

Borders and Discharges: Regulation of Tribal Activities under the Clean Water Act in States with NPDES Program Authority

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SUMMARY

Under the federal Clean Water Act, qualifying tribes can receive treatment-as-a-state status (TAS), which allows them to set water quality standards, certify that certain discharges meet those water quality standards, and, after delegation from the Environmental Protection Agency (EPA), administer the Act's National Pollutant Discharge Elimination System (NPDES) permitting program. The EPA generally regulates tribal activities for Clean Water Act purposes before a tribe receives TAS status. However, a number of jurisdictional issues remain unclear, especially where the state has been delegated permitting authority and the tribes within that state are in various stages of receiving TAS status.

Discussions of these issues to date have focused on downstream tribes that enacted more stringent water quality standards than did the EPA in states without delegated Clean Water Act authority. As a result, several issues remain to be resolved in states with permitting authority, such as where a particular discharge is located, whether location is the same for permitting and certification, and what is the effect of state ownership of relevant waterbodies bordering on and within reservations. These may become critical questions in states where the state, the EPA, and various tribes have claims to permitting or certification authority for a certain discharge.

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It also remains to be seen whether the EPA, the courts, or the affected states and tribes themselves will be the most effective in resolving the inevitable disputes. Thus far, the general pattern has been for the EPA to resolve the conflict and for courts to follow its lead. The EPA has not committed itself to the role of binding arbitrator, however, and this area of law could become quite complex and unpredictable without an overarching, coherent view of state-tribal relations to protect water quality. As such, state-tribal compacts could offer the best path to comprehensive, peaceful, and logical water quality regulation.

TABLE OF CONTENTS

I.	INTRODUCTION	3
II.	THE CLEAN WATER ACT AND INDIAN TRIBES.....	5
	A. <i>The Clean Water Act's Regulatory System</i>	5
	B. <i>Treatment-as-State Status for Tribes</i>	9
	C. <i>Interstate Provisions of the Clean Water Act</i>	13
III.	REGULATORY AND CERTIFICATION JURISDICTION IN STATES WITHOUT NPDES PERMITTING	
	AUTHORITY	17
	A. <i>General Principles of Indian Regulatory Jurisdiction</i>	17
	1. Indian Tribal Sovereignty and Application of the Clean Water Act to Tribes	17
	2. Federal Government Regulatory Power ...	22
	3. Federal Regulatory Policy	23
	4. State Regulatory Power.....	27
	B. <i>Interpreting Reservation Borders</i>	34
	1. Congressional Acts and Intent	34
	2. Executive Orders	36
	C. <i>Complications in Determining Borders for Clean Water Act Jurisdiction</i>	37
	1. Regulatory Boundaries for Tribes with TAS Status	37
	2. Location of the Discharge	38
	3. State Ownership of Navigable Waterbodies	40
IV.	STATE-TRIBAL NPDES PERMIT INTERACTIONS UNDER THE CLEAN WATER ACT.....	44
	A. <i>Current Case Law: Section 401 Interactions in States that Do Not Administer the NPDES Permit Program</i>	44

1. The Background: Interstate Water Quality Conflicts	44
2. Application 1: Preemption of State Permitting	50
3. Application 2: Downstream Tribes and EPA-Issued NPDES Permits.....	51
4. A Tangent: The Clean Water Act as a Means to Expand Tribal Authority Generally	57
B. <i>Section 401 Interactions in States with NPDES Permit Program Authority</i>	58
C. <i>Other State-Tribal Interactions Regarding Water Quality</i>	62
1. Dispute Resolution with EPA	62
2. Agreements Pursuant to the Clean Water Act	65
3. Agreements Pursuant to the Indian Gaming Regulatory Act	66
V. CONCLUSION	68

I.

INTRODUCTION

In 1987, Congress amended the Clean Water Act (“CWA”)¹ to give recognized Indian tribes more potential authority to protect the waters within their jurisdiction.² In the words of the Tenth Circuit:

Congress amended the Clean Water Act to authorize the Defendant EPA to treat Indian tribes as states under certain circumstances for purposes of the Clean Water Act. Through the amendment, Congress merged two of the four critical elements necessary for tribal sovereignty – water rights and government jurisdiction – by granting tribes jurisdiction to regulate their water resources in the same manner as states. Congress’s authorization for the EPA to treat Indian tribes as states preserves the right of tribes to govern their water resources within the comprehensive statutory framework of the Clean Water Act.³

1. 33 U.S.C. §§ 1251-1387 (1994).

2. Clean Water Act, Pub. L. No. 92-500, 86 Stat. 896 (1972), as amended by Act of Feb. 4, 1987, Pub. L. No. 100-4, 100 Stat. 76 (codified at 33 U.S.C. § 1377) [hereinafter CWA].

3. *City of Albuquerque v. Browner*, 97 F.3d 415, 418 (10th Cir. 1996) (footnotes omitted).

Case law interpreting the 1987 amendment and its implications is still limited. Moreover, decisions that do exist have arisen from controversies in states that are not themselves approved to administer the CWA.⁴ Such states are a small minority. Only eight states do not have National Pollutant Discharge Elimination System permitting authority.⁵

The dynamics of exercising permit jurisdiction in states with authority to do so differ from the dynamics in states without such authority both before and after tribes receive treatment-as-a-state status ("TAS status"). Most obviously, the state is a third permitting authority, creating issues of jurisdictional boundary-drawing that could quickly multiply, depending on how many tribes are in the state. In contrast, in states without a state permit program, the Environmental Protection Agency ("EPA") generally issues all permits until specific tribes receive their own permitting authority, thereby eliminating many jurisdictional battles.

The existence of a state permit program also changes the dynamics of water quality certifications under section 401 of the CWA.⁶ Before a tribe achieves TAS status, the EPA both issues water quality permits and certifies the discharge for activities that take place on the reservation. As soon as a tribe achieves TAS status, it takes from the EPA the power to certify that discharges "originating" within its TAS jurisdiction meet the applicable water quality standards. As long as the EPA continues to issue permits for the tribe, it faces two potential challenges to each permit it issues: 1) from the tribe for effects on water quality within the reservation, and; 2) from the downstream state or states for effects on their water quality.

Finally, states with existing permit programs may have a greater ability – and more incentive – to negotiate jurisdictional issues with tribes, particularly in situations where the tribes may wish to enact less stringent water quality standards and protections to promote their own interests. Such situations may become more common given the explosion of Indian gaming facilities erected pursuant to the Indian Gaming Regulatory Act

4. *See id.*; *City of Albuquerque v. Browner*, 865 F. Supp. 733 (D.N.M. 1993).

5. As of January 1997, states without CWA permitting authority included Alaska, Arizona, Idaho, Maine, Massachusetts, New Hampshire, New Mexico, and Texas. *See Approval of Application by Oklahoma to Administer NPDES program*, 61 Fed. Reg. 65047, 65051 (1996) [hereinafter *Oklahoma NPDES Approval*].

6. CWA § 401(a), 33 U.S.C. § 1341 (1994). Section 401 is discussed at length in section II.C, *infra*.

of 1988⁷ and will probably prompt more water quality agreements between the affected tribes and states.

II.

THE CLEAN WATER ACT AND INDIAN TRIBES

A. *The Clean Water Act's Regulatory System*

In 1972, Congress enacted the Clean Water Act in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁸ To carry out this goal, the Act provides that, "except as in compliance" with its provisions, "the discharge of any pollutant by any person shall be unlawful."⁹ Indeed, the Act established an ambitious, if impractical, "national goal that the discharge of pollutants into the navigable waters be eliminated by 1985."¹⁰

The CWA defines "discharge of a pollutant" to include both "any addition of any pollutant to navigable waters from any point source" and "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft."¹¹ "Pollutant" is a broad term, meaning:

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.¹²

A "point source" is "any discernible, confined and discrete conveyance," but "does not include agricultural stormwater discharges and return flows from irrigated agriculture."¹³ Finally, "navigable waters," for purposes of the CWA, are "waters of the United States, including the territorial seas."¹⁴ Courts have upheld the EPA's broad interpretation of this term to include, es-

7. Indian Gaming Regulatory Act, Pub. L. 100-497, 102 Stat. 2467 (codified at 25 U.S.C. §§ 2701-2720 and 18 U.S.C. §§ 1301-1304 (1988)).

8. CWA § 101(a), 33 U.S.C. § 1251(a) (1994).

9. CWA § 301(a), 33 U.S.C. § 1311(a) (1994).

10. CWA § 101(a)(1), 33 U.S.C. § 1251(a)(1) (1994).

11. CWA § 502(12), 33 U.S.C. § 1362(12) (1994).

12. CWA § 502(6), 33 U.S.C. § 1362(6) (1994).

13. CWA § 502(14), 33 U.S.C. § 1362(14) (1994).

14. CWA § 502(7), 33 U.S.C. § 1362(7) (1994).

entially, any water body capable of affecting interstate commerce.¹⁵

This collection of definitions effectively prohibits discrete sources of water pollution from adding much of anything to any water body except in compliance with the Act. Compliance with the Act, moreover, means that point sources must comply with two types of water quality protection mechanisms: water quality standards and effluent limitations.¹⁶ Water quality standards are general designations of what level of water quality is desirable for a particular water body based on how that water body is used. As such, a "water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses."¹⁷ With regard to intra-state waters, the Act initially required that all states adopt water quality standards within 180 days of October 18, 1972.¹⁸ The EPA set water quality standards initially only if a state failed to do so or if the state's proposed standards would not carry out the Act's purposes.¹⁹ Moreover, even if the EPA promulgated the water quality standards for a given state, either the state's governor or its "water pollution control agency" must review the applicable water quality standards at least once every three years.²⁰

An effluent limitation, in turn, is "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance."²¹ Effluent limitations generally impose on

15. *International Paper Co. v. Ouellette*, 479 U.S. 481, 486 n.6 (1987) (citing *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) and 33 U.S.C. § 1362(7)).

16. CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1) (1994); *Environmental Protection Agency v. National Crushed Stone Ass'n*, 449 U.S. 64, 71 (1980).

17. CWA § 303(c)(2), 33 U.S.C. § 1313(c)(2) (1994). The Act further reads: Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

Id.

18. CWA § 303(a)(3)(A), 33 U.S.C. § 1313(a)(3)(A) (1994).

19. CWA § 303(b)(1), 33 U.S.C. § 1313(b)(1) (1994).

20. CWA § 303(b)(2), 33 U.S.C. § 1313(c)(6) (1994).

21. CWA § 303(b)(2), 33 U.S.C. § 1313(b)(2) (1994).

dischargers specific numerical limits for individual pollutants. Initially, effluent limitations for point sources are set with reference to the “best practicable control technology currently available.”²² In other words, the limitations are set with an eye to how much control over the pollutant current technology allows.²³ However, the Act also requires a discharger to meet “any more stringent limitation” that might be necessary “to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations . . . or required to implement any applicable water quality standard established” under the Act.²⁴ In so doing, the Act explicitly emphasizes that it preserves states’ rights to regulate water quality within their borders,²⁵ and courts have interpreted the CWA as allowing states to require a higher level of pollution prevention than may be technologically feasible.²⁶

22. CWA § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A) (1994).

23. See *National Crushed Stone Ass’n.*, 449 U.S. 64, 69-72 (holding that the best practicable control variances cannot contain an examination of the discharger’s ability to meet the costs of such technology).

24. CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (1994).

25. In allowing more stringent limitations, section 301 references section 510. CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (1994). Section 510, in turn, explicitly preserves state authority over water quality:

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

CWA § 510, 33 U.S.C. § 1370 (1994).

26. The D. C. Circuit, for example, has noted that,

The drafters of the Act labored under no illusions about the uncertain state of current knowledge concerning the creation, effects, and control of water pollution. Their intent, therefore, was to rely on EPA’s ingenuity, backed up by the Act’s comprehensive system of administrative rulemaking and stiff penalties to force each industry on its own to develop the technology necessary to achieve the Act’s aspiring goal. Congress’s commitment to that goal, as well as the severe impact its achievement may have on those immediately affected, is further illustrated by the drafters’ realization that enforcement of the Act would probably shut down some plants across the nation.

Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1025 (D.C. Cir. 1978) (citations omitted). Similarly, the Seventh Circuit has held that:

The mechanism for ensuring that point sources meet both water quality standards and effluent limitations is the National Pollutant Discharge Elimination System ("NPDES") permit.²⁷ The permit allows regulated discharges of pollutants notwithstanding the Act's general prohibition so long as the discharger complies with all applicable limitations.²⁸ The EPA received the original authority to issue such permits.²⁹ However, the CWA also allows any state "desiring to administer its own permit program for discharges into navigable waters within its jurisdiction" to apply to the EPA for such authority.³⁰ Before the EPA approves a state program, the state must demonstrate that it has sufficient authority to issue and enforce the permits and to provide for adequate public and federal participation.³¹ Once a state has submitted its permit program to the EPA for approval, the EPA must suspend issuing its own permits within 90 days unless it determines that the state permit program does not meet the federal requirements.³² The EPA can withdraw its approval of the state's permit program if the state does not act in compliance with the CWA.³³ It also retains the right to review and object to any permit the state issues.³⁴

Nevertheless, after a state receives the EPA's approval, the permitting program becomes, for all practical purposes, the state's. The EPA has never withdrawn its approval of a state permit program. Forty-two states have received EPA approval for their NPDES permitting programs. The EPA continues to issue NPDES permits only for Alaska, Arizona, Idaho, Maine, Massa-

[I]t is clear from §§ 301 and 510 of the Act, and the legislative history, that the states are free to force technology. Although the Indiana Board considered technology in setting some of these limitations, it was not required to do so. Only the federal effluent limitations must be technology-based, and they represent the minimum level of pollution reduction required by the Act. If the states wish to achieve better water quality, they may, even at the cost of economic and social dislocations caused by plant closings.

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

27. See CWA § 402(a), 33 U.S.C. § 1342(a) (1994).

28. CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1) (1994).

29. CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1) (1994).

30. CWA § 402(b), 33 U.S.C. § 1342(b) (1994).

31. *Id.*

32. CWA § 402(c)(1), 33 U.S.C. § 1342(c)(1) (1994).

33. CWA § 402(c)(3), 33 U.S.C. § 1342(c)(3) (1994). However, before the EPA can withdraw its approval, it must first notify the state and make "public, in writing, the reasons for such withdrawal." *Id.*

34. CWA § 402(d), 33 U.S.C. § 1342(d) (1994).

chusetts, New Hampshire, New Mexico, and Texas.³⁵ Therefore, as a practical matter NPDES permitting is largely a state-controlled issue.

B. *Treatment-as-State Status for Tribes*

In 1987, Congress added section 518 to the CWA³⁶ to clarify several aspects of the Act's application to Indian tribes. First, section 518 provides that "Indian tribes shall be treated as States for purposes of such section 1251(g) of this title."³⁷ Under section 1251(g), "[i]t is the policy of Congress that the authority of each [Indian tribe] to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter."³⁸ Thus, to the extent that a given tribe has authority to allocate water use rights,³⁹ the CWA does not affect its jurisdiction over such rights.

Second, section 518 effectively gives the EPA — not the states — primary jurisdiction over sewage treatment works for Indian tribes. "The Administrator, in cooperation with the Director of the Indian Health Service, shall assess the need for sewage treatment works to serve Indian tribes, the degree to which such needs will be met through funds allotted to States under section 1285 of this title and priority lists under section 1296 of this title, and any obstacles which prevent such needs from being met."⁴⁰ The EPA is required to reserve certain funds exclusively "for grants for the development of waste treatment management plans and for the construction of sewage treatment works to serve Indian tribes."⁴¹

Third, section 518 requires that "[t]he Administrator shall make grants to an Indian tribe under section 1329 of this title as

35. See 61 Fed. Reg. 65047, 65051 (1996). In addition, the Virgin Islands have had an NPDES permit program since June 30, 1976. *Id.*

36. Pub. L. No. 100-4, 101 Stat. 76 (codified as amended at 33 U.S.C. § 1377 (1987)).

37. CWA § 518(a), 33 U.S.C. § 1377(a) (1994).

38. CWA § 101(g), 33 U.S.C. § 1251(g) (1994).

39. Water use rights are rights to actually withdraw or appropriate quantities of water from rivers or streams for various purposes such as irrigation, drinking water, or power generation. Such rights are a matter of state law. See *United States v. Anderson*, 736 F.2d 1358, 1365 (9th Cir. 1984). The CWA, in contrast, regulates from the federal level how many pollutants can be added to the waters of the United States — not how much water a person can actually withdraw from those waterbodies.

40. CWA § 518(b), 33 U.S.C. § 1377(b).

41. CWA § 518(c), 33 U.S.C. § 1377(c).

though such tribe was a State.”⁴² Section 1329 relates to nonpoint source⁴³ management programs and allows states to receive federal grants after they file nonpoint assessment reports and state management programs with the EPA.⁴⁴ Tribes must meet these requirements in order to receive nonpoint source management grants.⁴⁵

Most importantly for issues of overlapping jurisdiction, section 518 provides that the EPA can “treat an Indian tribe as a state for purposes of Title II and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, and 1344 of this title to the degree necessary to carry out the objectives of this section.”⁴⁶ Under this provision, authorized tribes can both set water quality standards and take over the NPDES permitting program, including permit enforcement. Thus, tribes with TAS status effectively carve out areas of permitting jurisdiction from the surrounding state.

