscience/standards/wqslibrary/tribes/fort_peck_8_wqs.pdf.

249 *Id.*

> cultural uses, wildlife habitat, esthetics, wild rivers, and special Native American fisheries.[250]

Those tribes that have gained approval from EPA demonstrate sophisticated technical command of their water quality interests. This provides a model for those tribes yet to seek such approval from EPA.

2. *Tribal Participation: Too Low After 20 Years?*

According to its listing under "Tribal Water Quality Standards approved by EPA," to date EPA has accorded thirty-two tribes a status equivalent to states.[251] This number is less than 10% of the 561 tribal entities recognized by the Bureau of Indian Affairs by virtue of their status as Indian tribes.[252] There are a number of possible reasons for this. TAS presents several problems to tribes including: legal threats (as evidenced by *Albuquerque v. Browner*, *Montana v. EPA*, and *Wisconsin v. EPA*) and consequent threats to tribal sovereignty;[253] lack of capacity—a water quality standards program requires money and infrastructure;[254] differences in cultural conceptions of the environment;[255] and a wide variety of other uncertainties.

The phrase treatment-as-state is an affront to tribal sovereignty, as well. EPA has decided to minimize the use of the term treatment-as-state." The Agency regards the term as somewhat misleading and perhaps offensive to tribes.[256] Therefore to the extent possible, EPA has amended existing regulations so as to discontinue use of the term treatment-as-state.[257] Nevertheless, since this phrase is included in several

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250 HOOPA VALLEY TRIBE, WATER QUALITY CONTROL PLAN, HOOPA VALLEY INDIAN RESERVATION, 25 (2004) [hereinafter HOOPA VALLEY TRIBE WATER QUALITY CONTROL PLAN], *available at* http://www.epa.gov/waterscience/standards/wqslibrary/tribes/hoopa_valley.pdf.

251 *See* EPA, Tribal Water Quality Standards, http://www.epa.gov/waterscience/standards/wqslibrary/tribes.html (last visited Mar. 7, 2008).

252 Indian Entities Recognized and Eligible to Receive Services from the U.S. Bureau of Indian Affairs Notice, 70 Fed. Reg. 71,194–98 (Nov. 25, 2005). In its *Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations*, EPA determined that approximately two hundred seventy-five tribes were "potentially eligible for treatment as States under the standards program." EPA 1989 Indian Policy Amendments, 54 Fed. Reg. 39,098 (Sept. 22, 1989) (to be codified at 40 C.F.R. pt. 131). EPA predicted that "roughly 50 to 60 Tribes will ultimately apply to be treated as States for purposes of water quality standards, with only about 20 of those applying during the first year." *Id.* These predictions are much higher than the actual numbers. *See also* Mark A. Bilut, Note, *Tribal Authority Under the Clean Water Act*, 45 SYRACUSE L. REV. 887, 888 (1994).

253 *See supra* Part V.B.

254 *See infra* notes 277–86 and accompanying text.

255 *See infra* notes 287–95 and accompanying text.

256 ENVTL. PROT. AGENCY, EPA Tribal Policy and Initiatives 19, *available at* www.epa.gov/indian/resource/modules/module3.pdf.

257 *Id.*

statutes, its continued use is sometimes unavoidable.[258] Because it is still used, tribes may find the language threatening and may feel that by applying for treatment-as-state, they are putting their sovereignty at risk and potentially exposing themselves to more federal or state encroachment on their sovereignty.

If EPA does grant a tribe TAS, states, local government, and industry may oppose tribal standards.[259] Tribal standards, as evidenced by the cases and plans mentioned earlier, are often more stringent than state standards, and states resist complying with them because they may pose a threat to industry or require the state to expend resources to comply with tighter standards.[260] According to Rodgers, "[the] revival of water pollution law in Indian country is not universally admired. In fact, it is frequently resented. Each and every tribal delegation runs into stiff opposition—invariably from an offended state, often from polluters who have prospered in the shadows of the status quo.ë[261] Tribes are certainly aware of this, and, as a result, may legitimately fear that any attempt to create a water quality standards plan will be met by vocal opposition and perhaps even a legal challenge.

