TRIBAL WATER QUALITY STANDARDS: ARE THERE ANY LIMITS?

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INTRODUCTION

The current thrust of federal Indian policy is to encourage tribal self-government. The policy of self-determination encompasses the concept that Native American tribal members know best what their interests and concerns are. The tribes know what measures are required to preserve their traditions and to maintain the environment in which to practice those traditions and rites. As James M. Grijalva writes:

> From time immemorial, the original inhabitants of the North American continent have maintained a close physical and spiritual connection with the natural world. Their vision that humans are caretakers and guardians of nature implies an individual and governmental responsibility to use nature's resources with respect and reverence. For thousands of years, that responsibility was discharged within the framework of custom and tradition guiding the tribe's citizenry.[1]

Unfortunately, tribes are now confined to limited areas. The boundaries of their reservations sever watersheds. As careful as a tribe may be to protect the resources within the reservation, the tribe has little control over off-reservation polluters. Environmental pollution is migratory because air and water flow over political boundaries. Thus, where there is use of a common body of water by both a tribe and another jurisdiction, the quality for all users needs to be protected.

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

An issue arises, however, when the protection of water quality for tribal users requires upstream dischargers to implement costly facility and program improvements. What rights do downstream tribes have to set water quality standards that fiscally affect upstream dischargers? And what role should the Environmental Protection Agency (EPA) play in approving tribal water quality control programs, issuing discharge permits that require improvements, and settling disputes between tribes and non-tribal jurisdictions with regard to water quality?

These issues arose in 1992 when the Pueblo of Isleta in New Mexico promulgated final water quality standards for the stretch of the Rio Grande lying within the Pueblo territory. The EPA approved the Pueblo's water quality standards on December 24, 1992.[2] Albuquerque, New Mexico is about five miles upstream from the Pueblo. The City owns and operates a wastewater treatment plant that discharges into the river. The City had previously obtained a discharge permit from the EPA, but the permit was under reconsideration at the time this dispute arose.[3] Among other objections the City had, it claimed that the EPA had approved the Isleta standards arbitrarily and capriciously.[4] According to the City, the real problem was that compliance with the Isleta standards would require $250 million in modifications to either municipal water supplies or wastewater treatment facilities (or both).

The following sections will provide a summary of the framework of regulations and policies under which tribes can establish standards to protect water resources for their uses. In addition, this Article will address effects on upstream dischargers and the EPA's position when such disputes arise. Since the Isleta-Albuquerque case is the first where many of these issues have arisen, it is the backdrop for the discussion.

I. OVERVIEW OF THE REGULATORY FRAMEWORK AND THE EPA' S INDIAN POLICY

"The Clean Water Act [CWA] is a comprehensive statute designed to 'restore and maintain the chemical, physical, and

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2. City of Albuquerque v. Browner, 865 F. Supp. 733, 736 (D.N.M. 1993) (*Albuquerque I*).

3. *Id.*

4. *Id.*

biological integrity of the Nation's waters' through the reduction and eventual elimination of pollutant discharge into those waters."[5] The CWA is administered by the EPA.

"The Clean Water Act does not authorize states to implement or enforce their water quality management programs on Indian lands. Therefore, in the absence of a treaty or federal statute granting such State authority over a particular tribal land, it is appropriate for the EPA to proceed under section 303(c)(4)(B) to promulgate federal water quality standards, where justified, for waters on Indian lands."[6]

On January 24, 1983, President Reagan published a Federal Indian Policy supporting the primary role of tribal governments in matters affecting American Indian reservations. While the EPA had previously issued general statements that recognized the importance of tribal governments in regulatory activities that impact reservations, in 1984 the EPA became the first federal agency to adopt a formal Indian Policy. The formal EPA Policy Memo of 1984 expanded upon previous position statements to create a new policy consistent with the overall federal position as stated in the Executive Order of 1983.[7] To further its policy and to provide the tribes a stronger voice in preserving the reservation environment, Congress enacted revised legislation to enable the EPA to treat tribes in the same manner as states for the purposes of administering EPA statutes. The 1987 amendments to the CWA provide the EPA with the authority to approve a tribe for treatment as a state for certain purposes enumerated in the Act.[8] One of the enumerated sections is Section 303 which allows a state, or a tribe treated as a state, to set water quality standards for waters within its jurisdiction.[9]

In 1984, 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-government' and 'government-to-

5. *Id.* at 737 (quoting Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (1994)).

6. Proposed Water Quality Standards for the Colville Indian Reservation in the State of Washington, 53 Fed. Reg. 26,968, 26,968 (1988) (to be codified at 40 C.F.R. § 131).

7. EPA Policy for the Administration of Environmental Programs on Indian Reservations 2 (November 8, 1984) (EPA Internal Policy Memo on file with author) [hereinafter EPA Indian Policy Memo].

8. 33 U.S.C. § 1377(a) (1994).

9. 33 U.S.C. § 1313 (1994).

government' relations between Federal and Tribal Government."[10] The policy further specifies that:

> In keeping with the principle of Indian self-government, the EPA policy provides that Tribal governments are the primary parties for setting standards, making environmental policy decisions, and managing programs for reservations. Moreover, Federal courts have approved the EPA's decision to grant Indian Tribes the same degree of autonomy to determine the quality of their environment as was granted to the States.[11]

States are provided the authority to regulate water quality and to set effluent standards as long as the state program meets or exceeds the standards set by the CWA.

