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# A LINK BETWEEN WATER QUALITY AND WATER RIGHTS?: NATIVE AMERICAN CONTROL OVER WATER QUALITY

Mark E. Chandler†

## I. INTRODUCTION

It is well settled that Indians have exclusive control over tribal lands, subject only to a superior power of the United States. It is also well settled that Indians have a right to a quantity of water that is sufficient for the reservation needs under a “first in time, first in right” system of water appropriation. An open question, however, is whether Indians have a right to any particular water quality, and whether that right has been guaranteed to them by the United States under existing treaties and statutes, or otherwise upon the creation of reservations.

This article first explores the sparse ground between Indian reservation water quality and water rights established under the *Winters* doctrine.<sup>1</sup> Secondly, it suggests that one working approach to tribal control over water quality in Indian country is embodied in the 1987 amendments to the Clean Water Act<sup>2</sup>. These amendments allow tribes a major, if not the sole voice in the quality of the water on the reservation.<sup>3</sup> Recent developments in EPA programs for tribal primacy will also be examined, with an emphasis on the legal issues

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1. See *Winters v. United States*, 207 U.S. 564 (1908).

2. 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993).

3. In 1987 Congress enacted the Water Quality Act of 1987. Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified as amended at 33 U.S.C. § 1377 (1988)) (adding § 518 to the Clean Water Act, providing Indian tribes the opportunity to apply for treatment as a state for regulatory purposes). A year later Congress enacted Pub. L. No. 100-581, 102 Stat. 2438 (1988) (codified as

raised in relevant court decisions. Additionally, the status of water quality rights in Oklahoma is explored. This article focuses on the author's experiences in the Environmental Protection Agency's Region Six offices.<sup>4</sup> Part II examines reserved water rights through the *Winters* doctrine and recent case decisions. Part III looks at the development of EPA policies regulating Indian lands with primary emphasis on the Clean Water Act provisions. Finally, Part IV looks into issues of Native American water quality rights in Oklahoma.

## II. DEVELOPMENTS IN WATER QUALITY

### A. *Water Quality Under Winters*

Tribal reserved water rights were first recognized by the Supreme Court in 1908. The doctrine of reserved water rights emanates from the decision in *Winters v. United States*.<sup>5</sup> The United States brought suit as trustee for the Indians to protect the reservation from upstream diversions that had been occurring. In *Winters*, the Supreme Court held that the right to use the waters of the Milk River was impliedly reserved in the agreement establishing the Fort Belknap Reservation.<sup>6</sup> The reservation was a part of what once had been a much larger tract of land that the Indians had roamed for centuries. The reserved lands were arid and, without irrigation, were "practically valueless."<sup>7</sup> Reasoning that under a contrary ruling the reservation would not have been livable, the *Winters* court found that the implied right to use went to the quantity of water needed to sustain the reservation.<sup>8</sup> In reaching this decision, the Court applied its canons of construction for agreements with Indians: first, ambiguities in an agreement will be resolved from "the standpoint of the Indians;" second, the rule should "certainly be applied [to choose] between two inferences," one which

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amended at 33 U.S.C. § 1377 (1988)) (restoring eligibility for sewage treatment funds to Indian tribes in Oklahoma, tribes thought to be excluded by Pub. L. No. 100-4).

4. Region Six consists of the states of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.

5. 207 U.S. 564 (1908).

6. *Id.* at 577. Congress terminated treaty-making with the Indians in 1871, after which reservations were created by agreements. Such agreements were later ratified by the Congress, as was the case with the Fort Belknap reservation. *Id.* at 570. The *Winters* doctrine, however, now applies to Indian reservations regardless of the manner of creation. *Arizona v. California*, 373 U.S. 546, 598 (1963); see also J. Royster, NATIVE AMERICAN WATER RIGHTS REGIME (Mar. 18, 1994) (unpublished manuscript on file with the *Tulsa Law Journal*).

7. *Winters*, 207 U.S. at 576.

8. *Id.*

supports the agreement;<sup>9</sup> and third, the agreements should be interpreted as the Indians understood them. *Winters* sets forth the basic principles of tribal reserved water rights. That is, a certain quantity of water is necessary to render arid land capable of sustaining life and an agrarian lifestyle. Consequently the tribes have a reserved right to a quantity of water.

However, more than a certain quantity of water is necessary. The water must be of useable quality. There was no mention in *Winters* of a minimal water *quality* standard having been in the agreement setting aside the Fort Belknap Reservation.<sup>10</sup> This omission may be attributed to the fact that good quality waters at that time in the history of the American West were taken for granted. Pollution and polluted waters we know today were generally unknown at the time of the treaties and agreements with the Indians. Consequently, the negotiators of the agreements would have had no reason to consider water quality to be an issue for negotiation. Nor would it necessarily have arisen in the minds of the Supreme Court Justices in 1908. Therefore, we must look to later cases to determine if they expand at all on the reserved water rights of *Winters*.

