ENDING THE INTERMINABLE GAP IN INDIAN COUNTRY WATER QUALITY PROTECTION

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Tribal self-determination in modern environmental law holds the tantalizing prospect of translating indigenous environmental value judgments into legally enforceable requirements of federal regulatory programs. Congress authorized this approach three decades ago, but few tribes have sought primacy even for foundational programs like Clean Water Act water quality standards, contributing to potentially serious environmental injustices. This Article analyzes in detail EPA's recent attempt at reducing tribal barriers—reinterpreting the Act as a congressional delegation of tribal jurisdiction over non-Indians—and the early indications its results are insignificant. The Article then proposes an unconventional solution ostensibly at odds with tribal self-determination: promulgation of national, federal water quality standards for Indian country. EPA's Indian Program actually began this way, as an interim step awaiting tribes' assumption of federal regulatory programs. Thirty years later, the seemingly interminable regulatory gap in Indian country water quality protection remains, and EPA has a legal and moral responsibility to close it.

Table of Contents

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> *From an indigenous perspective, the "self" of the right to self-determination can be conceptualized as not just the people but also the territory, the web of life, the flora and fauna, and the natural resources upon which life depends. An Indian tribe, in exercising its right to protect the environment, may understand the "self" in this way: the reservation is the place where the tribe's way of life exists, and its way of life includes much more than the people.*
>
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Introduction

The Clean Water Act ("CWA")[2] is built on the model of cooperative federalism used in nearly all modern U.S. environmental laws.[3] In the context of this Article, that federal-local partnership might be best typified by the general requirement that permits for water pollution discharges contain two kinds of legally enforceable conditions. The first permit conditions are technology-based standards, set by EPA for categories of industry and uniform across the country.[4] The second kind of permit conditions are water quality–based standards,

1. Dean B. Suagee, *A Human Rights–Based Environmental Remedy for the Legacy of the Allotment Era in Indian Country*, 29 Nat. Res. & Env't 3, 4 (2014).
2. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended in scattered sections of 33 U.S.C.).
3. *See* EPA Draft Policy on Federal Oversight of Environmental Programs Delegated to States (Nov. 25, 1983), 14 Env't Rep. 1449, 1449–50 (Dec. 16, 1983) ("EPA and the states have been given joint responsibility by Congress for national environmental programs [and] must develop a workable partnership in which each performs different activities that are based on the partner's unique strengths.").
4. *See* 33 U.S.C. § 1342(a)(1)(A); 40 C.F.R. § 122.44(a)(1) (2019).

set by the state (or qualified Indian tribe) representing site-specific value judgments about the water receiving the pollution.[5]

Site-specific water quality standards ("WQS") are critically important for Indian tribes as indigenous peoples face similar but not identical health risks that non-Indians do. Tribal welfare concerns are often quite different because environmental quality is inextricably entwined with indigenous culture based on ancient relations with the natural environment.[6] Hence, water pollution permits that do not account for indigenous cultural uses of water risk environmental injustice in a manner reminiscent of early colonial attempts at assimilation.

The national policy of tribal self-determination held obvious possibilities for incorporating cultural values into the water pollution permitting process, and although the policy's origin coincided with the birth of the modern environmental era in 1970, Congress initially overlooked tribes in providing local roles to state governments in the CWA. The newly created EPA[7] recognized the opportunity first, adopting a policy acknowledging tribes as the appropriate local governments for making site-specific environmental value judgments that would animate federal programs. Congress followed suit, amending the CWA to authorize tribal "treatment as a state" ("TAS") for a number of programs including WQS.[8]

Tribal TAS status effectively embraced self-determination by placing the responsibility for articulating tribal uses of reservation waters and the criteria for protecting them on tribes. Those tribal value judgments were then to be translated into pollution permit conditions ensuring protection of tribal health and welfare. A handful of Indian tribes developed WQS with great success, but the overwhelming majority of tribes have not taken advantage of the opportunity.[9] A number of reasons may explain their hesitation, but fear of litigation challenging tribal sovereignty and the status of their lands are likely key factors. EPA used its administrative environmental expertise to limit some litigation risks at the outset, and when that resulted in few tribal TAS programs, it exercised that discretion to do so again recently.

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5. *See* 33 U.S.C. § 1342; 40 C.F.R. § 122.44(d)(1).

6. *See* Dean B. Suagee et al., *Environmental Justice and Indian Country*, 30 Hum. Rts. 16 (2003) (noting different disproportionate impacts stemming from the ways in which tribal cultures are rooted in the environment materially through hunting, fishing, gathering, crafts; religiously through ceremonies and other practices, including oral traditions; and through their identity perception, creating "a unique type of suffering" when sacred places are damaged or destroyed).

7. *See* Exec. Off. of the President, Reorganization Plan No. 3 of 1970 (1970), https://perma.cc/P86V-GYHY.

8. Clean Water Act Amendments of 1987, Pub. L. No. 100-4, § 506, 101 Stat. 76 (codified at 33 U.S.C. § 1377(e)).

9. *See EPA Actions on Tribal Water Quality Standards and Contacts*, EPA, https://perma.cc/685W-642M.

This Article addresses in detail EPA's efforts to reduce litigation risks for tribes establishing WQS under the CWA, but concludes that EPA can no longer justify its tolerance of the significant regulatory gap that exists in Indian country water quality protection. Part I briefly describes the central role WQS play in the implementation of the CWA's main programs. Part II explores the complex legal context EPA confronted in implementing Congress' TAS authorization for tribes in protecting water quality. Part III analyzes EPA's recent reinterpretation of the Act after decades of tribal inaction raised the question of whether tribes desire self-determination over reservation water quality protection. Part IV raises a continuing litigation risk for tribal environmental implementation as well as EPA's Indian Program. Part V proposes EPA promulgate federal WQS ("FWQS") for Indian country, closing the three-decades-old regulatory gap in nationwide protection, addressing the environmental injustice it created, and perhaps spurring tribal action tailoring the federal standards to site-specific values or finally developing tribal WQS ensuring indigenous water uses are legally recognized and protected.

I. Background on the Significance of Water Quality Standards

Enacted in 1972 as amendments to the Federal Water Pollution Control Act,[10] the statute now commonly known as the Clean Water Act relied heavily on the modern cooperative federalism model first set out in the federal Clean Air Act[11] ("CAA") amended just two years earlier. Congress clearly intended the CWA's main program—NPDES[12] permits for water pollution discharged from point sources—to be implemented by states under EPA's supervision.[13] States were not required to do so, and Congress authorized EPA's direct implementation if states did not,[14] but most states did seek and receive NPDES permit program delegation from EPA.[15] Whichever government issued the permits, the federal-state partnership was built into the two fundamental kinds of permit conditions: those based on technological pollution control options

10. Pub. L. No. 92-500, 86 Stat. 816 (amending the Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948) (codified as amended in scattered sections of 33 U.S.C.)).
11. Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended in scattered sections of 42 U.S.C.).
12. Environmental law is rife with acronyms. NPDES is the commonly used reference for permits issued under the National Pollution Discharge Elimination System. *See* 33 U.S.C. § 1342.
13. *See id.* § 1342(b).
14. *Id.* § 1342(a)(1).
15. EPA currently reports forty-seven states have been delegated permit authority. *See About NPDES*, EPA, https://perma.cc/S38Y-XKAS.

identified by EPA,[16] and those based on water quality at the point of discharge as determined by the state.[17]

