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Jurisdiction Over Water Quality On Native American Lands

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INTRODUCTION

Under both the Federal Water Pollution Control Act[1] and the Safe Drinking Water Act,[2] the United States Environmental Protection Agency ("EPA") authorizes state governments to take the lead in implementing various programs to improve the water quality of lakes, rivers and streams in the United States. EPA routinely grants billions of dollars to these states to plan, construct and renovate wastewater and sewage treatment facilities and implement other projects and programs to protect water quality. Congress amended both of these statutes in the late 1980s

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[1] 33 U.S.C. § 1251 *et seq.* (1986 & Supp. 1992).

[2] 42 U.S.C. § 300f *et seq.* (1991).

to allow tribal governments to be treated like states—namely, to receive federal authority to operate certain water protection programs on Indian lands in lieu of the federal government.[3]

The issue of who has jurisdiction over tribal lands and how it will be implemented ultimately determines implementation of water programs in Indian country.[4] While federal environmental laws apply to tribal lands, at least two questions remain unanswered: (1) to what extent can state or local governments implement and enforce federal, state or local environmental programs on tribal lands; and (2) what is the nature and scope of environmental protection programs that tribes may implement in Indian country. This article discusses a range of jurisdictional issues concerning federal, state, local and tribal governments relevant to water quality protection on tribal lands. The paper seeks to clarify an area confusing not only to environmental law scholars, but to Native American scholars as well.

I. FEDERAL JURISDICTION OVER WATER QUALITY IN INDIAN COUNTRY

During the last 200 years,[5] Indian tribes in the United States have evolved into what are now dependent associations with

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[3] *See* 53 Fed. Reg. 52,829 (1988) for a list of federally recognized tribes, bands, villages, communities, pueblos and Alaska Native entities.

[4] The term "Indian country" as used in this article means all lands, including fee lands, on Indian reservations, all dependent Indian communities in the United States and all Indian allotments the titles to which have not been extinguished, as defined at 18 U.S.C. § 1151 (1988).

[5] After nearly 200 years of contentious relations between Native American tribes and the United States government, Congress enacted the Indian Reorganization Act in 1934. Indian Reorganization Act, 25 U.S.C. §§ 461-79 (1988). The Act sought "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." H.R. REP. No. 1804, 73d Cong., 2d Sess., 6 (1934). The statute aimed to foster self-government by the tribes. Fisher v. Dist. Ct., 424 U.S. 382, 387 (1976).

Signaling a change in national policy in the 1950s, Congress enacted the so-called "Termination Acts." *See* 25 U.S.C. §§ 564, 721-28, 741-60 (1988); Menominee Tribe v. United States, 391 U.S. 404 (1968). These acts terminated the tribal status of about 109 tribes and bands, without tribal consent. *See* Philip J. Smith, *Indian Sovereignty and Self-Determination: Is a Moral Economy Possible?*, 36 S.D. L. REV. 299, 316 (1991). The federal policy goal during the termination period was, ostensibly, to promote individual freedom of Indians by removing the Indian's dependence on the federal government. *See, e.g.*, Reed v. United States National Bank of Portland, 213 F. Supp. 919, 922 (D. Or. 1963) (under Klamath Termination Act, tribal member could elect to withdraw from the tribe and "have his share of the communal properties paid over to him in cash . . ."). The termination era ended during the 1960s and the current policy of tribal self-determination was articulated soon thereafter. *See, e.g.*, Bryan v. Itasca County, 426 U.S. 373, 389 (1976); United States v. Wheeler, 435 U.S. 313 (1978).

limited powers of self-government.[6] Tribes possess limited sovereignty, but where Congress expresses a clear intent to subject tribes to federal law, tribal sovereignty does not bar the effect of that law.[7] Under these established principles of limited sovereignty, authority exists to apply federal environmental water quality laws and regulations to tribal lands.

A. The Federal Water Pollution Control Act

The nation's rivers, lakes and streams are protected from pollution by the Federal Water Pollution Control Act, also known as the Clean Water Act ("CWA").[8] The CWA sought "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[9] To achieve this objective, the 1972 amendments to the statute specified two goals: (1) to eliminate discharge of pollutants into navigable waters; and (2) to attain interim water quality standards protective of fish and wildlife and suitable for recreation purposes.[10] The statute further establishes five national policies, including the prohibition of all discharges of pollutants in toxic amounts and the federally financed construction of publicly owned sewage treatment plants.[11]

From its inception, the goals of the CWA were to be achieved through the cooperation of federal, state and local agencies that would "develop comprehensive solutions to prevent, reduce and eliminate pollution . . . ."[12] The CWA imposes responsibility on the states, in large part, to control water pollution.[13] States that seek to be authorized to run these water quality protection programs in place of the federal government must obtain authorization as described by EPA regulations.[14] Today, most states have received this authorization.

An important water quality regulatory program under the CWA is the National Pollutant Discharge Elimination System ("NPDES"). Under this program, all discharges of pollutants

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[6] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978).

[7] *Id.* at 56.

[8] 33 U.S.C. §§ 1251 *et seq.* (1986 & Supp. 1992).

[9] *Id.* at § 1251(a).