#### B. *Recent Developments in Common Law Water Rights*

There are no cases directly bearing on the quality a reserved water must meet.<sup>11</sup> Subsequent cases, while not decided on issues of water quality, have hinted tantalizingly at the notion that a certain water quality goes hand-in-hand with certain reserved uses. The Supreme Court suggested such an element of water quality when it held in *Cappaert v. United States*<sup>12</sup> that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the *extent needed to accomplish the purpose of the reservation.*"<sup>13</sup> In *Cappaert*, the reservation was at a

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9. *Id.* at 576-77.

10. *Id.* at 575-78.

11. However, a federal district court has held that a reserved right required that the water temperature be maintained at 68° F or less for fishing purposes. *United States v. Anderson*, No. 3643 (E.D. Wash. July 23, 1979), *reprinted in part*, 6 Indian L. Rep. (Am. Indian Law. Training Program) F-129 (1979). *See also* *United States v. Gila River Irrigation Dist.*, 804 F. Supp. 1 (D. Ariz. 1992) (determining that the salt content in the river was a detriment to the tribes right to the natural flow of the river and enjoining the non-Indians from diverting the river flow); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 585-87 (Rennard Strickland ed., 1982).

12. 426 U.S. 128 (1976).

13. *Id.* at 138 (emphasis added).

national monument known as Devil's Hole, an underground pool containing a singular species of fish. This rendered the monument of special scientific value.<sup>14</sup> The court held that the purpose of the reservation litigated in *Cappaert* was "water sufficient to maintain the level of the pool to preserve its scientific value . . . ."<sup>15</sup>

The purpose of Indian reservations generally was to place the Indians in confined areas to live. Sustaining life within that confined area necessarily requires potable water for domestic, agricultural, grazing, and other uses. Stated another way, the creation of the Indian reservation by the Federal Government implied an allotment of water necessary to make the reservation livable.<sup>16</sup> The Court reiterated that reserved water is that water needed for use for all future time; it is not lost through non-use or forfeiture by the tribe or Indian allottee.<sup>17</sup>

The Pyramid Lake case may well be the stirring rod for including an implied reserved water quality as a corollary to reserved water quantity rights. In *Nevada v. United States*,<sup>18</sup> Justice Rehnquist noted with approval an interesting observation by the Court of Appeals.<sup>19</sup> The Appeals Court in *dicta* stated that the U. S. Government *could have sought*, but did not, adjudication of a *Winters* reserved right for certain purposes.<sup>20</sup> Such purposes may include irrigation, leaving open the possibility of expanding the reserved water rights for other purposes such as fishing. In a later footnote, J. Brennan, concurring with J. Rehnquist, recognized "[a]s a consequence, the Tribe retains a *Winters* right, at least in theory, to water to maintain the fishery, a right which today's ruling does not question."<sup>21</sup>

Justice Rehnquist may have been leaning toward the holding of the 9th Circuit in *Colville Confederated Tribes v. Walton*<sup>22</sup>. There, the court held that in addition to a right to a certain amount of water for

14. *Id.* at 132. This case first applied the *Winters* doctrine of reserved water rights to subsurface waters.

15. *Id.* at 147 (emphasis added).

16. *Arizona v. California*, 373 U.S. 546, 599 (1963); *see also Arizona v. California*, 460 U.S. 605, 609 (1983).

17. *Arizona*, 373 U.S. at 549; *see also Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

18. 463 U.S. 110 (1983) (determining rights to water in Pyramid Lake).

19. *Id.* at 134 n.13.

20. *Id.*

21. *Id.* at 145.

22. 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

irrigation, there was also reserved enough water to maintain the traditional tribal Omak Lake fishery.<sup>23</sup> This right necessarily included the right to sufficient water to allow natural spawning of trout.<sup>24</sup> Spawning of native trout requires near pristine water quality.<sup>25</sup> Therefore a high level of water quality would also appear implicit in the Court's decision.

Even though eleven years have passed since these cases were decided, with no other case on point, these kinds of statements remain tantalizing to the Indian water rights lawyer. The idea that good quality water falls within the *Winters* reserved rights certainly is percolating today in the minds of many such lawyers. A water quality argument should apply with a force equal to that of water quantity; that is, in order to be of value and to sustain the purpose of the reservation, the reserved water must be of a certain minimal quality. The time is ripe for a test case on the issue of water quality.

### III. STATUTORY WATER QUALITY

#### A. *Background of Environmental Protection Agency Policy*

When the newly-formed EPA began administering its statutes in Indian country in the 1970s, it was expanding into an area many states were already regulating. State regulation, whether sanctioned by federal Indian law or not, was extant unless challenged by an individual or the tribes. Tribal or individual resistance to state regulation was infrequent unless threatened with an enforcement action.<sup>26</sup> At first, this expansion produced no impact on the existing state programs. However, jurisdictional problems arose when the EPA began to receive applications for delegation of programs to the states.<sup>27</sup> First among those was under the Clean Water Act. Several states sought and obtained assumption of the National Pollutant Elimination Discharge System<sup>28</sup> in the early and mid-seventies. This forced the EPA

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23. *Id.* at 48.

24. *Id.*

25. See generally David Coursen, Comment, *Reserved Rights: Water for Fish Protection and the 1983 Indian Water Rights Decisions*, 63 OR. L. REV. 699 (1984) (detailing reserved fishing rights).