The starting point for NPDES permits is compliance with national effluent limits based on technological pollution control techniques identified by EPA for categories and subcategories of industry.[18] Technology-based permit conditions are uniform across the nation and do not take account of site-specific circumstances or needs. In contrast, the other fundamental condition of NPDES permits is premised on site-specific conditions. If the uniform technology-based standards cannot achieve the level of water quality needed for the uses designated at the point of discharge, then additional permit conditions are required[19] to ensure progress toward the CWA's goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters.[20]

That progress is measured primarily by WQS.[21] For each body (or segment) of surface water (rivers, lakes, streams, etc.) within its territory, the state first designates the uses of the water.[22] At a minimum, states must designate protection and propagation of aquatic species, and human recreation,[23] often called the fishable/swimmable standards. The state then sets water quality criteria to protect the minimum and any additionally designated uses. These criteria are typically stated in numeric terms,[24] but they can also be narrative descriptions of water quality protective of the designated uses.[25] EPA issues guidance on water quality criteria that states may adopt,[26] or states may use alternate means to set criteria so long as they show the criteria are protective of the designated uses and are attainable.[27] While each state's criteria must ensure protection of the CWA's minimum fishable/swimmable uses, states are free to set

16. 33 U.S.C. § 1342(a)(1)(A).
17. *Id.* § 1311(b)(1)(C).
18. *Id.* § 1342(a)(1)(A); 40 C.F.R. § 122.44(a)(1) (2019).
19. 33 U.S.C. § 1342(a)(1)(B); 40 C.F.R. § 122.44(d)(1).
20. 33 U.S.C. § 1251(a).
21. *Id.* § 1313.
22. *Id.* § 1313(c)(2)(A).
23. *See id.* § 1251(a)(2) (stating "it is the national goal that wherever attainable . . . water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water").
24. *See* 40 C.F.R. § 131.11(b)(1). For example, maximum levels of selenium in fish tissue might be "8.5 mg/kg dw or 11.3 mg/kg dw muscle (skinless, boneless filet)." *See* EPA's Model Water Quality Standards Template for Waters on Indian Reservations 30 (2016) [hereinafter Model WQS Template], https://perma.cc/2KGU-QAAL.
25. *See* 40 C.F.R. § 131.11(b)(2). For example, "[a]ll waters . . . shall be free from toxic, radioactive, conventional, non-conventional, deleterious or other polluting substances in amounts that will prevent attainment of the designated uses specified." Model WQS Template, *supra* note 24, at 8.
26. *See* 33 U.S.C. § 1314.
27. *See* 40 C.F.R. § 131.11(b)(1)(ii) (criteria based on EPA guidance but modified to reflect site-specific conditions); *id.* § 131.11(b)(1)(iii) (criteria based on other scientifically defensible methods).

criteria more stringent than those recommended by EPA.[28] Together, the state's designated uses and criteria constitute WQS.[29]

Each state's WQS represents value judgments made by the state in balancing its citizens' environmental, economic, social, and cultural interests. Those value judgments are animated legally by discharge permit conditions. If the uniform national technology-based standards do not ensure a proposed pollution discharge will comply with site-specific WQS, then additional permit conditions are required to ensure compliance.[30] Where the state issues the permit, it presumably includes conditions protective of its waters. Consistency with the CWA is ensured by requiring draft permits be sent to EPA for review of applicable WQS.[31] For states where EPA issues NPDES permits, and for the various other permits and licenses issued by other federal agencies for discharges into a state's waters, CWA section 401 requires certification by the state that proposed conditions in the permit or license comply with the state's WQS.[32]

Legally permitted pollution discharged in one state sometimes flows into a downstream state. As with the other federal environmental laws, Congress of course sought nationwide protection in the CWA. All states' WQS must ensure protection of the CWA's minimum uses, and if all states simply adopted minimum criteria then transboundary pollution would be sufficiently controlled by conditions imposed at the point of discharge. However, not all states select minimum standards. Congress accommodated states' police powers for protecting the public's health and welfare by authorizing state standards more stringent than minimum federal ones.[33] EPA lacks authority to second-guess the state's judgment for a more stringent standard; EPA ensures only that WQS protects the CWA's minimum uses and is attainable.[34] Two key approaches preserve the integrity of a downstream state's more stringent criteria. One is the requirement that upstream states' WQS ensure attainment and maintenance of downstream jurisdictions' WQS.[35] The other requirement is that state-issued NPDES permits contain conditions ensuring pollution discharges do not violate WQS of downstream states.[36]

28. 33 U.S.C. § 1370.

29. *Id.* § 1313(c)(2)(A). EPA also requires states to establish antidegradation requirements so that waters of exceptionally high quality are maintained. *See* 40 C.F.R. § 131.12.

30. 33 U.S.C. § 1342(a)(1)(B); 40 C.F.R. § 122.44(d)(1) (2019).

31. *See* 33 U.S.C. § 1342(d)(1).

32. *See id.* § 1341(a).

33. *See id.* § 1370.

34. *Compare* 40 C.F.R. § 131.4(a) (state authority to set WQS more stringent than federal minimum standards) *with id.* § 131.5(b) (EPA approves state WQS that meet minimum federal requirements).

35. *Id.* § 131.10(b).

36. *Id.* § 122.4(d); s*ee also* Arkansas v. Oklahoma, 503 U.S. 91, 105–07 (1992).

II. Tribal Water Quality Standards

Of all federal agencies not directly charged with regulating Indian country, EPA indisputably has the most robust Indian program, which coincidentally began in the context of the CWA's NPDES program. Congress' 1972 version of the CWA was silent on Indian country implementation.[37] As EPA developed its CWA regulations for state primacy in 1973, the Supreme Court echoed a longstanding federal Indian law theme: states generally lack regulatory authority over Indians in Indian country unless clearly authorized by Congress.[38] Nothing in the CWA reflected such congressional authorization, so EPA's 1973 regulations said an otherwise satisfactory state program would not be approved for Indian activities on Indian lands within the state.[39]

A. Background on EPA's Indian Program

That legally correct conclusion and logical result revealed Congress' significant oversight in building the cooperative federalism model into modern environmental law: EPA's state partners could not achieve nationwide environmental protection because of their limited authority in Indian country. In other words, Congress had (inadvertently) created a regulatory gap in national environmental protection with serious ramifications:

> [W]ithout some modification, our programs, as designed, often fail to function adequately on Indian lands. This raises the serious possibility that, in the absence of some special alternative response by EPA, the environment of Indian reservations will be less effectively protected than the environment elsewhere. *Such a result is unacceptable.* "The spirit of our Federal trust responsibility and the clear intent of Congress demand full and equal protection of the environment of the entire nation without exceptions or gaps under the programs for which EPA is responsible."[40]

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37. Despite its silence, EPA assumed the CWA applied to Indian country. *Cf.* Davis v. Morton, 469 F.2d 593, 597 (10th Cir. 1972) (applying the National Environmental Policy Act's requirement for an environmental impact statement to an Indian pueblo despite the law's silence on its application, in the first reported Indian country environmental law case in the modern era, decided the same year the CWA was enacted).

38. *See* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 170–71 (1973); *see also* Rice v. Olson, 324 U.S. 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.").

39. National Pollutant Discharge Elimination System, 38 Fed. Reg. 13,528, 13,530 (May 22, 1973) (codified at 40 C.F.R. § 125.3).

40. Memorandum from Barbara Blum, Deputy Adm'r, EPA, to Reg'l Adm'rs et al., EPA attach. at 3 (Dec. 19, 1980) (on file with author) [hereinafter 1980 Indian Policy].