[10] *Id.*

[11] *Id.* Congressional appropriations for such state construction grants began in 1972 and expired in fiscal year 1990. *See* 33 U.S.C. §§ 1287, 1376 (1986 & Supp. 1992).

[12] 33 U.S.C. § 1251(g).

[13] *See, e.g.*, District of Columbia v. Schramm, 631 F.2d 854, 860 (D.C. Cir. 1980).

[14] *See, e.g.*, 40 C.F.R. § 123 (1991).

into navigable waters are unlawful although exceptions are made when a NPDES permit is first obtained. Thus, discharges that fit within the permitted discharge limits are permissible. Because the definitions of "pollutant,"[15] "discharge of a pollutant"[16] and "navigable waters"[17] are extremely broad, the NPDES regulatory program controls almost any matter affecting any surface water. All permitted discharges, in turn, must meet or exceed effluent limitations based on the source of the discharge, as established by EPA.[18] As an additional level of protection, each state must develop and submit to EPA for approval, its own water quality standards that will either maintain, or lead to achieving, the applicable water quality requirements of the CWA.[19] These standards are based on the predetermined use of the particular body of water.[20] The CWA also provides grants to the states for the construction of publicly owned treatment facilities.[21] Under sections 1287 and 1376 of CWA, appropriations for funding such construction expired in fiscal year 1990.[22]

In 1987, Congress amended the CWA making Indian tribes eligible for the same treatment as states for certain water programs.[23] The Administrator of EPA is authorized to "treat an Indian tribe as a State" under the Act, only if:

> (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are

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[15] "Pollutant" under the Act means "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water." 33 U.S.C. § 1362(6) (1986). Under this broad definition, "heat" is a "pollutant"; a pollutant can be discharged where the temperature of the water is raised (the discharge of "heat").

[16] Under the CWA, the term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (1986).

[17] Under the CWA, "navigable waters" means "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (1986). The Courts have construed this term very broadly, including within its scope dry gullies that might eventually carry a pollutant into a "navigable" body of water. *See* Quivira Mining Co. v. EPA 765 F.2d 126 (10th Cir. 1985).

[18] 33 U.S.C. §§ 1314, 1316 (1986).

[19] 33 U.S.C. § 1313(a)-(c) (1986 & Supp. 1992).

[20] *Id.*

[21] 33 U.S.C. § 1281(g)(1) (1986).

[22] 33 U.S.C. §§ 1287, 1376 (1986).

[23] 33 U.S.C. § 1377 (Supp. 1992).

> held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and
> (3) 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 and purposes of this chapter and of all applicable regulations.[24]

The Act states specifically that Indian tribes may operate delegated federal programs over the entire reservation area, including fee lands owned by nonmembers.[25]

The 1987 amendments to the CWA provided no additional funds to support tribal water programs.[26] Instead, program grants were made available through reallocation of existing resources. Section 1377(c) reserved one-half of one percent of funds appropriated under section 1287 "for the development of waste treatment management plans and for the construction of sewage treatment works to serve Indian tribes . . . former Indian reservations in Oklahoma . . . and Alaska Native Villages . . . ."[27] Section 1377(f) made tribes eligible to receive grant monies for non-point source management programs under section 1329 of the CWA.

Between 1989 and 1992, EPA promulgated regulations describing the requirements tribes must meet to receive authorization for a variety of water programs under the CWA, including general pollution control activities, establishment of water quality standards and implementation plans, and the NPDES permit program. Interim final regulations were published by EPA in April of 1989 describing how tribes could receive grant money for various pollution control activities, for water quality management planning including such work as determining what wastewater treatment plants should be constructed, and for evaluation of the water quality of lakes and evaluation of non-point sources of water pollution.[28] In 1990, EPA published an interim final

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[24] *Id.* at § 1377(e)(1)-(3).

[25] *Id.* at § 1377(h)(1); *see also* Brendale v. Confederated Tribes & Bands of Yakima, 492 U.S. 408 (1989).

[26] *See* 56 Fed. Reg. 64,876 at 64,889-90 (1991). EPA's response to a comment, in the preamble of a regulation amending certain procedures by which tribes may qualify for treatment as states under the CWA, indicates tribes will not be treated as "states" where funding is concerned.

[27] 33 U.S.C. § 1377(c) (Supp. 1992).

[28] 54 Fed. Reg. 14,354 (1989).

regulation providing for delegation of the CWA's construction grant program.[29] This delegation authorized tribes to assist local communities on tribal lands in planning, designing, and building wastewater treatment plants. [30] In 1991, EPA published final rules establishing how a tribe may develop, renew and revise water quality standards for surface waters and operate certification programs for activities that require a federal license or permit because they may cause a discharge to surface waters.[31] In March of 1992, EPA published regulations for treatment of Indian tribes as states for the following additional CWA programs: inspection and monitoring of point sources of pollution; civil enforcement against violators; NPDES permitting; and sewage sludge disposal and permitting.[32]

To date, a limited number of tribes are developing water pollution control programs and water quality standards.[33] EPA believes basic grants made available under section 1256 of the CWA will assist tribes in developing federally authorized water programs.[34] Approximately ninety-one tribes have received such grants for fundamental water quality planning, along with some federal technical assistance.[35] In 1992, tribes also received $9.7 million in a special, one-time congressional appropriation for construction of sewage treatment facilities.[36] EPA awarded most of this money to Alaskan tribes.[37]

B. The Safe Drinking Water Act

The Federal Safe Drinking Water Act ("SDWA") protects drinking water supplies by: (1) establishing drinking water quality standards; (2) regulating injection of fluids into the ground for disposal (Underground Injection Control Program or UIC Program); and (3) protecting wellhead areas that supply public water

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[29] 55 Fed. Reg. 27,092 (1990).