A. *Local Water Quality Control Programs*

Section 510 of the CWA is a "savings provision" that indicates that existing state (or tribe treated as a state) authority to regulate effluent discharges and/or to set water quality standards is not preempted by the CWA, as long as the state standards are at least as stringent as those required by the CWA.[12] Thus, states are permitted to enact water quality protection programs, and upon approval of these programs by the EPA, to release regulatory authority to local control. The EPA endeavors to provide guidance to the states in the development of these programs. In fact, the CWA requires the EPA to develop criteria for water quality that reflect the latest scientific knowledge[13] and to provide those criteria to the states as guidance.[14] As the Court stated in *Albuquerque I*, "the states are free to draw upon the EPA's recommended water quality criteria, but are equally free to use other criteria for which they have sound scientific support."[15]

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10. EPA Indian Policy Memo, *supra* note 7, at 2.

11. *Id.*; *see* Nance v. EPA, 645 F.2d 701 (9th Cir. 1981); discussion *infra* p. 370-71.

12. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,886 (1991) (to be codified at 40 C.F.R. § 131).

13. 33 U.S.C. § 1314(a)(1).

14. 33 U.S.C. § 1314(a)(3).

15. *Albuquerque I*, 865 F. Supp. 733, 738 (D.N.M. 1993) (*Albuquerque I*); *see* Water Quality Standards Regulation, Final Rule, 48 Fed. Reg. 51,400, 51,411 (1983) (to be codified at 40 C.F.R. § 35, 120, 131).

B. *Setting Water Quality Standards*

The CWA provides two measures of water quality in order to meet the objective of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. One measure is an effluent limitations guideline. Effluent limitations guidelines are uniform, technology-based standards promulgated by the EPA, which restrict the quantities, rates, and concentrations of specified substances discharged from *point sources*.[16]

Point sources are locations, or particular facilities, from which there are water discharges into any surface or subsurface drainage system.[17] They are termed point sources because the point of discharge is known; that is, discharges, and potential contaminants therein, can be traced to a particular point, location, facility, or activity. Nonpoint source pollution, on the other hand, is pollution that occurs as water drains across the land and picks up contaminants along the way. For example, sheet flow across a golf course where pesticides are used may pick up and carry pesticide residue, which will then continue to follow the drainage of the watershed. Those pollutants will be added to contaminants from stockyards or pasture-land or urban runoff. It is difficult to trace a particular contaminant to a particular *point* in the watershed, thus the term, nonpoint source pollution.

The other measure of water quality is a "water quality standard."[18] Water quality standards can include numerical standards, but are an expression of the *desired condition of a particular waterway* rather than a measure on which to base pollutant controls (as are the technology-based effluent limitations mentioned above). There are three elements of water quality standards: (1) one or more designated "uses" consistent with the goals of the CWA; (2) "criteria" expressed either as numerical standards or narratives describing the necessary quality in order to protect the specified uses; and (3) an anti-degradation provision.[19]

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16. *Id.*; *see* Clean Water Act §§ 301, 304, 33 U.S.C. §§ 1311, 1314 (1994).

17. 33 U.S.C. § 1362(14).

18. *Albuquerque I*, 865 F. Supp. at 738.

19. *Id.* at 738. (citing Clean Water Act § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(a) (1994); 40 C.F.R. § 131 (1992)).

The primary means of enforcing these limitations and standards is the National Pollutant Discharge Elimination System (NPDES).[20] This system was enacted as a revision to the CWA in 1972.[21] Section 301(a) of the Act, generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained an NPDES permit.[22] Permitting comes from two possible regimes: state permit programs, or in the absence of a federally approved state program, issuance by the EPA of an NPDES permit under section 402 (a) of the CWA.[23]

The designation of uses is the first step in developing water quality standards; it establishes the goals of the program.[24] There are several important regulatory aspects to the designation of uses. First, in designating uses and the appropriate criteria for those uses, "the [tribe] shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters."[25] Second, the tribe assigns specific "uses" to the identified waters.[26] These are the uses that the tribe currently designates for the waters. At a minimum, the CWA requires the tribe to protect recreational uses, and uses by fish and wildlife for protection and propagation (termed fishable/swimmable standards).[27] The tribe has the prerogative to adopt other use categories appropriate to its reservation.[28] Uses likely to be protected could include irrigation for agriculture, municipal drinking water, industrial and commercial activities, and cultural or religious activities.[29]

If a tribe designates uses other than fishable/swimmable uses, the tribe must conduct a "'use attainability analysis.'" "A use attainability analysis is a 'scientific assessment of the physical, chemical, biological,

20. Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992).
21. *Id.* at 101-2.
22. *Id.* at 102.
23. *Id.* at 103.
24. Grijalva, *supra* note 1, at 451.
25. 40 C.F.R. § 131.10(b) (1996).
26. Grijalva, *supra* note 1, at 451.
27. *Id.*
28. *Id.*
29. *Id.*

and economic factors' affecting whether a use can be attained."[30] This analysis "assist[s] the tribe in determining which uses are possible, and the relative need for implementation of environmental controls to protect those uses from the adverse consequences of existing and future point and nonpoint sources."[31] The regulations state that "[a]t a minimum, uses are deemed attainable if they can be achieved by the imposition of . . . *cost-effective and reasonable best management practices for nonpoint source control.*"[32] It is important to note that the cost-effectiveness evaluation is for control of nonpoint source pollution, rather than for point source pollution, as in the case where Albuquerque was discharging from a wastewater treatment facility. The classification of waters a state must take into consideration include the use and value of water for public water supplies, protection and propagation of fish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes.[33] Removing uses requires a substantial showing of non-attainability.[34]