EPA's recognition that American Indians potentially faced disproportionate health and welfare risks because of the regulatory gap preceded the environmental justice ("EJ") movement by more than a decade. EPA's 1973 NPDES regulations and other actions taken in the mid-1970s, discussed below, were arguably the agency's first programmatic EJ actions. The "special alternative response" selected for the CWA in 1973 was that EPA would directly implement the NPDES program for Indian facilities rather than delegate it to states.[41] Direct implementation accounted for states' limited authority in Indian country, and gave some substance to the federal government's trust responsibility to tribes. The 1973 rule thus set the foundation of the agency's nascent Indian Program: EPA would directly implement federal environmental programs rather than delegate them to states.

The natural next step in the spirit of cooperative federalism was finding an alternate local partner. Within just a few years, Congress affirmed state-like environmental regulatory roles for tribes in two specific programs,[42] generating momentum for an administrative cross-program effort. In 1980, EPA became the first federal agency with an official Indian Policy.[43] The "heart" of the Policy was EPA's view that tribal governments should play "a key role in implementing pollution control programs affecting their reservations."[44] EPA refined and reissued its Indian Policy in 1984, which continues to guide the agency today.[45] The 1984 Indian Policy's "cornerstones" were respect for tribal self-determination and a commitment to working with tribes on a government-to-government basis, implemented by "including Tribal Governments as partners in decision-making and program management on reservation lands, much as we do with State Governments off-reservation."[46] More specifically, the Policy said: "The Agency will recognize Tribal Governments as the primary parties for

41. National Pollutant Discharge Elimination System, 38 Fed. Reg. at 13,530.

42. *See* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 127(a), 91 Stat. 685 (codified at 42 U.S.C. § 7474(c)) (authorizing reservation airshed redesignations by Indian governing bodies); Federal Insecticide, Fungicide and Rodenticide Act Amendments, Pub. L. No. 95-396, 92 Stat. 819, 834 (1978) (codified at 7 U.S.C. § 136u(a)) (providing federal assistance to tribes to train and certify applicators pursuant to EPA regulations requiring tribal certification of non-Indian commercial applicators, *see* 40 C.F.R. § 171.307).

43. In 1980 and 1981, the national organization Americans for Indian Opportunity surveyed three federal departments and over twenty-five federal agencies with statutory responsibilities affecting Indian country health. Its report listed EPA as the sole federal agency with an official Indian policy, citing the 1980 Indian Policy. *See* AMS. FOR INDIAN OPPORTUNITY, HANDBOOK OF FEDERAL RESPONSIBILITY TO INDIAN COMMUNITIES IN AREAS OF ENVIRONMENTAL PROTECTION AND INDIVIDUAL HEALTH AND SAFETY 85 (1981).

44. Memorandum from Barbara Blum, Deputy Adm'r, EPA, to Reg'l Adm'rs et al., EPA (Dec. 19, 1980) (on file with author) (transmitting the 1980 INDIAN POLICY *supra* note 40).

45. EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (1984), https://perma.cc/R26B-KFHX [hereinafter 1984 INDIAN POLICY].

46. OFF. OF EXTERNAL AFFS., EPA Cover Memorandum on the 1984 INDIAN POLICY (on file with author).

setting standards, making environmental policy decisions and managing programs for reservations, consistent with Agency standards and regulations."[47]

Knowing it had very limited statutory authority to realize that goal, EPA included a Policy Principle that it would take steps "to remove existing legal and procedural impediments to working directly and effectively with tribal governments on reservation programs."[48] EPA's Indian Policy implementation strategy set a primary objective of identifying statutory constraints and amending the laws where appropriate.[49] With the help of interested tribes, EPA quickly obtained state-like tribal regulatory roles in three key environmental regulatory statutes.[50] In 1986, Congress amended the Safe Drinking Water Act ("SDWA") authorizing EPA to "treat Indian Tribes as States" for groundwater and public drinking water protection programs.[51] In 1987, Congress authorized EPA to "treat an Indian tribe as a State" for the CWA's surface water protection programs,[52] and in 1990 to "treat Indian tribes as States" for the CAA's air quality management programs.[53] While the language varied slightly among the statutes, all explicitly authorized EPA's treatment of tribes in the same manner as states for key environmental program roles and so became known generally as tribal "treatment as a state" or TAS provisions.[54]

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47. 1984 INDIAN POLICY, *supra* note 45, at 2.

48. *Id.* at 3.

49. OFF. OF FED. ACTIVITIES, EPA, INTERIM STRATEGY FOR IMPLEMENTATION OF THE EPA INDIAN POLICY 2–3 (1985).

50. Congress also authorized TAS for the nonregulatory programs addressing cleanup of hazardous substances and restoration of natural resource damages under the Comprehensive Environmental Response, Compensation and Liability Act, also known as Superfund. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 207(e), 100 Stat. 1613 (codified at 42 U.S.C. § 9626). One important regulatory statute lacking a TAS provision is the Resource Conservation and Recovery Act ("RCRA") that manages solid and hazardous waste. 42 U.S.C. §§ 6901–6986. RCRA has not been substantially amended since EPA adopted its Indian Policy and so no TAS provision has been proposed. EPA attempted to extend state-like RCRA program roles to tribes administratively but was rebuffed. *See* Backcountry Against Dumps v. EPA, 100 F.3d 147, 151 (D.C. Cir. 1996) (finding RCRA's definition of tribes as municipalities precluded EPA from treating tribes as states).

51. Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, § 302(c), 100 Stat. 665 (codified at 42 U.S.C. § 300j-11(a)).

52. Water Quality Act of 1987, Pub. L. No. 100-4, § 506, 101 Stat. 76 (codified at 33 U.S.C. § 1377(e)).

53. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 107(d), 104 Stat. 2464 (codified at 42 U.S.C. § 7601(d)).

54. The practice of equating tribes with states for environmental program roles originated nearly a decade earlier. In the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 127(a), 91 Stat. 733 (codified at 42 U.S.C. § 7474), Congress authorized tribes, like states, to redesignate the default air quality classification set for the CAA Prevention of Significant Deterioration program. Thus, "Indian tribes are given the same powers as States." S. REP. NO. 95-127, at 35 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1113. Congress' first official use

Each TAS provision had nearly the same eligibility requirements. TAS roles were only available to a federally recognized tribe[55] with a governing body carrying out substantial governmental duties and powers.[56] Some variation in the requirements was necessary because they applied to different programs. The tribe had to be capable, or be reasonably expected to be capable, of carrying out the particular environmental program functions sought, consistent with the relevant statute and regulations.[57] The last eligibility requirement focused on the tribe's authority or jurisdiction to implement the environmental program functions.

The CWA authorized TAS only if:

> The [environmental] 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.[58]

The phrase "held by" in the first three categories of water resources denoted ownership, which is odd since the legislative history is clear that Congress had no intent to address water *quantity* or water rights;[59] its sole concern was with water *quality*.[60] In contrast, the final category of waters encompassed all reserva-

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of the "treatment as a state" formulation wasn't in the environmental context. *See* Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, § 202, 96 Stat. 2608 (providing "[a]n Indian tribal government shall be treated as a State" for deductions for money transfers to and for tribal governmental use).