[30] *Id.* at 27,094.

[31] 56 Fed. Reg. 64,876 (1991).

[32] 57 Fed. Reg. 8522 (1992).

[33] Telephone Interview with Wendell Smith, United States Environmental Protection Agency, Region IX, Water Quality Programs Manager (June 1, 1992).

[34] *Id.*

[35] Telephone Interview with Diane Davis, United States Environmental Protection Agency, Office of Water, Washington D.C. (May 27, 1992).

[36] *Id.*

[37] *Id.*

systems.[38] Under the SDWA, EPA may approve state programs to operate in place of federal programs.

In 1986, Congress amended the SDWA by making tribes recognized by the Department of Interior[39] eligible for treatment as states for certain SDWA programs.[40] From this, EPA may "delegate to such tribes primary enforcement responsibility for public water systems and for underground injection control."[41] EPA may also provide such tribes with "grant and contract assistance to carry out functions provided by this subchapter."[42] The 1977 SDWA Amendments specifically provide that the amendments do not change the jurisdictional status of Indian lands.[43]

Under the statute, tribes may receive "primacy" to implement SDWA programs only if:

> (A) the Indian Tribe is recognized by the Secretary of the Interior and has a governing body carrying out substantial governmental duties and powers;
> (B) the functions to be exercised by the Indian Tribe are within the area of the Tribal Government's jurisdiction; and
> (C) 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 and purposes of this subchapter and of all applicable regulations.[44]

The SDWA further provides no tribe is allowed to assume primacy over the Act's enforcement provisions if its SDWA programs are less protective of human health than an approved state program.[45]

The question of federal jurisdiction over tribal lands under the SDWA arose in *Phillips Petroleum Co. v. EPA*, where the Court of Appeals for the Tenth Circuit held the SDWA authorized EPA to promulgate regulations establishing an Underground Injection Control ("UIC") program for the Osage Indian Mineral Reserve in Oklahoma.[46] Phillips Petroleum argued that, under

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[38] 42 U.S.C. §§ 300f to 300j-11 (1991).
[39] *Id.* at § 300j-11.
[40] *Id.* at § 300j-11(a)(1).
[41] *Id.* at § 300j-11(a)(2).
[42] *Id.* at § 300j-11(a)(3).
[43] *Id.* at § 300j-6(c)(1).
[44] 42 U.S.C. § 300j-11(b)(1)(A)-(C) (1991).
[45] *Id.* at § 300j-11(b)(2).
[46] Phillips Petroleum Co. v. EPA, 803 F.2d 545 (10th Cir. 1986).

federal law, EPA had authority to regulate UIC programs on Indian lands only where the state government could, but failed, to regulate such activities. The State of Oklahoma received "primacy" from EPA to operate the UIC program in 1981, but did not seek or receive authority to operate its program on the Osage Indian Reserve.[47] The Tenth Circuit rejected Phillips Petroleum's narrow interpretation of the law and relied instead on broader principles of statutory intent and purpose in light of the jurisdictional relationships between federal, tribal, and state governments. As a result of this ruling, EPA established a UIC program for the Osage Reserve in cooperation with the tribe.

In 1988, EPA promulgated regulations establishing federal UIC program requirements for reservations that did not have primacy.[48] EPA also promulgated regulations on treatment of Indian tribes as states for purposes of administering the Public Water System and UIC programs.[49]

According to EPA, tribes typically confront difficulties in raising the necessary funds to implement the expensive drinking water programs under the SDWA. In 1991, only $21.4 million dollars in financial support was available to tribes from EPA. To date, only three tribes have submitted applications to EPA for approval of drinking water programs. Two tribes, the Osage and the Navajo, have received grants to operate federal UIC programs.[50]

C. Environmental Protection Agency Indian Policy

On November 8, 1984, EPA Administrator William D. Ruckelshaus issued the EPA Policy for the Administration of Environmental Programs on Indian Reservations.[51] Along with the policy, EPA Deputy Administrator, Alvin Alm, issued the Indian Policy Implementation Guidance to EPA Assistant Administrators, Regional Administrators and General Counsel.[52] Together these documents set forth EPA's overall approach to operating federal

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[47] *Id.* at 549.

[48] 53 Fed. Reg. 43084 (1988).

[49] 53 Fed. Reg. 37396 (1988).

[50] Telephone Interview with Martin Topper, Office of Federal Activities, United States Environmental Protection Agency, Washington, D.C. (May 26, 1992).

[51] ENVIRONMENTAL PROTECTION AGENCY, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (Nov. 8, 1984).