To qualify as an “Indian tribe” for these purposes, an Indian group must be “any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian Reservation.”⁴⁷ In addition, the EPA can confer CWA authority on the tribe only if:

42. CWA § 518(f), 33 U.S.C. § 1377(f).

43. The Act does not explicitly define “nonpoint sources” of pollution. From the context of the Act, nonpoint sources are best understood as any source of pollution that is not a point source – meaning not a “discernible, confined and discrete conveyance.” CWA § 502(14), 33 U.S.C. § 1362(14) (1994). The Act specifically provides that agricultural stormwater runoff and agricultural return flows are not point sources. *Id.* Other common nonpoint sources of pollution are forest and urban stormwater runoff.

44. CWA § 319(a), (b), (h), 33 U.S.C. § 1329(a), (b), (h).

45. CWA § 518(f), 33 U.S.C. § 1377(f).

46. CWA § 518(e), 33 U.S.C. § 1377(e). Under this provision, a tribe can obtain TAS status for:

- Title II: Grants for construction of treatment works.
- § 1254: Research, investigation, training, and information.
- § 1256: Grants for pollution control programs.
- § 1313: Water quality standards and implementation plans.
- § 1315: State reports on water quality.
- § 1318: Records, reports, and inspections.
- § 1319: Enforcement, including administrative penalties, civil penalties, and criminal penalties.
- § 1324: Clean lakes authority.
- § 1329: Nonpoint source management programs.
- § 1341: State certification of federal activities.
- § 1342: NPDES permitting.
- § 1344: § 404 permitting for dredge or fill material.

47. CWA § 518(h), 33 U.S.C. § 1377(h).

- (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 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 act and of all applicable regulations.⁴⁸

The EPA has also promulgated regulations for Indian tribes seeking to administer the NPDES permit program on their reservations.⁴⁹ Under these regulations, the EPA "will treat an Indian Tribe as eligible to apply for NPDES program authority if it meets the following criteria:"

- 1) the Indian Tribe is recognized by the Secretary of the Interior;
- 2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers;
- 3) The functions to be exercised by the Indian Tribe pertain to the management and protection of water resources which are held by an Indian Tribe, held by the United States in trust for the 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;
- 4) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions to be exercised, in a manner consistent with the terms and purposes of the Act and applicable regulations, of an effective NPDES permit program.⁵⁰

In addition, the tribe "must also satisfy the State program requirements described in [§ 123] for assumption of the State program."⁵¹ However, tribes need not have criminal enforcement authority as must the states:⁵² "to the extent that an Indian Tribe is precluded from asserting criminal enforcement authority as re-

48. CWA § 518(d), 33 U.S.C. § 1377(e).

49. 40 C.F.R. §§ 123.31, 123.32, 123.33, 123.34 (1995).

50. 40 C.F.R. § 123.31(a) (1996).

51. 40 C.F.R. § 123.31(b) (1996). State requirements are found at 40 C.F.R. § 123.27 (1996).

52. *See* 40 C.F.R. § 123.27(a)(3), (b)(1) (1996).

quired . . . the Federal Government will exercise primary criminal enforcement responsibility.”⁵³

The EPA has established a procedure whereby “[a]n Indian Tribe may apply to the Regional Administrator for a determination that it qualifies pursuant to section 518 of the Act for purposes of seeking NPDES permit program approval.”⁵⁴ This process is abbreviated if the EPA “has previously determined that a Tribe has met the prerequisites that make it eligible to assume a role similar to that of a State as provided by statute under the Safe Drinking Water Act, the Clean Water Act, or the Clean Air Act.”⁵⁵ The EPA’s regulations require that it process such applications “in a timely manner.”⁵⁶

In addition, tribes can apply to administer a water quality standards program independent of an application for an NPDES permit program.⁵⁷ The regulatory requirements are substantially identical to those a tribe must meet for the NPDES permitting program.⁵⁸ The application procedure is also similar to that for the NPDES permit.⁵⁹

The EPA has interpreted the TAS provision in section 518 to include section 510,⁶⁰ which allows states to impose more stringent standards than the EPA would require.⁶¹ This policy has been upheld by one federal district court.⁶² Therefore, recognized tribes, like states, can impose more stringent standards for water quality than the EPA demands.

53. 40 C.F.R. § 123.34 (1996); *see also* 40 C.F.R. § 123.27(e) (1996) (“Indian Tribes that cannot satisfy the criminal enforcement authority requirements of this section may still receive program approval if they meet the requirement for enforcement authority established under § 123.34”). Unlike states, tribes would rarely, if ever, be able to demonstrate sufficient criminal authority, particularly over non-tribal members acting on the reservation. *See Duro v. Reina*, 495 U.S. 676, 688 (1990) (“In the area of criminal enforcement, tribal power does not extend beyond internal relations among members;” therefore a tribe does not have criminal enforcement authority against crimes on tribal land committed by a person who was not a member of that tribe).

54. 40 C.F.R. § 123.32 (1996).

55. 40 C.F.R. § 123.32(f) (1996).

56. 40 C.F.R. § 123.33(a) (1996).

57. 40 C.F.R. § 123.31 (1996).

58. 40 C.F.R. § 131.8(b) (1996).

59. *Compare* 40 C.F.R. § 123.8(b) (1996) *with* 40 C.F.R. § 123.32 (1996).

60. 33 U.S.C. § 1370 (1994).

61. Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, 54 Fed. Reg. 39098, 39099 (1989) [hereinafter Amendments to Water Standards I].

62. *City of Albuquerque v. Browner*, 865 F. Supp. 733, 739-40 (D.N.M. 1993).

The EPA's separation of water quality standards authority from NPDES permit program authority has the potential to complicate jurisdictional issues between states and tribes. As an initial matter, this separation suggests that a tribe can have TAS status for some purposes but not for others. Courts addressing the issue to date, however, have tended to assume that once a tribe has authority to issue water quality standards, it has TAS status for all purposes.⁶³ Thus, the District Court of New Mexico slipped from noting that a tribe met the EPA's requirements to assuming that the tribe was "recognized as a State for purposes of the Act."⁶⁴ The Tenth Circuit, reviewing the district court's decision, made a similar slide.⁶⁵ As will be discussed, however, tribes with TAS status only for purposes of setting water quality standards are subject to different procedures regarding state/tribe conflicts of jurisdiction than those with TAS status to issue NPDES permits. These differences are particularly evident regarding the EPA's role in dispute resolution.

C. *Interstate Provisions of the Clean Water Act*

Once a tribe achieves TAS status, it becomes subject to the provisions of the CWA governing interstate water pollution. When the EPA issues an NPDES permit, the surrounding state or tribe and the downstream state or tribe have fairly direct means of influencing – even controlling – the permit's terms through CWA section 401.⁶⁶ Section 401 provides that:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. . . . No license or permit shall be granted until the certification required by this section has been obtained or has been waived. . . . No license

63. However, the case has not yet arisen where the separation of particular TAS sub-statuses was critical.

64. *City of Albuquerque*, 865 F. Supp at 738.

65. *City of Albuquerque v. Browner*, 97 F.3d 415, 422 n.8 (10th Cir. 1996).

66. The EPA has interpreted the CWA so that section 401 applies to EPA-issued NPDES permits. 40 C.F.R. § 121.1(a) (1996) (defining "license or permit" for purposes of section 401).

or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.⁶⁷

Thus, when the EPA issues an NPDES permit for an activity within the tribal reservation, the tribe can directly veto that permit or control its terms.

In addition, the EPA has a duty to protect downstream states and tribes. After the EPA receives an application and certification for an EPA-issued NPDES permit, it must determine whether the discharge involved will affect "the quality of the waters of any other State." If the discharge will, then the EPA has 30 days to notify the other state or TAS tribe.⁶⁸ The affected state or TAS tribe then has 60 days to inform the EPA that the discharge will violate that state's or tribe's water quality standards and to object to the permit's issuance.⁶⁹ The EPA then must "condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance, [the EPA] shall not issue such license or permit."⁷⁰ Thus, under section 401, the EPA must ensure compliance with the water quality standards of downstream states or TAS tribes.

A state's section 401 certification power exists independently of its status regarding NPDES permitting authority. Tribes do not automatically have section 401 certification authority as do states. Tribes acquire section 401 certification authority when they acquire TAS status for water quality standards.⁷¹ Thus, as tribes acquire TAS status, situations will arise where the EPA is still the permitting authority but the tribe has the veto power of a section 401 certification.

In contrast to EPA issued permits, when a state or tribe issues a NPDES permit, the downstream states or tribes have only an indirect means of protecting their interests. A state or tribe must prove to the EPA, as a prerequisite to having NPDES permitting authority, that it has adequate authority "[t]o insure that . . . any other State the waters of which may be affected receives notice of each application for a permit. . . ."⁷² The state or tribe also must:

67. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1) (1994).

68. CWA § 401(a)(2), 33 U.S.C. § 1341(a)(2) (1994).

69. *Id.*

70. *Id.*

71. 40 C.F.R. § 124.51(c) (1996); 40 C.F.R. § 131.4(c) (1996).

72. CWA § 402(b)(3), 33 U.S.C. § 1342(b)(3) (1994).

insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing. . . .⁷³

Thus, notification to and consultation with affected states is built into the NPDES permitting program.

Nevertheless, the downstream state's or tribe's real influence on the permitting state or tribe depends largely on the EPA's willingness to object to the permit involved. States and tribes with NPDES permitting authority must send the EPA a copy of every NPDES permit application and inform the EPA of the steps the state or tribe takes regarding each application.⁷⁴ The EPA then has 90 days to object to the issuance of a NPDES permit.⁷⁵ If the state or tribe does not resubmit a permit that conforms to the EPA's objections, the EPA may issue the permit instead.⁷⁶

The EPA has already used its authority to take over permitting duties to resolve interstate water quality conflicts. In *Champion International Corporation v. Environmental Protection Agency*,⁷⁷ the Champion pulp and paper mill had operated along the Pigeon River in Canton, North Carolina, since 1907, about twenty-six miles upstream from the Tennessee border.⁷⁸ Until 1981, the Champion mill had an NPDES permit issued by the State of North Carolina.⁷⁹ Discharge from the mill made the river brown and murky to the Tennessee border and beyond.⁸⁰

Tennessee had expressed concern about the Pigeon River pollution since 1945.⁸¹ In January 1983, "Tennessee informed North Carolina that it felt Champion to be in violation of Tennessee water quality standards with respect to uses designated for the

73. CWA § 402(b)(5), 33 U.S.C. § 1342(b)(5) (1994).

74. CWA § 402(d)(1), 33 U.S.C. § 1342(d)(1) (1994).

75. CWA § 402(d)(2), 33 U.S.C. § 1342(d)(2) (1994).

76. CWA § 402(d)(4), 33 U.S.C. § 1342(d)(4) (1994). However, the permitting state or tribe does have a right to request a hearing on the EPA's objections first. *Id.*

77. 850 F.2d 182 (4th Cir. 1988).

78. *Id.* at 183.

79. *Id.*

80. *Id.*

81. *Id.*

Tennessee portion of the Pigeon River.”⁸² It asked North Carolina to reissue Champion’s expired permit to “incorporate its water quality concerns,” even providing North Carolina with a model permit.⁸³

Tennessee’s major concern was color removal, but when North Carolina submitted a draft permit, the permit’s provisions did not guarantee enough color removal to meet Tennessee’s water quality standards.⁸⁴ Both the EPA and Tennessee objected, but North Carolina “issued a final permit . . . substantially identical to the draft permit.”⁸⁵ When North Carolina again refused to modify the permit, the EPA assumed permitting authority for the Champion mill.⁸⁶ The Fourth Circuit upheld the EPA’s action, holding “that the EPA has done exactly what Congress intended it to do. . . . This is in terms the type of impasse that Congress envisioned, and is the setting in which Congress intended that the EPA assume issuing jurisdiction.”⁸⁷

If the EPA does not object or declines to take over the permitting process, downstream states or tribes have few options left to them. If they cannot resolve their differences through negotiation, they are likely to end up in federal court.⁸⁸ As will be discussed, federal cases to date indicate that downstream states receive less protection than downstream tribes and that no downstream entity receives much protection in the absence of EPA action. The disparity in treatment has already troubled one court, and the uncertainty of exactly how much protection a court might accord a downstream state or tribe may prompt states and tribes to increasingly resolve their own disputes.

82. *Id.* at 183.

83. *Id.*

84. *Id.* at 184.

85. *Id.*

86. *Id.* at 184-85.

87. *Id.* at 187.

88. In a recent case, the U.S. Supreme Court held that the Indian Commerce Clause does not give Congress the authority to waive states’ sovereign immunity from suit under the Eleventh Amendment of the U.S. Constitution. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). As a result, the Seminole Tribe could not sue the State of Florida in federal court to force the state to negotiate a gaming compact in good faith. *Id.* at 1114. Moreover, the Court overruled its previous decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which held that legislation passed pursuant to the Interstate Commerce Clause — like the Clean Water Act — can abrogate a state’s immunity from suit. *Seminole Tribe*, U.S. at 1127.

III.

REGULATORY AND CERTIFICATION JURISDICTION IN
STATES WITHOUT NPDES
PERMITTING AUTHORITYA. *General Principles of Indian Regulatory Jurisdiction*

1. Indian Tribal Sovereignty and Application of the Clean Water Act to Tribes

The regulation of tribes and Indian lands is a legally complex and fact-specific area of law. Indian tribes are, to a certain extent, independent sovereigns; their sovereignty is limited by their status as dependents of the United States government. This balance, as the United States Supreme Court has discussed, is a delicate one:⁸⁹ “the general principle that the ‘exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.’”⁹⁰

Despite such pronouncements, tribes occasionally assert aboriginal authority over lands and regulatory matters. Aboriginal title is a tribal right to occupy lands that have been historically and continuously occupied by the tribe, despite a modern nation’s asserted sovereignty over those lands.⁹¹ For example, the

89. According to the Court:

Prior to the European settlement of the New World, Indian tribes were “self-governing sovereign political communities,” *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978), and they still retain some “elements of ‘quasi-sovereign’ authority after ceding their lands to the United States and announcing their dependence on the Federal Government.” *Oliphant v. Suquamish Indian Tribe*, 435 U. S. 191, 208 (1978). Thus, an Indian tribe generally retains sovereignty by way of tribal self-government and control over other aspects of its internal affairs. *Montana v. United States*, 450 U. S. 544, *reh’g denied* 452 U.S. 911 (1981), at 564.

A tribe’s inherent sovereignty, however, is divested to the extent it is inconsistent with the tribe’s dependent status, that is, to the extent it involves a tribe’s “external relations.” *Wheeler*, 435 U.S. at 326. Those cases in which the Court has found a tribe’s sovereignty divested generally are those “involving the relations between an Indian tribe and nonmembers of the tribe.” *Ibid.* For example, Indian tribes cannot freely alienate their lands to non-Indians, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-668 (1974), cannot enter directly into commercial or governmental relations with foreign nations, *Worcester v. Georgia*, 6 Pet. 515, 559 (1832), and cannot exercise criminal jurisdiction over non-Indians in tribal court. *Oliphant* at 195.

Brendale v. Confederated Yakima Indian Nation, 492 U.S. 408, 425-26, *reh’g denied sub nom Wilkinson v. Confederated Tribes & Bands of Yakima Nation*, 492 U.S. 937 (1989).

90. *Id.* at 426 (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)).

91. *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 641-42 (9th Cir. 1986).

Yankton Sioux Tribe in South Dakota claimed Lake Andes on the basis of aboriginal title.⁹² The Eighth Circuit explained the doctrine of aboriginal title as follows:

Aboriginal title provides the original natives of this country the exclusive right to occupy the lands and waters used by them and their ancestors before the United States asserted its sovereignty over these areas. In order to establish aboriginal title, an Indian tribe must show that it actually, exclusively, and continuously used the property for an extended period of time. Once established, the United States may extinguish aboriginal title at any time, but an intent to extinguish Indian title by treaty must be plain and unambiguous.⁹³

Nevertheless, the Eighth Circuit denied the tribe's claim, relying heavily on the fact that the tribe's claim arose after the Louisiana Purchase, and thus only after United States sovereignty had attached to the lake at issue.⁹⁴ The Ninth Circuit has also addressed aboriginal title. It denied the Chumash Indian tribe's aboriginal claim to Santa Cruz Island and Santa Rosa Island off the coast of Santa Barbara, California. The Chumash failed to present their claims in the land confirmation proceedings for the Treaty of Guadalupe Hidalgo whereby Mexico ceded California — including the islands at issue — to the United States.⁹⁵

Aboriginal claims seldom expand a tribe's jurisdiction or authority. Tribal sovereignty is often limited to certain lands, to certain people, and to certain activities. For example, tribes generally have no jurisdictional claim to lands that are not "Indian country."⁹⁶ As defined by federal statute, Indian country is "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent. . . ."⁹⁷

92. *Yankton Sioux Tribe of Indians v. South Dakota*, 796 F.2d 241 (8th Cir. 1986).