26. See *Currey v. Corporation Comm'n.*, 617 P.2d 177 (Okla. 1980), *cert. denied*, 452 U.S. 938 (1981).

27. 33 U.S.C. § 1251(b) (1988 & Supp. V 1993). Under the Clean Water Act Congress recognized the need for preservation and protection of the primary responsibilities and rights of the states. Therefore, Congress authorized the EPA to approve State programs for achievement of surface discharge pollution control. See *id.*

28. 33 U.S.C. § 1342 (1988 & Supp. V 1993). This section of the Clean Water Act establishes a permit program for controlled discharges of wastewater effluent into a water of the

to consider for the first time the jurisdictional implications in delegation programs. Region Six of the EPA initially did not receive delegation applications. Thus, the state/federal jurisdictional issue did not arise until the early 1980s when states in the region first applied for delegation under statutes unrelated to the Clean Water Act.<sup>29</sup>

The EPA was forced under the precepts of Federal Indian law to deny most, if not all, of the early state jurisdictional claims within Indian country.<sup>30</sup> Events moved rapidly in the early 1980s when states began to apply for primacy of programs in the Safe Drinking Water Act<sup>31</sup> and the Resource Conservation and Recovery Act<sup>32</sup>. In Region Six, these two statutes forced decisions on the jurisdictional questions, with the underground injection control<sup>33</sup> program in the Safe Drinking Water Act being a primary catalyst.

The regulatory programs for those Acts, as well as those for the Clean Water Act required that a state asserting jurisdiction in an application for delegation demonstrate adequate legal authority over Indian lands.<sup>34</sup> States such as Oklahoma and New Mexico, with significant Indian country within their borders, made initial efforts to demonstrate sufficient legal authority to regulate activities in Indian country. The EPA determined that the New Mexico demonstration of legal authority was "presently inadequate" for delegation of the Underground Injection Control program.<sup>35</sup> Oklahoma, which initially

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United States. *Id.* A water of the United States is defined in the EPA regulations and generally includes all intrastate and interstate streams, rivers and lakes, including wetlands. 40 C.F.R. § 122.2 (1993).

29. States applied for delegation programs under Safe Drinking Water Act, 42 U.S.C. § 300f to 300j-26 (1988 & Supp. IV 1992); and Resource Conservation Recovery Act, 42 U.S.C. §§ 6901-92k (1988 & Supp. IV 1992). To date only Arkansas has a delegation program under the Clean Water Act.

30. *See, e.g.*, 48 Fed. Reg. 31,640 (1983).

31. 42 U.S.C. § 300f to 300j-26.

32. 42 U.S.C. §§ 6901-92k.

33. 42 U.S.C. § 300j-2.

34. *See* 40 C.F.R. § 123.5(b) (1980) (no longer in force). The same requirement exists in current regulations. 40 C.F.R. §§ 123.23(b), 145.24(b), 271.7(b) (1993) (promulgated under the Clean Water Act, the Safe Drinking Water Act, and the Resource Conservation and Recovery Act.)

35. *See* 48 Fed. Reg. 31,640 (1983). This determination pertained only to the injection wells under the jurisdiction of the New Mexico Environmental Improvement Agency. A separate agency for the Class II wells did not, at the time, assert jurisdiction over Indian country.

had attempted a demonstration of legal authority, withdrew its assertion<sup>36</sup> except for the Class II<sup>37</sup> program under the Oklahoma Corporation Commission (OCC). The OCC attempted to assert jurisdiction over all Indian country within the state, but the EPA delegated the program to the OCC only for the restricted lands of the Five Civilized Tribes in Eastern Oklahoma. The EPA's recognition of Oklahoma's existing authority was based on a federal statute and remains the only delegation of a regulatory program over Indian country granted to a state by the EPA.<sup>38</sup> The EPA thus continued to administer its statutes elsewhere in Indian country, and, for those statutes such as the Safe Drinking Water Act<sup>39</sup> which require regulations to be in place prior to permitting sources or activities, the EPA set about developing them.

### B. *Development of EPA Programs and the Tribes As States Statutes*

Even before the EPA statutes were amended in the mid-1980s to provide more opportunities for the tribes, the EPA was rapidly (a relative term) developing its policy and approach toward tribal participation. After retaining the authority on Indian lands in the underground injection control program, the EPA began developing regulations for injection wells on Indian lands. In November 1984, the EPA promulgated an underground injection control program for wells on the Osage Mineral Reserve.<sup>40</sup> That same month, the EPA issued its Indian Policy, stressing a government-to-government relationship with Native Americans. "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-

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36. 47 Fed. Reg. 27,273-74 (1982). Upon EPA recommendation, Oklahoma withdrew its assertion to demonstrate legal authority to regulate activities within Indian Country.

37. 47 Fed. Reg. 5413 (1982) (discussing Class II wells in New Mexico). Class II wells are those related to the oil and gas industry, such as water flooding and reinjection of produced water.

38. The U. S. Congress in the late 1940s passed a law requiring all oil and gas operators on the restricted lands of the Five Civilized Tribes to follow the rules and orders of the OCC. The statute was litigated in *Currey v. Corporation Comm'n.*, 617 P.2d 177 (Okla. 1980), *cert. denied*, 452 U.S. 938 (1981).