[52] ENVIRONMENTAL PROTECTION AGENCY, INDIAN POLICY IMPLEMENTATION GUIDANCE (Nov. 8, 1984).

environmental programs on tribal lands, emphasizing "government-to-government" relations and tribal self-government.

In its Indian Policy, EPA pledged to "stand ready" to work with tribal governments on a "one-to-one" basis, recognizing tribal governments as independent sovereigns.[53] EPA promised to "look directly to Tribal Governments to play this lead role for matters affecting reservation environments."[54] According to the Indian Policy Implementation Guidance, direct EPA enforcement actions against tribal facilities will be considered where EPA determines that: "(1) a significant threat to human health or environment exists; (2) such action would reasonably be expected to achieve effective results in a timely manner; and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion."[55] However, where a facility in violation is owned or managed by private parties and there is no substantial tribal interest or control involved, the Agency will respond to the noncompliance as it would in the private sector.[56]

EPA sought to help tribes develop their own water pollution regulatory programs, paralleling and eventually replacing, the federal programs. Absent such federally approved tribal programs, requirements of the CWA and the SDWA are, as a matter of law, implemented and enforced by EPA on tribal lands. EPA currently provides technical assistance and limited funding to approximately 200 tribes that operate their own limited environmental protection programs.[57]

The EPA policy emphasizing tribal self-government is buttressed by statutory authority under both the CWA and the SDWA, allowing EPA to authorize tribes to operate water programs created by these statutes, in lieu of the federal government. This "authorization" or "delegation" process has been used by EPA for many years to allow state governments to run such programs. The CWA and SDWA provide specifically that tribes may be treated as "states" for purposes of delegation if the tribes meet specified requirements.

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[53] EPA Policy for the Administration of Environmental Programs on Indian Reservations, *supra* note 51, at 2.

[54] *Id.*

[55] Indian Policy Implementation Guidance, *supra* note 52, at 6.

[56] *See Id.*

[57] Telephone Interview with Martin Topper, Office of Federal Activities, United States Environmental Protection Agency, Washington, D.C. (May 26, 1992).

A lack of funding seriously limits the development of such authorized tribal environmental programs, capable of operating CWA and SDWA programs on Indian lands. While the Agency promised to "take affirmative steps to encourage and assist tribes" in developing federally approved programs, the EPA Indian Policy failed to commit federal resources to the development of delegated tribal programs consistent with the federal funding state governments have received. Instead, the accompanying implementation guidance requests that agency managers, at their discretion, reallocate existing resources to initiate projects "that will constitute a respectable step towards implementation of the Indian Policy."[58] The EPA policy to treat tribes like "states" has not been backed by the same level of congressionally approved funding accorded the States. For example, while billions of dollars have been made available to states under the CWA construction grants program,[59] only one half of one percent of the appropriations under section 1287 have been reserved by Congress for use by tribes for the same purpose.[60] Because many clean water programs are expensive to initiate and maintain, the lack of funding cripples such initiatives on tribal lands.[61]

II. STATE JURISDICTION OVER WATER QUALITY IN INDIAN COUNTRY

States and tribes have a long history of bitter disputes.[62] Case law[63] shows disagreements often arise where states attempt to regulate activities on the reservation. Current legal analysis of

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[58] Indian Policy Implementation Guidance, *supra* note 52, at 4.

[59] *See* 33 U.S.C. §§ 1376, 1287 (1983).

[60] *Id.* at § 1377(c).

[61] In a recent study of "environmental equity," EPA's Environmental Equity Workgroup assessed whether Native Americans and other racial minorities and low-income communities bear a higher environmental risk than the general population. EPA found that Native American tribes are a unique racial group with special environmental problems and that tribes often lack the physical infrastructure, institutions, trained personnel and resources to protect themselves and their environment. Reina Milligan and Robert M. Wolcott, *Findings and Recommendations of EPA's Environmental Equity Workgroup*, 18 EPA JOURNAL No. 1, 20 at 21 (March/April 1992). EPA's recognition of special responsibilities to tribes could arguably run counter to EPA's policy of "hands off" tribal self-government. Alternatively, Congress could react to the Workgroup's findings by enacting further legislation to ensure more funds are appropriated for tribal environmental protection programs.

[62] Gover, Stetson and Williams, P.C., *Tribal-State Dispute Resolution: Recent Attempts*, 36 S.D. L. REV. 277, 277 (1991).

[63] *See infra* notes 64-79 and accompanying text.

state regulatory jurisdiction over tribal lands involves the following two issues: (1) will state action infringe on tribal rights of self-government;[64] and (2) is state law preempted by federal law.[65] Infringement or preemption may operate to bar state jurisdiction over tribal lands.

At least one state tried to extend its environmental regulatory authority to the reservation by seeking authorization to operate a hazardous waste[66] regulatory program on tribal lands pursuant to the Resource Conservation and Recovery Act (RCRA).[67] In 1982, the Governor of the State of Washington applied to EPA for interim federal authorization of the state's hazardous waste facility permitting program. If approved by EPA, the state could implement federal hazardous waste permitting requirements in lieu of EPA. The State of Washington asserted jurisdiction to implement such a program on Indian lands within the state. Washington Indian tribes disagreed, fearing the state planned to use reservations as a "dumping ground" for hazardous wastes.