55. Curiously, only the SDWA's TAS eligibility provision requires tribes to be federally recognized. EPA included that eligibility requirement in all TAS programs because each of the other statutes *define* Indian tribes as those recognized by the Department of the Interior. *See* 33 U.S.C. § 1377(h)(2) (1987) (CWA); 42 U.S.C. § 7602(r) (1990) (CAA); *id.* § 9601(36) (1986) (CERCLA); id. § 300j-11(b)(1)(A) (1996) (SDWA).
56. *See* 33 U.S.C. § 1377(e)(1) (2014); 42 U.S.C. § 7601(d)(2)(A) (1963).
57. *See* 33 U.S.C. § 1377(e)(3) (2014); 42 U.S.C. § 300j-11(b)(1)(C) (1996); *id.* § 7601(d)(2)(C) (1990).
58. 33 U.S.C. § 1377(e)(2) (2014).
59. *See, e.g.*, Revised Interpretation of CWA Tribal Provision, 80 Fed. Reg. 47,430, 47,434 (proposed Aug. 7, 2015) [hereinafter 2015 Proposed TAS Reinterpretation] (noting the "bulk of [section 518's] legislative history relates to the entirely separate issue of whether section 518(e) pertains to non-Indian water quantity rights, which it does not"); Amendments to the WQS Regulations that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,880 (Dec. 12, 1991) (to be codified at 40 C.F.R. pt. 131) [hereinafter 1991 WQS Rule] (noting statements in the legislative record clarifying the CWA TAS provision were not intended "to affect existing water quantity rights").
60. *Compare* 33 U.S.C. § 1251(a) (stating the policy of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters") *with id.* § 1251(g) (stating the policy of Congress that the CWA not supersede or abrogate rights to quantities of water established by States).

tion surface waters without regard to ownership (tribal, Indian or non-Indian). Congress made that even clearer by defining Indian reservation in the CWA using the archetypal definition of Indian country: "*all land* within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding* the issuance of any [non-Indian] patent, and including rights-of-way running through the reservation."[61]

B. EPA's First Interpretation of the CWA TAS Provision

That same definition produced *United States v. Mazurie*,[62] the only Supreme Court decision on congressional delegation to tribes of jurisdiction over non-Indians. *Mazurie* held that a federal statute authorizing tribal regulation of liquor sales by non-Indians on Indian reservations meant the tribe need not prove its inherent sovereignty to regulate them.[63] The CWA TAS provision used the same Indian reservation definition, implying a similar congressional delegation for tribes to implement water quality programs over non-Indians without showing independent, inherent authority.

Curiously, a plurality opinion in an unrelated Supreme Court case cited the CWA TAS provision as an example of an express congressional delegation.[64] That case, *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,[65] concerned tribal zoning authority over non-Indian fee lands. The Court split into three camps with no majority opinion on the scope of the Tribe's *inherent authority*.[66] In noting the Tribe made no claim of congressional delegation, Justice White's plurality opinion (for four Justices) cited the CWA TAS provision as a comparative example of delegation.[67]

When EPA proposed its first CWA TAS regulation in 1989—coincidentally, for WQS and section 401 certification programs—it did *not* examine *Mazurie* or *Brendale*.[68] Perhaps because it did not do so, EPA rejected delegation in a single unanalyzed assertion: "The Clean Water Act authorizes use of *existing Tribal regulatory authority* for managing EPA programs, but *it does not grant additional authority to Tribes*."[69] Thus, the agency said a tribe could receive TAS status "*only* where the tribe *already possesses* and can adequately demon-

61. *Id.* § 1377(h)(1) (emphasis added).

62. 419 U.S. 544 (1975).

63. *Id.* at 557.

64. 492 U.S. 408, 428 (1989) (White, J., plurality opinion).

65. *Id.*

66. *Id.*

67. *Id.* at 428 (White, J., plurality opinion).

68. Amendments to the WQS Regulations that Pertain to Standards on Indian Reservations, 54 Fed. Reg. 39,098, 39,101 (proposed Sept. 22, 1989) [hereinafter 1989 Proposed WQS Rule].

69. *Id.* (emphasis added).

strate *[legal] authority* to manage and protect water resources within the borders of the reservation."[70]

EPA's analysis supporting this new requirement was a single paragraph that strangely did not analyze the CWA TAS statutory text.[71] Instead, the agency referred to its 1988 SDWA TAS rulemaking rejecting a presumption of tribal jurisdiction over reservation groundwater polluters, and requiring instead that each tribal applicant demonstrate its inherent jurisdiction.[72] EPA neglected to mention a critical distinction: the SDWA TAS provision explicitly required tribes show their regulatory functions "*are within the area of the Tribal Government's jurisdiction*."[73] The CWA, by contrast, did not mention tribal jurisdiction. It required only that the regulatory functions "pertain to the management and protection of water resources . . . *within the borders of an Indian reservation*."[74]

EPA's proposed regulation generated a modest thirty-four written comments.[75] Two targeted EPA's implicit rejection of congressional delegation. One letter submitted by two senators and a congressman agreed with EPA that the CWA TAS provision was *not* intended to enlarge tribal jurisdiction (and was thus apparently not a delegation).[76] Making an otherwise relatively dry administrative process more dramatic, three other senators took the opposite view,

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70. *Id.* (emphasis added). It is odd that EPA treated jurisdiction as relevant to this proposal because WQS are not regulatory in the traditional control and command context of environmental law. WQS define levels that serve as goals for designated uses of particular waters and measures for assessing their impairment. *See* Federal Baseline Water Quality Standards for Indian Reservations, 81 Fed. Reg. 66,900, 66,902–03 (advance notice of proposed rulemaking Sept. 29, 2016) [hereinafter 2016 Baseline WQS Proposal]. WQS have legal effect only through a secondary vehicle, most commonly an NPDES discharge permit that bases legally enforceable conditions on WQS at the point of discharge or downstream. *Id.* at 66,902. Similarly, section 401 certification is a tribe's (or state's) confirmation that a permit proposed by a federal agency will attain applicable WQS. *Id.* at 66,903. Because the 1991 WQS Rule did not offer any permit authority to tribes, their jurisdiction over polluters was irrelevant.

71. 1989 Proposed WQS Rule, *supra* note 68, at 39,101.

72. SDWA—National Drinking Water Regulations, Underground Injection Control Regulations; Indian Lands, 53 Fed. Reg. 37,396, 37,399 (Sept. 26, 1988) (codified at 40 C.F.R. pts. 35, 124, 141–46).

73. 42 U.S.C. § 300j-11(b)(1)(B) (emphasis added).

74. 33 U.S.C. § 1377(e)(2) (emphasis added).

75. 1991 WQS Rule, *supra* note 59, at 64,876. Twenty-five people also made oral comments at three regional hearings. *Id.* EPA did not indicate how many of the oral comments were readings of written comments, as is common in administrative hearings. EPA suggested the "relatively few comments" submitted were due to pre-proposal tribal consultations where "many of the difficult issues were resolved." *Id.*

76. *Id.* at 64,879–80 (comments of Senator Alan Simpson, R-WY, Senator Max Baucus, D-MT, and Representative Bruce Morrison, D-CT).

arguing Congress intended the TAS provision as a delegation of jurisdiction to tribes over non-Indian water polluters.[77]

EPA was unmoved. The D.C. Circuit had just that year cautioned EPA about relying on post-enactment statements by congressional members to interpret statutory provisions.[78] The actual legislative history, not surprisingly, was "somewhat confusing" and "inconclusive."[79] Justice White's *Brendale* opinion was largely dismissed as it did not analyze the CWA's legislative history, was not a majority opinion, and was not about water quality regulation.[80] EPA still did not consider *Mazurie*'s holding that the same Indian reservation definition found in the CAA TAS provision constituted a congressional delegation.[81]

Ultimately, EPA concluded that "expansion" of tribal authority over non-Indians was of such importance that, had Congress desired delegation, it "probably" would have drafted appropriate statutory language.[82] EPA thus opted not to interpret the TAS provision as a congressional delegation, at least "pending further judicial or Congressional guidance."[83] That did not mean tribes could not receive CWA primacy like states; rather, the rule required tribes demonstrate their inherent sovereignty over non-Indian water polluters.[84]