The second element of a water quality control program is the water quality criteria, or standards. Effective criteria usually contain both narrative and numerical water quality criteria. Narrative criteria are statements of acceptable pollutant concentrations without reference to defined units or requirements. A common example of a narrative statement is the provision that toxic material concentrations in surface waters shall be below those which "may adversely affect characteristic water use."[35] Narrative criteria are often used where a numerical criterion for a specific chemical is not available.[36] Numerical criteria are more easily understood and enforced.[37] These criteria establish tolerance levels of various pollutants in each water body.[38]

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30. *Id.* (quoting REFERENCE GUIDE TO WATER QUALITY STANDARDS FOR INDIAN TRIBES, EPA 440/5-90-001, at 1 (January 1990)).

31. Grijalva, *supra* note 1, at 451.

32. 40 C.F.R. § 131.10(d) (1996) (emphasis added).

33. 40 C.F.R. § 131.10(a).

34. Grijalva, *supra* note 1, at 451.

35. *Id.* at 452-53.

36. *Id.* at 452-3.

37. *Id.*

38. *Id.*

The third element of a water quality control program is the anti-degradation policy. This policy is a statement of the jurisdiction's commitment to maintain existing levels of water quality.[39]

To this point several important concepts have been developed. The first is that the EPA has established a policy to develop a partnership with tribes to enhance environmental protection. The nature of this policy will be discussed in greater detail below. The second important concept is that the EPA may release to local control implementation of federal environmental protection regulations and that release may be to a tribe as well as to a state. For purposes of the CWA, tribes are to be treated as states once certain findings are made as to the tribe's authority and ability to execute the program. Thirdly, the EPA has not given states jurisdiction over tribes to enforce federal environmental regulations. Fourthly, a water quality control program consists of three elements: the designated uses, the standards, and the anti-degradation policy.

II. EPA'S INDIAN POLICY

On January 24, 1983 the President published a Federal Indian Policy supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed the themes of Indian self-government and the establishment of government-to-government relations between the federal and tribal governments. On November 8, 1984 the EPA issued its Policy for the Administration of Environmental Programs on Indian Reservations. That policy was intended to provide guidance for the EPA program managers in the conduct of the Agency's congressionally mandated responsibilities.[40]

The Policy contains nine mission statements and a brief narrative description of each:

> The Agency stands ready to work directly with Indian Tribal Governments on a one-to-one basis, rather than as subdivisions of other governments.
>
> The Agency will recognize Tribal Governments as the primary parties for setting standards, making environmental

39. 40 C.F.R. § 131.12 (1996).

40. EPA Indian Policy Memo, *supra* note 7.

> policy decisions and managing programs for reservations, consistent with agency standards and regulations.
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> The Agency will take affirmative steps to encourage and assist Tribes in assuming regulatory and program management responsibilities for reservation lands.
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> The Agency will take appropriate steps to remove existing legal and procedural impediments to working directly and effectively with Tribal Governments on reservation programs.
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> The Agency, in keeping with the federal trust responsibility, will assure that Tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments.
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> The Agency will encourage cooperation between Tribal, State, and local governments to resolve environmental problems of mutual concern.
>
> The Agency will work with other federal agencies which have related responsibilities on Indian reservations to enlist their interest and support in cooperative efforts to help tribes assume environmental program responsibilities for reservations.
>
> The Agency will strive to assure compliance with environmental statutes and regulations on Indian reservations.
>
> The Agency will incorporate these Indian policy goals into its planning and management activities, including its budget, operating guidance, legislative initiatives, management accountability system and ongoing policy and regulation development processes.[41]

The EPA then formulated internal implementation guidance procedures to direct how the above mission statements were to be executed.[42]

Both prior to the formal issuance of the Indian Policy, and since 1984, the EPA has exercised repeated opportunities to reinforce its position with regard to relations with tribal governments. Additionally, the courts have repeatedly relied on the EPA policy in making decisions. For example, in support of its legal authority to establish

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41. *Id.*
42. *Id.*

federal water quality standards on an Indian reservation, the EPA stated:

> In keeping with the principle of Indian self-government, the EPA policy provides that tribal governments are the primary parties for setting standards . . . and managing programs for reservations. Moreover, Federal courts have approved the EPA's decisions to grant Indian Tribes the same degree of autonomy to determine the quality of their environment as was granted to the States.[43]

In the December 1991 Amendments to the Water Quality Standards Regulations That Pertain to Standards on Indian Reservations, the EPA stated its position that there are strong policy reasons to allow Tribes to set any water quality standards consistent with 40 C.F.R. 131.10.[44] It puts tribes and states on an equal footing when setting standards. There is no indication that Congress intended to treat tribes as "second class" states under the CWA.[45] Furthermore, the EPA stated that it has no procedures in place for defining a level of standards beyond which a tribe would not be allowed to go.[46] Since states are not limited in the level of standards they can set in their local water quality control programs, tribes should therefore not be limited either in the level of water quality protection or controls they are permitted to establish.