EPA maintained state jurisdiction over Indian lands may be acquired only through a treaty or an express act of Congress and RCRA did not provide such jurisdiction. The Court of Appeals for the Ninth Circuit agreed, holding RCRA did not authorize states to regulate Indians on Indian land. The court concluded EPA remains responsible for ensuring that federal[68] hazardous waste standards are met on reservation lands.[69]

However, the court did not reach the issue of whether states have jurisdiction under RCRA over tribal lands owned in fee by non-Indians.[70] The Supreme Court in *Montana v. United States*, did consider this issue and held that state jurisdiction is exclusive on non-member fee lands, if it does not interfere with tribal sovereign interests. Tribes have exclusive regulatory jurisdiction

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[64] Williams v. Lee, 358 U.S. 217, 220 (1959).

[65] McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973).

[66] Some of the cases discussed *infra* deal with regulatory jurisdiction over air pollution and hazardous and radioactive wastes, rather than water quality. The jurisdictional issues in these cases may also appear in the context of or otherwise from the context of water quality.

[67] State of Wash. Dept. of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985).

[68] Currently, federal hazardous waste laws do not allow EPA to delegate authority to tribes to operate federal hazardous waste management programs on tribal lands. Tribes cannot thus be treated as states under the Resource Conservation and Recovery Act.

[69] *State of Wash. Dept. of Ecology*, 752 F.2d at 1472.

[70] *Id.* at 1467-68.

where non-members have placed themselves in the sphere of tribal regulations or where tribal sovereign interests are implicated.[71]

Recently, in *Brendale v. Yakima Indian Nation*,[72] the Supreme Court held a county had zoning authority over fee lands owned by a non-member in an "open" area of a reservation. The "open" area was accessible to the general public and approximately fifty percent of it was owned in fee.[73] The "open" area parcel at issue was near the boundary of the reservation and overlooked the municipal airport and the city of Yakima.[74]

Wilkinson, the non-member who owned a forty-acre parcel within the "open" area of the reservation, sought to subdivide thirty-two acres of his property into twenty lots for single family homes, consistent with county zoning ordinances.[75] The proposed development was prohibited under tribal ordinances. Applying the test devised in *Montana*, the Court upheld county jurisdiction, finding the development "would have no direct effect on the tribe and would not threaten the tribe's political integrity, economic security or health and welfare."[76]

Since *Brendale*, the State of South Dakota has challenged EPA's award of a planning grant to the Standing Rock Sioux Tribe under the SDWA. The tribe's grant application claimed authority over non-member municipal treatment plants. After EPA clarified that the grant did not include a determination that the tribe had permitting authority over non-members, the state dismissed the suit as unripe.[77]

Where federal law does not expressly address the issue, the question of whether states may regulate non-member fee lands located on reservations is thus analyzed on a case-by-case basis using the *Montana* test. The CWA, however, specifically provides that a tribe may operate a federally delegated program on tribal land. The tribe may also regulate non-member fee lands

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[71] Montana v. United States, 450 U.S. 544, 555-56 (1981), *reh'ing denied* 452 U.S. 911 (1981).

[72] Brendale v. Confederated Tribes & Bands of Yakima, 492 U.S. 408 (1989). See also Peter W. Sly, *EPA and Indian Reservations: Justice Stevens' Factual Approach*, 20 ENVTL. L. REP. 10429 (Oct. 1990) for an excellent discussion of the *Brendale* opinion.

[73] *Id.* at 416.

[74] *Id.* at 418.

[75] *Id.*

[76] *Id.* at 432.

[77] South Dakota v. EPA, No. 89-2772 (8th Cir. May 23, 1990), *dismissed by stipulation*; *see* 20 ENVTL. L. REP. 10429, 10434 n.64 (Oct. 1990).

located on the reservation,[78] implying states would not have such jurisdiction. The SDWA does not contain the same language, but amendments in 1977 stated that the amendments did not alter established tribal/state jurisdiction.[79] For SDWA programs delegated to tribes, therefore, a *Montana* analysis would be needed to determine whether a state or a tribe has jurisdiction over non-member fee lands, as the unripe challenge by South Dakota discussed above indicates. While tribes and states continue to argue over jurisdiction in the courts, tribes have been generally successful in defending their tribal authority against states since the self-determination policy was adopted in the early 1970s.

III. TRIBAL JURISDICTION OVER WATER QUALITY IN INDIAN COUNTRY

Tribes retain limited sovereignty over self-government and internal affairs.[80] These tribal sovereign rights may be preempted by federal law on the same subject. Questions remain over when and how tribes may implement regulatory programs that affect others outside the reservation and to what extent tribes may regulate non-member fee lands on Indian reservations. State governments generally may not apply their laws or regulations in Indian country, although in some cases concurrent jurisdiction with state and local governments may exist. Recently, some tribes and state and local governments have agreed to put jurisdictional disputes aside and work together under cooperative agreements.[81]

A. Preemption Of Tribal Regulation By Federal Law

In *Northern States Power Company v. Prairie Island Mdewakanton Sioux Indian Community*,[82] a Mdewakanton Sioux tribal ordinance regulating transportation of radioactive material across the reservation was preliminarily enjoined, after a federal district court determined it was likely the tribal ordinance was

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[78] 33 U.S.C. § 1377(h)(1) (Supp. 1992).