93. *Id.* at 243-44 (citations omitted). *See also* *United States ex rel. Chunie*, 788 F.2d at 641-42 (noting aboriginal title is an occupancy right granted to the tribes by conquering Europeans; as conquerors, however, the Europeans acquired the right to extinguish Indian title at any time).

94. *Yankton Sioux Tribe*, 796 F.2d at 244. The Eighth Circuit was unwilling, given this circumstance, to create an exception to the Equal Footing doctrine for state ownership of navigable waters. *Id.* For more discussion of the Equal Footing doctrine, see part III.C.3, *infra*.

95. *United States ex rel. Chunie*, 788 F.2d at 644-46.

96. *See Hagen v. Utah*, 510 U.S. 399, 421-22 (1994) (holding that the State of Utah had jurisdiction to prosecute crimes not committed in Indian country).

97. 18 U.S.C. § 1151 (1994).

If land *is* Indian country, then only a congressional act can change its borders. “The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.”⁹⁸ Until Congress diminishes a reservation,⁹⁹ a tribe generally has regulatory jurisdiction within its reservation boundaries.

This regulatory jurisdiction is generally limited to members of the reservation tribe, especially in criminal matters. While “[i]t is undisputed that the tribes retain jurisdiction over their members . . . the inherent sovereignty of the tribes does not extend to criminal jurisdiction over non-Indians who commit crimes on the reservation.”¹⁰⁰ Also, a tribe does not have criminal jurisdiction over an Indian who is not a member of that tribe.¹⁰¹ In sum, “the retained sovereignty of the tribes is that needed to control their own social relations, and to preserve their own unique customs and social order.”¹⁰²

Tribes can exercise civil regulatory authority over a broader class of persons than just tribal members. “Tribal courts, for example, resolve civil disputes involving nonmembers, including non-Indians. . . . Civil authority may also be present in areas such as zoning where the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination.”¹⁰³ The Supreme Court has recognized two exceptions to the general limitation on tribal regulatory authority over non-members. First, “[a] tribe may regulate, through taxation, licensing, or other means, activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”¹⁰⁴ Second, “[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare

98. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

99. *See infra*, Part III.B.

100. *Duro v. Reina*, 495 U.S. 676, 680 n.1, 684 (1990).

101. *Id.* at 685, 688.

102. *Id.* at 685-86.

103. *Id.* at 687-88 (citations omitted).

104. *Id.* (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)).

of the tribe.”¹⁰⁵ The impact of the non-Indian activity “must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe.”¹⁰⁶

The EPA defers to these general principles regarding the authority of TAS tribes over water quality. It takes the general position “that if Congress had intended to make a change as important as expansion of Indian authority to nonmembers, it probably would have done so through statutory language and discussed the change in committee reports.”¹⁰⁷ Because Congress was, instead, ambiguous about this issue, a tribe’s CWA authority over nonmembers is measured “in light of relevant principles of Federal Indian law.”¹⁰⁸

Perhaps the most complex situation is where non-Indians own land within the reservation in fee. Such land remains part of the reservation, but non-Indian fee ownership reduces the tribe’s authority. Tribes cannot regulate non-Indian hunting and fishing on land within the reservation owned in fee by non-Indians.¹⁰⁹ Nevertheless, the Supreme Court has held that “[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”¹¹⁰

The EPA interprets this holding as generally allowing TAS tribes to regulate water quality on fee lands within the reservation.¹¹¹ As a practical matter, however, the EPA notes that:

because of the mobile nature of pollutants in surface waters and the relatively small length/size of stream segments or other water bodies on reservations, it would be practically very difficult to separate out the effects of water quality impairment on non-Indian fee land within a reservation with those on tribal portions. . . . EPA

105. *Id.* (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)).

106. *Id.* at 431.

107. Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64876, 64880 (1991) [hereinafter Amendments to Water Standards II].

108. *Id.*

109. *South Dakota v. Bourland*, 949 F.2d 984, 990 (8th Cir. 1991)(citing *Montana v. United States*, 450 U.S. 544, 559 (1981) and *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 325, 332 (1983)).

110. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nations*, 492 U.S. 408, 428 (1989) (quoting *Montana v. United States*, 450 U.S. 544, 566 (1981)).

111. Amendments to Waters Standards II, *supra* note 107, at 64877.

believes that a 'checkerboard' system of regulation, whereby the Tribe and State split up regulation of surface water quality on the reservation, would ignore the difficulties of assuring compliance with water quality standards when two different sovereign entities are establishing standards for the same small stream segments.¹¹²

The EPA's position thus suggests that TAS tribes will generally obtain jurisdiction over non-Indian fee lands within the reservation so far as NPDES permitting is concerned.

Finally, federal statutes and treaties can extend or limit the subject matter of tribal jurisdiction. A treaty might give a tribe broad regulatory authority. The Supreme Court has suggested that if a valid treaty gave a tribe "exclusive use and benefit" of all the land within a reservation, that tribe might have extensive regulatory powers.¹¹³ Congress might expressly delegate a specific regulatory power to a tribe,¹¹⁴ as in the CWA. Once rights have been delegated to a tribe "[o]nly Congress can modify or abrogate Indian tribal rights; it will be held to have done so only when its intention to do so has been made absolutely clear."¹¹⁵ Statutes can limit a tribe's subject-matter jurisdiction. For example, the Indian Major Crimes Act¹¹⁶ provides that any Indian who commits one of the enumerated felonies¹¹⁷ in Indian country is subject to the "exclusive" jurisdiction of the United States.¹¹⁸ Nevertheless, "[i]t remains an open question whether jurisdiction under § 1153 over crimes committed by Indian tribe members is exclusive of tribal jurisdiction."¹¹⁹

Whatever the extent of a tribe's sovereignty and jurisdiction, it is generally subject to federal statutes. According to the U.S. Supreme Court, "a general statute in terms applying to all persons includes Indians and their property interests."¹²⁰ Likewise, the Ninth Circuit has held that "federal laws generally applicable throughout the United States apply with equal force to Indians

112. *Id.*

113. *Brendale*, 492 U.S. at 422-23.

114. *Id.* at 428.

115. *United States v. Eberhardt*, 789 F.2d 1354, 1361 (9th Cir. 1986).

116. 18 U.S.C. § 1153 (1994).

117. *Id.* "[M]urder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661. . . ."

118. *Id.*

119. *Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990) (citing *United States v. Wheeler*, 435 U.S. 313, 325 n.22 (1978)).

120. *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).

on reservations.”¹²¹ Occasionally, a general federal law does *not* apply to reservations because of the principle of Indian self-government.¹²² However, this is definitely not the case for the CWA. Section 518 makes clear that Congress intended the Act to apply to Indian tribes. Until a given tribe acquires TAS status for either water quality standards or permitting, the question is whether the state or the EPA implements the CWA.

2. Federal Government Regulatory Power

In many ways, the federal government acts on behalf of Indian tribes. “Congress has the exclusive power to deal with Indians and Indian affairs on reservations set apart for them.”¹²³ Because the tribes are “dependent” on the federal government, the federal government generally acts as trustee for them. “[T]he trust obligation owed by the United States to the Indians [must] be exercised according to the strictest fiduciary standards.”¹²⁴ “[A]ny Federal government action is subject to the United States’ fiduciary responsibilities toward the Indian tribes,” including the actions of federal agencies such as the EPA.¹²⁵

Congress has generally authorized the Executive branch of the federal government to manage Indian affairs.¹²⁶ Such management is delegated both to the Bureau of Indian Affairs, within the Department of the Interior (“DOI”) and to the President.¹²⁷ While the Supreme Court has noted that these statutes do not give the DOI “a general power to make rules governing Indian

121. *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985) (quoting *United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980), *cert. denied* 449 U.S. 1111 (1981)).

122. *See, e.g., Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d at 1116.

123. *Hilderbrand v. Taylor*, 327 F.2d 205, 206 (10th Cir. 1964) (citing *Williams v. Lee*, 358 U.S. 217 (1959); 27 Am. Jur. Indians § 42).

124. *Nance v. Environmental Protection Agency*, 645 F.2d 701, 710 (9th Cir.), *cert. denied sub nom., Crow Tribe of Indians Montana v. Environmental Protection Agency*, 454 U.S. 1081 (1981).

125. *Id.* at 711.

126. 25 U.S.C. §§ 2, 9 (1994).

127. 25 U.S.C. § 9 (1994): “The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeable to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.” 25 U.S.C. § 2 (1994). The President, in contrast, “may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of accounts of Indian affairs.”

conduct,”¹²⁸ courts have usually upheld the DOI’s regulatory authority.¹²⁹

3. Federal Regulatory Policy

The relationship between the federal government as trustee and the tribes as semi-sovereigns has been complicated historically by changing federal policy regarding Indian self-government. In the late 19th century, Congress passed the Indian General Allotment Act,¹³⁰ which allotted lands to individual members of tribes. The Supreme Court has recently noted that “an avowed purpose of the allotment policy was the ultimate destruction of tribal government.”¹³¹ Congress repudiated the Allotment Act in 1934 through the Indian Reorganization Act.¹³² Then, in the Indian Self-Determination Act of 1975, Congress declared its,

commitment to the maintenance of the Federal Government’s unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.¹³³

The Clinton Administration issued one of the strongest policy statements ever in favor of Indian self-government:

In order to ensure that the rights of sovereign tribal governments are fully respected, executive branch activities shall be guided by the following,

128. *Kake Village v. Egan*, 369 U.S. 60, 63 (1962).

129. The Ninth Circuit, for example, has limited *Kake* to its facts, noting that the Supreme Court in *Kake* “emphasized that the cited statutes gave Interior the power to regulate the exercise of existing rights, not to grant new rights, and that none of the Indians affected belonged to a reservation, which might have given Interior authority to permit Indian fishing contrary to state law.” *United States v. Eberhardt*, 789 F.2d 1354, 1360 (9th Cir. 1986). As a result, the Ninth Circuit held “that the general trust statutes in Title 25 do furnish Interior with broad authority to supervise and manage Indian affairs and property commensurate with the trust obligations of the United States.” *Id.*

130. Act of Feb. 8, 1887, 24 Stat. 388, *codified at* 25 U.S.C. §§ 331 to 334, 339, 341, 342, 348, 349, 354, 381.

131. *Montana v. United States*, 450 U.S. at 560 n.9.

132. Act of June 18, 1934, 48 Stat. 984 (*codified at* 25 U.S.C. §§ 461 et seq.). *See also* *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, 423 (1989).

133. 25 U.S.C. § 450a(b) (1994).

- (a) The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government-to-government relationship with federally recognized tribal governments;
- (b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals;
- (c) Each executive department and agency shall assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities;
- (d) Each executive department and agency shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes;
- (e) Each executive department and agency shall work cooperatively with other Federal departments and agencies to enlist their interest and support in cooperative efforts, where appropriate, to accomplish the goals of this memorandum;
- (f) Each executive department and agency shall apply the requirements of Executive Orders Nos. 12875 ("Enhancing the Intergovernmental Partnership") and 12866 ("Regulatory Planning and Review") to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities.¹³⁴

The EPA has more specific policies regarding its dealings with Indian tribes under the CWA. In recent years, the EPA has taken the position that until a tribe is approved, the EPA retains responsibility for administering the CWA on Indian lands. Furthermore, the EPA's regulations regarding a state's authority to regulate Indian lands under the CWA are less than clear:

In many cases, States (other than Indian Tribes) will lack authority to regulate activities on Indian lands. This lack of authority does not impair that State's ability to obtain full program approval

134. Memorandum: Government-to-Government Relations with Native American Tribal Governments, 59 Fed Reg 22951, 22951 (April 29, 1994).

in accordance with this part, *i.e.*, inability of a State to regulate activities on Indian lands does not constitute a partial program. The EPA will administer the program on Indian lands if a State (or Indian Tribe) does not seek or have authority to regulate activities on Indian lands.¹³⁵

The EPA further advises states “to contact the United States Department of the Interior, Bureau of Indian Affairs, concerning authority over Indian lands.”¹³⁶

The EPA has given some indications that it considers state water quality laws, including permitting authority, to be potentially applicable to Indian lands. When an Indian tribe becomes authorized, the state must stop issuing permits “for activities within the scope of the newly approved program.”¹³⁷ The state, however, retains authority over existing permits.¹³⁸ The implication is that the EPA does not perceive the CWA as prohibiting states from issuing permits for activities on tribal lands.

Moreover, the EPA has declared that:

Until Tribes qualify for the standards program and adopt standards under the Clean Water Act, EPA will, when possible, assume that existing water quality standards remain applicable. . . . This policy is not an assertion that State standards apply on reservations as a matter of law, but the policy merely recognizes that fully implementing a role for Tribes under the Act will require a transition period. EPA may apply State standards in this case because (1) there are no Federal standards that apply generally, and (2) to ignore previously developed State standards would be a regulatory void that EPA believes would not be beneficial to the reservation water quality. However, EPA will give serious consideration to Federal promulgation of water quality standards on Indian lands where EPA finds a particular need.¹³⁹

State water quality standards would seem to be the standard default for Indian reservations. The EPA has emphasized this point through the options it presents to tribes faced with the task of establishing their own water quality standards. According to the EPA, these options include:

Negotiation of cooperative agreements with an adjoining State to apply the State’s standards to the Indian lands; (2) incorporation of

135. 40 CFR § 123.1(h) (1995).

136. *Id.*

137. 40 CFR § 123.1(d) (2) (1996).

138. *Id.*

139. ENVTL. PROTECTION AGENCY, WATER QUALITY STANDARDS HANDBOOK 1-17 (Sept. 15, 1993).

the standards from an adjacent State as the Tribe's own, with or without revision; or (3) independent Tribal development and adoption of water quality standards that may account for unique site-specific conditions and waterbody uses.¹⁴⁰

Options 1 and 2, it notes,

[W]ould afford Tribes the opportunity to gain experience in developing and implementing water quality standards. Once a Tribe has had this opportunity, the Tribe could then modify these standards to meet changing needs. . . . [T]he EPA does not intend to discourage [use of Option 3] but notes that Indian Tribes may want to make full use, where appropriate, of the programs of adjacent States.¹⁴¹

The EPA encourages tribes to keep their standards the same as those of adjoining states – a policy that would reduce conflicts. Nevertheless, the EPA also has a strong policy of dealing with tribes as sovereign entities separate from the states:

EPA's Indian Policy is "to give special consideration to Tribal interests in making Agency policy and to ensure the close involvement of Tribal governments in making decisions and managing the environmental programs affecting reservation lands." In practice, EPA's policy is to work directly with Tribal governments as independent authorities for reservation affairs, and not as political subdivisions of States.¹⁴²

Consistent with this policy:

Where a State asserts authority to establish future water quality standards for a reservation, EPA policy is to ensure that the affected Tribe is made aware of that assertion, so that any issues the Tribe may wish to raise can be reviewed as part of the normal standards setting process. EPA will also encourage State-Tribal communication on standards issues, with one possible outcome being the establishment of short-term cooperative working agreements pertaining to standards and NPDES permits on reservations.¹⁴³

Storm water discharges provide another example of how the EPA will segregate tribes from state regulation. For example, in Oregon, EPA Region 10 recently issued a general NPDES permit for storm water discharges from industrial activities for "Federal Indian Reservations located in . . . Oregon (except Fort

140. Amendments to Water Standards I, *supra* note 61 at 39102-03.

141. *Id.*

142. *Id.* at 39098-99.

143. *Id.* at 39104.

McDermitt Reservation lands, which are handled by Region IX)”¹⁴⁴

Federal courts have made it fairly clear that the EPA’s policies regarding state regulation of Indians under the CWA will control. In the Ninth Circuit, an issue arose regarding Washington’s authority to regulate all persons, Indian and non-Indian, on Indian lands for RCRA purposes.¹⁴⁵ The EPA denied approval of Washington’s program as it applied to Indian lands, finding that the “RCRA does not give the state jurisdiction over Indian lands, and that states could possess such jurisdiction only through an express act of Congress or by treaty.”¹⁴⁶ Because the RCRA was silent on the issue of Indian regulation, the Ninth Circuit upheld the EPA’s interpretation.¹⁴⁷

4. State Regulatory Power

Generally, a state can regulate nonfederal lands that were never part of Indian reservations,¹⁴⁸ that are not otherwise considered Indian lands, or that have been completely ceded to the United States by the tribe. For example, in the absence of additional treaty rights, Oregon was free to impose regulations on hunting and fishing on lands ceded to the federal government by the Klamath tribe in 1901 without the reservation of hunting and fishing rights.¹⁴⁹

Because federal law generally supersedes state law under the U.S. Constitution’s Supremacy Clause, the state must honor any rights that tribes have reserved to themselves in their negotiations with the federal government. The state must do so unless Congress has subsequently acted to abrogate those rights. For

144. Final National Pollutant Discharge Elimination Storm Water Multi-Sector General Permit for Industrial Activities, 60 Fed. Reg. 50804 (1995).

145. *Washington Dep’t of Ecology v. Environmental Protection Agency*, 752 F.2d 1465, 1467 (1985).

146. *Id.*

147. *Id.* at 1467-69.

148. For a statement of this principle, see *Narragansett Indian Tribe. Narragansett Elec.*, 878 F. Supp. 344, 355 (D.R.I. 1995) (“Absent express federal law to the contrary, state law applies to the activities of Indians beyond the boundaries of their reservations.”).