To explain the position stated in the 1991 Amendments, the EPA delved into legislative intent and history. The EPA referenced discussions of the Conference Committee on the Water Quality Act of 1987, quoting Senator Burdick:

> The intent of the conferees was to assure that Indian tribes would be able to exercise the same regulatory jurisdiction over water quality matters with regard to waters within Indian jurisdiction that states have over their water. The conferees believe that tribes should have the primary

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43. Proposed Water Quality Standards for the Colville Indian Reservation in the State of Washington, 53 Fed. Reg. 26,968, 26,968 (1988) (to be codified at 40 C.F.R. § 131); *see* Nance v. EPA, 645 F.2d 701 (9th Cir. 1981).

44. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,876 (1991) (to be codified at 40 C.F.R. § 131).

45. *Id.* at 64,886.

46. *Id.*

> authority to set water quality standards to assure fishable and swimmable water and to satisfy all beneficial uses.[47]

Particularly relevant to the Isleta-Albuquerque dispute was a portion of the Final Rule on the 1991 Amendments regarding overly-stringent water quality standards. The EPA had specifically invited comments regarding whether the EPA should attempt to establish scientific factors by which overly-stringent water quality criteria could be identified.[48]

In response to this query, the EPA noted that section 303 of the CWA explicitly requires criteria to be developed that support designated uses.[49] Considerations of cost-effectiveness and achievability cannot override this requirement.[50] That is, the EPA will judge whether a use that a tribe wants to designate is attainable based on a reasonable evaluation of the tribe's finances to achieve the standards necessary for that particular use. A use will be deemed "not attainable" if the tribe has neither the technology in place for implementation of the standards to support the use, nor the potential (fiscal or otherwise) to reasonably expect to achieve it. The EPA would not support overreaching on the part of the agency designating uses.[51] It appears, then, that the regulations preclude a tribe from designating uses that would require standards that the tribe has no hope of ever achieving because it does not have the necessary funds.

This evaluation of cost-effectiveness does not serve as an escape route for an upstream point source polluter in resolving a dispute regarding standards considered by one party (the polluter) to be "overly stringent." The requirement for setting standards that are achievable through cost-effective measures is merely to protect an agency from designating uses for which standards could never be attained because of its own internal inability to provide or implement the necessary measures. It is not to protect an upstream discharger from having to meet the standards set by the downstream party because it would not be cost-effective for the upstream discharger.

If the EPA determines that criteria for the proposed standards are overly-stringent to achieve designated uses, the EPA will advise

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47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 64,887.

the affected jurisdictions of that determination.[52] However, such determinations will not be grounds for disapproval of the criteria because the EPA does not believe it has the authority to disapprove a standard solely on the basis that the EPA considers it overly stringent.[53]

The EPA was the first federal agency to take such a strong and progressive position in involving tribes in managing resources on their own lands. Although willing to treat tribal governments respectfully and on an equal footing with state governments, the EPA had to promulgate some standards for evaluating whether a tribe was capable of successfully taking control and being treated as a state. The following section is a discussion of the rules and processes by which a tribe will be treated as a state for purposes of the CWA.

III. TREATING TRIBES AS STATES

The first applications under the CWA came from the pueblos of New Mexico.[54] The pueblos had difficulty, however, obtaining approval for treatment as a state because New Mexico challenged approval on several bases: whether the pueblos are reservations; what waters are considered to be within reservations (as in the State of New Mexico's challenge regarding the Sandia Pueblo's legal boundary along the Rio Grande); the EPA's authority to approve or requirement to disapprove standards; and whether tribal standards can be more stringent than state standards (as in the Albuquerque's challenge to the EPA's approval of the Pueblo of Isleta's water quality standards).[55]

In response to the State of New Mexico's challenge that pueblos are not reservations for purposes of the CWA, the EPA's General Counsel concluded that a pueblo is functionally equivalent to a reservation.[56] Many of the pueblos in New Mexico are located along the Rio Grande, as is the City of Albuquerque. New Mexico's question of precisely where on the Rio Grande the legal boundary of the Sandia Pueblo is located was determined through a series of

52. *Id.*

53. *Id.*

54. Mark E. Chandler, *A Link Between Water Quality and Water Rights?: Native American Control Over Water Quality*, 30 TULSA L. J. 105, 114 (1994).

55. *Id.* at 114-15.

56. *Id.* at 114.

communications that did not reach the courtroom. The Secretary of the Interior, the EPA and the State of New Mexico reached agreement that the Sandia Pueblo boundary was the middle of the stream, based on doctrines of riparian rights.[57] Thus, for the stretch of the Rio Grande subject to Sandia jurisdiction, the Pueblo controls the eastern half of the river, and the state has water quality jurisdiction over the western half.[58]

The Code of Federal Regulations includes requirements that Indian Tribes must meet in order to be approved to administer a water quality standards program.[59] An administering tribe must be a

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57. *Id.* at 115.

58. *Id.*

59. 40 C.F.R. § 131.8 (1996) states:

(a) The Regional Administrator [the agency has nine regions], as determined based on OMB [Office of Management and Budget] Circular A-105, may accept and approve a tribal application for purposes of administering a water quality standards program if the Tribe meets the following criteria:

(1) The Indian Tribe is recognized by the Secretary of the Interior and meets the definitions in §§ 131.3(k) and (l),

(2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers,

(3) The water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for the Indians, within the borders of the Indian reservation and held by a member of the Indian Tribe if such property is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation, and

(4) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

(b) Requests by Indian Tribes for administration of a water quality standards program should be submitted to the lead EPA Regional Administrator. The application should include the following information:

(1) A statement that the Tribe is recognized by the Secretary of the Interior.