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77. *Id.* (comments of Senators Daniel Inouye, D-HI, John McCain, R-AZ, and Quentin Burdick, D-ND). Adding more intrigue, Senator Inouye, Chairman of the Senate Select Committee on Indian Affairs, called a historic first oversight hearing three months earlier on the implementation of EPA's 1984 Indian Policy. *Administration of Indian Programs by the Environmental Protection Agency: Hearing Before the Sen. Select Comm. on Indian Affs.*, 101st Cong. 101-412 (1989). Inouye's introductory remarks said he convened the hearing because "of deep concerns expressed throughout Indian country about . . . the widely-held perception that not enough is being done to address environmental problems on Indian lands." *Id.* at 1. Senator McCain, Vice-Chair of the Committee, praised Inouye for convening the hearing as "[n]o committee of the Congress has *ever* inquired into these matters." *Id.* at 3 (emphasis added). McCain noted numerous complaints by tribes that federal agencies like EPA, the Bureau of Indian Affairs ("BIA") and the Indian Health Service ("IHS") were not addressing serious environmental threats to reservation environments, and that many tribal governments had indicated a need for federal assistance in developing tribal capacity for building and operating effective environmental regulatory programs. *Id.* at 2. At the end of the hearing, Inouye concluded there was "ample justification to be critical of EPA and BIA and IHS on matters of [Indian country] environmental quality." *Id.* at 21.

78. 1991 WQS Rule, *supra* note 59, at 64,880 (citing Hazardous Waste Treatment Council v. EPA, 886 F.2d 355 (D.C. Cir. 1989)).

79. *Id.* at 64,880.

80. *Id.*

81. *Id.*

82. *Id.* EPA did not say what statutory language it wanted to see. Again, *Mazurie* would have provided a quick example.

83. *Id.* at 64,877–78.

84. Several commentators criticized that decision. *See, e.g.*, Jessica Owley, *Tribal Sovereignty Over Water Quality*, 20 J. Land Use & Env't L. 61, 62–63 (2004) (arguing the CWA TAS provision is a clear congressional delegation); Regina Cutler, *To Clear the Muddy Waters: Tribal Regulatory Authority Under Section 518 of the Clean Water Act*, 29 Env't L. 721, 738

Determining the scope of tribal inherent sovereignty is a legal puzzle fraught with the risk of indeterminate tests and analyses. The majority of comments on the proposed rule, and therefore EPA's attention, focused on two Supreme Court decisions. One was *Montana v. United States*,[85] a relatively contemporaneous case that announced a new "general proposition" that tribes lack civil regulatory jurisdiction over nonmembers on fee land within Indian country.[86] One of two exceptions to the new rule seemed perfectly suited to environmental management: a tribe can regulate the "conduct of non-Indians on fee lands within its reservation when that conduct *threatens or has some direct effect on the . . . health or welfare of the tribe*."[87]

The Court is typically quite deferential to states' decisions on these subjects, accepting, for example, a state's assertion at the turn of the century that its bird-hunting laws were rationally related to preserving the public's general welfare.[88] The *Montana* Court, however, offered no deference to the Crow Tribe who enacted similar game management laws and sought to apply them to non-Indians on fee lands within the Crow Reservation. The Court rejected the Tribe's asserted jurisdiction, criticizing the United States, who sued on behalf of the Tribe, because it "did not allege that non-Indian hunting and fishing on fee lands *imperil* the subsistence or welfare of the Tribe."[89]

Brendale was the other Supreme Court decision most commenters focused on. It was the first Supreme Court case after *Montana* directly addressing inherent tribal regulatory authority, this time over the proposed development of two non-Indian fee parcels. Decided just months before EPA proposed the CWA TAS regulation, *Brendale* could have provided clarity on *Montana's* health and welfare exception. Instead, the Court split on approaches to the two land parcels. Six justices denied tribal jurisdiction over fee land in the developed non-Indian community where tribal interests were arguably more tenuous.[90]

(1999) (arguing the first court addressing EPA's interpretation should have held the provision a clear congressional delegation). Professor Alex Tallchief Skibine made the intriguing argument that EPA should have resolved the CWA's ambiguity by invoking the Indian canon of construction to find congressional delegation. *See* Alex Tallchief Skibine, *The Chevron Doctrine in Federal Indian Law and the Agencies' Duty to Interpret Legislation in Favor of Indians: Did the EPA Reconcile the Two in Interpreting the "Tribes as States" Section of the Clean Water Act,* 11 ST. THOMAS L. REV. 15, 53–54 (1998).

85. 450 U.S. 544 (1981).

86. *Id.* at 565.

87. *Id.* at 566 (emphasis added).

88. Geer v. Connecticut, 161 U.S. 519, 534 (1896), *overruled on other grounds by* Hughes v. Oklahoma, 441 U.S. 322, 327 (1979).

89. *Montana*, 450 U.S. at 566 (emphasis added).

90. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 430–31 (1989) (White, J., plurality opinion); *id.* at 446–47 (Stevens, J., concurring).

Five justices upheld tribal jurisdiction over fee land in the Tribe's undeveloped forested area where its welfare interests were most at stake.[91]

Those results offered little precedential guidance for EPA other than confirming *Brendale* had not significantly undercut or even overruled *Montana*'s exceptions.[92] There were, though, some scattered tea leaves. One *Brendale* opinion suggested *Montana's* health and welfare effects must be "demonstrably serious."[93] Another opinion said the non-Indian activities should implicate "a significant" tribal interest.[94] And dicta from a contemporaneous criminal law decision said that tribes could possess civil authority over non-Indians when its exercise was "vital" to tribal self-determination.[95] EPA took note of the adjectives, and sensed the Court's trend toward requiring the tribal impacts be "more than de minimis."[96] EPA's final WQS rule thus included "an interim operating rule"[97] requiring tribes seeking TAS show the potential impacts of non-Indian water pollution were "*serious and substantial*."[98]

EPA would evaluate each tribe's TAS application individually, with EPA's expertise and experience forming a backdrop for evaluation. First, EPA explicitly recognized that clean water and critical habitat are "absolutely crucial to the survival of many Indian reservations."[99] Second, EPA made certain "generalized findings"[100]: the CWA constituted a legislative determination that water pollution presents serious and substantial impacts on public health and welfare; the high mobility of water pollutants makes identifying water quality impairment caused by non-Indian pollution discharges (as compared to Indian pollution) difficult if not impossible; water movement increases the possibility tribal citizens will be exposed to pollutants released from non-Indian lands; and Congress clearly preferred tribal water quality regulation on Indian reservations. Finally, EPA stated its obvious conclusion: "water quality management serves the purpose of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government."[101]

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91. *Id.* at 450 (Blackmun, J., concurring); *id.* at 443–44 (Stevens, J., concurring).
92. *Id.*
93. *Id.* at 431 (White, J., plurality opinion).
94. *Id.* at 450 (Blackmun, J., concurring).
95. *See* Duro v. Reina, 495 U.S. 676, 688 (1990) (citing *Brendale*, 492 U.S. 408).
96. 1991 WQS Rule, *supra* note 59, at 64,878.
97. EPA did not explain why it labeled this eligibility requirement as an "interim operating rule." Its discussion of the cases characterized the Supreme Court as "exploring" options for the *Montana* test, having not yet settled on one. *Id.* at 64,878. The agency said it adopted the rule "solely as a matter of prudence in light of judicial uncertainty and [that it did] not reflect an Agency endorsement of [the] standard *per se*." *Id.* That comment clearly foreshadowed the agency's reinterpretation of the TAS provision in 2016, discussed below in Part III.
98. *Id.* (emphasis added).
99. *Id.*
100. *See id.* at 64,879.
101. *Id.*.