149. *Oregon Fish and Wildlife Dep’t. v. Klamath Tribe*, 473 U.S. 753, 762-64 (1985). See also *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 425, *reh’g denied* 421 U.S. 939 (1975) (holding that when Congress ratified an agreement whereby tribes relinquished all claim, right, title and interest in reservation lands, the “state courts have civil and criminal jurisdiction over conduct of members of the tribe on the non-Indian, unallotted lands within the [previous] reservation borders”).

example, the State of Washington could not enforce its hunting regulations against tribal members hunting out of season on ceded lands when the cession agreement provided that "the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged."¹⁵⁰ In addition, "state law reaches within the exterior boundaries of an Indian reservation only if it would not infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'"¹⁵¹

A state generally remains free to regulate persons who are not members of the benefited tribe.¹⁵² Absent an express congressional delegation of authority or specific treaty rights, Indian tribes generally have no authority to regulate non-Indians, even within a reservation. For example, the Yakima Nation had no authority to impose its zoning regulations on lands within the reservation owned in fee by non-Indians;¹⁵³ the local county zoning regulations controlled.¹⁵⁴

Theoretically, states can derive regulatory authority over tribes from congressional acts. Congress expressly provided, through Public Law 280,¹⁵⁵ that California, Minnesota, Nebraska, Oregon, and Wisconsin have civil jurisdiction over all Indian country within those States except for specific, named reservations.¹⁵⁶ Specifically, these States "shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State[s] . . . [have] jurisdiction over other civil causes of action, and those civil laws of such State[s] . . . that are of general application to private persons or private property shall have the

150. *Antoine v. Washington*, 420 U.S. 194, 196 (1975).

151. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470 (1979) (quoting *Williams v. Lee*, 358 U.S. 217, 219-20 (1959)).

152. *Antoine v. Washington*, 420 U.S. at 206.

153. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 428 (1989).

154. *Id.* at 432.

155. Act of Aug. 15, 1953, ch.505, 67 Stat. 588 (codified at 28 U.S.C. § 1360 (1984)).

156. 18 U.S.C. § 1162(a); 28 USC § 1360(a). Nevertheless federal courts have judicially limited the scope of a state's authority under Public Law 280 to promote tribal self-regulation. See *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 387-89 (1976). The Ninth Circuit, for instance, has concluded that "[a]lthough its language is broad, P.L. 280 has been narrowly interpreted to confer state jurisdiction over private civil litigation involving reservation Indians, and does not constitute a grant of general civil regulatory authority." *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1390 (9th Cir. 1987).

same force and effect within such Indian country as they have elsewhere within the State[s]. . . .”¹⁵⁷

Although the language of the statutory grant is broad, other statutory provisions and subsequent legal interpretations by courts have significantly circumscribed the states’ authority pursuant to Public Law 280. Title IV of the Civil Rights Act of 1968¹⁵⁸ repealed part of Public Law 280 and instead requires that tribes consent before states assume further jurisdictional authority over reservations.¹⁵⁹ Moreover, in determining that states cannot tax Indians within a reservation absent specific congressional authority to do so, the U.S. Supreme Court noted that “[t]he primary concern of Congress in enacting Pub. L. 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement.”¹⁶⁰ The Court interpreted Public Law 280’s central focus to be state criminal jurisdiction; discussion of congressional intent for state civil authority is almost entirely absent from the text of the law.¹⁶¹ Congress’ intent, as the Supreme Court discerned it, was to allow state courts to resolve civil disputes between Indians and between Indians and non-Indians using the state’s rules of decision.¹⁶² Congress did not intend the Act to allow states to completely assimilate tribal reservations.¹⁶³

As Public Law 280 has been interpreted, the civil authority granted to states does not include civil regulatory authority over general water quality issues. If anything, section 518 of the CWA undercuts assertions of civil authority by states. Prior to section 518’s enactment, the EPA’s approvals of CWA programs were general.¹⁶⁴ Since enactment of the CWA, however, the EPA’s

157. 28 U.S.C. § 1360(a) (1994).

158. Pub. L. 90-284, 82 Stat. 78 (codified at 25 U.S.C. §§ 1321-1326 (1983)).

159. Title IV § 406, 25 U.S.C. § 1326 (1994).

160. *Bryan v. Itasca County*, 426 U.S. 373, 379 (1976).

161. *Id.* at 380-81.

162. *Id.* at 383-84.

163. *Id.* at 387-88.

164. *See, e.g.*, Water Pollution Control; Utah Application to Administer the National Pollution Discharge Elimination System, 52 Fed. Reg. 27578, 27579 (1987) (“Today’s Federal Register notice is to announce the approval of Utah’s NPDES program, including its pretreatment program and authority to issue general permits and regulate discharges from federal facilities located in the State.”); Approval of Arkansas’ NPDES Program, 51 Fed. Reg. 44518, 44519 (1986) (“Today’s Federal Register notice is to announce the approval of Arkansas’ NPDES program, including its pretreatment program and authority to issue general permits and regulate discharges from federal facilities located in the State.”); Oregon Pretreatment Pro-

approvals have clearly specified that the state programs do not extend to Indian lands.¹⁶⁵ In addition, when states that received program approval prior to the enactment of section 518, seek to modify their program agreements with the EPA, the EPA clarifies that it has not delegated authority over Indian lands to the states.¹⁶⁶ At the same time, EPA declarations of regulatory authority have become clearer. Thus, in issuing a general NPDES permit for the Southern Ute Indian Reservation in Colorado, the EPA announced that:

Discharges that occur within Indian Country are the jurisdiction of the EPA unless the Agency enters into an agreement with a Tribe or other Indian political body authorizing the Tribe to regulate these discharges in lieu of EPA doing so. No Tribal body has such jurisdiction within the Southern Ute Indian Reservation.¹⁶⁷

Even when state regulation governs Indians within a reservation, states must remain cognizant of Indian interests because of

gram Approval, 46 Fed. Reg. 17649, 17649-50 (1981) (approving Oregon's pretreatment program without mention of whether that program extends to tribes).

165. Oklahoma NPDES Approval, *supra* note 5, at 65049 (1996) ("The State of Oklahoma does not seek jurisdiction over Indian country. EPA will retain NPDES authority to regulate discharges in Indian country. . ."); Approval of Application by Louisiana to Administer NPDES Program, 61 Fed. Reg. 47932, 47933 (1996) (The Louisiana Department of Environmental Quality "does not seek to administer the LPDES program in Indian Country. EPA will thus issue NPDES permits for discharges in Indian Country within the geographical boundaries of Louisiana, *i.e.*, the reservations of the Chitimacha, Coushatta, and Tunica-Biloxi tribes."); Approval of Application by the State of Florida to Administer NPDES Program, 60 Fed. Reg. 25718, 25721 (1995) (authorization of Florida's NPDES program does not violate EPA's trust responsibility to the Miccosukee Tribe because EPA "retains full jurisdiction to administer the NPDES program on the Miccosukee Tribe's Reservation."); Approval of Application by South Dakota to Administer NPDES Program, 59 Fed. Reg. 1535, 1542 (1994) ("At this time, EPA is withholding authorization to administer the NPDES program on Indian Country located within South Dakota, including lands for which there is significant controversy over whether or not the land is Indian Country."); Approval of NPDES Pretreatment Program for Washington, 51 Fed. Reg. 36806, 36806 (1986) (Washington's "application for the pretreatment program does not contain a request for authority to regulate Indian lands, and today's program approval extends only to non-Indian lands. The EPA will continue to implement the pretreatment program requirements for industrial sources located on Indian lands").

166. Revision of Washington's NPDES Program, 55 Fed. Reg. 2550, 2550 (1990) (announcing that EPA had entered a new Memorandum of Understanding with Washington which "includes a new section * * * addressing Indian issues, which makes clear that EPA is not delegating authority over Indian lands to the State of Washington."); Approval of California's Revisions to NPDES program, 54 Fed. Reg. 40664, 40664 (1989) ("California does not have, and has not requested, EPA approval to administer the NPDES and pretreatment programs on Indian lands").

167. NPDES Permit for Activities Related to Natural Gas Production within Southern Ute Indian Reservation, 55 Fed. Reg. 40235, 40236 (1990).

general principles of federal preemption. When the federal government has directly addressed an issue, its ruling will supersede or preempt conflicting state regulation. "Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state laws that interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution are invalid."¹⁶⁸ In short, a "state law that conflicts with federal law is 'without effect.'"¹⁶⁹ Thus, when "the tribes' protectible interest is one arising under federal law, the Supremacy Clause requires state and local governments . . . to recognize and respect that interest in the course of their activities."¹⁷⁰ Such recognition and respect, the Court suggested, occurs when state and local governments procedurally involve affected tribes in any regulatory decisionmaking.¹⁷¹

Federal preemption analysis is particularly complex when issues of tribal regulatory authority are involved. The resolution of such issues is fact-specific and depends upon the tribe involved; the federal treaties, agreements, and legislative acts involving or affecting that tribe; and the lands, persons, and activities sought to be regulated.

One major source of federal preemption in Indian issues is congressionally-ratified treaties and agreements between the federal government and a particular tribe.¹⁷² Treaties and agreements ratified through legislation by Congress are laws of the United States and supersede state law. If a federal treaty or agreement with an Indian tribe speaks to Indian conduct, and state laws or regulation conflict with the treaty's or agreement's terms, the treaty or agreement will preempt state law even if the Indians' conduct takes place outside the reservation.¹⁷³ Indian

168. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604-05 (1991) (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824) (Marshall, C.J.)).

169. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

170. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 431 (1989).

171. *Id.*

172. As an initial matter, "the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." *Antoine v. Washington*, 420 U.S. 194, 199 (1975) (citing *Worcester v. Georgia*, 6 Pet. 515 (1832)). Thus, such agreements and treaties are generally interpreted to the Indians' advantage.

173. *Antoine*, 420 U.S. at 201. Thus, when the Colville Confederated Tribes ceded the northern half of the Colville Indian Reservation to the federal government through a ratified agreement but expressly provided that their right to hunt and fish on those lands would not be abridged, the State of Washington could not enforce its hunting and fishing regulations against members of the tribe hunting out of season on the ceded lands. *Id.* at 195-96, 205.

treaties and agreements generally have no effect on regulation of persons who are not members of the tribe. In *Antoine v. Washington*,¹⁷⁴ the Supreme Court clearly noted that “[n]on-Indians are, of course, not beneficiaries of the preserved rights, and the State remains wholly free to prohibit or regulate non-Indian hunting and fishing.”¹⁷⁵

The Ninth Circuit has a more expansive preemption analysis for on-reservation activities. For its on-reservation preemption analysis, the court undertakes ““a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.””¹⁷⁶ The particularized inquiry “makes Indian law preemption broader than traditional preemption: That is, in the Indian law context, state law is preempted not only by an explicit congressional statement — the traditional preemption standard — but also if the balance of federal, state, and tribal interests tips in favor of preemption.”¹⁷⁷ Of course, when federal law explicitly allows a state regulatory practice, there is no preemption.¹⁷⁸

In the area of hunting and fishing regulation, the Supreme Court has allowed states to avoid federal preemption if the state’s hunting and fishing regulations are “reasonable and necessary conservation measure[s]” that do not discriminate against Indians and the application of those regulations “to the Indians is necessary in the interest of conservation.”¹⁷⁹ According to the Ninth Circuit:

Unlike Congress, states may not qualify Indian fishing rights. . . . However, states may regulate Indian rights in the interest of conservation by an appropriate exercise of their police power. State regulation for conservation purposes is based on the state’s interest in protecting fish and wildlife resources for the benefit of its citizens. . . .

174. 420 U.S. 194 (1975).

175. *Id.* at 206.

176. *In re Blue Lake Forest Products, Inc.*, 30 F.3d 1138, 1142 (9th Cir. 1994), *cert. denied sub nom Hongkong and Shanghai Banking Corp. v. Hoopa Valley Tribe*, 115 S. Ct. 670 (1994) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980)).

177. *Id.*

178. *Red Mountain Machinery Co. v. Grace Investment Co.*, 29 F.3d 1408, 1410-12 (9th Cir.), *cert. denied sub nom Grace Investment Co. v. Red Mountain Machinery Co.*, 513 U.S. 1044 (1994).

179. *Antoine*, 420 U.S. at 201 (citing *Washington Game Dep’t v. Puyallup Tribe*, 414 U.S. 44 (1973); *Tulee v. Washington*, 315 U.S. 681, 684 (1942)).

A state must show that any regulation of Indian fishing rights is both reasonable and necessary for conservation purposes. . . . State regulations meeting these standard may extend to the manner of fishing, the size of the take, and the restriction of commercial fishing. . . . In the context of state regulation of Indian fishing rights, we have rejected the endangered species approach to conservation, finding that fishing limitations may be proper even though extinction is not imminent.¹⁸⁰

Likewise, the Ninth Circuit has indicated that water quality issues under the CWA pit very strong state interests against very strong tribal interests. It has suggested that the state's strong interest in regulating waters flowing from a reservation to other parts of the state may give the state the right to regulate water quality on a reservation — at least as non-Indians are concerned.¹⁸¹ That court held that a state's exercise of water rights jurisdiction over non-tribal use of excess waters flowing through a reservation did not sufficiently threaten Indian interests to give the Tribe regulatory authority.¹⁸² The Ninth Circuit ruled in favor of state regulation because of a “general rule of deference to state water law,”¹⁸³ and because the water would eventually flow off the reservation.¹⁸⁴

It should be noted that the Ninth Circuit has also used an expanded definition of “on-reservation” activities that may mean that all discharges arising *from activities on Indian land* — no matter where the water quality effect actually occurs — are subject to on-reservation regulatory analysis. It considers an activity to be “on-reservation” if “the essential conduct at issue occurred on the reservation” or if “the Indian enterprise at the heart of this dispute . . . is located on, not off, the reservation.”¹⁸⁵ Therefore, the Ninth Circuit could possibly consider all water quality issues generated from activities on the reservation — even if the addition of the discharge to navigable waters takes place off the reservation — to be subject to “on-reservation” analysis and tribal jurisdiction.

180. *United States v. Eberhardt*, 789 F.2d 1354, 1361-1362 (9th Cir. 1986) (citations omitted).

181. *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).

182. *Id.* at 1365.

183. *Id.*

184. *Id.* at 1366.

185. *In re Blue Lake Forest Products, Inc.*, 30 F.3d 1138, 1141 (9th Cir. 1994).

B. *Interpreting Reservation Borders*

1. Congressional Acts and Intent

The physical boundary of a reservation is set by federal law.¹⁸⁶ Congress is the body most responsible for creating reservations and changing their borders. In addition to creating reservations directly, Congress also ratifies reservations established by the President through Executive Order.¹⁸⁷ Throughout the past two centuries, Congress has passed numerous acts that directly or indirectly changed the borders of pre-existing reservations – generally reducing the size of those reservations. For example, in 1887, Congress passed the General Allotment Act, which gave the President authority to allot reservation land to individual tribal members and to sell the surplus to non-Indian settlers.¹⁸⁸ Subsequent allotment and surplus land acts allowed reservations to be allotted or sold.¹⁸⁹

At the beginning of the 20th century, the United States Supreme Court upheld Congress' power to unilaterally alter reservation boundaries.¹⁹⁰ As a result, courts have determined that some of the surplus land acts reduced the size of some reservations.¹⁹¹ Not all of the congressional acts did so. A court should look at the language of the particular act and the circumstances surrounding its enactment by Congress to determine its effect.¹⁹² As with all statutory construction, "[t]he underlying premise is that congressional intent will control."¹⁹³

186. See *Oregon Fish and Wildlife Dep't v. Klamath Tribe*, 473 U.S. 753, 761-62 (1985) (discussing the boundary resolution between the Klamath Tribe and the federal government).

187. See *Hagen v. Utah*, 510 U.S. 399, 402 (1994) (noting that Congress ratified an Executive Order through which President Lincoln reserved two million acres in Utah for Indian occupation);

188. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887).

189. See, e.g., Act of May 27, 1902, ch. 888, 32 Stat. 245, 263 (1902) (providing that if a majority of the adult male members of the Uintah and White River Indians in Utah consented, the Secretary of the Interior should make allotments out of the Uintah Reservation by October 1, 1903, giving 80 acres to each head of a family and 40 acres to any other member of the tribes; all unallotted land was restored to the public domain for sale to homesteaders); Act of March 3, 1903, ch. 994, 32 Stat. 982, 998 (1903) (directing the Secretary of the Interior to allot lands from the Uintah Reservation unilaterally if the Uintah and White River Tribes did not consent by June 1);

190. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-568 (1903).

191. *Solem v. Bartlett*, 465 U.S. 463, 469 (1984) (citations omitted).

192. *Id.*

193. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977).