Given the likelihood of a state, local government, or another affected party bringing a lawsuit if a tribe adopts a water quality standards plan more stringent than the non-tribal program, tribes must assess whether they are capable of fighting such a battle. Of course, tribes typically have less capacity to defend themselves in court. They have fewer resources to devote to litigation than do state governments or industry, and, as described above, tribes may often anticipate bias in the judicial system.[262]

When a state challenges a tribe's plan, it is also likely to challenge that tribe's right to that land or its treaty with the United States, as both of those are factors EPA is called upon to consider in granting TAS.[263] While some tribes may have treaties with the federal government that give them a strong position for their TAS applications, other tribes may have weaker grounds upon which their sovereign authority rests.[264] These tribes may have more difficulty in convincing a court that their EPA-granted jurisdiction over the waters is appropriate.[265] These tribes

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258 *Id.*

259 *See* Rodgers, *supra* note 107, at 820 ("There is nothing in the early experience of section 518 to quell the suspicion that it is sponsoring a rebellion in the pollution-harboring preferences if "states as states.").

260 *Id.*

261 *Id.*

262 *See supra* Part V.A.

263 Clean Water Act§ 518, 33 U.S.C. § 1377(e) (2001); *see also* Tweedy, *supra* note 197, at 480.

264 Tweedy, *supra* note 197, at 480.

265 *Id.*

may, therefore, be less likely to pursue TAS for water quality standards programs.

Courts may also determine that the basis for the tribe's seeking approval, i.e., the presumption that jurisdictional authority over the waters is necessary for the health and welfare of the tribe, is invalid.[266] Worse yet, a court might hold that that section 518 is completely invalid if the court determines that tribes should have no authority over non-members.[267]

> Each venture into non-Indian courts brings extravagant response. No state that brings a lawsuit runs serious risk that a court might hold that the state does not exist, that its territory is but a fraction of that imagined. . . . Tribes, by contrast, are exposed to these risks all the time.[268]

This means that a tribe might be forced to adopt a conservative position with respect to its boundaries, or possibly even have to defend its authority over its entire reservation.[269] These threats to tribal sovereignty operate as deterrents to tribes pursuing TAS for water quality standards programs, and pose a tremendous threat to tribal water quality, as well as the water quality of their entire watershed.[270]

In addition to the legal and bureaucratic wrangling tribes may encounter in seeking sovereignty over their waters, tribes may face political opposition. In 1995, when the Republican-controlled House passed an amendment that would have limited tribal authority and denied authority to the tribes to regulate non-members for purposes of the Clean Water Act, undermining tribal control over the waters within their boundaries.[271] Dean Suagee argues that "opponents of tribal sovereignty can be expected to press their case in Congress."[272] Here, they did, and another incident confirms Suagee's position.

Another example of such a political roadblock for tribes seeking sovereignty over their waters occurred in August 2005, when U.S. Senator James Inhofe of Oklahoma, the former Chairman of the Environment and Public Works Committee overseeing EPA, placed a midnight rider into the Transportation Reauthorization Bill.[273] The clause required

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266 *Id.* at 477.

267 *Id.*

268 Rodgers, *supra* note 107, at 823.

269 *Id.*

270 *See* Grijalva, *supra* note 196, at 34.

271 H.R. 961, 104th Cong. (1995); *see also* Dean B. Suagee, *Clean Water and Human Rights in Indian Country*, 11 NAT. RESOURCES & ENV'T. 46, 47 (1996).

272 Suagee, *supra* note 27a, at 47.

273 Tony Thornton, *Indian Leaders Hear Complaints About Legislation*, THE OKLAHOMAN, Nov. 2, 2005, at 11A; About Senator Inhofe—Biography, http://inhofe.senate.gov/public/index.cfm?FuseAction=AboutSenatorInhofe.Biography (last visited Apr. 5, 2008).