[79] 42 U.S.C. § 300j-6(c)(1) (1991).

[80] *See Brendale*, 492 U.S. at 425.

[81] 33 U.S.C. § 1377(d) (Supp. 1992) provides that tribes and states may "enter into cooperative agreements" to "jointly plan and administer the requirements" of the Act.

[82] Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 781 F. Supp. 612 (D. Minn. 1991).

preempted by the Federal Hazardous Materials Transportation Act and possibly the Atomic Energy Act. The party seeking the injunction operated a nuclear power plant in Red Wing, Minnesota, on land adjacent to the reservation. Access to the nuclear power plant was by one county road and a railroad, both of which traversed the reservation. The tribe's ordinance required a tribal license for transport of radioactive materials across the reservation and purported to regulate the construction of a waste management facility the plaintiff planned to build on land near the reservation (land to which the tribe laid claim under congressionally ratified treaties).[83] Thus the tribal ordinance purported to regulate transportation and management of radioactive waste. The district court found that the federal government has exclusive authority in these areas, under the doctrine of preemption.[84]

B. Tribal Jurisdiction Over Non-members

A key question in tribal environmental programs concerns tribal regulation of non-members who own land on the reservations. The legal tests courts apply to this question allow tribes to regulate non-members, even on non-member fee lands, where: (1) the tribe entered into an agreement with the non-member; and (2) the non-member's activities affect the health and welfare, or economic or political security of the tribe.[85]

In *Brendale*, a second petitioner named Philip Brendale, the owner of a 160 acre tract in the heart of the "closed" area of the reservation,[86] sought to build summer cabins complete with individual wells and septic tanks.[87] Brendale was a non-member fee owner of tribal land within the area of the reservation "closed" to the public. Brendale inherited the parcel through his great aunt who was a member of the Yakima Nation. A tribal zoning ordinance prohibited the development Brendale sought.[88] The Court held the tribe had authority to restrict the use of fee land owned by non-member Brendale in the "closed" area of the reservation because the planned development would

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[83] *Id.* at 613-14.
[84] *Id.* at 612-13.
[85] *Montana*, 450 U.S. at 565-66 (1981).
[86] *Brendale*, 492 U.S. at 417.
[87] *Id.* at 417, 440.
[88] *Id.*

endanger economically important timber and threaten the spiritual and cultural value of the closed area.[89]

In other situations courts have concluded tribes lack authority to regulate the environment on reservation land owned by non-members. In *Holly v. Yakima Nation*,[90] for example, the district court invalidated a tribal code that purported to regulate non-member use of surplus water flowing through the reservation. The court found inherent sovereign interests preserved by treaty did not include the right to regulate use of surplus waters by non-members on the reservation.[91] The potentially troublesome issue of tribal regulation of non-members on reservations has been eliminated where tribes seek to implement water programs under the CWA, since the statute itself clearly expresses congressional intent to allow tribes to regulate fee lands of non-members.[92]

C. Tribal Regulation Affecting Areas Outside The Reservation

Disputes have arisen where tribal regulation potentially affects those outside the reservation. Typically, such regulation has been upheld unless preempted by federal law. In *Nance v. E.P.A.*,[93] EPA was allowed to delegate certain regulatory authority under the Clean Air Act to a tribe, even though the tribe could then affect land owners outside the reservation. EPA regulations allowed Indian tribes to redesignate their air quality classification from the automatic Class II category (moderate air quality deterioration allowed) to Class I (very little deterioration allowed) or Class III (air quality deterioration to the level of secondary ambient air quality standards allowed).[94] EPA approved a redesignation of air quality from Class II to Class I as requested by the Tribal Council of the Northern Cheyenne Tribe.[95]

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[89] *Id.* at 444.

[90] Holly v. Confederated Tribes & Bands of Yakima Indian Nation, 655 F. Supp. 557 (E.D. Wash. 1985), *aff'd. mem.* Holly v. Totus, 812 F.2d 714 (9th Cir. 1987), *cert. denied* 484 U.S. 823 (1987), *reh'ing denied* 484 U.S. 970 (1987).

[91] *Id.* at 559.

[92] *See* 33 U.S.C. § 1377(e), (h)(1); *Brendale*, 492 U.S. 408 (1989).

[93] Nance v. EPA, 645 F.2d 701 (9th Cir. 1981), *cert. denied* Crow Tribes of Indians Montana v. EPA, 454 U.S. 1081 (1981).

[94] *Id.* at 704.

[95] *Id.* at 705.