Supplemented by these findings, EPA said it would presume a tribal applicant's legal analysis met EPA's *Montana* test if it made:

> [A] relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members, (and thus that the Tribe or tribal members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters and critical habitat are subject to protection under the Clean Water Act. The Tribe must also explicitly assert that impairment of such waters by the activities of non-Indians, would have a serious and substantial effect on the health and welfare of the Tribe.[102]

EPA said the presumption of tribal jurisdiction was rebuttable. The regulation created a new notice and comment process for adjacent states and tribes who could lodge a jurisdictional objection by proving that non-Indian water pollution *did not* present serious and substantial threats to tribal health and welfare.[103]

C. A Legal Challenge to EPA's Operating Rule

The agency's translation of the *Montana* test into the CWA context clearly favored tribal primacy for CWA programs. Still, it was unusually honest for a federal agency to state so baldly the regulation's most controversial conclusion: "EPA believes . . . there are substantial legal and factual reasons to assume that Tribes ordinarily have the legal authority to regulate surface water quality within a reservation."[104] That was surely a step further than EPA had taken the year before in its SDWA regulations when it "recognize[d] . . . substantial support" for tribal jurisdiction across reservations.[105] But like the SDWA regulation that declined to "automatically assume" such tribal authority,[106] the final CWA regulation said EPA would *not* make a "conclusive statement" that tribes possessed jurisdiction over non-Indian fee lands.[107] Each tribal application would be scrutinized to ensure it met the interim operating rule's heightened standard of showing serious and substantial impacts from non-Indian pollution.

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102. *Id.*

103. *See id.* at 64,898 (codified at 40 C.F.R. § 131.8(c)(2)(ii)).

104. *Id.*

105. SDWA—National Drinking Water Regulations, Underground Injection Control Regulations; Indian Lands, 53 Fed. Reg. 37,396, 37,399 (Sept. 26, 1988) (codified at 40 C.F.R. pts. 35, 124, 141–46).

106. *Id.*

107. 1991 WQS Rule, *supra* note 59, at 68,878. EPA ostensibly buttressed its CWA approach by noting it was "consistent" with its SDWA approach. *Id.* Again, however, the agency did not acknowledge the two statutes were not consistent on this key element: the SDWA TAS provision explicitly required a showing of tribal jurisdiction whereas the CWA TAS provision did not.

The ostensible rigor of that standard was thrown into question by EPA's explanation of the burden the interim operating rule put on tribes, *and* their opponents. States were certainly not fooled. In later litigation over a particular tribal TAS application, eleven states filed an amicus brief proclaiming "EPA has concocted a simplistic, wooden formula under which no tribe could ever fail to receive state status under the Clean Water Act."[108] The states accused EPA of shifting the burden of proof established by the Supreme Court: instead of making tribes show jurisdiction over nonmembers, EPA allegedly required states prove the *absence* of tribal jurisdiction, a burden the states complained was impossible to meet.[109] Oddly, though, no state or non-Indian organization challenged the final regulation when it became effective.

Instead, the regulation's legal validity was implicated nearly five years later when EPA approved the WQS of the Salish and Kootenai Tribes for the Flathead Indian Reservation in western Montana. The Reservation's distinguishing feature is Flathead Lake, the largest natural freshwater lake in the contiguous United States west of the Mississippi River.[110] The State of Montana operates a research facility on the Reservation that discharges pollutants into the Lake. Two Montana towns operate wastewater facilities on the Reservation that discharge pollutants into creeks downstream. Although the State's research facility and both towns are on the Reservation, and EPA had not authorized State implementation of the NPDES permit program there, all three facilities operated under state-issued permits.[111] Once the Tribes' WQS were approved, the State sued EPA because it feared these facilities would need federally issued

108. Brief of Amici Curiae States of Arizona et al. in Support of Petition for Writ of Certiorari at 11, Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998) (No. 97-1929).

109. *See id.* at 15–16.

110. Archeology Program, *State Submerged Resources: Montana*, Nat'l Park Serv., https://perma.cc/JUF3-X2A5.

111. *See* Montana v. EPA, 941 F. Supp. 945, 947 (D. Mont. 1996) [hereinafter Montana v. EPA I], *aff'd* 137 F.3d 1135, 1140 (9th Cir. 1998) [hereinafter Montana v. EPA II].

NPDES permits,[112] and the State believed that EPA's approval trenched on state sovereignty.[113]

The main thrust of the case was on EPA's application of the *Montana* test to the Salish and Kootenai Tribes' WQS application. The State argued EPA got the test wrong.[114] The Tribes argued the State was challenging EPA's interim operating rule five years too late.[115] EPA let that issue go, presumably content to rest in the comfort of administrative law's judicial deference.

EPA conceded it was not entitled to deference in analyzing the Supreme Court's federal common law for Indians.[116] How EPA applied the CWA TAS provision to the Tribal WQS application in light of *Montana* and *Brendale* was a different matter. The district court would not review that decision de novo, but would simply ensure the decision was not arbitrary or capricious.[117] The court concluded EPA's factual findings that non-Indian pollution could have serious and substantial impacts on tribal health and welfare were "entitled to

112. *See id.* The case was decided on summary judgment, so there was no evidence offered that EPA demanded the facilities apply for federal permits. EPA's answer did allege compliance with the CWA required the facilities obtain federally-issued NPDES permits. *See id.* at 948. That seemingly contradicts the agency's acknowledgment two years earlier that some states were issuing water discharge permits in Indian country without authorization, and pledging EPA "will, whenever possible, assume, without deciding" they contained enforceable limitations. *See* Treatment of Indian Tribes as States for Purposes of Sections 308, 309, 401, 402, and 405 of the Clean Water Act, 58 Fed. Reg. 67,966, 67,974 (Dec. 22, 1993) (codified at 40 C.F.R. pts. 122, 123, 124, 501). On the other hand, Montana lies within EPA's Region VIII that was then led by William Yellowtail, the Nation's first Indigenous Regional Administrator, whose informal policy was to replace state-issued NPDES permits on Indian reservations with federal ones *upon the request of the tribe*. Personal communication from William Yellowtail to author (1997). EPA's response to the State's complaint apparently made no reference to a tribal request, nor a federal one. *See* Montana v. EPA I, 941 F. Supp. at 948.

113. The State argued EPA's approval subjected the State to Tribal regulation and infringed on the State's 401 certification authority. Montana v. EPA I, 941 F. Supp. at 947–48. These arguments were illustrative of the reflexive, baseless objections often made by states (and non-Indians) in the face of exercises of tribal sovereignty. As described in note 68 above, WQS are value judgments on the desired quality of water; they are not regulatory and had no direct impact on the State. WQS are implemented primarily by NPDES permits, which are regulatory. *Id.* But the Tribes had not applied for NPDES program delegation. The facilities' permits would either remain issued by the State itself or would be issued by EPA, *see supra* text accompanying notes 107–09, not the Tribes. Similarly, the State's 401 certification authority for federal permits outside the Reservation was unaffected by EPA's approval. Since the State had never been approved for 401 certification on the Reservation, it was not possible to lose it.

114. *See* Montana v. EPA I, 941 F. Supp. at 947.

115. *Id.* at 948.

116. *Id.* On review, the Ninth Circuit explained "the scope of inherent tribal authority is a question of law for which EPA is entitled to no deference. . . . [Federal Indian law] has nothing to do with [EPA's] own expertise . . . ." Montana v. EPA II, 137 F.3d at 1140.