Oklahoma tribes to negotiate with the state before determining their water quality standards and effectively eliminated the "sovereigntyë granted Oklahoma tribes under the CWA.[274] Senator Inhofe did not inform EPA, any tribes, or the governor of Oklahoma that he was going to include this provision in the transportation legislation; only the Oklahoma Independent Petroleum Association knew that the Senator was going to insert it.[275] Several editorials applauded Senator Inhofe for his rider (albeit at the expense of Oklahoma Indian tribes receiving the benefits of the CWA) though others lambasted him for it.[276]

Apart from the legal and political challenges created by TAS, many tribes lack the infrastructure and finances to administer a water plan. While tribes may regulate with or without the involvement of EPA, "either programmatic approach requires substantial commitments of tribal and federal staff time and resources necessary for creating required administrative infrastructure."[277]

The CWA necessitates that a tribe demonstrate its ability to administer a water quality standards program; this requires the tribe to prove that it has the infrastructure to do so.[278] Environmental management is expensive, and requires skilled employees and costly infrastructure.[279] According to Grijalva, "[m]any tribes have no established environmental agency, administrative procedure laws, formal court systems, or other complementary governmental functions."[280] This puts tribes at a tremendous disadvantage in terms of developing and running a water quality standards program.

Tribes may consider water quality standards programs and other environmental programs too expensive to implement.[281] EPA does provide resources for tribes to plan, develop and administer water quality standards programs, but the resources EPA provides may be insufficient for many tribes. EPA provides grants for tribes to establish environmental

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274 *See* Thorton, *supra* note 273, at 11A; *see also Highway Bill May Limit Tribes' Ability to Exceed State Environment Rules*, INSIDE FUELS AND VEHICLES, VOL. 4, NO. 16 (Aug. 11, 2005); Jim Meyers, *EPA Unaware of Inhofe Provision*, TULSA WORLD, August Aug. 13, 2005, at A11, *available at* http://www.tulsaworld.com/news/article.aspx?articleID=050813_Ne_A11_EPAun26591.

275 Thornton, *supra* note 273.

276 *See, e.g.*, sources cited *supra* note 274.

277 Grijalva, *supra* note 196, at 34.

278 *See* Tweedy, *supra* note 197, at 479.

279 *See* Grijalva, *supra* note 196, at 33–34.

280 James M. Grijalva, *Where Are the Tribal Water Quality Standards and TMDLs?*, 18 Nat. Res. & Env't 63, 67 (Fall 2003).

281 "Because the issue of a clean environment is often framed as being in conflict with economic success, many tribes have viewed environmental action as something beyond their reach." Allan Kanner, Ryan Casey, & Barrett Ristroph, *New Opportunities for Native American Tribes to Pursue Environmental and Natural Resource Claims*, 14 DUKE ENVTL. L. & POL'Y F. 155, 157 (2003).

agencies and regulations.[282] EPA offers funding to assist in the development and implementation of plans that address water and other environmental concerns.[283]

By following the guidelines outlined by the CWA and applying for funding from the federal government for the necessary historical and scientific research to support their standards, tribes can begin to establish water programs.[284] Tribes that have TAS have an advantage because they are eligible for more funding than those tribes who apply for the same grants without TAS.[285] However, TAS may be unappealing for tribes with the necessary infrastructure or finances to develop such a program because it requires submitting to the cumbersome and potentially degrading application process.[286]

A further issue complicating tribal applications for TAS is that the standards by which water quality programs are judged may be different from or even inconsistent with native perspectives. The process outlined by section 303 for setting water standards—imposing discharge requirements on point sources and managing nonpoint sources on the land—means that tribal environmental management becomes in effect contingent on Anglo-American norms.[287] David Getches has observed that "[t]he entire reserved water rights doctrine is not based on Indian values but on federal legislative purposes."[288]

The theme of native perspectives on the environment is popular among academics. Getches further notes that the "integrity of land, water, and the natural world is at the heart of nearly all tribal cultural and

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282 EPA provides General Assistance Program grants and grants under various sections of the CWA. Indian Environmental General Assistance Program Act of 1992 § 502(b), 42 U.S.C. § 4368b(b) (1992); *see, e.g.*, Clean Water Act,a§ 319(h), 33 U.S.C. § 1329(h) (2002).