Petitioner Nance operated a strip mine near the reservation and was concerned that the reclassification, coupled with tougher 1977 Clean Air Act amendments, could impose emission reductions on his mining operations. Nance sued EPA alleging, among other things, that the tribe's redesignation of the air quality classification was not authorized under the Clean Air Act, and that delegation of authority to a tribe which affects the area outside the reservation was a violation of due process and the Tenth Amendment.[96] The Court of Appeals for the Ninth Circuit upheld EPA's delegation of authority to tribes as proper under the Clean Air Act, based on the inherent sovereignty of Indian tribes, deference to the Agency's interpretation of the statute, and 1977 legislative history indicating Congress' approval of Indian authority to redesignate air quality classifications.[97] The court rejected Nance's Tenth Amendment argument as "patently without merit" since the argument implied that Congress also lacked authority to regulate activities of private parties that cause pollution.[98]

D. Concurrent Jurisdiction On Tribal Lands

According to the Supreme Court, the possibility also exists that "federal and state environmental protection requirements may be superimposed on county or tribal zoning ordinances."[99] Such "concurrent jurisdiction" is a "product of the unique overlapping of governmental authority that characterizes much of our Indian-law jurisprudence."[100] An example of this is found in *Cotton Petroleum Corporation v. New Mexico*,[101] where the Court held the state and the tribe could impose severance taxes on a non-Indian producer of oil and gas who leased reservation lands. Concurrent jurisdiction, however, may cause disruptions in both regulatory schemes and may ultimately be unworkable in water quality management.

Some states and tribes have reached agreements allowing them to work together cooperatively, without fighting jurisdictional battles in court. For example, in California the Campo

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[96] *Id.* at 705, 714-716.
[97] *Id.* at 713-14.
[98] *Id.* at 716.
[99] *Brendale*, 492 U.S. 408, 440 at n.3 (1989).
[100] *Id.*
[101] Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

Band of Mission Indians has proposed an agreement with the state to build and operate a sanitary waste disposal facility on tribal land.[102] Seeking economic development, the Campo Band General Council decided to construct a sanitary landfill and recycling and composting center on its reservation.[103] The Band created its own Campo Environmental Protection Agency[104] and enacted the Campo Solid Waste Management Code of 1990.[105] The Band's code was stricter than corresponding EPA regulations and was at least as stringent as the states' regulations that would apply if the facility were located off the reservation.[106]

While the Band asserted that comprehensive federal and tribal review of the project preempted any state jurisdiction over the facility, local residents fought to ensure the state would have jurisdiction over the planned facility.[107] In August 1990, the California Legislature passed a bill making it illegal for anyone to deliver waste to a tribal landfill unless the landfill received a permit from the state, but the Governor vetoed the bill as unconstitutional, preventing it from becoming law.[108] In 1991, new legislation[109] was enacted authorizing the California Environmental Protection Agency to enter into cooperative agreements with tribes to ensure tribal environmental protections are comparable to the state's requirements.

To minimize fears that the Campo Band's regulations would not protect the environment and to take advantage of technical expertise, the Band began negotiating with state and local agencies to provide services related to permitting, facility inspecting and recordkeeping. Such an agreement would allow both the Band and the state to discuss and review regulation of the solid waste disposal facility, with neither side conceding jurisdiction.

IV. TRIBAL RIGHTS TO WATER AS A POSSIBLE BASIS FOR WATER QUALITY REGULATION

Although as yet untested, water rights issues may affect water quality regulation. Tribal water rights stand, for instance, as an

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[102] *See* Gover, Stetson and Williams, *supra* note 62, at 281-86.
[103] *Id.* at 281.
[104] *Id.* at 282.
[105] *Id.* at 284-85.
[106] *Id.* at 285.
[107] *Id.*
[108] Gover, Stetson and Williams, *supra* note 62, at 285 n.46.
[109] 1991 Cal. Legis. Serv. Ch. 805 (A.B. 240).

exception to state regulated water rights systems; states may not regulate on Native American lands without congressional consent, and Congress has not granted such consent except for authorizing suits in state court for administration of federal water rights.[110] Tribal rights are considered federal water rights that flow not from state law but from federal treaties, statutes, agreements and executive orders.[111] Because tribal water rights constitute federal rights under the Supremacy Clause of the United States Constitution, state law cannot override them, creating a situation that has caused significant tension between states and tribes, particularly in the water-short western states.

Historically tribal water rights have fallen into one of three categories, each stemming from a different historical base. The first type was announced in *United States v. Winans*.[112] The *Winans* right derived from the period before 1871, when the federal government generally entered into treaties with the tribes under which the tribes usually ceded vast tracts of land to the federal government in exchange for the right to live on smaller tracts of land under federal protection and with some federal assistance. *Winans* involved the tribes of the Pacific Northwest, who had by treaty ceded 64 million acres of land in return for small land reservations and, among other things, the "right of taking fish at all usual and accustomed places . . . in common with the citizens of the territory."[113] When the Winans brothers, with state licensing and approval, excluded members of the Yakima Tribe from their traditional fishing places, the Yakima sued. The Supreme Court ruled the tribal fishing right could not be abrogated by subsequent state licenses. The Court held "the treaty was not a grant of rights to the Indians but a grant of rights from them—a reservation of those not granted."[114] As a consequence of how they were derived, *Winans* rights are usually aboriginal subsistence rights, based on pre-existing uses and not transferable to other users or uses.[115]

The second type of tribal water right is derived from *Winters v. United States*.[116] *Winters* arose during the post-1871 period,

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[110] 4 ROBERT E. BECK, WATERS AND WATER RIGHTS, § 37.04(d)(2) (1991 ed.)