117. Montana v. EPA I, 941 F. Supp. at 956 (citing 5 U.S.C. § 706(2)(A)).

substantial deference."[118] EPA's experience and expertise in making the generalized findings about the serious nature of water pollution were "not to be treated lightly,"[119] and the agency's reconciliation of environmental law with its Indian Policy by avoiding checkerboarding between Indian trust land and non-Indian fee land was entitled to deference.[120] The district court upheld EPA's approval and the Tribes' water quality-related value judgments became legally enforceable.[121]

Montana fared no better in its appeal to the Ninth Circuit.[122] Unlike the district court, the Ninth Circuit recognized the State's claim for what it was: "a facial challenge to regulations the Environmental Protection Agency (EPA) promulgated pursuant to § 518(e) [the TAS provision] of the Clean Water Act."[123] Like the district court, the Ninth Circuit addressed the untimely claim anyway. The State's substantive argument was a convoluted effort to extract from *Brendale*'s split opinions a binding impact that either overruled or significantly revised *Montana*.[124] Unfortunately for the State, an intervening unanimous Supreme Court decision made clear *Montana* was still good law.[125]

The Ninth Circuit was unpersuaded by the State's attempt to convert into a rule Justice Steven's *Brendale* opinion insisting tribal inherent sovereignty over non-Indians existed only where state or federal remedies were inadequate to alleviate threats to tribal welfare.[126] Two related Federal Circuit cases supported EPA's view of tribal sovereignty over reservation water pollution discharged by any source.[127] Finally, EPA's decision to adopt inherent tribal authority as the

118. *Id.* at 957.

119. *Id.* at 958.

120. *Id.* (citing Wash. Dep't of Ecology v. EPA, 752 F.2d 1465, 1469 (9th Cir. 1985)).

121. *Id.* The dispositive impact of administrative law on the Tribes' WQS program here shows clearly the beneficial impact of partnering with EPA as compared to proceeding on inherent tribal sovereignty alone. *See generally* JAMES M. GRIJALVA, CLOSING THE CIRCLE: ENVIRONMENTAL JUSTICE IN INDIAN COUNTRY (2008) (analyzing Indian country environmental law court cases and arguing the confluence of administrative law with environmental and Indian law presents the best opportunity for achieving environmental justice in Indian country).

122. Montana v. EPA II, 137 F.3d at 1138.

123. *Id.* at 1137–38.

124. *Id.* at 1140.

125. *Id.* (stating Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997), "reaffirmed the vitality of *Montana*").

126. *Id.* at 1140–41.

127. *Id.* at 1141 (citing Confederated Colville Tribes v. Walton, 647 F.2d 42, 52 (9th Cir. 1981) (noting waters are unitary resources where actions by one user have immediate and direct effects on others) and Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996) (affirming the authority of tribes to set more stringent WQS than adjacent states under the CWA)).

standard intended by Congress implicated judicial deference because the CWA's language and legislative history were not entirely clear.[128]

D. Why Aren't There More Tribal Water Quality Standards?

Of the 573 federally-recognized tribes,[129] EPA estimates about three hundred have formal or informal reservations making them eligible for WQS TAS.[130] EPA's WQS TAS regulation became effective in 1992.[131] Almost thirty years later, there are forty-five tribes with approved WQS,[132] a mere fifteen percent of eligible tribes. Sixteen more tribes have been approved "as states," but have not submitted WQS for EPA review.[133] Another ten have applications for basic CWA TAS status under review.[134] History suggests it is unlikely those twenty-six tribes will develop and submit WQS to EPA for approval anytime soon, but if they did, and if EPA approved them, then only twenty-four percent of eligible tribes would have legally enforceable tribal water quality value judgments under the CWA, nearly thirty years after the opportunity to establish them arose.

Why, for tribes who view the environment as central to their cultural identity[135] and know particularly that "water is life,"[136] have so few developed WQS during those thirty years? To my knowledge, no formal survey has asked this

128. *Id.* at 1140 (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843–44 (1984) (holding where a statute is silent or ambiguous on the disputed issue, the court's role is to determine whether the agency's answer is based on a permissible construction of the statute, and not to substitute the court's view for the agency's)).

129. Indian Entities Recognized by and Eligible to Receive Services from the BIA, 84 Fed. Reg. 1200 (Feb. 1, 2019).

130. *See* 2016 Baseline WQS Proposal, *supra* note 70, at 66,902 (advance notice of proposed rulemaking Sept. 29, 2016) (including formal reservations, pueblos, and informal reservations, which are lands held in trust by the United States for tribes that are not officially designated as reservations). The main reason for the disparity with the overall number of 573 federally recognized tribes is the Supreme Court's misguided decision in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), which held that, with one exception, the lands of the 229 Alaskan tribes are not reservations. *See* Bureau of Indian Affs., Dep't of the Interior, *Alaska Region*, https://perma.cc/4AW8-8LRM (noting BIA serves 229 federally recognized tribes).

131. 1991 WQS Rule, *supra* note 59, at 64,878.

132. *See EPA Actions on Tribal Water Quality Standards and Contracts*, EPA, https://perma.cc/V2P5-CBR7 [hereinafter WQS TAS Table]. One tribe, the Confederated Tribes of the Colville Reservation in Washington, has federally-promulgated WQS. *See id.*

133. *Id.* EPA's WQS TAS Table contains some but not all tribal applications and EPA decision documents. These give no indication of whether the tribes with TAS status are actively developing WQS. Ten of these fifteen tribes received TAS status in the last few years, so they may be developing their WQS now. Five of those tribes, though, were approved more than eight years ago, and one was approved over twenty years ago.

134. *Id.*

135. *See, e.g.*, AMS. FOR INDIAN OPPORTUNITY, *supra* note 44, at 4:

question. Tribes and commentators have made a number of fair but anecdotal suggestions: historical suppression, resource constraints, possible incongruence between western and indigenous models of environmental protection, and perhaps most significantly, fear of litigation.

The historical reality of over two hundred years of genocide, relocation, assimilation, pervasive federal control over all aspects of Indian life, and misguided attempts to remake tribal governments in Euro-American models make it plain that tribes face an incredible uphill struggle to realize self-determination in any genuine sense.[137] EPA's Indian Policy essentially acknowledged all of this, albeit generally:

> It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations *cannot be accomplished immediately*. Effective implementation will *take careful and conscientious work* by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be *necessary to proceed in a carefully phased way,* to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that

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> Indian people not only have a special relationship with the Federal government, but also with the environment. The land, the air, the water, the wildlife, the river and sealife, and the plantlife—all are important to Indian people, not only for esthetic values but also for religious reasons. Indian lands have diminished to a fraction of what they originally were, and these remaining reservations are the only ones for the future. The quality of the environment, then, is extremely important. Indian people cannot sell these lands once they become polluted and move elsewhere. The importance of the environment cannot be thought of in terms of singular issues and actions, but rather as a "whole." This "whole" defines Indian people. Consequently, separation of one ingredient; culture, religion, environment, and development cannot be successfully achieved without adversely affecting reservation and community life.

136. *See* Comment of Ken Norton, Chairman, Nat'l Tribal Water Council, to Danielle Anderson, EPA at 2 (2015) (quoting a Water Prayer from the East: "We give thanks to all the waters of the world for quenching our thirst and providing our strength. Water is Life."). In 2016, "water is life" became a rallying cry for some ten thousand indigenous and other people nonviolently opposing the construction of an oil pipeline just upstream of the Standing Rock Indian Reservation in North Dakota. The protest, and the parallel litigation by two Sioux tribes against the Army Corps of Engineers is briefly described in Robert T. Anderson, *Indigenous Rights to Water & Environmental Protection*, 53 HARV. C.R.–C.L. L. REV. 337, 367–75 (2018). *See also* Elizabeth Ann Kronk Warner, *Environmental Justice: A Necessary Lens to Effectively View Environmental Threats to Indigenous Survival*, 26 TRANSNAT'L L. & CONTEMP. PROBS. 343, 355–65 (2017) (using the controversy as a case study that demonstrates how specific environmental challenges indigenous communities face may be viewed through an EJ lens).