283 *See* 33 U.S.C. § 1329(h)(1).

284 According to the GAO report, between 2002 and 2004, tribal governments received approximately $360 million in funding from the EPA for various environmental activities. GAO REPORT, *supra* note 155, at 5 (2005). $253 million of that came from the Indian General Assistance Program, the CWA, the Safe Drinking Water Act, and the Clean Air Act. *Id.* at 21. Specifically, EPA gave $114 million through the Indian General Assistance Program to help tribes "plan, develop, and establish environmental protection programs" and $66 million under the CWA for water pollution programs. *Id.* at 26. The remaining funds were authorized under the Toxic Substances Control Act, the National Environmental Education Act, the Comprehensive Environmental Response, Compensation and Liability Act, and other environmental programs. *Id.*

285 Though the Indian General Assistance Program does not require that tribes have TAS, tribes contribute less matching funds for grants under CWA section 106 if they have TAS status. *Id.* at 23.

286 *See id.* at 20.

287 Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 226 (1996).

288 David Getches, *Defending Indigenous Water Rights with the Laws of a Dominant Culture: The Case of the United States, in* LIQUID RELATIONS: CONTESTED WATER RIGHTS AND LEGAL COMPLEXITY 44, 63 (Dik Roth et al. ed., 2005).

spiritual life."[289] Angie Debo refers to the love Indians have for their homeland as amounting to a mystical identification with it.[290] Debo quotes a leader of the Spokane tribe who stated, "I was born by these waters. The earth here is my mother."[291] In contrast to wider American culture, many Native Americans see the world in a holistic way, "that is, as an organic or unified whole, whose parts are totally interdependent and whose reality is greater than the sum of those parts."[292] Creating a water quality standards plan consistent with both Indian cultural perspectives and the requirements of section 303 poses an additional problem for tribes that states simply do not have to confront.

Tribes that do confront this challenge, however, often advance biological purposes and protection that should be viewed as important. Robert Adler criticizes the deficiency of water quality standards in providing for biological factors.[293] In this respect, tribal water quality standards may serve as valuable examples of desirable water protection objectives to states and local government. As William Galloway states, "[t]ribes identify with their land in ways that non-Indian society is only beginning to understand. Tribes' love for their land could also lead to improvements in the reservation and neighboring environments, since they seem likely to establish more stringent standards than the surrounding states."[294] Whether tribes advance policy goals that reflect indigenous values, Anglo-American values, or a combination of the two, may depend on the particular character of that tribe and the individuals advancing the policy.[295]

Many of the stereotypes, however, while they may find some basis in individual tribes or individual tribal members, also complicate any discussion of environmentalism and Indians because not all tribes and tribal members share the same perspectives about the environment.[296] Nevertheless, although the federal government has imposed Anglo-American norms, TAS gives tribes an opportunity to share their own values and impress their own standards through the CWA and discus-

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289 *Id.* at 63.

290 ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 2 (2006).

291 *Id.*

292 Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 ARIZ. ST. L.J. 175, 182 (1992).

293 For example, some commentators criticize water quality standards for failing to provide biological factors. ROBERT W. ADLER, JESSICA C. LANDMAN, & DIANE M. CAMERON, THE CLEAN WATER ACT: 20 YEARS LATER 125 (1993).

294 Galloway, *supra* note 133, at 202.

295 *See* Tsosie, *supra* note 287, at 227 (describing conflicting pressures on Indian communities to act in accordance with tribal traditions and values while not seeming to evade the mainstream regulatory system).

296 *Id.*

sions with EPA and the states.[297] Tribes, while they may be deterred by the norms imposed on them through section 303, can work within those norms to add their own value to the standards developed.