39. See 42 U.S.C. § 300f to 300j-26 (1988 & Supp. IV 1992).

40. 40 C.F.R. § 147.2901 (1993). The state of Oklahoma did not seek authority over the Osage Mineral Reserve Class II activity. Nevertheless, the EPA applied the "split estate" doctrine in considering the mineral reserve as Indian country. The federal split estate doctrine states that if either the surface or mineral estate is Indian country, the whole is Indian country. See, e.g., 49 Fed. Reg. 38,463 (1984) (stating surface mining rules of the Department of the Interior).



government' and 'government-to-government' relations between Federal and Tribal Government."<sup>41</sup> During this same period, the EPA formally adopted the term "Indian country" as the definition of "Indian lands," which is used elsewhere in EPA promulgations.<sup>42</sup> The EPA continued to work on promulgating Underground Injection Control programs for Indian country in other areas of the Region. These programs were completed in October 1988 and covered all other Indian lands in Oklahoma<sup>43</sup> and New Mexico, including the Navajo Reservation.<sup>44</sup>

To further its policy and to provide the tribes a stronger voice in preserving the reservation environment, the EPA revised its statutes to enable it to treat tribes in the same manner as states for the purposes of administering the EPA statutes. In brief, the following statutes were revised using similar language to accomplish the purpose: The Safe Drinking Water Act<sup>45</sup> - the EPA may treat tribes as states for all of the programs contained in the statute; The Comprehensive Environmental Response, Compensation and Liability Act (Superfund)<sup>46</sup> - the EPA may enter into cooperative agreements with tribes to carry out Superfund purposes; The Clean Water Act<sup>47</sup> - the EPA may treat tribes as states for regulatory programs; and The Clean Air Act<sup>48</sup> - the EPA may treat tribes as states for the purposes of the Act.

### C. *The Clean Water Act and Water Quality*

The 1987 amendments to the Clean Water Act provide the EPA with the authority to approve a tribe for treatment as a state for certain purposes enumerated in the act.<sup>49</sup> One of the enumerated sections for which tribes may seek approval is Section 303, the water quality standard provision of the act. That section allows a state, or a tribe treated as a state, to establish water quality standards for the water resources within the state's or the tribe's governmental jurisdiction. A tribe must demonstrate four categories of authority and capability in order to be treated as a state by the EPA. First, the tribe must

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41. EPA Policy for the Development of Environmental Programs on Indian Reservations (November 4, 1984).

42. 40 C.F.R. § 144.3 (1993).

43. See 40 C.F.R. § 147.3000 (1994).

44. See 40 C.F.R. § 147.3100 (1994).

45. 42 U.S.C. § 300f to 300j-26 (1988 & Supp. IV 1992).

46. 42 U.S.C. §§ 9601-75 (1986 & Supp. IV 1992).

47. 33 U.S.C. §§ 1251-1387 (1988).

48. 42 U.S.C. §§ 7401-7671g (1990 & Supp. IV 1992).

49. See 33 U.S.C. § 1377(a) (1988).

be one that is recognized by the Department of the Interior.<sup>50</sup> Second, the tribe must have a governing body carrying out substantial governmental duties and powers.<sup>51</sup> Third, the functions to be exercised must pertain to the management and protection of the water resources which are held by an Indian tribe, held in trust by the United States for Indians, held by a member of an Indian tribe subject to a restriction, or otherwise within the borders of an Indian reservation.<sup>52</sup> Finally, the tribe must show that it is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised.<sup>53</sup>

Water quality standards establish the desired ambient nature of a water body.<sup>54</sup> The appropriate state or tribal authority establishes designated beneficial uses for the water resources under its jurisdiction, then promulgates narrative and numerical criteria to protect the designated uses.<sup>55</sup> Each set of standards must contain an anti-degradation clause, intended to prohibit further fouling of the water.<sup>56</sup>

Water quality standards, once established and approved, apply to lakes, rivers, and streams or portions thereof. Most streams are divided into segments. If there is a discharge into a segment of the water body, the required permit issued to the discharger must nominally meet any applicable water quality standards.<sup>57</sup> A permit cannot be issued if the discharge would violate these standards.<sup>58</sup> When drafting a permit, the EPA seeks certification from the state or from a tribe that the limitations in the proposed permit will not violate existing water quality standards.<sup>59</sup> Moreover, a discharge permit must be conditioned so as not to violate *downstream* standards.<sup>60</sup>

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50. 33 U.S.C. § 1377(h)(2) (1988).

51. 33 U.S.C. § 1377(e)(1) (1988).

52. 33 U.S.C. § 1377(e)(2) (1988).

53. 33 U.S.C. § 1377(e)(3) (1988).

54. 33 U.S.C. § 1313 (1988). The rules and regulations for establishing, submitting, and approving standards are in 40 C.F.R. § 131 (1993).

55. 33 U.S.C. § 1313(c)(2)(A) (1988).

56. *Id.* Anti-degradation measures provide that existing uses may not be lowered, very high quality waters must be maintained and protected, and high quality waters in state and national outstanding resource areas must be maintained and protected.