(2) A descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. The statement should:

(i) Describe the form of Tribal government;

(ii) Describe the types governmental functions currently being performed by the Tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population, taxation, and the exercise of the power of eminent domain; and

(iii) Identify the source of the Tribal government's authority to carry out the governmental functions currently being performed.

tribe recognized by the Secretary of the Interior and must have a governing body that has authority to carry out substantial governmental powers and duties.[60] Additionally, the Administrator must find that the tribe "is reasonably expected to be capable . . . of carrying out the functions of an effective water quality standards program."[61] Furthermore, the Code of Federal Regulations describes additional information that is required in which the tribe demonstrates its capability to administer such a program and describes the waters over which the tribe will exert authority.[62]

Upon receipt of the application, the Regional Administrator will notify appropriate government entities of the tribe's application and the basis of the tribe's authority to regulate water quality.[63] The Administrator provides a 30-day period to receive public comments on the tribe's assertion of authority.[64] Once recognized as a state for purposes of the Act, the tribe may submit proposed water quality standards.[65]

IV. THE CITY OF ALBUQUERQUE V. CAROL BROWNER, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY

The Rio Grande runs north to south through New Mexico, then turns east to form the border between Texas and Mexico.[66] The Pueblo of Isleta is located on the eastern side of the river, south of Albuquerque.[67] Albuquerque operates a wastewater treatment facility and the effluent from the facility discharges into the river approximately five miles north of the Pueblo.[68] The treatment facility, a point source, discharges into the river pursuant to an NPDES discharge permit issued by the EPA.[69] The EPA sets permit discharge limits for the facility to meet New Mexico's water quality

60. 40 C.F.R. § 131.8(b).
61. 40 C.F.R. § 131.8(a)(4).
62. 40 C.F.R. § 131.8(b).
63. City of Albuquerque v. Browner, 865 F. Supp. 733, 738 (D.N.M. 1993) (*Albuquerque I*) (citing 40 C.F.R. § 131.8(c)).
64. *Id.*
65. *Id.*
66. *Id.* at 736.
67. *Id.*
68. *Id.*
69. *Id.*

standards.[70] In 1992, the NPDES permit was in the process of being revised.[71]

The Pueblo of Isleta applied to the EPA for approval of tribal-established water quality standards as part of a local water quality control program pursuant to the CWA.[72] The EPA approved the Pueblo's standards on December 24, 1992.[73] The Pueblo's program designated primary contact ceremonial uses and primary contact recreational uses as the uses for which it was establishing water quality standards.[74] Pueblo members were reluctant to describe what ceremonial use of the river entails, but do admit that it means some ingestion of the water.[75]

The EPA delayed issuing the City's revised NPDES permit until the Pueblo's water quality standards had been approved.[76] The Pueblo's standards are more stringent than those set by the State of New Mexico.[77] As of December 24, 1992, the EPA was preparing a permit for the wastewater treatment facility that would meet the Pueblo's standards as well as New Mexico's standards.[78]

The City of Albuquerque obtains its drinking water from two wells which tap an aquifer which has a high arsenic content.[79] As the aquifer is continually depleted, the arsenic concentration increases, resulting in the discharge of effluent into the Rio Grande with elevated arsenic [and ammonia] concentrations.[80] In its petition for certiorari to the Supreme Court, the City postulated that " . . . compliance with nondetectable discharge limits would require reverse osmosis with a cost to the city of 248 million dollars in capital improvements and 26 million dollars in annual operating costs."[81]

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70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 740.
76. *Id.* at 736.
77. *Id.*
78. *Id.*
79. Personal communication with EPA Office of Regional Counsel, Region VI, Dallas, Texas (October 1996).
80. *Id.*
81. Petition for Certiorari, City of Albuquerque v. Browner 20-21 (1997) (unpublished court document on file with author).

Reverse osmosis pre-treatment would reduce the arsenic levels prior to discharge into the river.[82]

Albuquerque challenged the EPA's approval of the water quality standards by filing a motion for summary judgment on June 11, 1993 in the District Court of New Mexico.[83] The District Court is authorized to review actions of federal agencies under the Administrative Procedures Act.[84] The City raised several questions in its challenge of the EPA's approval of the Pueblo of Isleta's water quality standards.[85] Although there were other issues, this Article addresses only three of the issues that were raised by the City. First, the City asserted that the EPA, in recognizing a ceremonial use standard, violated the Constitution's Establishment Clause by imposing a mandate that aids tribal religion at the City's expense.[86] Second, the City raised the issue of the EPA's authority to approve standards or its requirement to disapprove standards that were without rational scientific basis.[87] Third, the City argued that the EPA authorized unduly stringent standards and improperly implemented two provisions, sections 518 and 510, of the CWA.[88]

A. *Overly Stringent Standards: Sections 510 and 518*

Section 518 of the CWA authorizes the EPA to treat tribes as states.[89] Section 510 prohibits states from imposing standards which are less stringent than federal standards.[90] The Section reserves the right for states to adopt standards that are more stringent than the federal standards.[91] Since Section 510 does not expressly reference Section 518 (treating tribes as states), but does expressly reference Section 303 (authorizing states to develop water quality standards), Albuquerque claimed that the legislative intent was to exclude tribes from application of Section 510; that is, that Section 510 only applies

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82. Personal communication with EPA Office of Regional Counsel, Region VI, Dallas, Texas (October 1996).

83. *Albuquerque I*, 865 F. Supp. at 736.

84. *Id.*

85. *Id.*

86. *Id.* at 740.

87. *Id.* at 741.