Though EPA is committed to tribal participation through TAS, even the bureaucratic element of the application process may deter tribes.[298] The CWA statutes, EPA regulations, and EPA's handbook for tribes applying for TAS status and approval of their water quality should provide a cohesive explanation of EPA's policy. However, the statutes, while detailed, do not convey the details of EPA's TAS policy.[299]

EPA's experience with past applications may be immensely helpful to tribes.[300] However, EPA received criticism in the GAO's report on tribal applications for environmental programs in October 2005.[301] The GAO examined twenty cases from EPA Regions 6, 9, and 10, the regions where the greatest number of approvals had occurred.[302] The report was particularly critical of the delays in the process for applications.[303] In one instance, EPA asked for necessary information about a tribe's water bodies, water uses and land status twenty months after receiving the TAS request, but EPA should have asked for this information when the tribe's request was submitted.[304] In other instances, bureaucratic confusion at EPA or changes in staff (at EPA and within tribal environmental programs) led to delays of several months or even several years.[305] The GAO report, however, reveals shortcomings of those regions with the most success administering TAS rather than an examination of the shortcomings nationwide.[306] The twenty cases assessed in preparation of the report were all from the Regions 6, 9, and 10.[307] Those Regions accounted for 77% of the approved tribal applications under the CWA, SDWA, and CAA.[308] The authors of the study met with representatives from Indian tribes and state officials in Arizona, New Mexico,

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297 *See id.* at 229–32.

298 *See* GAO REPORT, *supra* note 155, at 20.

299 *See generally* Clean Water Actn§§ 101–607, 33 U.S.Ce §§ 1251–1387 (2002).

300 Given the high economic costs involved in developing environmental programs, the significant amount of time and resources required to complete an application, the difficulties sometimes faced by tribes when attempting to navigate an unfamiliar Anglo-American system, and the extensive delays frequently encountered in processing tribal applications, EPA's guidance is tremendously important; a more explicit policy, such as the one EPA intended to create following the GAO report, would be valuable.

301 *See generally* GAO REPORT, *supra* note 155.

302 *Id.* at 30.

303 *Id.* at "Highlights" (unnumbered page).

304 *Id.* at 18.

305 *Id.* at 18–19.

306 *Id.* at 30.

307 *Id.*

308 *Id.*

Oklahoma, and Washington—states in Region 9, 6, 6, and 10, respectively.[309]

Apparently, the GAO did not meet with EPA administrators, tribal leaders, or states outside those regions where TAS has been less sought after. Region 2, for example, includes New York State, New Jersey, Puerto Rico, the U.S. Virgin Islands, the Cayuga Nation, the Oneida Indian Nation, the Onondaga Nation, the St. Regis Mohawk Tribe, the Seneca Nation of Indians, the Tonawanda Band of Senecas, and the Tuscarora Nation.[310] As of April 8, 2008, only the St. Regis Mowhawk Tribe had an EPA-approved TAS application.[311] The Tribe applied for TAS and was approved on October 16, 2002.[312] Its water quality standards were approved by EPA in August 2007.[313]

VIII. TAS AND SOVEREIGNTY: NO GOOD CHOICE FOR TRIBES

In response to the October 2005 GAO report and Inhofe's intervention in the TAS program, EPA decided to form the Tribal Water Program Council.[314] The Council was designed by EPA to improve relations between states and tribes regarding water quality programs.[315] It will facilitate dialogue between tribes and states regarding water quality criteria for shared watersheds.[316] Furthermore, EPA promised tribal leaders a guidance document for TAS programs and software to assist with the development and implementation of their programs.[317]

Despite the bureaucratic, legal, and political wrangling facing a tribe requesting TAS, the alternative leaves the tribes with less control over their part of the watersheds in which their reservations lie.[318] Under the CWA, the federal government, through EPA, has authority to control

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309 *Id.* at 31.

310 Federally-Recognized Indian Nations Located in Region 2 Area, http://www.epa.gov/region2/nations/intro.htm (last visited Apr. 8, 2008).

311 *See* Indian Tribal Approvals, http://www.epa.gov/waterscience/tribes/approvtable.htm (last visited Apr. 8, 2008).

312 ENVTL. DIVISION, ST. REGIS MOHAWK TRIBE, WATER QUALITY STANDARDS, AUGUST 8, 2007, at 1 (2007), http://www.epa.gov/waterscience/standards/wqslibrary/tribes/srmt_2_%20wqs.pdf.