57. 33 U.S.C. § 1341(a) (1988).

58. 33 U.S.C. § 1341(a)(2) (1988).

59. *Id.* The certifying authority is the governmental entity with legal jurisdiction over the water body where the discharge originates and which has water quality standards. A permit cannot be issued if the certifying authority determines that the discharge will violate the standards.

60. 40 C.F.R. § 131.10(b) (1993); *see also* *Arkansas v. Oklahoma*, 112 S. Ct. 1046 (1992); *City of Albuquerque v. Browner*, No. 93-CV-82 (D. N.M.), *reprinted in* 38 *Env't Rep. (BNA)* 2062, 2063 (Oct. 21, 1993). *See infra* notes 75-92 and accompanying text.

The first applications under the Clean Water Act came from the Pueblos of New Mexico, seeking section 106<sup>61</sup> grants to develop the capability to set and enforce water quality standards. Such funds could also be used to build capability to assume other programs such as the surface water discharge program.<sup>62</sup> In 1990 ten Pueblos were approved for treatment as a state for section 106, eight of them as individual Pueblos, others as part of an Eight Northern Indian Pueblo Consortium.<sup>63</sup> By the end of 1993, three Pueblos had EPA-approved water quality standards, all on or spanning the Rio Grande. The approval process provided some very interesting legal issues, some arising only after approval.

The only tribes within Region Six that have sought EPA approval for treatment as a state are the Pueblos of New Mexico. Obtaining approval for treatment as a state has not been easy for the Pueblos in New Mexico, and the EPA has been faced with many unique issues in arriving at conclusions during the approval process.<sup>64</sup> States have challenged approval on whether Pueblos are reservations, what waters are within the reservation, EPA's authority to approve standards, and whether Tribal standards can be more stringent than state standards.

The first challenge the EPA received was from the State of New Mexico, which made the argument that a Pueblo is not a "reservation" for purposes of the treatment as a state process.<sup>65</sup> Hence, argued the State, the Clean Water Act would not apply on the lands of the nineteen Pueblos. The General Counsel of the EPA disagreed, however, and concluded that, "for purposes of [section] 518(h)(2), a Pueblo is functionally equivalent to a reservation. Thus, the Pojoaque Pueblo is eligible for treatment as a state under the Clean Water Act."<sup>66</sup>

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61. 33 U.S.C. § 1256 (1988) (authorizing grants to states for pollution control programs).

62. 33 U.S.C. § 1342 (1988).

63. Also, the Pueblo of Acoma was approved separately for treatment as a state in 1990 under § 314 of the Clean Water Act, the clean lakes provision.

64. Similar issues may arise for the tribes in Oklahoma, who were treated differently (probably inadvertently) in the 1987 amendments to the Clean Water Act. These differences and the very recent decisions by the EPA in its effort to remove them are discussed *infra* notes 95-105 and accompanying text.

65. The definition of an "Indian tribe" in the Clean Water Act includes the phrase "exercising governmental authority over a Federal Indian 'reservation.'" 33 U.S.C. § 1377(h)(2) (1988). The challenge was raised by letter, from the New Mexico Health and Environment Department to Robert E. Layton, Jr. (Sept. 12, 1989) (on file with author) (discussing the Pueblo of Pojoaque status as a state application).

66. General Counsel memorandum from Gerald M. Yamada to Rebecca Hanmer (Sept. 26, 1989) (on file with author). The Pojoaque Pueblo has not however, submitted water quality standards for EPA approval.

A controversial jurisdictional question arose during the treatment as a state process for the Sandia Pueblo in New Mexico. The Rio Grande marks the western boundary of the Sandia. The application raised the question of precisely *where* on the Rio Grande the legal boundary rests. Arguably, the boundary line could be the east or west bank of the river, in the middle of the river, or set by metes and bounds in some other configuration. If the boundary were the east bank above the high water mark, the Pueblo probably would have no authority to set standards for the river absent contrary language in historical documents. Conversely, if the boundary were on the west bank, the Pueblo would have authority over the entire width of the river, from the Pueblo's north to its south boundary lines.

The State of New Mexico briefly pursued the issue with the EPA.<sup>67</sup> In order to be able to approve the application with specified boundaries and pursuant to the regulations, the EPA consulted with the Department of the Interior.<sup>68</sup> The Department of Interior provided the EPA with an opinion that the Sandia Pueblo owned a proprietary right, probably to the middle of the stream.<sup>69</sup> This opinion rested on traditional doctrines of riparian rights on non-navigable waterways; that is, a riparian owner retains proprietary rights to the thread of the stream.<sup>70</sup> The EPA researched the issue simultaneously and ultimately adopted the conclusion of the Department of Interior's position. The EPA then approved the Sandia treatment as a state application with a western boundary to the middle of the Rio Grande.<sup>71</sup> Thus, the State of New Mexico shares the authority with the Sandia to set standards on that portion of the Rio Grande since it has governmental jurisdiction for the western half of the river. This decision has yet to be challenged.<sup>72</sup>

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67. Letter from Kathleen M. Sisneros to Ruben L. Baca, Governor, Sandia Pueblo (May 28, 1991) (on file with author). In the letter, New Mexico states its belief that the original grant of Pueblo land "lies east of and abutting the [Rio Grande]." *Id.* New Mexico concluded in the letter, however, that "New Mexico shares authority with the Pueblo of Sandia on the Rio Grande." *Id.* This opinion was pursued in a telephone conversation between Mark E. Chandler and Anita Miller on July 11, 1991.