The mere fact that an act opened a reservation to non-Indian settlement does not necessarily mean that Congress intended to change the reservation's boundaries.¹⁹⁴ Instead, federal courts have looked at three factors to determine the effect of a given act: 1) the statutory language used to open the Indian lands; 2) the historical context surrounding the passage of the surplus land acts; and 3) who actually moved onto opened reservation lands.¹⁹⁵ The first of these factors is the most probative, and in their interpretation of the statute, the courts "resolve any ambiguities in favor of the Indians. . . ."¹⁹⁶

To show diminishment, the statutory language must "establish an express congressional purpose to diminish."¹⁹⁷ However, no particular form of words is required: "a statutory expression of congressional intent to diminish, coupled with the provision of a sum certain payment, would establish a nearly conclusive presumption that the reservation had been diminished."¹⁹⁸ Under these standards, language returning unallotted reservation lands to the public domain "indicates that the Act diminished the reservation,"¹⁹⁹ particularly when other historical evidence and non-Indian settlement support that interpretation.²⁰⁰

In sum, there are no "magic words" or controlling provisions that guarantee that a court will find that a surplus land act diminished a reservation.²⁰¹ If the text of an act or its legislative history fail to establish a congressional intent to diminish a reservation, then the courts "are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening" of the reservation to non-Indian settlement.²⁰²

A recent case in the Eighth Circuit demonstrates how these traditional issues of reservation boundaries can affect environmental regulatory jurisdiction. In *Yankton Sioux Tribe v. South-*

194. *Id.* at 586-87.

195. *Hagen v. Utah*, 510 U.S. 399, 410-11 (citing and quoting *Solem*, 465 U.S. at 470, 471, 472).

196. *Id.* (citations omitted).

197. *Id.* at 411 (citing *Solem*, 465 U.S. at 475).

198. *Id.* at 411-12 (citing *Solem*, 465 U.S. at 470-71).

199. *Id.* at 414; *see also* *Rosebud Sioux Tribe*, 430 U.S. at 589 (relying on statutory language that returned one-half of a reservation to the public domain as evidence of congressional intent to diminish that reservation).

200. *Hagen*, 510 U.S. at 418-21.

201. *Solem*, 465 U.S. at 471.

202. *Id.* at 472.

ern Missouri Waste Management District,²⁰³ the Yankton Sioux Tribe sought to enforce its right to regulate a landfill site allegedly within its reservation boundaries. The state claimed that a congressional act had returned the lands to state jurisdiction. Although a sale price of \$600,000 in conjunction with language that the Yankton Sioux Tribe would “cede, sell, relinquish, and convey” part of its reservation gave rise to a presumption of diminishment, the Eighth Circuit was still willing to find no diminishment. First, the legislative history showed “that a sum certain price was included for reasons other than issues of jurisdiction and sovereignty.” Second, the allegedly diminishing Act included “the strongest savings clause of any unallotted land sale agreement between a tribe and that government,” which preserved the full force and effect of an earlier treaty “the same as though this [later] agreement had not been made.”²⁰⁴ The state, not the tribe, had jurisdiction to regulate the landfill site.

2. Executive Orders

Subject to congressional approval, presidents can create and change Indian reservations through an executive order.²⁰⁵ Presidential declarations and executive orders often support interpretations that certain surplus acts did in fact diminish a particular reservation.²⁰⁶

For example, in 1882 President Chester Arthur set aside 2.5 million acres of land in Arizona for the Hopi Indians and “such other Indians as the Secretary of the Interior may see fit to settle thereon.”²⁰⁷ Later, in 1900, 1901, and 1907, some of these lands were withdrawn by Executive Orders for the Navajo.²⁰⁸ The resulting jurisdictional boundaries between the two tribes de-

203. 99 F.3d 1439 (8th Cir. 1996).

204. *Id.* at 1144-47.

205. *See* Hagen, 510 U.S. at 402 (noting that President Lincoln reserved two million acres of land in Utah for Indian settlement in 1861, which Congress confirmed in 1864).

206. *See* Hagen, 510 U.S. at 419-20 (relying on a proclamation by President Roosevelt actually opening the Uintah Reservation to settlement by non-Indians to support its construction of two Acts as diminishing that reservation); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 602-03 (relying on a proclamation by President Theodore Roosevelt opening the Rosebud Reservation to settlement as proof that the Rosebud Sioux Tribe had ceded some of its lands);

207. *Sekaquaptewa v. MacDonald*, 626 F.2d 113, 114 (9th Cir., 1980).

208. *Id.* at 115.

pended upon the Executive Orders and not “a series of erroneous partial surveys, railroad protractions, and maps.”²⁰⁹

Courts analyze executive orders that purport to diminish reservation boundaries in the same manner that they review congressional acts. Thus, the Ninth Circuit recently looked first to the language of an 1886 Executive Order by President Cleveland opening up the Chehalis Reservation to settlement; the court determined that, “[o]n its face, the order appears to diminish the size of the reservation.”²¹⁰ The court went on, however, to conclude that “[t]he historical circumstances surrounding the order . . . show that there was no executive intent to diminish the reservation.”²¹¹ Although treaties similar to the one that created the Chehalis Reservation “routinely contained provisions authorizing the eventual allotment of reservations,” the Chehalis treaty did not.²¹² “The restoration of lands [in the reservation] was merely an expedient means” of fulfilling the federal government’s “intent to provide the Chehalis with the same allotments that the treaty reservation Indians enjoyed.”²¹³ Finally, only reservation Indians could — or did — settle the opened lands for 25 years.²¹⁴ Given these factors, the Ninth Circuit concluded that President Cleveland’s Executive Order “did not diminish the size of the Chehalis Reservation.”²¹⁵

C. *Complications in Determining Borders for Clean Water Act Jurisdiction*

1. Regulatory Boundaries for Tribes with TAS Status

Geographically, a TAS tribe’s jurisdiction is limited to land under the tribe’s control. A tribe can only receive TAS status if “the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are 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.*”²¹⁶ Thus, a tribe’s geographic

209. *Id.* at 118.

210. *Confederated Tribes of the Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 344 (9th Cir. 1996).

211. *Id.*

212. *Id.*

213. *Id.* at 345.

214. *Id.*

215. *Id.* at 346.

216. CWA § 518(e), 33 U.S.C. § 1377(e) (emphasis added).

jurisdiction is generally the borders of the reservation. The CWA defines a "Federal Indian reservation" as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation."²¹⁷ In addition, "[t]he U.S. Supreme Court has made it clear that the term 'reservations' should be broadly construed to include all lands falling within the definition of 'Indian country.'"²¹⁸ Thus, tribal jurisdiction under the CWA could cross state boundaries and includes rights-of-way within the reservation/Indian country, regardless of who holds the right-of-way or over Indians who are not members of that tribe.²¹⁹ For CWA purposes at least one court and the EPA have suggested that a tribe that applies for TAS status might have inherent *regulatory* jurisdiction over non-member as well as member property for purposes of setting water quality standards because of the potential serious impacts on the tribe's health and welfare.²²⁰

2. Location of the Discharge

The general consensus of the few court opinions on authorized tribes is that once a tribe is authorized, state CWA regulation no longer applies within the boundaries of the tribe's jurisdiction.²²¹ EPA regulations agree. When a state has been the authorized permitting authority and a tribe is subsequently approved as a permitting authority, the state must suspend issuing permits for activities subject to the approved tribal program.²²² However, "[t]he authorized State will retain jurisdiction over its existing permits . . . absent a different arrangement stated in the Memo-

217. CWA § 518(h), 33 U.S.C. § 1377(h).

218. *Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co.*, 878 F. Supp. 349, 355 (D.R.I. 1995), *rev'd in part and aff'd in part*, 89 F.3d 908 (1996); (citing *Oklahoma State Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 126 (1993)). Nevertheless, the scope of tribal authority varies depending on the type of jurisdiction being asserted. For instance, in criminal matters, tribal courts have no inherent authority over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 191 (1978).

219. *Duro v. Reina*, 495 U.S. 676, 688 (1990).

220. *Montana v. Environmental Protection Agency*, 941 F. Supp 945, 452-53, 458 (1996).

221. See *Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co.*, 878 F. Supp. 349, 362 (D.R.I. 1995), *rev'd in part and aff'd in part*, 89 F.3d 908 (1996); *City of Albuquerque I*, 865 F. Supp. at 773 (D.N.M. 1993).

222. 40 C.F.R. § 123.1(d)(1)-(2) (1995).

randum of Agreement executed between the EPA and the Tribe.”²²³

The regulatory boundary for NPDES permits between the state and the tribe or the EPA should be determined by the physical location of the outfall from the point source. NPDES permits are issued to regulate the “discharge of a pollutant.”²²⁴ A “discharge of a pollutant” is “any addition of any pollutant to navigable waters from a point source.”²²⁵ The critical regulatory question, therefore, is where the discharge enters navigable waters.

Only a few courts have had to assess where a discharge “is” for CWA regulatory purposes. Most of these opinions²²⁶ support an outfall analysis. In a controversy involving the border between Indiana and Kentucky, the D.C. Circuit faced arguments that a discharge originated in Kentucky for purposes of a section 401 certification because “the end of the . . . discharge pipe was on the Kentucky side of the border” though the discharging plant was clearly in Indiana.²²⁷ The D.C. Circuit found against Kentucky, but not because of the discharger’s location. Instead, the court determined that Indiana had properly issued the section 401 certification because “the *opening* for the plant’s proposed discharge pipe would lie on the Indiana side” of the border mark.²²⁸

The opposite interpretation, that a point source discharge is “located” where it begins, makes less intuitive sense when discharges spill from pipes far from their sources. Such an interpretation does not comfortably fit the Act’s definition of “point source.” Nevertheless, where tribes are involved, some courts may very well adopt the view that the location of the discharge

223. *Id.* § 123.1(d)(2).

224. CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1) (1994).

225. CWA § 502(12), 33 U.S.C. § 1362(12) (1994).

226. In 1990, the D.C. Circuit determined that a discharge from a dam originated at the dam itself, in Arkansas, rather than in Oklahoma, where lands actually flooded, for purposes of section 401 certifications. *National Wildlife Fed’n v. Federal Energy Regulatory Comm’n*, 912 F.2d 1471, 1483-84 (D.C. Cir. 1990). However, dams are generally *not* considered to be point sources. *See, e.g., United States ex rel. Tennessee Valley Auth. v. Tennessee Water Quality Control Bd.*, 717 F.2d 992, 998 (6th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *National Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). As such, they do not need NPDES permits and hence are unlikely to generate jurisdictional battles between states and tribes.

227. *Kentucky ex rel Stephens v. Nuclear Regulatory Comm’n*, 626 F.2d 995, 997 (D.C. Cir. 1980)

228. *Id.* (emphasis added).

depends on where the source of the discharge is located, not the outfall. For example, the Ninth Circuit considers an activity to be located on a reservation if "the essential conduct at issue occurred on the reservation" or if "the Indian enterprise at the heart of [the] dispute . . . is located on, not off, the reservation."²²⁹

3. State Ownership of Navigable Waterbodies

Another potential complication in determining permitting and section 401 certification authority is the ownership of navigable waterways. Under the equal footing doctrine, states acquired ownership to the beds and banks of navigable²³⁰ waterways within their borders as soon as they became states.²³¹ Despite the Equal Footing doctrine, Indian tribes occasionally assert ownership of navigable waters. In such conflicts, the U.S. Supreme Court has established that, as a general principle, the state retains ownership of the navigable waterway even when the federal government has established a tribal reservation around the water body. As it explained in *Montana v. United States*,²³²

[T]he ownership of land under navigable waters is an incident of sovereignty. As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an "equal footing" with the established States. After a State enters the Union, title to the land is governed by state law. The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce. . . A

²²⁹ In re Blue Lake Forest Products, Inc., 30 F.3d 1138 (9th Cir. 1994).

²³⁰ "Navigable," in the context of ownership of rivers and other waterbodies, has a narrower meaning than "navigable" for CWA purposes. Two tests exist to establish title navigability. First, states "received ownership of all lands under waters subject to the ebb and flow of the tide." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988). Second, states own the beds of rivers that are navigable in fact. *Utah v. United States*, 403 U.S. 9, 10 (1971). Waterways are navigable in fact if they "are used, or are susceptible to being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. (10 Wall) 999, 1001 (1871).

²³¹ *Shively v. Bowlby*, 152 U.S. 1, 29-50 (1894). Later states thus enter the union on an "equal footing" with the original thirteen states. If a waterbody is navigable for title purposes, the state holds that waterbody in trust for the public and cannot divest itself of that public trust. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

²³² 450 U.S. 544 (1981).

court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States [to an Indian tribe before statehood], and must not infer such a conveyance “unless the intention was definitely declared or otherwise made plain,” or was rendered “in clear and especial words,” or “unless the claim confirmed in terms embraces the land under the waters of the stream.”²³³

Given the strong presumption against Indian title to navigable water, the Supreme Court rejected the claim of the Red Lake Indian Reservation to the bed of a navigable lake wholly within the boundaries of the reservation.²³⁴ Treaties with the Crow Tribe failed to overcome the presumption of state ownership of navigable water because the treaties in question “in no way expressly referred to the riverbed” but instead simply reserved a place of occupation for the tribe.²³⁵

Occasionally courts will hold that tribes did receive title to navigable waters through treaty or other interactions with the federal government. Thus, in *Choctaw Nation v. Oklahoma*,²³⁶ the Supreme Court decided that the Choctaw, Chickasaw, and Cherokee Nations of Oklahoma had in fact received title to the beds and banks of the navigable portion of the Arkansas River in Oklahoma. The Indians’ claims were based on treaties dated 1785, 1786, 1791, 1798, 1801, 1805, 1817, 1819, 1820, 1825, 1828, 1830, 1835, 1837, and 1855, all entered well before Oklahoma was admitted to the nation in 1907.²³⁷

The Court found in favor of the tribes for two reasons. First, the treaties’ language described the boundaries of the reservations as “beginning on the Arkansas River” and running “up the Arkansas to the Canadian Fork,” in the case of the Cherokee Nation, or as running “down the Arkansas” or “down the main channel of the Arkansas river,” in the case of the Choctaws.²³⁸ As such, the treaties did specifically refer to the river. Second, the Court relied on a canon of Indian treaty interpretation that requires “that treaties with the Indians must be interpreted as they would have understood them . . . and any doubtful expressions in them should be resolved in the Indians’ favor.”²³⁹ The

233. *Id.* at 551-52 (citations omitted).

234. *United States v. Holt State Bank*, 270 U.S. 49, 159 (1926).

235. *Montana*, 450 U.S. at 553-54.

236. 397 U.S. 620 (1970).

237. *Id.* at 622-27.

238. *Id.* at 629-30.

239. *Id.* at 631 (citations omitted).

Court concluded that the Indians would have understood the descriptions of the Arkansas River as including the beds and banks of that river: "the United States was competent to say the 'north side' or 'bank' of the Arkansas River when that was what it meant, as it had in the 1817 grant to the Cherokees in the Arkansas Territory."²⁴⁰ The Court continued:

Together, petitioners were granted fee simple title to a vast tract of land through which the Arkansas River winds its course. The natural inference from these grants is that all the land within their metes and bounds was conveyed, including the banks and beds of rivers. To the extent that the documents speak to the question, they are consistent with and tend to confirm this natural reading. Certainly there was no express exclusion of the bed of the Arkansas River by the United States as there was to other land within the grants.

As a practical matter, reservation of the river bed would have meant that petitioners were not entitled to enter upon and take sand and gravel or other minerals from the shallow parts of the river or islands formed when the water was low. In many respects, however, the Indians were promised virtually complete sovereignty over their new lands. We do not believe that petitioners would have considered that they could have been precluded from exercising these basic ownership rights to the riverbed, and we think it very unlikely that the United States intended otherwise.²⁴¹

Despite *Choctaw Nation*, recognition of tribal ownership of navigable waters remains relatively rare.²⁴² When waters within

240. *Id.*

241. *Id.* at 634-35 (citation omitted).

242. *See* *United States v. Washington*, 969 F.2d 752 (9th Cir. 1992), *cert. denied sub nom* *Lummi Indian Tribe v. Washington*, 507 U.S. 1051 (1993) (holding that the boundary of the Lummi Reservation was the low tide line rather than including the bed of any navigable waters); *United States v. Aam*, 887 F.2d 190 (9th Cir. 1989) (holding that tidelands were not part of the Suquamish Tribe's reservation); *Yankton Sioux Tribe of Indians v. South Dakota*, 796 F.2d 241, 243-44 (8th Cir. 1986) (holding that the Yankton Sioux Tribe did not have title to the bed of the navigable Lake Andes within the borders of its reservation); *United States v. Aronson*, 696 F.2d 654 (9th Cir. 1983), *cert. denied*, 464 U.S. 982 (1983) (holding that the eastern half of the Colorado River bed was not conveyed to the Colorado River Indians).

But see also *Coeur d'Alene Tribe of Idaho v. Idaho*, 42 F.3d 1244, 1255-57 (9th Cir. 1994), *rev'd*, 117 S.Ct. 2028 (1997) (holding that the Coeur d'Alene tribe had stated a claim for relief in claiming title to navigable waters within their reservation based on an 1873 Executive Order and aboriginal claims); *United States v. Big Eagle*, 881 F.2d 539, 541-42 (8th Cir. 1989), *cert. denied*, 493 U.S. 1084 (1990) (holding that the boundaries of each of two adjacent Indian reservations extended to the midpoint of the Missouri River, excluding state regulation); *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1258 (9th Cir. 1983), *cert. denied*, 405 U.S. 1049 (1984) (concluding "that where a grant of real property to an Indian tribe includes

or bordering a reservation are “navigable” in terms of sovereignty chances are good that they will belong to the state, not the tribe.