88. *Id.* at 739-40.

89. Clean Water Act § 518, 33 U.S.C. § 1377(a) (1994).

90. Clean Water Act § 510, 33 U.S.C. § 1370 (1994).

91. *Id.*

to true states, leaving only true states with the authority to adopt standards more stringent than federal standards.[92] According to this interpretation, as the court points out, tribes would not be permitted to establish standards more stringent than federal standards.[93]

Although the court did not go so far, the City's logic can be extended as follows. Section 518 authorizes tribes to be treated as states; that Section does not expressly reference Section 510, which prohibits states from imposing standards less stringent than federal standards.[94] If Section 510 does not apply to tribes, they would then be free to set standards at any level or none at all. However, if a tribe attempted to establish a local water quality control program with standards below federal standards, it would not be approved. If tribes, as Albuquerque asserts, are also precluded from establishing more stringent standards, all that remains is for a tribal program to equal the federal program. This would, as the court pointed out, conflict with both the EPA stated policy of self-government for Indian Tribes and general principles of federal Indian law.[95]

The City wanted to prevent the tribes from being authorized to adopt standards that were more stringent than federal standards. Since the City is an upstream discharger, the City's discharge permit for its treatment facility would be issued only in such a manner as would allow the downstream standards to be met. That is, Section 401 of the CWA appears to require the EPA to issue permits that comply with downstream standards.[96]

On appeal of the District Court's decision to the Tenth Circuit Court of Appeals, Albuquerque is claiming that the EPA must disapprove unduly stringent standards.[97] The Tenth Circuit stated that "[c]ongress's failure to incorporate [Section 510] in [Section 518] does not prevent Indian tribes from exercising their inherent sovereign power to impose standards . . . that are more stringent than those imposed by the federal government."[98] Indian tribes have residual sovereign powers that already guarantee the powers of Section 510—to impose standards more stringent than federal—absent an

92. *Id.*
93. *Albuquerque I*, 865 F. Supp. at 739.
94. Clean Water Act § 303, 33 U.S.C. § 1313 (1994).
95. *Albuquerque I*, 865 F.Supp. at 739.
96. Clean Water Act § 401, 33 U.S.C. § 1341 (1994).
97. City of Albuquerque v. Browner, 97 F.3d 415, 423 (10th Cir. 1996) (*Albuquerque II*).
98. *Id.*

express statutory elimination of those powers.[99] The Court did not view Section 510 as a constraint on either the EPA's authority or on tribal authority, but rather as a provision that directs state actions.[100]

As discussed above, the EPA has stated that in the event it determines that a standard is overly high to achieve the designated uses, it will notify the affected parties.[101] The agency has not determined that it has the authority to disapprove unduly stringent water quality protection programs. The mission of the agency is not simply to maintain the *status quo*, but to "restore . . . the chemical, physical, and biological integrity of the Nation's waters."[102] Thus, in a situation involving dispute resolution between an upstream discharger and a downstream user, if the EPA established a position of judging and potentially vetoing local programs on the basis of stringency, the EPA may risk creating the perception of advocacy for the party that considers itself harmed by the imposition of downstream standards.

The statutes permit states, and tribes treated as states, to establish standards necessary to support the designated uses. The EPA's mission is to assure implementation of the statute and achievement of the broad purpose of restoration of water quality. Even if the result is that technology is forced to be developed or applied in a new context, the Supreme Court has supported the EPA's actions under those circumstances. States are free to set water quality standards so as to force the development of technology.[103]

B. *Establishment of Religion*

The United States Constitution prohibits government from becoming entangled in the practice or establishment of religion. The Religion Clauses of the First Amendment, made applicable to the states by incorporation into the Fourteenth Amendment,[104] provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[105] "Thus, the

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99. *Id.*

100. *Id.*

101. *Id.*

102. Personal communication with EPA Office of Regional Counsel, Region VI, Dallas, Texas (October 1996)(quoting Clean Water Act § 101, 33 U.S.C. § 1251(a) (1994)).

103. United States Steel Corp. v. Train, 556 F.2d 822, 838 (7th Cir. 1977).

104. *See* Cantwell v. Connecticut, 310 U.S. 296, 393 (1940).

105. U.S. CONST. amend. I.

First Amendment obviously excludes all "governmental regulation of religious beliefs as such."[106] The City of Albuquerque claimed that by adopting a water quality standard that supports a ceremonial use, the EPA is entangling government and religion in violation of the Constitution.[107] The EPA's response is that the designation of uses pursuant to the CWA is to have a framework in which to set the quality standards.[108]

The District Court rejected the City's claim of an Establishment Clause violation.[109] The secular goal is to improve water quality in the nation's waters. Designation of a ceremonial use does not change the goal of the program, nor does it place the EPA in a position to promote or encourage such a use. It merely allows the EPA to ensure the safety and health of participants if they do engage in such activities.[110]

The Native American Church challenged an ordinance of the Navajo Tribal Council outlawing the use of peyote in religious ceremonies.[111] The Church relied on the First Amendment as a protection for freedom of religion since peyote use was essential to the practice of that religion.[112] The Tenth Circuit Court of Appeals stated that the First Amendment was applicable to Congress, and by the Fourteenth Amendment applicable to the states.[113] The Tenth Circuit found that no provision in the Constitution made the First Amendment applicable to tribes, and there is no legislative act making it applicable either.[114]

The Court made it clear that Indian tribes are not required to provide the protections of the Bill of Rights and other constitutional limitations under which the state and federal governments operate. To cure the potential for governmental abuses of tribal members by tribal governments, Congress enacted the Indian Civil Rights Act of

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106. Employment Div., Dep't. of Human Resources of Oregon v. Smith, 494 U.S. 872, 877 (1990) (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963)).