68. See 40 C.F.R. § 131.8(c)(4) (1993).

69. Letter from U.S. Department of the Interior to Mark E. Chandler, Regional Judicial Officer (July 27, 1992) (on file with author) (discussing the western boundary of the Sandia Pueblo).

70. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 699 (1899) (holding that the Rio Grande in New Mexico was non-navigable in fact).

71. Responsive Summary, enclosed with letter from Myron O. Knudson, Regional Administrator to the Honorable Moses Chavez, Governor, Pueblo of Isleta (December 24, 1992) (on file with author).

72. New Mexico has thus far worked in cooperation with the Sandia Pueblo and is not expected to challenge the approval formally.

Another interesting challenge arose during the approval process for the Isleta Pueblo. The Pueblo, in central New Mexico, lies five miles south of the City of Albuquerque and straddles the Rio Grande. The regulations at the time required the EPA to seek comment through public notice from appropriate "governmental entities" in the vicinity of the tribe seeking treatment as a state.<sup>73</sup> During this process, the Middle Rio Grande Conservancy District, an agency with the authority to manage the water resources of the Rio Grande, provided comment. The District believed that the EPA could not approve the Pueblo for treatment as a state for the waters within the reservation because the District had jurisdiction. The EPA replied that approval did not confer any water management authority to the Pueblo, but only the authority to determine the quality of the water within the reservation. Further, the EPA reasoned that approval for water quality standards could be made without any erosion or diminution of the District's authority.<sup>74</sup>

The City of Albuquerque immediately filed suit in federal district court upon approval of the Isleta standards, seeking to overturn the EPA's decision.<sup>75</sup> The Pueblo's approved standards are effective within the boundaries of the reservation. The surface water discharge permit for Albuquerque would have to be written by the EPA to meet the downstream standards of the Pueblo.

In this case of first impression respecting Indian provisions of the Clean Water Act, the City sought a preliminary injunction to stop the EPA from issuing the permit challenging on several grounds. Specifically, the city alleged that the EPA: 1) failed to follow the required public participation procedures in approving the standards; 2) misinterpreted section 518 (the Indian tribe provisions);<sup>76</sup> 3) approved standards that are unconstitutional under the Establishment Clause<sup>77</sup> and

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73. 40 C.F.R. § 131.8(c) (1993).

74. Memorandum from Mark E. Chandler to Diane Evans (October 13, 1992) (on file with author) (Response to Comments, attached with approval for treatment as a state). The Pueblo was not seeking approval for water management authority, it was seeking the authority only to set water quality standards. Therefore the District retains full management authority of the water in the Rio Grande, but any of its discharges must meet the water quality standards of the Pueblo.

75. *City of Albuquerque v. Browner*, No. 93-CV-82 (D.N.M.), reprinted in 38 *Env't Rep. (BNA)* 2062, 2063 (Oct. 21, 1993).

76. *Id.* at 2066. The city argued that EPA incorrectly determined that § 510, a provision preserving a state's right to set standards more stringent than the EPA's, applied to tribes as well as states.

77. *Id.* at 2067. The First Amendment provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. Here, the EPA approved a *ceremonial* beneficial use in the standards.

impermissibly vague; 4) failed to provide a mechanism to resolve unreasonable consequences;<sup>78</sup> 5) failed to ensure that the Pueblo standards are stringent enough to protect the designated uses; and, 6) approved Pueblo standards that are without any rational scientific basis.<sup>79</sup>

The City asked the court to review the EPA's decision under the Administrative Procedures Act (APA)<sup>80</sup> and the Declaratory Judgment Act.<sup>81</sup> The court reviewed the EPA decision under the APA and rejected review under the Declaratory Judgment Act. Review was limited to the administrative record before the EPA when it made its decision and the standard of review was the arbitrary and capricious standard of the APA.<sup>82</sup>

The court upheld the EPA's ruling.<sup>83</sup> The court's holdings may best be explained by expressing them in the same numerical order as the allegations set forth above. First, the court found that the EPA was not required by the Act or the APA to provide public comment of its own since the Pueblo (or a state) is required to and in fact had done so appropriately.<sup>84</sup> Second, the EPA recognition that section 510 reserved tribal, as well as state's rights, was permissible, otherwise the section 518 provisions were meaningless.<sup>85</sup> Third, the EPA did not foster religion in violation of the Establishment Clause by approving the ceremonial use, but was merely carrying out the secular goal of the Act.<sup>86</sup> Further, the standards are not impermissibly vague because they provide sufficient notice of what is expected.<sup>87</sup> Fourth, the EPA's consideration and decision to allow only states or tribes to initiate the dispute resolution for alleged unreasonable consequences does not violate the Clean Water Act or the APA.<sup>88</sup> Fifth, the City's argument that the standards did not protect designated uses, based on a drinking water standard rather than a fishable/swimmable

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78. See 40 C.F.R. § 131.7 (1993).