Under the CWA, tribes with TAS status can manage and protect the “water resources which are 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.”²⁴³ Waters within or near a reservation that are navigable for sovereignty purposes, as noted above, will generally belong to the state, and thus are technically *not* within the reservation borders. These waters should not be subject to tribal management and protection unless courts determine that, despite state ownership, they are “otherwise within the borders of an Indian reservation.”

For navigable rivers and lakes on the perimeter of tribal reservations whose bed and banks are owned by the state, this language presents little interpretive difficulty: the border of the reservation will generally end at waterbody’s edge.²⁴⁴ State-owned navigable waters will be governed by state water quality standards. Point sources discharging into the waterbody could be located for permitting purposes within state permitting jurisdiction, at least if courts apply a strict outfall interpretation of “point source.”

Navigable waterbodies owned by the state that cut through or are surrounded by tribal lands potentially create more complicated issues of interpretation. In cases addressing hunting and fishing rights, tribal regulatory authority over such waters has been held to be limited, especially regarding regulation of non-tribal members.²⁴⁵ Technically, the borders of the reservation stop at the edge of state-owned navigable waters and restart on the other side, so that such waters are not “within the borders of

within its boundaries of a navigable water and the grant is made to a tribe dependent on the fishery resource in that water for survival, the grant must be construed to include the submerged lands if the Government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the grant.”).

243. CWA § 518(e)(2), 33 U.S.C. § 1377(e)(2) (1994).

244. *United States v. Willow River Power Co.*, 324 U.S. 499, 509 (1945) (“High water mark bounds the bed of the river.”).

245. *See, e.g., Montana v. United States*, 450 U.S. 544, 557-61 (1981) (undercutting a tribe’s ability to regulate hunting and fishing when the state owned the bed and banks of the Big Horn River as it ran through the reservation).

an Indian reservation.” Therefore, a strong legal argument exists that these waters are subject to state water quality standards and, under the strict outfall view of point sources, to state NPDES permitting.

Nevertheless, some courts may choose to read “within the borders” broadly and generally rather than technically on the grounds that Congress enacted section 518 with the purpose of expanding tribal authority over water quality. Moreover, the “EPA has consistently read the phrase ‘or otherwise within . . .’ as a separate category of water resources.”²⁴⁶ This suggests that the EPA would view waterbodies owned by the state through a title of navigability as being “otherwise within” the reservation. Tribes and the EPA could acquire authority for water quality standards and permitting over waters that the state would still – at least technically – own. Such water quality authority could become the basis for eroding state control of the waterbody in terms of dredging, sale of gravel, dock-building, and public use on the grounds that these activities all affect water quality.

IV.

STATE-TRIBAL NPDES PERMIT INTERACTIONS UNDER THE CLEAN WATER ACT

A. *Current Case Law: Section 401 Interactions in States that Do Not Administer the NPDES Permit Program*

1. The Background: Interstate Water Quality Conflicts

If, as the CWA purports, TAS status simply means that tribes are treated as states for purposes of water quality standards and/or NPDES permitting, then existing case law regarding interstate conflicts should be relevant. Two decisions by the U.S. Supreme Court are particularly important in this context: *International Paper Co. v. Ouellette*²⁴⁷ and *Arkansas v. Oklahoma*.²⁴⁸

In *International Paper*, the International Paper Company operated a pulp and paper mill on the New York side of Lake Champlain. The mill discharged into the lake “a short distance” from the New York-Vermont state boundary.²⁴⁹ Property owners on the Vermont side of the lake filed a class action suit asserting that International Paper was a nuisance under Vermont common

246. Amendments to Water Standards II, *supra* note 107, at 64881.

247. 479 U.S. 481 (1987).

248. 503 U.S. 91 (1992).

249. *International Paper*, 479 U.S. at 483-84.

law.²⁵⁰ The issue facing the Supreme Court was whether the CWA preempted application of a downstream state's nuisance law to a discharger in an upstream state. The Court held "that when a court considers a state-law claim concerning interstate water pollution that is subject to the CWA, the court must apply the law of the State in which the point source is located."²⁵¹

In reaching its conclusion, the Court considered the relationship established under the Act between the state containing the point source at issue and neighboring affected states. It reasoned:

While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States). Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders. Before a federal permit may be issued, each affected State is given notice and the opportunity to object to the proposed standards at a public hearing. An affected State has similar rights to be consulted before the source State issues its own permit; the source State must send notification, and must consider the objections and recommendations submitted by other States before taking action. *Significantly, however, an affected State does not have the authority to block the issuance of the [source-State-issued] permit if it is dissatisfied with the proposed standards. An affected State's only recourse is to apply to the EPA Administrator, who then has the discretion to disapprove the permit if he concludes that the discharges will have an undue impact on interstate waters. Also, an affected State may not establish a separate permit system to regulate an out-of-state source. Thus the Act makes it clear that affected States occupy a subordinate position to source States in the federal regulatory program.*²⁵²

Unless the EPA was willing to intervene the Court saw little recourse for downstream states. In light of the Act's preference for source states, the Court was "convinced that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of" Congress's purposes.²⁵³ "[T]he CWA

250. *Id.*

251. *Id.* at 487.

252. *Id.* at 490-91 (citations and footnotes omitted; emphasis added).

253. *Id.* at 493.

precludes a court from applying the law of an affected State against an out-of-state source.”²⁵⁴

Justifying this conclusion, the Court further noted that “[t]he affected State’s nuisance laws would subject the point source to the threat of legal and equitable penalties if the permit standards were less stringent than those imposed by the affected State.”²⁵⁵ Such power, would mean that affected states “could do indirectly what they could not do directly – regulate the conduct of out-of-state sources.”²⁵⁶ The Court was also concerned that applying out-of-state nuisance law “also would have the result of allowing affected States effectively to set discharge standards without consulting with the source State, even though source States are required by the Act to give affected States an opportunity to be heard and a chance to comment before issuing a permit.”²⁵⁷ The regulatory playing field, in other words, would not be level.

The Court’s ruling, however, did not leave potential plaintiffs without a viable cause of action: “nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source State.”²⁵⁸ Noting that the Act expressly allows source States to impose more stringent standards than federal law would require, the Court concluded that “the imposition of source-state law does not disrupt the regulatory partnership established by the permit system.”²⁵⁹ “Moreover, States can be expected to take into account their own nuisance laws in setting permit requirements.”²⁶⁰ If an affected state could catch a source state violating the source state’s own nuisance laws, it had a claim.

* The *International Paper* court strongly implies that a source state that has NPDES permitting authority is largely free of the claims of downstream states if the EPA chooses not to protest the permit. In *International Paper*, the conflicting states both had long-established NPDES permitting authority.²⁶¹ New York had issued *International Paper*’s NPDES permit, and, given that the

254. *Id.* at 494.

255. *Id.* at 495.

256. *Id.* at 495-96.

257. *Id.* n.15.

258. *Id.* at 497.

259. *Id.* at 499.

260. *Id.*

261. See Oklahoma NPDES Approval, *supra* note 5, at 65052 (table showing that New York received NPDES permitting authority on October 28, 1975, while Vermont received its permitting authority on March 11, 1974).

landowners sued on the basis of Vermont common law, an EPA interpretation or resolution of the conflict was not before the Court. In contrast, in *Arkansas v. Oklahoma*, the Supreme Court faced an interstate water quality conflict with an EPA resolution already in place.

In that case, the source state was Arkansas, a state without NPDES permitting authority. As a result, the EPA issued the NPDES permit to a sewage treatment plant in Fayetteville, Arkansas, that authorized the facility to discharge into a stream 39 miles from the Oklahoma border.²⁶² The discharge flowed through three creeks over about 17 miles, then entered the Illinois River about 22 miles upstream from the Arkansas-Oklahoma border.²⁶³ Oklahoma challenged the permit through section 401, arguing “that the discharge violated the Oklahoma water quality standards,” including a provision forbidding the degradation of existing water quality.²⁶⁴

The EPA concluded that the permit would be upheld “if the record shows by a preponderance of the evidence that the authorized discharges would not cause an actual detectable violation of Oklahoma’s water quality standards.”²⁶⁵ An administrative law judge found that no such detectable violation would occur, and the EPA sustained the permit.²⁶⁶ Oklahoma appealed.

In a move that emphasizes the EPA’s role in resolving water quality conflicts, the Supreme Court began by distinguishing *International Paper* on the basis of who issued the NPDES permit.²⁶⁷ When a source state issues the NPDES permit, the downstream affected state has no statutory authority “to veto the issuance of a permit for a new point source in another State;” nevertheless, “the Administrator retains authority to block the issuance of any state-issued permit that is outside the guidelines and requirements of the Act.”²⁶⁸ In contrast, when the EPA issues the NPDES permit, affected states have direct power to affect discharges in another state.²⁶⁹

262. *Arkansas v. Oklahoma*, 503 U.S. at 91, 94 (1992).

263. *Id.* at 95.

264. *Id.*

265. *Id.* at 97 (quoting EPA’s Chief Judicial Officer in the appeal from an Administrative Law Judge’s determination).

266. *Id.*

267. *Id.* at 101.

268. *Id.* at 102 (citing 33 U.S.C. § 1342(d)(2)).

269. *Id.* at 103 (citing 33 U.S.C. § 1341(a)(1)).

Next, the *Arkansas* Court considered three questions arising out of the EPA's interpretation of section 401:

First, does the Act require the EPA, in crafting and issuing a permit to a point source in one State, to apply the quality standards of downstream States? Second, even if the Act does not require as much, does the Agency have the statutory authority to mandate such compliance? Third, does the Act provide . . . that once a body of water fails to meet the water quality standards no discharge that yields effluent that reach the degraded waters will be permitted?²⁷⁰

The Court refused to decide the first question, considering such resolution "neither necessary nor prudent."²⁷¹ As one reason for not deciding the EPA's statutory obligations, it noted that many of the Act's provisions that were involved would also affect permits issued by states with NPDES permit authority. As such, "[i]t seem[ed] unwise to evaluate those arguments in a case . . . which only involve[d] a federal permit."²⁷²

Even if the EPA did not have to order compliance with Oklahoma's water quality standards, the Act "clearly does not limit the EPA's authority" to do so.²⁷³ The EPA's regulations had required, since 1973, that NPDES permits not be issued "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States."²⁷⁴ Moreover, the Court noted that Congress gave the EPA oversight authority for NPDES permits.²⁷⁵ As such, the EPA's interpretation of its statutory authority was "perfectly reasonable" and consistent with the CWA's purposes.²⁷⁶

The Court then again distinguished *International Paper* on the basis of the difference between the states and the EPA. When Arkansas argued that *International Paper* had established downstream states as subordinate in the permitting process, the Court noted that "*International Paper* concerned only an affected State's input into the permit process. . . . Limits on an affected State's direct participation in permitting decisions, however, do not in any way constrain the EPA's authority to require a point source to comply with downstream water quality standards."²⁷⁷

270. *Id.* at 104.

271. *Id.*

272. *Id.*

273. *Id.* at 105.

274. *Id.* (quoting 40 C.F.R. § 122.4(d) (1991)).

275. *Id.* (citing 33 U.S.C. §§ 1342(a)(2) and 1342(d)(2)).

276. *Id.* at 105-06.

277. *Id.* at 106.

In addressing the third issue, the Court held that nothing in the CWA “mandates a complete ban on discharges into a waterway that is in violation” of the applicable water quality standards.²⁷⁸ Instead of there being a “categorical ban” on such discharges, “the Clean Water Act vests in the EPA and the States broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution.”²⁷⁹

Once the Court established the EPA’s authority to require the Arkansas point source to comply with Oklahoma’s water quality standards, it went on to uphold the EPA’s authority to interpret those standards. State water quality standards promulgated under the EPA’s guidance and approved by the EPA for CWA purposes “are a part of the federal law of water pollution control” and “have a federal character.”²⁸⁰ As such, “the EPA’s reasonable, consistently held interpretation of those standards is entitled to substantial deference.”²⁸¹ Moreover, the EPA’s interpretation in this case – that no degradation of Oklahoma’s waters occurred unless there was a measurable, rather than theoretical, impact from an upstream discharger – “makes eminent sense in the interstate context: If every discharge that had some theoretical impact on a downstream State were interpreted as ‘degrading’ the downstream waters, downstream States might wield an effective veto over upstream discharges.”²⁸²

The Supreme Court emerged from *Arkansas v. Oklahoma* still concerned about the potential for downstream states to “veto” upstream permitting but highly deferential to the EPA’s resolution of interstate issues. In *Arkansas v. Oklahoma*, Oklahoma’s water quality standards had little practical effect on the Arkansas permit, given the EPA’s determination that the discharge would not measurably affect Oklahoma water quality. The CWA’s interstate provisions, it seemed, gave downstream states little power even under section 401 unless those states could show truly egregious effects on their water quality from an upstream discharger.

278. *Id.* at 108.

279. *Id.*

280. *Id.* at 109-10.

281. *Id.* at 110.

282. *Id.* at 111.

2. Application 1: Preemption of State Permitting

Although section 518 has existed for almost a decade, only four courts, in two sets of cases, have interpreted its ramifications. The most straightforward application of section 518's provisions to date occurred when the District Court of Rhode Island relied upon the Narragansett Tribe's TAS status to preempt application of state water quality laws pursuant to the CWA and Safe Drinking Water Act of 1974 ("SDWA").²⁸³ The Narragansett tribe sought to construct a housing complex on its property but failed to obtain state and local permits and approvals. The State of Rhode Island and Town of Charlestown sought to enjoin construction until the Tribe complied with State and local law.²⁸⁴ After determining that the housing site qualified as Indian country,²⁸⁵ the court analyzed whether state regulation of the site was preempted.²⁸⁶ It noted that Rhode Island had promulgated regulations to enforce the CWA and SDWA, but found these regulations inapplicable to the Tribe's housing project:

In determining the applicability of Rhode Island's regulations to the Tribe's housing project, one need look no further than the statutes they implement. The CWA expressly provides that Indian tribes may be treated as states if the Environmental Protection Agency (EPA) finds that they meet specified criteria. 33 U.S.C. § 1377. The First Circuit has stated that the Narragansett Tribe has met these requirements and is considered a state for purposes of the CWA. *Rhode Island v. Narragansett Tribe*, 19 F.3d at 703 (1st Cir. 1994).

Similarly, the 1986 amendments to the SDWA authorize EPA to treat Indian tribes as states for purposes of that statute. 42 U.S.C. § 300h-1(e); *Phillips Petroleum Co. v. U.S. Environmental Protection Agency*, 803 F.2d 545, 548 (10th Cir. 1986). Although the record is silent as to whether the Narragansett Tribe has received such approval, the SDWA regulations state that underground injection control programs for Indian tribes in Rhode Island is [sic] administered by the EPA. 40 C.F.R. § 147.2001. Thus, whether the State purports to regulate under authority of the SDWA or the CWA, its jurisdiction to do so is preempted by federal law.²⁸⁷

283. Pub. L. 93-523 (Dec. 16, 1974), 88 Stat. 1660 (codified at 42 U.S.C. §§ 300f to 300j-26).

284. *Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co.*, 878 F. Supp 349 (D.R.I. 1995), rev'd in part and aff'd in part, 89 F.3d 908 (1996).

285. *Id.* at 356-57.

286. *Id.* at 359-66.

287. *Id.* at 362.

3. Application 2: Downstream Tribes and EPA-Issued NPDES Permits

In contrast to the fairly clear interpretation of section 518 in *Narrangansett*, the District Court of New Mexico, in *City of Albuquerque v. Browner*,²⁸⁸ had to translate preexisting interstate water quality law to the TAS context in order to determine whether the EPA abused its discretion in approving the Isleta Pueblo Indian Reservation's water quality standards for the Rio Grande River and in revising the City of Albuquerque's NPDES permit for its waste treatment facility.²⁸⁹ The EPS selected the tribe's standards for both projects; the standards were more stringent than the state's. The City's challenge was multifold:

Specifically, the City alleges that EPA failed to follow the required procedures in approving the standards, misinterpreted two provisions of the Act in approving the standards, and approved standards that are unconstitutional. Further, the City asserts that EPA violated the Act by failing to provide a mechanism to resolve unreasonable consequences which arise when a State and a Tribe impose different standards on a common body of water, and by failing to ensure that the Pueblo standards are stringent enough to protect the designated uses. Finally, the City asserts that the Pueblo's water criteria are without any rational scientific basis and should not have been approved.²⁹⁰

The district court ruled in favor of the EPA – and the Tribe – across the board. First, it held that the EPA did not commit a procedural error by not providing notice of its intent to approve the Pueblo's water quality standards or allowing public comment upon that proposed approval.²⁹¹ As the CWA requires,²⁹² the Pueblo held a public hearing regarding its proposed standards and published notice of that hearing.²⁹³ The CWA does not re-

288. 865 F. Supp. 733 (D.N.M. 1993).