107. City of Albuquerque v. Browner, 865 F. Supp. 733, 740 (D.N.M. 1993) (*Albuquerque I*).

108. *Id.*

109. *Id.* at 740-41.

110. *Id.*

111. Native American Church v. Navajo Tribal Council, 272 F.2d 131, 132 (10th Cir. 1959).

112. *Id.*

113. *Id.* at 134.

114. *Id.* at 135.

1968.[115] The Act does apply most provisions of the Bill of Rights, including the Free Exercise Clause. It provides that no Indian tribe in exercising powers of self-government shall make or enforce any law prohibiting the free exercise of religion.[116] However, the Act does not apply the Establishment Clause, which would, in effect, prohibit a tribe from making any law which would establish a religion. Thus, the Pueblo would be free to govern itself with respect to establishment of religion.

In the instant case, the Tenth Circuit did not address its previous holding in *Native American Church* by reminding the City that the Establishment Clause did not concern the Pueblo. The City argued that the EPA violated the Establishment Clause by its approval of water quality standards that supported ceremonial and religious uses, leading the Court to address the three elements of Establishment Clause violation as set forth in *Lamb's Chapel*: a government action does not violate the Establishment clause if there is a secular purpose; if there is no primary effect of advancing or inhibiting religion; and there is no excessive entanglement with religion.[117] The City did not argue that there was anything but a secular purpose. Instead, the City argued that the secular purpose requirement does not mean unrelated to religion.[118] Therefore, the purpose could be secular but still related to religion in violation of the Establishment Clause. The Court did not agree with Albuquerque, stating that the EPA's purpose in approving the designation of ceremonial use is unrelated to the Pueblo's religious reason for establishing it.[119] With regard to the City's claim that the EPA's action had the effect of advancing religion, the Court responded simply by stating that the effect of the EPA's action is to advance the goals of the CWA.[120] As for the third element, excessive governmental entanglement, the City asserted that the EPA must inquire on a continuing basis whether the standards adequately protect the religious uses of the river. The Court responded that approval of a ceremonial use of the river would not require the EPA to be involved in the tribal religious practices in

115. 25 U.S.C. § 1303 (1994).

116. Indian Civil Rights Act of 1968 § 202, 25 U.S.C. § 1302(1) (1994).

117. Albuquerque II, 97 F.3d at 428 (*Albuquerque II*) (citing Lamb's Chapel v. Center Moriches Union Free Sch. Dist. 508 U.S. 384, 395 (1993)).

118. *Id.*

119. *Id.*

120. *Id.*

any way.[121] Tribal use may be thought of as analogous to the protections that would need to be given to a swimming hole.

C. *Standards Without Rational Scientific Basis*

The City claimed that the standards set by the Pueblo are unattainable because the proposed standard for arsenic is below ambient levels.[122] The City asserted that it should not be held to a standard that requires the concentration of arsenic to be below what the concentration is when the City extracts the water from the ground.[123] The City claimed that the EPA's approval of such a standard "was unsupported by a rational basis on the record and [therefore the approval was] . . . arbitrary and capricious."[124] The District Court in this case cited the District Court of South Dakota: "EPA lacks the authority to reject stringent standards on the grounds of harsh economic or social effects."[125]

Although the District Court upheld the EPA's approval of the pueblo's standards, it admitted having some concerns. "For example, the pueblo's arsenic standard . . . is .... 1000 times more stringent than the federal safe drinking water standard, and is below the concentration that can be . . . measured by laboratory equipment."[126] The Court did not address the issue because it related to the issuance of Albuquerque's discharge permit, something beyond the jurisdiction of the District Court.[127]

In its appeal to the Tenth Circuit, the City argued that the EPA was required to reject the Pueblo's standards unless the EPA established its own record, based on a scientific rationale, for each particular component.[128] Interestingly, the court noted that Albuquerque repeatedly complained about the irrationality of the Pueblo's water quality standards, stating that the standards placed excessive economic burdens on the City.[129] However, an NPDES permit issued

121. *Id.* at 428-29.

122. *Albuquerque I*, 865 F.Supp. at 742.

123. *Id.*

124. *Albuquerque II*, 97 F.3d. at 426.

125. *Albuquerque I*, 865 F. Supp. at 741 (citing Homestake Mining Co. v. EPA, 477 F. Supp. 1279, 1283-84 (D.S.D. 1979)).

126. *Albuquerque I*, 865 F.Supp. at 742.

127. *Id.*

128. *Albuquerque II*, 97 F.3d at 426.