313 *See id.*

314 *EPA Guidance May Speed Creation of Tribal Water, Air Standards*, ENVTL. POL'Y ALERT, June 21, 2006, Vol. 23, No. 13.

315 *New EPA-Backed Council May Help Resolve Tribal-State Water Disputes*, WATER POL'Y REPORT, Apr. 3, 2006, Vol. 15, No. 7.

316 *Id.*

317 *EPA Guidance May Speed Creation of Tribal Water, Air Standards*, ENVTL. POL'Y ALERT, June 21, 2006, Vol. 23, No. 13; *see also EPA Guidance May Speed Creation of Tribal Water Quality Standards*, *supra* note 155.

318 *See* Royster & Fausett, *supra* note 125, at 602.

pollution of surface waters.[319] EPA retains the responsibility of creating and enforcing water quality standards for states who have not assumed the administration and enforcement of their own standards and tribes who have not received TAS.[320]

But EPA may have the option of allowing states to include tribal reservations in their water programs. Federal preemption of state law applies when a federal law explicitly preempts state law or occupies the field to the exclusion of state law.[321] When Congress authorized EPA to treat tribes as states, it preempted state jurisdiction over tribal reservations.[322] However, there is no express language in the statutes providing for the designation of tribes as states that would deny EPA the option of allowing states to administer state-crafted regulations on reservation lands.[323] Thus:

> As time goes by, state regulatory authority may continue to "creep" onto reservations [in] areas where a combination of tribal and federal inaction has resulted in "de facto" state regulation. This regulatory void may enhance state claims that state intrusions into the arena of reservation water quality standards do not affect tribal self-government.[324]

If this were to happen, tribes would risk losing their historic or culturally significant uses of the water, in addition to simply relinquishing control of those waters. Because EPA's position is essentially to advance any reasonable tribal water program within reason and because courts have consistently upheld tribal authority to create such programs,[325] pursuing TAS under section 303 might be the most prudent means of preserving tribal sovereignty over the waters and their uses.

It may be surmised that the relatively large percentage of tribes that have not sought TAS under the CWA feel there is no over-riding incentive to do so. A potentially major incentive to proceed in seeking approval would arise if states began to assumes it was in their interest to

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319 *See* Clean Water Act §402(b), 33 U.S.C. § 1342(b) (2000).

320 *See* 33 U.S.C. § 1316(c); *see also* 33 U.S.C. § 1342(b); Whitman Memorandum, *supra* note 140.

321 Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 4–5 (1995).

322 *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 343–44 (1983) (holding that where an Indian tribe with assistance from the federal government had developed a program for the management of its reservation's natural resources, and where concurrent jurisdiction by the state would interfere with or nullify that regulatory scheme, application of the State's hunting and fishing laws to the reservation was preempted).

323 *See, e.g.*, Clean Water Act §§ 101–607, 33 U.S.C. §§1251–1387 (2002).

324 Kurt R. Moser, *Water Quality Standards and Indian Tribes: Are Tribes Afraid of Clean Water?*, 8 U. DENV. WATER L. REV. 27, 29 (2004).

325 *See, e.g.*, Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996).

themselves establish water quality standards for tribal waters in the absence of tribal action. The continuing, significant impairment of the nation's waters demonstrates the insufficiency of relying upon point source controls. It seems persuasive that the remedy is widespread adoption of the machinery of section 303. This will mandate control measures based on comprehensive watershed planning and management through the application of Total Maximum Daily Loads. "TMDL-based rules should be thought of as an inevitable step toward a mature phase of regulation in which all sources of water quality degradation are addressed."[326] "All sources" include those within reservations.