289. *Id.* at 736-37. The City challenged EPA's actions pursuant to the federal Administrative Procedures Act, 5 U.S.C. § 706(2). *Id.* at 737. This provision allows a court to reverse an agency's action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 5 U.S.C. § 706(2) (1994). EPA had recognized Isleta Pueblo as a state on October 12, 1992, and the Pueblo adopted its water quality standards on December 24, 1992. *City of Albuquerque v. Browner*, 97 F.3d 415, 419 (10th Cir. 1996).

290. *City of Albuquerque*, 865 F. Supp. at 736.

291. *Id.* at 739.

292. CWA § 303(c), 33 U.S.C. § 1313(c) (1994).

293. *City of Albuquerque*, 865 F. Supp. at 739.

quire the EPA to provide for additional notice and comment after it approves water quality standards.²⁹⁴

Second, the district court also upheld the EPA's interpretation that TAS status under section 518 included the authority to impose more stringent water quality standards under section 510.²⁹⁵ The court noted that section 518 does not explicitly refer to section 510,²⁹⁶ but found sufficient authority for the EPA's position in two other provisions, sections 303 and 401. Regarding section 303, the court noted:

[Section 518] does incorporate § 303, authorizing States to develop water quality standards. Under the City's reading of § 518, Tribes would be authorized to develop water quality standards neither more nor less stringent than federal standards. This construction makes § 518 meaningless and conflicts with EPA's stated policy with respect to Indian Tribes and with general principles of federal Indian law. . . . EPA has consistently interpreted § 518 to include § 510, and has interpreted § 510 as a savings clause, recognizing an authority already held by the states rather than conferring some new authority. 56 Fed. Reg. 64,886 (1991).²⁹⁷

The court's reliance on section 401 was more complex and drew from the United States Supreme Court's decision in *Arkansas v. Oklahoma*.²⁹⁸ In the context of section 510, the District Court of New Mexico applied the principles of *Arkansas v. Oklahoma* as follows:

EPA's position [that section 518 incorporates section 510] is further supported by the reference to § 1341 in § 518. Section 1341 appears to require EPA to issue permits that comply with a downstream state's water quality standards. Clean Water Act § 401, 33 U.S.C. § 1341; *Arkansas v. Oklahoma*, 503 U.S. 91, — n.9, 112 S.Ct. 1046, 1055 n.9, 117 L.Ed.2d 239 (1992). The Supreme Court found that, even if the Act does not require the upstream discharger to comply with downstream state standards, the statute does not limit EPA's authority to require such compliance. *Arkansas v. Oklahoma*, 503 U.S. at —, 112 S.Ct. at 1056. I believe the same argument must apply to an upstream discharger and a downstream Tribe.²⁹⁹

294. *Id.*

295. *Id.* at 739-40.

296. *Id.* at 739.

297. *Id.* at 739-40.

298. 503 U.S. 91 (1992).

299. *City of Albuquerque*, 865 F. Supp. at 740.

In light of sections 303 and 401, the court held “that [the] EPA properly recognized the Pueblo’s authority to develop water quality standards more stringent than those of the federal government.”³⁰⁰

Third, the District Court of New Mexico addressed the EPA’s dispute resolution procedure. Section 518 requires the EPA to develop a procedure for resolving disputes when a state’s and a tribe’s water quality standards differ.³⁰¹ The EPA complied with this requirement,³⁰² however, under its procedures only a state or a tribe can initiate the dispute resolution procedure.³⁰³ As a result, the City of Albuquerque had no means of bringing its dispute with the Isleta Pueblo before the EPA, and it argued that the EPA’s procedures thus failed to meet the statutory requirement for resolving disputes.³⁰⁴

The court dismissed the City’s concern rather handily. It noted that the EPA “considered whether . . . affected parties should be involved in the resolution process and determined that such parties could be invited to participate.”³⁰⁵ In allowing only states and tribes to initiate the process, the EPA had not acted arbitrarily or capriciously “because they are the entities authorized to revise or modify the water quality standards in question.”³⁰⁶

Fourth, the court addressed whether the Pueblo’s water quality standards were stringent enough to protect the designated uses, “specifically primary contact ceremonial use and primary contact recreational use.”³⁰⁷ Because tribal members admitted that ceremonial uses included the incidental ingestion of river water, the City argued that the river had to meet standards established under the SDWA.³⁰⁸ The Pueblo’s standards, although more stringent than the state’s CWA standards for non-drinking water use of the river, were less protective than standards required for drinking water under the SDWA. Therefore, according to the City, the EPA had improperly approved the Pueblo’s water quality standards. The court concluded that “[t]he primary contact ceremonial use appears to resemble a fishable/swimmable stan-

300. *Id.*

301. CWA § 518(e), 33 U.S.C. § 1377(e) (1994).

302. 40 C.F.R. § 131.7 (1996).

303. 40 C.F.R. § 131.7(b)-(c) (1996).

304. *City of Albuquerque*, 865 F. Supp. at 740.

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

dard, which assumes the ingestion of some water, more than it resembles a safe drinking water standard, which assumes the ingestion of a volume of water daily.”³⁰⁹ The court thus rejected the City’s argument that the Pueblo’s standards were not protective enough.³¹⁰

Fifth, the court dealt with the City’s argument that the EPA’s recognition of a ceremonial use of the river violated the Establishment Clause of the U.S. Constitution “by imposing a mandate which aids tribal religion at City expense.”³¹¹ Relying on the Establishment Clause analysis in *Lemon v. Kurtzman*,³¹² the court concluded that “[t]he Pueblo’s designation of a ceremonial use does not invalidate the overall secular goal” of the Clean Water Act, that the EPA was not advancing or promoting religion and there was no excessive entanglement of government and religion involved.³¹³

Nor was the court convinced by the City’s sixth argument, that the Pueblo’s standards were unconstitutionally vague.³¹⁴ Indeed, the court found the City’s argument “unsupportable” because the EPA’s regulations allow water quality standards that are merely narrative descriptions and because the City would have specific enforceable standards to meet in its NPDES permit.³¹⁵

Finally, the City argued that the EPA’s approval of the Pueblo’s water quality standards was arbitrary and capricious because the Pueblo’s standards were far too strict, requiring the river to be cleaner than it would be “naturally” and because the standards were technologically unattainable.³¹⁶ The court noted that the “EPA reviews proposed water quality standards only to determine if they are stringent enough to protect the proposed water quality standards.”³¹⁷ Moreover:

The EPA does not believe it is authorized to reject proposed standards because they are more stringent than background levels. 56 Fed. Reg. 64,886 (1991). EPA lacks the authority to reject stringent standards on the grounds of harsh economic or social effects.

309. *Id.*

310. *Id.*

311. *Id.*

312. 403 U.S. 602 (1971).

313. City of Albuquerque, 865 F. Supp. at 740-41.

314. *Id.* at 741.

315. *Id.* (citing 40 C.F.R. §§ 131.1, 131.2 (1992)).

316. *Id.*

317. *Id.* (citing 40 C.F.R. §§ 131.5, 131.11(a) (1992)).

Homestake Mining Co. v. Environmental Protection Agency, 477 F. Supp. 1279, 1283 (D.S.D. 1979).³¹⁸

Because the EPA and the Pueblo examined the technical aspects of the standards and properly explained their reasons for enacting them, the EPA had not acted arbitrarily and capriciously in approving the Pueblo's water quality standards.

The Tenth Circuit recently affirmed the District Court of New Mexico on all issues.³¹⁹ In the interim, the City, the EPA, the State of New Mexico, and Isleta Pueblo negotiated an agreement resulting in a new four-year NPDES permit for the City's waste treatment facility.³²⁰ Subsequently, the City sought to vacate the district court's opinion as moot.³²¹ The Tenth Circuit, however, found that the case was not moot "because the stipulation and agreement is not a final settlement of all claims brought in the City's suit."³²²

In affirming the district court, the Tenth Circuit also clarified several points. First, it emphasized that section 510 is a savings clause "that merely recognizes powers already held by the states."³²³ Like states, "[i]ndian tribes have residual sovereign powers that already guarantee the powers enumerated in § 1370, absent an express statutory elimination of those powers."³²⁴ As a result, the court concluded "that the EPA's construction of the 1987 amendment to the Clean Water Act – that tribes may establish water quality standards that are more stringent than those imposed by the federal government – is permissible because it is in accord with powers inherent in Indian tribal sovereignty."³²⁵ Thus, the Tenth Circuit emphasized inherent tribal authority over deference to the EPA's interpretation of the CWA in upholding a TAS tribe's right to create more stringent water quality standards than those for the surrounding state.

In contrast, the Tenth Circuit relied heavily on the EPA's role in upholding downstream tribal water quality standards to upstream, non-tribal dischargers. Dismissing the City's argument on appeal that Isleta Pueblo was in effect enforcing its standards outside of reservation boundaries, the Tenth Circuit concluded

318. *Id.*

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

320. *Id.* at 420.

321. *Id.*

322. *Id.* at 421.

323. *Id.* at 423 (citing 56 Fed. Reg. 64,886 (1991)).

324. *Id.*

325. *Id.*

that “tribes are not applying or enforcing their water quality standards beyond reservation boundaries. Instead, it is the EPA which is exercising its own authority in issuing NPDES permits in compliance with downstream state and tribal water quality standards. . . . [U]nder §§ 1311, 1341, 1342 and 1377, the EPA has the authority to require upstream NPDES dischargers, such as Albuquerque, to comply with downstream tribal standards.”³²⁶

The court also emphasized the EPA’s discretion in approving water quality standards that are more stringent than federal minimums require. After first noting that the City’s claim that the Pueblo’s standards were unattainable was belied by the settlement “which applies the Isleta Pueblo standards to Albuquerque,”³²⁷ the court emphasized the narrow scope of EPA review:

The EPA, however, reviews proposed water quality standards only to determine whether they are stringent enough to comply with the EPA’s recommended standards and criteria. If the proposed standards are more stringent than necessary to comply with the Clean Water Act’s requirements, the EPA may approve the standards without reviewing the scientific support for the standards. Whether the more stringent standard is attainable is a matter for the EPA to consider in its discretion; sections 1341 and 1342 of the Clean Water Act permit the EPA and states to force technological advancement to attain higher water quality.³²⁸

Because the City had not shown that the EPA failed to consider an important aspect of the Pueblo’s water quality standards, the Tenth Circuit upheld the district court’s determination that the EPA had not been arbitrary and capricious.

What emerges from the *City of Albuquerque* cases is a decided willingness for courts to rely upon the EPA’s permit-issuing authority as the primary means of resolving conflicts between states or a state and TAS tribe regarding differing water quality standards. This reliance is especially noticeable because – despite the New Mexico District Court’s reliance on *Arkansas v. Oklahoma* – the EPA used different standards to evaluate Oklahoma’s ability to affect the permit for an Arkansas discharger as opposed to the Isleta Pueblo’s ability to affect the permit for a New Mexico discharge. As the New Mexico District Court itself noted, the

326. *Id.* at 424.

327. *Id.* at 426 n.16. The court noted that, “[p]resumably, Albuquerque would not have agreed to the NPDES permit settlement if the water quality standards placed impossible demands on it.” *Id.* at n.16.

328. *Id.* (citations omitted).

EPA's support of downstream states appears to be inconsistent with its willingness to support downstream tribes.

In particular, the EPA's intention to require the City to meet the downstream tribe's water quality standards gave the district court pause. It noted that in *Arkansas v. Oklahoma*, the EPA "argued that the proper criterion to measure the effectiveness of a discharge limit in meeting a downstream standard is whether the discharge will measurably affect the water quality in the downstream river."³²⁹ In that case the EPA concluded that the discharge in Arkansas "would not measurably affect Oklahoma's water quality."³³⁰ In contrast, in *City of Albuquerque*, the EPA was "prepared to include limits in the City's NPDES permit to ensure that discharged water *at the facility outfall* meets the water quality standards of the downstream state without first concluding that the quality of the river water *five miles further downstream* will be measurably improved."³³¹ Although the issue of the City's NPDES permit was not before the court, the court raised "this issue of the agency's apparent inconsistency because it is one [the court found] troubling."³³²

As a more general matter, the courts may not be able to defer to the EPA's permitting decisions when the EPA does not directly issue the NPDES permit in question. To be sure, the EPA has indicated that it will use its authority to object to state-issued NPDES permits to ensure that upstream dischargers meet downstream water quality standards.³³³ Nevertheless, in situations where the EPA no longer has initial NPDES permitting authority and chooses not to protest a permit, the courts may find that they need to play a far more active role in harmonizing inconsistencies than the New Mexico District Court recognized.

4. A Tangent: The Clean Water Act as a Means to Expand Tribal Authority Generally

In a very different context from that facing the New Mexico District Court, the First Circuit in *Rhode Island v. Narragansett Indian Tribe*³³⁴ addressed the issue of tribal jurisdiction under the

329. *City of Albuquerque v. Browner*, 865 F.Supp. 733, 741 (D.N.M. 1993).

330. *Id.*

331. *Id.* at 741-42 (emphasis added).

332. *Id.* at 742.

333. Amendments Water Standards II, *supra*, note 108.

334. 19 F.3d 685 (1st Cir. 1994).

Indian Gaming Regulatory Act (“IGRA”).³³⁵ In particular, the court had “to determine whether [IGRA] applies to lands now held in trust by the United States for the benefit of the Narragansett Indian Tribe.”³³⁶ Although the court concluded that the Rhode Island Indian Claims Settlement Act of 1978³³⁷ gave the state civil regulatory jurisdiction over the lands in question, it also determined “that the Gaming Act does not specifically exempt the lands in questions; that the Narragansetts have concurrent jurisdiction over, and exercise governmental power with respect to, those lands, and, therefore, are entitled to invoke the Gaming Act; and that, to the extent of the jurisdictional conflict between the Settlement Act and the Gaming Act, the former is impliedly repealed.”³³⁸

In order to be entitled to rely on IGRA’s provisions, the Narragansett Tribe had to both have jurisdiction over the lands in question and exercise governmental power over them.³³⁹ In holding that the tribe had met the second of these requirements, the court in part noted that the Narragansett tribe “has obtained status as the functional equivalent of state for purposes of the Clean Water Act.”³⁴⁰ The First Circuit thus demonstrated that TAS status under the CWA can have broader implications for a tribe’s self-government and autonomy; it is not just limited to water quality.

B. *Section 401 Interactions in States with NPDES Permit Program Authority*

Under the CWA, people receiving licenses or permits from the federal government for activities that could affect water quality must receive certification from the affected state that their discharges will comply with the applicable effluent limitations, water quality standards, implementation plans, national standards of performance for new sources, and toxic and pretreatment effluent standards.³⁴¹ The U.S. Supreme Court has determined that section 401 certifications certify that the applicant and the entire activity — not just the discharge in question

335. 25 U.S.C. §§ 2701-2721, 18 U.S.C §§ 1166-1168 (1994).

336. Narragansett Indian Tribe, 19 F.3d at 688.

337. 25 U.S.C. §§ 1701-1716 (1994).

338. Narragansett Indian Tribe, 19 F.3d at 688-89.

339. *Id.* at 701 (citing 25 U.S.C. §§ 2710(d)(3)(A), 2710(b)(1), 2703(4) (1988)).

340. *Id.* at 703.

341. CWA § 401(a)(1), 33 USC § 1341(a)(1) (1994).

— will comply with the CWA.³⁴² Therefore, section 401 authorizes “additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.”³⁴³ However, states cannot create requirements; rather, “[t]he State can only ensure that the project complies with ‘any applicable effluent limitations and other limitations, under [33 U.S.C. §§ 1311, 1312]’ or certain other provisions of the Act, ‘and with any other appropriate requirement of State law.’ 33 U.S.C. § 1341(d).”³⁴⁴

As an initial matter, it should be noted that permitting and section 401 certifications are mutually exclusive procedures available to a state or TAS tribe for any given NPDES permit. A state or TAS tribe can assert section 401 certification authority over an NPDES permit only if the EPA issues that permit because section 401 certifications apply only to federally-issued permits.³⁴⁵ If the state or TAS tribe issues a given permit, section 401 does not apply.

If the EPA issues the NPDES permit, then section 401 interactions will depend upon where the discharge is located for permitting purposes and where it originates for certification purposes. Courts to date have largely glossed over the fact that, under the CWA, different definitions apply for purposes of determining regulatory jurisdiction over a point source and determining who has section 401 certification authority. The D.C. Circuit has implied that a point source discharge is “located” where its outfall occurs for both NPDES and section 401 purposes.³⁴⁶

In fact, the definition of “point source” focuses on the point where the discharge is added to navigable waters,³⁴⁷ while section 401 certifications come “from the State in which the discharge originates or will originate.”³⁴⁸ Nothing in the Act requires that a discharge’s point of origination be the same as its point of addition. Indeed, in a strictly physical, commonsense view, the two often are different when point sources use pipes to deliver their discharges to waterbodies some distance away.

342. PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology, 511 U.S. 700, 711 (1994).

343. *Id.* at 1909.

344. *Id.*

345. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1) (1994).

346. Kentucky v. Nuclear Regulatory Comm’n, 626 F.2d 995, 997 (D.C. Cir. 1980).

347. CWA § 502(14), 33 U.S.C. § 1362(14) (1994).

348. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1) (1994).

Under this split view of regulatory jurisdiction, the point of *addition* of a discharge to navigable waters would determine NPDES permitting jurisdiction, while the point of *origin* would determine section 401 certification authority.