129. *Id.* at n.16.

for the wastewater treatment facility incorporated the Isleta standards; the Court inferred that the City would not have agreed to the issuance of the permit if the standards placed impossible demands upon it.[130] The Court responded that the EPA reviewed standards to determine if they are stringent enough to meet the federal standards; if they exceed the federal standards, the EPA is not required to review the scientific support.[131] In fact, the EPA has in its record "a detailed explanation of the Isleta Pueblo's scientific, technical, and policy reasons for choosing to establish more stringent standards."[132]

The Tenth Circuit affirmed the District Court, holding that the CWA permits the EPA to force technological advancement to attain higher water quality.[133] To the City's charge of "arbitrary and capricious," the Court responded that the review standard is deferential to the agency decision. The agency must have entirely failed to consider an important aspect of the problem before a court will reverse the EPA's approval.[134] The Court could not find evidence of oversight on the agency's part in making its approval.[135]

D. *Current State of the Case*

The District Court's decision of October 21, 1993 was appealed to the Tenth Circuit Court of Appeals. Subsequent to the decision by the District Court, on April 15, 1994, the City, the EPA, the State of New Mexico and the Isleta Pueblo agreed to a new four-year permit for the wastewater treatment facility.[136] The permit incorporates the Pueblo's water quality standards.[137] Additionally, prior to issuance of the new permit, and pending the Tenth Circuit's decision, the EPA, the Pueblo of Isleta, and the City of Albuquerque all agreed that there was no strong baseline data regarding the current water quality conditions of that portion of the Rio Grande. The parties agreed to pool their resources and cooperate in conducting a joint study to obtain that baseline data. Furthermore, the discharges from the City's

130. *Id.*
131. *Id.* at 426.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 419.
137. *Id.*

treatment facility contained ammonia concentrations that exceeded the City's prior NPDES permit standards. The City agreed to spend $55 million in facility improvements to reduce the ammonia levels. The Pueblo agreed to not force the compliance issue while the water quality study is being conducted.

As a separate matter, Albuquerque filed a motion to have the District Court's judgment vacated and to direct the Court to dismiss the complaint without prejudice.[138] The City claims the case is moot because of the agreement between the parties which resulted in the issuance of the new NPDES permit.[139]

In its opinion, the Tenth Circuit addressed the City's motion to vacate by stridently noting that the settlement which resulted in the issuance of the permit does not mention the instant case and does not resolve it.[140] Albuquerque is challenging the lawfulness of the agency's approval of the Isleta standards, not the issuance of the NPDES permit.[141] The standard for mootness is whether the parties lack a cognizable interest in the outcome: for example, if there is no reasonable expectation that the alleged violation will recur and if there are interim events that have completely eradicated the effects of the alleged violation.[142] Since there are still outstanding issues and claims on appeal to the Tenth Circuit, which were not resolved or even addressed in the negotiated agreement which resulted in issuance of the NPDES permit, the case cannot be moot. There is no reasonable expectation that the City would not again challenge the legality and constitutionality of the approval by the EPA.[143] Therefore, the Court rejected the mootness claim and denied the motion to vacate the District Court's opinion.[144]

Although the issue of excessive financial burden may have been stayed by the agreement and the issuance of the permit to allow the wastewater treatment facility to continue to operate without incurring fines due to violation of the CWA, Albuquerque may have only inserted the proverbial finger in the dike. As the aquifer continues to deplete and municipal demand continues to increase, the quality of

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138. *Id.* at 420.
139. *Id.*
140. *Id.*
141. *Id.* at 421.
142. *Id.* at 420.
143. *Id.* at 421.
144. *Id.*

the effluent is likely to continue to degrade unless there are improvements to the municipal water treatment system in Albuquerque. At some point in the future the City may again not be able to meet the standards of a downstream user, and negotiation may be more difficult as water quality gets further from acceptable standards. It is likely that Albuquerque will be required to improve its wastewater treatment facility or to implement a municipal supply pre-treatment system that enables the City to achieve downstream water quality standards of the Pueblo of Isleta. It is also possible that discharges into the Rio Grande will require both solutions to meet Pueblo standards.

V. SUMMARY

The EPA was the first federal agency to develop a policy identifying the government-to-government relationship it intended to foster with tribal governments. Further, the EPA promulgated regulations under which tribes are treated as states for purposes of establishing local control for managing resources and the tribal environment.

Specifically, in terms of control over quality of water within tribal jurisdiction, this means that states in which tribes are located do not have complete control over water quality. The EPA will maintain control until a local control program is approved by the federal agency. Once a tribe has been certified for treatment as a state, any water quality control program which is developed by that tribe and approved by the EPA attains the same status as, and is on equal footing with, a program developed by a state.

The EPA issues National Pollutant Discharge Elimination System (NPDES) permits to states and to individual entities within states. The permits are issued so that those standards which are adopted by downstream users are not jeopardized by upstream discharges. The EPA, with support of the courts, has not determined that it has the authority to disapprove water quality standards on the basis that the standards are overly stringent in terms of what is necessary to attain the uses as designated in a given local water quality control program. Furthermore, the EPA's mission is not to assure mere maintenance of the existing conditions, but to encourage measures that would result in improvement and recovery of the integrity of the nation's waters. To further this purpose Congress has provided the EPA the responsibility and discretion to approve ambitious standards even if

upstream dischargers are burdened to make facility improvements to achieve those standards.

The courts have agreed that to implement the EPA's mission to not just maintain the *status quo* of the nation's water quality, but to restore it to prior non-polluted conditions, the EPA may impose requirements that would force development of technological advances. As the aquifer from which Albuquerque is drawing its municipal supplies continues to deplete, and concentrations of target chemicals continue to increase in the effluent, the City may again be unable to meet the water standards of a downstream user. In order to obtain the necessary discharge permits, the City may be required to make improvements to the wastewater treatment facility or implement a pre-treatment system such that discharges into the Rio Grande would not be in conflict with downstream standards. Such improvements may require new technology to be developed in order for the improvements to be fiscally feasible. While the initial development of the technology may be expensive, it may result in improvements that are more cost-effective to operate over the long term.