CONCLUSION

Water rights are traditionally held to apply to a quantity of water allocated according to the rights. However, it would seem judicious to specify water quality in the definition of water rights. For tribes, gaining TAS for their water quality standards programs is one way to assure access to water quality that suits their aspirations. Unfortunately, greater stringency in the expression of water quality standards is often seen as grounds for opposition rather than emulation. There is a long history of conflict between states and tribes over regulatory jurisdiction.[327]

In providing for tribes to be treated as states, Congress potentially instituted a tenfold increase in the number of states.[328] This reality poses two critical needs. First, it is highly desirable that efforts be made to promote a wider understanding and acceptance of the water quality standards, and consequent management measures adopted by the tribes. Second, there is an even greater immediate need to encourage the vast majority of tribes that have not sought TAS-status to pursue that status through EPA. Indian communities are understandably likely to act with caution in protecting their interests, but ultimately, those interests seem to require achieving TAS.

Tribes have a responsibility to protect the health and welfare of their communities through their own Water Quality Control Plans. Despite its shortcomings, the CWA provides a framework that allows tribes to create standards for their uses and to protect against those uses being undermined by non-tribal communities with whom they share their waters. As stated in the Hoopa Valley Indian Reservation, Water Quality Control Plan, "[i]n protecting Tribal property, wildlife and natural resources with the adoption of this Water Quality Control Plan, the Tribe is exercising its inherent power to regulate activities that may threaten or have a direct

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326 James Boyd, *The New Face of the Clean Water Act: A Critical Review of the EPA's New TMDL Rules*, 11 DUKE ENVTL. L. & POL'Y F. 39, 41 (2001).

327 Galloway, *supra* note 133, at 177.

328 Fort, *supra* note 199, at 772

effect on the political integrity, the economic security, and health and welfare of the Tribe."[329] Not having plans may have more unpalatable effects for tribes in the long-term. It is not in their interest to delay until states feel obliged to intervene in tribal water management.

> Delegation to tribal governments of all jurisdiction under the [FWPCA] is the result most consistent with current congressional and judicial expressions favoring tribal self-government. Assumption of such delegation by the tribe would prevent further encroachment by the state in the jurisdictional voice in determining their own environmental future and the future of areas surrounding the reservation.[330]

The legal history of environmental protection is an area that "came to be dominated by un-kept promises and the promotion of a culture within that area dominated by adversarialism, polarization, and distrust."[331] Treating tribes as states under the Clean Water Act requires that domination should end. Although the CWA imposes an Anglo-American paradigm on tribes applying for TAS, it allows tribes to protect their waters on their terms. This adds value to the program not only for tribes, but also potentially for states and the federal government.Tribal management is critical because watershed protection and the development of TMDLs and their application in practice requires the engagement of all communities within it. Tribes are more likely to respect water quality standards when they have ownership in their creation. Although tribal water quality standards may be stricter than state or local standards, they are entirely consistent with the goals of the CWA and the need to improve the nation's waters. The holistic view of the world, often attributed to Native Americans, is obviously a more realistic view than a is the piecemeal approach to environmental protection. If water quality management programs begin to reflect this holistic view it will be a positive step toward improving the nation's blighted waters.

When Congress amended the Clean Water Act in 1987 to allow Indian tribes to receive TAS, their intent was to enhance the protection for water's within the nation's boundaries by focusing on the quality of reservation waters. This was a logical extension of the Clean Water Act, as water quality on reservations has an impact on water quality in neighboring states. Tribes should be encouraged to take advantage of the resources available to them through EPA funding and should take some

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329 HOOPA VALLEY TRIBE WATER QUALITY CONTROL PLAN, *supra* note 250, at 2.

330 Petros, *supra* note 109, at 63. Petros noted that in 1975 Congress was in favor of tribal participation in a piece of federal strip mining legislation that was ultimately vetoed. *Id.* at 93 n.168.

331 LAZARUS, *supra* note 13, at 87.

comfort in the fact that the courts have upheld their standards when challenged. Still, too few tribes have this status. The problems that have developed from this legislation, including bureaucratic, legal, and political obstacles, may discourage tribes. Financial limitations and other incapacities may also be obstacles. This regrettable situation risks losing potentially valuable contributions to environmental programs on the part of tribes. The management and regulation of tribal waters could default to the states especially given the increased need for integrated watershed management posed by TMDLs. This outcome would not only defeat the congressional purpose in including section 518 in its amendments to the CWA in 1987, it would also be a defeat for tribal interests in water resources.