79. *City of Albuquerque v. Browner*, No. 93-CV-82 (D.N.M.), reprinted in 38 Env't Rep. (BNA) 2062, 2063 (Oct. 21, 1993).

80. Administrative Procedures Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

81. Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1988 & Supp. V 1993).

82. 5 U.S.C. § 706(2) (1988).

83. *City of Albuquerque v. Browner*, No. 93-CV-82 (D.N.M.), reprinted in 38 Env't Rep. (BNA) 2062, 2068 (Oct. 21, 1993).

84. *Id.* at 2068.

85. *Id.* at 2066.

86. *Id.* at 2067.

87. *Id.*

88. *Id.*

standard,<sup>89</sup> was rejected by the court.<sup>90</sup> Finally, the EPA's belief that it could not disapprove a standard because it is more stringent than background levels was not arbitrary.<sup>91</sup> The case is being watched closely by many tribes and Indian law attorneys nationwide, since it is the first Tribes as States case under environmental laws.

The court did, however, emphasize that the City had raised some troublesome issues, primarily on the very stringent water quality criteria.<sup>92</sup> Although the case is still on appeal, the permit issues were resolved by agreement and the permit was issued with relaxed water quality standards because of the settlement.

At the present, three tribes in New Mexico are controlling the quality of the water resources within their boundaries by taking advantage of Clean Water Act provisions.<sup>93</sup> Discharges into the water course above these reservations must not cause the water quality to exceed the standards set by Pueblos. By specifying the quality of water that may enter the reservation, the Pueblos can more directly control the quality of their water resources. This is a major step and a valuable tool for Native Americans in their efforts to improve the reservation environment.

Additional court challenges will undoubtedly be brought in connection with the treatment as a state process as the EPA continues to make decisions nationwide. For instance, the EPA has proposed approval of the South Dakota application for a determination of adequacy of its municipal solid waste permit program over non-Indian lands for the former lands of the Yankton Sioux, Lake Traverse (Sisseton-Wahpeton) and parts of the Rosebud Indian Reservations.<sup>94</sup> If the EPA approves the application, the State of South Dakota is expected to sue the EPA; if the EPA disapproves anything other than full jurisdiction within the reservation boundaries, the Yankton Sioux are expected to sue.

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89. See 33 U.S.C. § 1251(a)(2) (1988).

90. *City of Albuquerque v. Browner*, No. 93-CV-82 (D.N.M.), reprinted in 38 *Env't Rep. (BNA)* 2062, 2067 (Oct. 21, 1993).

91. *Id.*

92. *Id.* at 2068. The primary issue for concern with the City was the Tribes' arsenic limitation. It was virtually a zero amount or trace standard that was allowable and could not be measured by current equipment.

93. The San Juan Pueblo is the third to have its water quality standards approved by the EPA.

94. 58 *Fed. Reg.* 16,647 (1994).

## IV. WATER QUALITY IN OKLAHOMA

A. *Status of Tribes in Oklahoma*

Tribes in Oklahoma were given distinctive treatment from other tribes. In the 1987 amendments, Congress defined an Indian tribe as “[a]ny Indian tribe, band, group or community recognized by the Secretary of the Interior and exercising governmental authority over a federal Indian reservation.”<sup>95</sup>

Four categories of water resources qualify as being under Indian authority, including those: 1) held by an Indian tribe; 2) held by the United States in trust for Indians; 3) held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation; or 4) otherwise within the borders of an Indian reservation.<sup>96</sup>

The phrase federal Indian reservation has caused a great deal of confusion and raised doubts as to whether the new provisions for Indian tribes applied at all to tribes in Oklahoma. The term revived an old perception that there are no reservations in Oklahoma.<sup>97</sup> Practically, there was a more damaging consequence. The 1987 amendments took away something the tribes in Oklahoma *always* had in the Clean Water Act; the eligibility to receive a grant from the EPA to build or upgrade sewage treatment plants. This apparent exclusion affected other tribal areas as well: native villages in Alaska, rancherias in California, and other parts of Indian country not generally known as “reservations.”<sup>98</sup> But nowhere was there greater apprehension than in Indian country in Oklahoma.

The EPA officials, Native American groups, and other interested parties initiated efforts to persuade Congress to correct the problem by amendment. In response, Senators from Alaska and Oklahoma introduced a bill in 1988 designed to correct the problem.<sup>99</sup> As the Senators expressed it, they too, feared that the tribes in those states had been excluded, and the bill was introduced to restore eligibility to them under Title II of the Clean Water Act (the sewage treatment

95. 33 U.S.C. § 1377(h)(2) (1988) (emphasis added).

96. 40 C.F.R. § 131.8(a)(3) (1993). The EPA interprets the fourth category as a separate category of water resources as well as a modifier to the previous three.

97. See *Chickasaw v. Oklahoma Tax Comm’n.*, No. 92-7117, slip op. at 33-34 (10th Cir. July 29, 1994) (rejecting Tax Commission’s disestablishment argument); cf. *Hagen v. Utah*, 114 S. Ct. 958 (1994), *reh’g denied*, 114 S. Ct. 1058 (1994).