[111] *Id.* at § 37.02(a).

[112] United States v. Winans, 198 U.S. 371 (1905).

[113] *Id.* at 378.

[114] *Id.* at 381.

[115] BECK, *supra* note 109, at § 37.02(a)(2).

[116] Winters v. United States, 207 U.S. 564 (1908).

when the federal government had generally stopped signing treaties with tribes and instead established tribal reservations only by statute or executive order.[117] The *Winters* case related to an 1888 statute by which the United States confined the Indians of the Fort Belknap reservation in Montana to a land area of 1400 square miles with little water, except for the Milk River on its northern boundary. The statute, typical of the time, did not specifically address the tribe's right to water in connection with the reservation. When drought in 1905 made it impossible to satisfy the demands of all users of the Milk River water, the federal government sued to protect the tribal right to divert water from the Milk River.[118] The Supreme Court, noting the government policy to encourage tribes to become agricultural and further noting the reservation was practically valueless without irrigation water, held the 1888 statute impliedly reserved water in the Milk River for the tribe.[119] A subsequent decision, *State of Arizona v. State of California*, held the amount of water reserved was to be measured by the "practicably irrigable acreage" in the reservation.[120] Thus, *Winters* rights, unlike *Winans* rights, derive from implied grants from the federal government for future water uses on Indian lands.[121]

Pueblo water rights constitute the third type of tribal water rights and derive from Spanish and Mexican law. In the 1848 Treaty of Guadalupe Hidalgo between Mexico and the United States, the United States agreed to recognize pueblo water rights in assuming jurisdiction over former Mexican territories.[122] The pueblo water right is the paramount right of the city, as successor to the pueblo, to use water occurring within the old pueblo limits for the use of the city and its inhabitants. Only two states, California and New Mexico, apply the pueblo rights doctrine.[123]

To date, the water rights of tribes have had a water quality dimension only in the context of *Winans*-type fishing rights. For example, *Kittitas Reclamation District v. Sunnyside Valley Irrigation* changed the operation of a dam to release more water to

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[117] BECK, *supra* note 109.

[118] *Winters*, 207 U.S. at 567-68.

[119] *Id.* at 576-77.

[120] State of Arizona v. State of California, 373 U.S. 546, 600-01 (1963).

[121] *See* BECK, *supra* note 109, at § 37.02(a)(1).

[122] Treaty of Guadalupe Hidalgo, art. VIII, 9 Stat. 922 (1848).

[123] A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES, §§ 4.06[4], 5.08[3] and 5.03[6] (1992).

preserve salmon[124]; *United States v. Adair* blocked issuance of permits that would have interfered with river flows needed to maintain fish habitat[125]; and *Confederated Tribes. Etc. v. Alexander* stopped construction of a dam.[126]

All tribal water rights, however, potentially include a water quality component. Tribes might argue, for example, that because of upstream uses, the quality of water reaching the tribe is so poor as to be virtually unusable, and thus the tribe has been effectively deprived of its water rights. Alternatively, they may argue the poor water quality leaves the water unusable for economically viable projects on the reservation, again effectively denying them their water right. As tribes regulate water quality on the reservation, they may argue still further that water entering the reservation fails to meet their water quality standards and effectively deprives them of use of their water rights. Given the rising concerns about water quality and the constant demand for water rights, we should expect to see such claims in the future, intertwining water rights with water quality concerns and potentially stretching the consequence of tribal jurisdiction beyond the boundaries of tribal land.

CONCLUSION

Amendments to the CWA and SDWA in the late 1980s authorized federally recognized tribes to seek and obtain authorization from EPA to implement and enforce water protection programs, just as states have been eligible to do for many years. Unfortunately, Congress appropriated no additional funds for such federally delegated tribal programs. Tribes were forced to rely on limited funds made available through internal budgetary reallocations within EPA. EPA's Indian Policy emphasizes tribal self-government and encourages tribes to take the lead in matters affecting the environment in Indian country, but because most tribes have neither the environmental protection infrastructures nor the expertise or funds, the lack of federal funding severely impedes development of tribal water protection programs.

In these difficult economic times, tribes may not receive significant funding from Congress. Congress conceivably could

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[124] 763 F.2d 1032 (9th Cir. 1985) *cert. denied*, 474 U.S. 1032 (1985).
[125] 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).
[126] 440 F. Supp. 553 (D. Or. 1977).

appropriate or EPA may allocate additional funds in response to recent findings by EPA's Workgroup on Environmental Equity that Native Americans have distinct environmental problems and often lack the resources and training (e.g., institutions, trained personnel and money) to address them.[127]

The best alternative for some tribes seeking effective water pollution prevention and control may be to work cooperatively with the states, despite the lengthy history of disputes between state and tribal governments. Through cooperative ventures, tribes could arrange to retain control of the program and sidestep jurisdictional disputes with states, while reaping the benefit of state governments' technical expertise and information. Cooperative arrangements with a traditional adversary may prove to be the more productive course for environmental protection in the long run.

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[127] *See generally* Milligan and Wolcott, *supra* note 61.