No reported federal cases have addressed the issue of section 401 certification for Indian activities, tribes or reservations. Generally, four possibilities of regulatory jurisdiction exist. First, a given discharge addition could fall within state boundaries in a state with NPDES permitting authority. In that case, the state would issue the permit and section 401 would not apply. Downstream TAS tribes or states seeking to protect their water quality standards would have to encourage the EPA to protest the state-issued permit or seek other means of resolving their disputes.

Second, if the discharge addition falls within the boundaries of a tribe with TAS status for permitting, the tribe would issue the permit and section 401 would not apply. Again, downstream states and tribes would either have to encourage the EPA to object to the permit or find other means to resolve their differences.

Third, the discharge addition could fall within the boundaries of a tribe without TAS status at all, with both the discharge addition and discharge origin being within the reservation. In this case, the EPA would issue the permit regardless of the state's permitting authority. Moreover, the tribe would not have certification authority, and the EPA would issue the section 401 certification for it as well.³⁴⁹

The EPA generally "assume[s] that existing water quality standards remain applicable" to Indian reservations.³⁵⁰ The EPA also recognizes that "to ignore previously developed State standards would be a regulatory void that the EPA believes would not be beneficial to the reservation water quality."³⁵¹ Nevertheless, the "EPA will give serious consideration to Federal promul-

349. "In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator." 33 U.S.C. § 1341(a)(1) (1994). Consistent with this provision, EPA issues section 401 certifications for the NPDES permits that it issues for activities on Indian reservations. See NPDES General Permit for Storm Water Discharges Associated with Industrial Activities on Indian Lands in Oregon, 57 Fed. Reg. 35774, 35775 (1992) (EPA Region 10 certified, pursuant to section 401, that storm water discharges on Indian lands in Oregon that an NPDES general permit issued by EPA covers "will comply with the applicable provisions of CWA sections 208(e), 301, 302, 303, 306, and 307").

350. ENVTL PROTECTION AGENCY, WATER QUALITY STANDARDS HANDBOOK 1-17 (Sept. 15, 1994).

351. *Id.*

gation of water quality standards on Indian lands where EPA finds a particular need.”³⁵²

These policies suggest that, as a general matter, the EPA’s section 401 certifications will assume that *state* effluent limitations and water quality standards are the applicable provisions for determining compliance with the CWA sections listed in section 401. However, the EPA has made clear that state standards and limitations are the applicable provisions only as a matter of EPA policy, not as a matter of federal law, and CWA section 401 does not require that the applicable provisions be state water quality standards and limitations. Therefore, if the EPA has in fact promulgated water quality standards for Indian lands, the section 401 certification would reference those standards. Nevertheless, the surrounding state and other downstream states and tribes could use section 401 to ensure that their water quality standards would be met.

Finally, in the fourth and most complicated situation, the discharge addition could be within the borders of a state without NPDES permit authority or of a tribe with TAS status for water quality standards but not for NPDES permitting, while the discharge’s origin was within the surrounding state’s, an adjacent state’s, or another TAS tribe’s jurisdiction. If such a situation ever arises, it is likely to spawn two jurisdictional battles: whether the location of the discharge for NPDES and section 401 authority should be the same, and, if so, whether the point of addition or the point of origin is the better choice.

If a court happens to adopt the split view, the EPA would issue the NPDES permit, but the surrounding state, adjacent state, or other TAS tribe would have authority to issue or deny the section 401 certification. The tribe or state of addition would thus be relegated to the status of a downstream state for section 401 purposes even though the discharge “occurred,” for NPDES purposes, within its boundaries.

Courts faced squarely with this last situation would likely opt to locate a discharge in the same place — whether that be the point of addition or the place or origin — for both NPDES permitting and section 401 purposes. However, as the number of TAS tribes increases, courts in states with several tribes — and hence subject to increasingly complex border issues — may not have the luxury of deciding the law governing section 401 and

352. *Id.*

NPDES permitting discharge locations simultaneously. As such, the law governing discharge location for section 401 certifications could diverge from that governing the location of point source discharges, effectively imposing the split view and its arguably absurd regulatory consequences on states and TAS tribes.

C. *Other State-Tribal Interactions Regarding Water Quality*

1. Dispute Resolutions with EPA

In adding section 518 to the CWA, Congress recognized that conflicts might arise between TAS tribes and their adjacent states. Thus, it required the EPA to “provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water.”³⁵³

In compliance with this requirement, the EPA has promulgated regulations to establish a dispute resolution mechanism for tribes and states.³⁵⁴ When disputes arise between tribes and states “as a result of differing water quality standards on common bodies of water,”³⁵⁵ the EPA’s regional administrator “will attempt to resolve such disputes” only where:

- (1) The difference in water quality standards results in unreasonable consequences;
- (2) The dispute is between a State . . . and a Tribe which EPA has determined is eligible to the same extent as a State for purposes of water quality standards;
- (3) A reasonable effort to resolve the dispute without EPA involvement has been made;
- (4) The requested relief is consistent with the provisions of the Clean Water Act and other relevant law;
- (5) The differing State and Tribal water quality standards have been adopted pursuant to State and Tribal law and approved by EPA; and
- (6) A valid written request has been submitted by either the Tribe or the State.³⁵⁶

The EPA did not define “unreasonable consequences” when it originally proposed its dispute resolution mechanism in 1989 “because the occurrence of such consequences is dependent on the

353. CWA § 518(e), 33 U.S.C. § 1377(e) (1994).

354. 40 C.F.R. § 131.7 (1996).

355. 40 C.F.R. § 131.7(a) (1996).

356. 40 C.F.R. § 131.7(b) (1996).

unique circumstances associated with the dispute.”³⁵⁷ Similarly, when it amended the dispute resolution procedure two years later, the EPA again refused to define the term, offering several justifications: “(1) It would be presumptuous and unjustified Federal intrusion into local and State concerns for the EPA to define what unreasonable consequences might be as a basis for a national rule, (2) EPA does not want to unnecessarily narrow the scope of problems to be addressed by the dispute resolution mechanism, and (3) the possibilities of what might constitute an unreasonable consequence are so numerous as to defy a logical regulatory requirement.”³⁵⁸ While these are legitimate concerns, the resulting regulations give the EPA considerable discretion to determine if it will become involved in a dispute. This uncertainty may prompt states and tribes to negotiate their own settlements.

Even if the EPA does initiate the dispute resolution mechanism, its regulations do not establish a process whereby the EPA can bind the state and tribe to a solution against their will. If the tribe and state “have entered into an agreement that resolves the dispute or establishes a mechanism for resolving a dispute, EPA shall defer to this agreement where it is consistent with the Clean Water Act and where it has been approved by EPA.”³⁵⁹ Otherwise, the EPA’s regulations establish mediation as the normal first process for dispute resolution.³⁶⁰ Arbitration is also an option,³⁶¹ but “[t]he parties are not obligated to abide by the arbitrator’s or arbitration panel’s recommendation unless they voluntarily entered into a binding agreement to do so.”³⁶² If all else fails, “the Regional Administrator may appoint a single official or panel to review available information pertaining to the dispute and to issue a written recommendation for resolving the dispute.”³⁶³

The EPA considered including involuntary binding arbitration and federal promulgation of applicable water quality standards as potential dispute resolution mechanisms.³⁶⁴ However, “[the] EPA does not believe . . . that the Agency has the authority,

357. Amendments to Water Standards I, *supra* note 61, at 39100.

358. Amendments to Water Standards II, *supra* note 107, at 64888.

359. 40 C.F.R. § 131.7(e) (1996).

360. 40 C.F.R. § 131.7(f)(1)(i) (1996).

361. 40 C.F.R. § 131.7(f)(2) (1996).

362. 40 C.F.R. § 131.7(f)(2)(iv) (1996).

363. 40 C.F.R. § 131.7(f)(3) (1996).

364. Amendments to Water Standards I, *supra* note 61, at 39099.

under CWA sections 518 and 303, to compel a Tribe or a State to submit to binding arbitration of a water quality standards dispute.”³⁶⁵ The EPA also did not include federal promulgation for two reasons. First, “the EPA does not believe that the Agency has the authority to promulgate Federal standards which are less stringent than those adopted by a State or Tribe and approved by EPA as a means of resolving a State/Tribal dispute.”³⁶⁶ Second, although “federal promulgations are authorized by the CWA where the State or Tribe adopts water quality standards that are not compliant with the requirements of the CWA,” the EPA had already described its authority to take over the promulgation in other regulations.³⁶⁷

The net effect of these regulations is that the EPA can bind a disputing tribe and state only if neither has promulgated water quality standards or if their promulgated standards violate the CWA – an unlikely scenario, given that the dispute resolution mechanism requires that duly promulgated standards be in conflict. As a result, if state-tribal disputes reach federal courts, those courts may not always – or even often – have EPA determinations to rely upon. As one commentator has recognized:

From the legislative history, the lack of foresight into how section 518 would ultimately be implemented is evident. Those who expected EPA to be involved in the “disposition” of situations where there were unreasonable consequences did not foresee that the autonomy offered by EPA to standard setting jurisdictions was not to be so easily overturned by Congress and that EPA would not find in section 518 a mandate to actually resolve disputes. And those who did not believe that stream standards could have an effect outside tribal lands were not listening to their colleagues, who anticipated conflicts and provided a provision to address them.³⁶⁸

Instead, the EPA’s non-binding dispute resolution mechanism may serve to put courts in a position of having great power to determine the upstream and downstream effects of tribal water quality standards without much guidance from the EPA.

365. *Id.* at 39100.

366. *Id.*

367. *Id.*

368. Denise D. Fort, *State and Tribal Water Quality Standards Under the Clean Water Act: A Case Study*, 35 NAT. RESOURCES J. 771, 797 (1995).

2. Agreements Pursuant to the Clean Water Act

Section 518 explicitly contemplates state-tribal agreements to protect water quality. “In order to ensure the consistent implementation of the requirements of [the CWA], an Indian tribe and the State or States in which the lands of such tribe are located may enter into a cooperative agreement, subject to the review and approval of the Administrator, to jointly plan and administer the requirements of [the CWA].”³⁶⁹ The EPA will defer to these agreements if they are consistent with the CWA and the EPA has approved them. “[The] EPA recommends that such agreements be entered into as a basic means of resolving disputes,” but it advises “that such agreements must comport with the requirements of the [CWA].”³⁷⁰

State-tribal agreements offer several means of resolving conflicts. Agreements might provide that state water quality standards apply on the TAS reservation,³⁷¹ thus eliminating the differences in standards that would cause the downstream party to object. In a variation on this theme, the State of Washington and the Colville Indian Tribe entered “an agreement that water quality standards on and off the reservation will be as similar as possible.”³⁷² In a companion agreement with the EPA, Washington agreed – without conceding its own authority – that the EPA would issue NPDES permits for the tribe until the tribe assumed the NPDES program.³⁷³ The EPA promulgated water quality standards for the tribe to give effect to these agreements.³⁷⁴

Alternatively, state-tribal agreements could provide more binding procedures for dispute resolution. Such agreements would eliminate much of the uncertainty inherent in the EPA’s dispute resolution procedure and could provide for relatively quick and final resolutions of disputes. Such agreements would help ensure that state and tribal resources were spent on protecting water quality instead of on determining who had authority to do so.

369. CWA § 518(d), 33 U.S.C. § 1377(d).

370. Amendments to Water Standards II, *supra* note 107 at 64889.

371. *Id.*

372. Water Quality Standards for the Colville Indian Reservation, 54 Fed. Reg. 28622, 28623 (1989).

373. *Id.*

374. *Id.* at 28622.

3. Agreements Pursuant to the Indian Gaming Regulatory Act

The Indian Gaming Regulatory Act ("IGRA")³⁷⁵ constitutes one source of possible preemption of state regulation. Under IGRA, casino-type gambling is permitted on tribal reservations pursuant to a tribal-state compact,³⁷⁶ which is also the mechanism whereby a tribe might seek to have state laws and state jurisdiction apply to activities conducted on Indian land.³⁷⁷ "Indian tribes have the exclusive right to regulate Indian gaming activity on Indian lands."³⁷⁸

The U.S. Supreme Court has not addressed preemption issues under IGRA. However, in the IGRA context, two issues may be critical to a state's water-quality regulation: first, whether the tribal-state compact explicitly addresses water quality issues; and second, if it does not, whether water-quality-related activities are properly considered part of the gaming activity and thus are within the IGRA's scope. Even if water quality issues are generally *not* considered to be part of the gaming activity, some compacts include water quality language. If they do, that language probably controls.

Therefore, the drafting of gaming compacts could be critical in determining water quality regulatory jurisdiction for some gaming facilities. For example, in Oregon, the Cow Creek Gaming Compact explicitly provides that:

Tribal ordinances and regulations governing water discharges from the gaming facilities shall be at least as rigorous as standards generally imposed by the laws and regulations of the State relating to public facilities; provided, however, that to the extent that federal water discharge standards specifically applicable to the Indian lands would preempt such State standards, then such federal standards shall govern.³⁷⁹

The Cow Creek compact generally provides that either tribal law or federal law will apply to water discharges from gaming facilities on the reservation. If tribal law applies, it must be at

375. Pub. L. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-21, 18 U.S.C. §§ 1166-68).

376. 25 U.S.C. § 2710(d).

377. S. REP. NO. 100-446, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075-76.

378. 25 U.S.C. § 2701(5) (1994).

379. TRIBAL-STATE COMPACT FOR REGULATION OF CLASS III GAMING BETWEEN THE COW CREEK BAND OF UMPQUA TRIBE OF INDIANS AND THE STATE OF OREGON 26 (Oct. 2, 1992).

least as strict as state water quality law for public facilities. Because the compact distinguishes between “standards generally imposed by laws and regulations of the State” and “federal water discharge standards,” if tribal ordinances and regulations govern water discharges, those regulations must match *all* state laws and regulations imposing standards on water discharges.

The Cow Creek compact fails to address three important issues. First, it is limited to gaming *facilities* and does not address other discharges. Second, it does not address regulatory issues when discharges from gaming facilities are mixed with other wastes, as is often the case. Third, it does not discuss the EPA’s role.

The language of the Cow Creek compact also poses some critical ambiguities. It does not define the “standards generally imposed” on water discharges by state law and regulation. More important, it does not make clear when federal law would actually apply. Presumably, such federal discharge standards would not have to be as strict as state law because federal law only applies if it would preempt state law. Specifically, federal standards govern if “federal water discharge standards specifically applicable to the Indian lands would preempt such State standards.” “Water discharge standards” is not a term of art in federal water pollution law. The term could arguably include federal permit limitations, federal water quality programs made applicable to the Indian lands involved, federally-established load allocations under the TMDL program, etc.

The Cow Creek compact does not specify if federal standards would preempt state law. For example, any existing federal standards would arguably preempt state law simply because they are federal standards regulating an Indian tribe on Indian lands. That interpretation, however, would seem to undercut the tribe’s ability to pass its own water quality ordinances, because it would mean that if federal standards existed, they would control even if the tribe wanted to impose more stringent standards.

Although gaming compacts under IGRA could solve many issues regarding water quality jurisdiction, existing compacts like Cow Creek indicate that they only multiply the potential jurisdictional battles rather than clarifying water quality authority for activities on Indian reservations. Nevertheless, as the Cow Creek Compact *does* indicate, compacts pursuant to IGRA are more likely to contemplate a regulatory situation that is the reverse of current case law involving Indian tribes. Unlike the Isleta

Pueblo tribe trying to protect water quality for religious purposes, tribes building gambling casinos use reservation waters for waste and sewage disposal. Tribal interests may not weigh as heavily in favor of having water quality standards that are more strict than the ones in surrounding states.

Given the increasing number of tribes making use of IGRA's authority to construct casinos and other gambling facilities, gaming compacts provide states a viable means of settling major issues of water quality regulatory jurisdiction without having to go to court. Because such compacts would continue to be in effect even after the tribe at issue acquired its own NPDES permitting authority, gaming compacts could provide downstream states with effective protections even after they lose their rights under section 401.

V.

CONCLUSION

In enacting section 518 of the Clean Water Act, Congress multiplied the potential jurisdictions for NPDES permitting and section 401 certification purposes without clarifying how to draw the regulatory jurisdictional boundaries. Case law to date favors downstream tribes over downstream states, and, unless the EPA issues the NPDES permit, dispute resolution procedures are unclear and largely non-binding. It is unclear who can enforce the CWA when state-owned waters are involved or when a discharger pipes pollutants across regulatory boundaries before discharging them into water. The EPA has not been consistent in its treatment of downstream entities. It is entirely unclear what will happen when a tribe wants to use less stringent water quality standards than downstream states or tribes.

Given all these uncertainties, states and tribes wishing to avoid litigation would be wise to enter into binding agreements regarding water quality issues for common waterbodies. In order to be effective, these agreements need to specify what water quality standards apply to what discharges, who will issue any NPDES permits, how borders will be determined, what role the EPA will play, and how disputes will be resolved.

The alternative, as the cases to date have shown, would seem to be years of litigation ending with a negotiated settlement. The Clean Water Act's goals and purposes can be better met by tribes and states creating their own binding rules to protect water quality.