98. In the interim, the EPA had to exclude the tribes at the outset of the process and orally advised the tribes that they should not apply.

99. S. 2208, 100th Cong., 2d Sess. § 207, 102 Stat. 2939, (codified as amended at 33 U.S.C. § 1377 (1988)).



grant funds).<sup>100</sup> However, Senator Stevens, upon introducing the bill to the Select Committee on Indian Affairs, made a statement that was very damaging to the hopes of the Oklahoma tribes when he stated on the floor “[this bill] does not extend regulatory powers granted elsewhere in the act. It is intended only to extend the grant programs to the Alaska Natives and Oklahoma Indians currently excluded.”<sup>101</sup>

Thus, it seemed the EPA had no choice but to accept the explanatory floor language at face value and tell the tribes in Oklahoma that they were ineligible for the programs in Titles III and IV of the Clean Water Act. Those titles include the provisions for water quality standards, the surface water discharge program and other regulatory functions. For five years, the EPA was mired in that unenviable position. BUT, all is not lost for the tribes in Oklahoma!

In February 1991, the *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma*<sup>102</sup> case was decided. The Supreme Court expressly held that the land held by the Potawatomi “qualifies as a reservation” for tribal immunity purposes.<sup>103</sup> The EPA more recently has reasoned that, after *Potawatomi*, it could revert to the 1987 statutory language and rely on the use of the term reservation. By doing so, the EPA could treat the tribes in Oklahoma as eligible for the regulatory programs. The EPA formally took this position in December of last year when it promulgated the regulations for Indian tribal assumptions of the programs in sections 308, 309, 401, 402, and 405 of the Clean Water Act. In explaining the effects of the *Potawatomi* case, the EPA said:

[T]he meaning of the term “reservation” must be determined in light of statutory law and with reference to relevant case law. EPA considers trust land formally set apart for the use of Indians to be “within a reservation” for purposes of section 518(e)(2), even if they have not been formally designated as “reservations.” [citing *Potawatomi*]. This means it is the status and use of the land that determines if it is to be considered “within a reservation” rather than the label attached to it.<sup>104</sup>

The EPA will take the status of the land into consideration on a case-by-case basis when evaluating a tribe’s application for treatment as a state. This now includes applications from tribes in Oklahoma.

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100. See 134 CONG. REC. S2906 (daily ed. Mar. 23, 1988).

101. *Id.*

102. 498 U.S. 505 (1991).

103. *Id.* at 511. See also *Oklahoma Tax Comm’n v. Sac and Fox Nation*, 113 S. Ct. 1985, 1991 (1993).

104. 58 Fed. Reg. 67,970 (1993).

Thus, the tribes now have the opportunity to take part in the application process and no longer face precursory exclusion.

### B. *Other Problematic Issues in Oklahoma*

There are some other troubling issues associated with assumption of the Clean Water Act programs by the tribes in Oklahoma. The exterior boundaries of the pueblos and reservations in other states are fairly well fixed and marked on most maps. The land holdings of the tribes in Oklahoma, however, have been variously characterized as scattered, checkerboarded, and noncontiguous. The noncontiguous, checkerboarded nature of Indian country in Oklahoma may or may not be suitable for the setting of water quality standards on small reaches of a stream. There may not be sufficient water resources held by such a tribe for it to seek assumption of a regulatory function under the Clean Water Act. This raises the question, too, as to whether tribal land bases are large enough for a tribal water quality standard to make a significant difference. This may present problems for both tribes and the EPA upon tribal application for assumption of programs under the Clean Water Act.

While the EPA may anticipate some of the problems at this time, the criteria under which decisions will be made on an application by a tribe in Oklahoma have not been decided. There may never be criteria; each application may need to be considered on its own merits and circumstances. These are issues that the EPA will of necessity wrestle with upon application by a tribe in Oklahoma for one or more of the Clean Water Act programs. This article expresses no opinion as to the nature or extent of those problems. But, these are issues which the EPA has announced it is willing to consider.<sup>105</sup>

## V. CONCLUSION

The time may be ripe for an appropriate case seeking a reserved water *quality* right under *Winters*. That right, coupled with the opportunities in the Clean Water Act, would greatly enhance a tribe's ability

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105. This article does not consider the effects of the Supreme Court rulings in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970) and *United States v. Cherokee Nation*, 480 U.S. 700 (1987), cases respecting the Arkansas River. In *Choctaw*, the Supreme Court held that three Indian Nations — the Cherokee, Choctaw, and the Chickasaw — own the bank and bed of the "entire Arkansas River in Oklahoma below its confluence with the Grand River" (about 90 miles). The *Choctaw* case may encourage the three tribes to attempt to extend such ownership to the establishment of water quality standards for that reach of the Arkansas River. The *Cherokee* case was a takings case and did not rule on ownership, but it referenced for foundation the *Choctaw* holding.

to maintain its water resources. The Clean Water Act is a valuable tool for tribes seeking a greater — if not a sole — voice in the determination of the quality of water resources under their control.