137. Against that backdrop, it is amazing the programmatic successes many tribes have achieved in a broad variety of areas like housing, education, health, economic development, criminal enforcement, judicial systems, utilities, and a host of others.

> exist now and continuing in the direction established under these principles, over time we can significantly enhance environmental quality on reservation lands.[138]

Many tribes simply lack the financial and human resources required to manage environmental programs,[139] and EPA offers insufficient financial and technical resources to build tribal capacity.[140] In light of longstanding and varied federal efforts dismantling traditional indigenous governance systems, many tribes today lack a foundation of governmental infrastructure for building effective environmental programs. One basic example of that is the lack of administrative procedure laws guiding tribal agencies as they implement their various programs.[141] Compounding that gap is the frequent turnover of tribal council members, resulting in a parade of leaders unfamiliar with the significant benefits (and challenges) of TAS, and technical staff who seem to leave or move to other positions just as they become knowledgeable about environmental programs.

Occasionally a commenter will suggest generally that Western environmental law is simply inconsistent with indigenous cultural values,[142] or that tribal state-like roles are arguably just another extension of colonialism.[143] These

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138. 1984 INDIAN POLICY, *supra* note 45, at 1 (emphasis added). Relevant to this discussion is the reality it took EPA eleven years from its 1973 CWA rule for Indian country implementation just to adopt its official 1984 cross-program, agency-wide policy promising respect for tribal self-determination, s*ee* James M. Grijalva, *The Origins of EPA's Indian Program*, 15 KAN. J.L. & PUB. POL'Y 191, 205–77 (2006) [hereinafter Grijalva, *Origins*], and another ten years to begin implementing it in earnest, *see* Memorandum from Carol M. Browner, Adm'r, EPA, to Asst. Adm'rs et al., EPA (July 14, 1994) (on file with author) (Announcement of Actions for Strengthening EPA's Tribal Operations).

139. 2016 Baseline WQS Proposal, *supra* note 70, at 66,902 (noting some tribes have not developed WQS for lack of resources).

140. *See, e.g.*, Tom Goldtooth, *Indigenous Nations: Summary of Sovereignty and Its Implications for Environmental Protection*, *in* ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 138, 146 (Bunyan Bryant ed., 1995) (implying EPA's underfunding of tribes is a key factor in environmental injustice).

141. *See generally* Dean B. Suagee & John P. Lowndes, *Due Process and Public Participation in Tribal Environmental Programs*, 13 TUL. ENV'T L.J. 1 (1999) (discussing reasons why tribes that become involved in American environmental federalism should adopt administrative public participation rules and due process mechanisms, and considering ways tribes might incorporate culturally important interests in such rules).

142. *See, e.g.*, Robert Williams, Jr., *Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133 (1994) (arguing that western environmental law is incapable of accounting for Indigenous visions of EJ).

143. *See, e.g.*, Anna Fleder & Darren J. Ranco, *Tribal Environmental Sovereignty: Culturally Appropriate Protection or Paternalism?,* 19 J. NAT. RESOURCES & ENV'T L. 35 (2004–2005) (questioning whether a court decision upholding stringent conditions imposed by EPA on an upstream, off-reservation pollution source on the basis of federally-approved tribal WQS designed to protect cultural interests promoted or eroded tribal sovereignty); Darren J.

are fair positions, although the former is typically expressed in the limited context of the shortcomings of environmental impact statements under the National Environmental Policy Act, and the latter often generalizes tribal TAS roles in ways that do not fully capture the complex nature of environmental federalism. Contrary positions are also offered, suggesting perhaps an imperfect but functional blending of ancient traditions and duties with modern limitations on true sovereignty.[144]

Rarely stated explicitly, but exceptionally clear to tribal environmental and EPA attorneys, fear of litigation consistently gives tribes and EPA pause.[145] After two hundred years, some states still resent the presence of Indian country within their borders and the limits imposed on state authority there, and they robotically react to tribal exercises of governmental authority with taxpayer-funded lawsuits. Non-Indian industry presumably cares little for the integrity of state sovereignty, but perhaps its comfort with state politicians and their tendency to favor economic development over environmental protection immediately causes disquiet at the first hint of federal or tribal regulation.

Tribal and EPA fear of litigation is thus well-founded against a long history of legal challenges to tribal jurisdiction over non-Indians.[146] Yet, on the narrow question of tribal jurisdiction under the CWA WQS and section 401 certification programs, *Montana v. EPA II*[147] should have significantly assuaged

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Ranco, *Models of Tribal Environmental Regulation: In Pursuit of a Culturally Relevant Form of Tribal Sovereignty*, FED. LAW., Mar.–Apr. 2009, at 46, 48 (asserting "TAS status . . . appears to augment the authority of tribes but, in fact, diminishes tribal sovereignty").

144. *See, e.g.*, Dean B. Suagee, *Tribal Self-Determination and Environmental Federalism: Cultural Values as a Force for Sustainability*, 3 WIDENER L. SYMP. J. 229, 233–34 (1998) (noting when tribes "become engaged in environmental federalism, they do not act exactly like state governments [because] protecting the land and its biological communities tends to be a prerequisite for cultural survival"); Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 226 (1996) ("[B]ecause of the Indian nations' status as 'domestic dependent nations,' tribal environmental policy is to some extent contingent upon Anglo-American norms . . . Yet the traditional systems of decision-making and normative frameworks for determining appropriate human conduct toward the environment remain.").

145. *See* Dean B. Suagee, *The Tribal Right to Protect the Environment*, 27 NAT. RES. & ENV'T 52, 53 (2012) (suggesting a main reason so few tribes have sought TAS status is the trend in the Supreme Court of restricting tribal sovereignty through the "implicit divestiture" concept articulated by Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), which allows the Court to decide whether a particular governmental power is appropriate or should be implicitly divested). My experience over thirty years working with some seventy tribes as an attorney, consultant and collaborator in a variety of settings addressing a wide spectrum of environmental issues confirms anecdotally many of the foregoing reasons, especially anxiety over provoking litigation.

146. Of particular concern is the risk of judicial diminishment discussed in Part IV.A.

147. 137 F.3d 1135 (9th Cir. 1998)

that fear.[148] EPA's interim operating rule offered tribes the safest jurisdictional harbor available short of congressional delegation. The unique combination of administrative, environmental and Indian law convinced the Ninth Circuit that the operating rule reasonably applied the Supreme Court's *Montana* test in the context of CWA regulation. This was of course only one decision in one federal appellate circuit, but the Ninth Circuit is an important one for Indian law,[149] and the Supreme Court denied certiorari for the case.[150]

Also relevant for tribes who partner with EPA in the cooperative federalism mode for environmental management is the reality that state and non-Indian lawsuits name EPA as the sole or lead defendant, not the tribe.[151] These legal challenges are most commonly federal administrative law claims alleging EPA wrongly treated the tribe as a state for some program, for instance, approving a particular tribe's WQS or air quality redesignation.[152] Thus, EPA bears the burden of funding and staffing those cases.[153] The suit might focus on EPA's process completely apart from the tribe's substantive program,[154] or it

148. A more pressing fear, indirectly aimed at tribal sovereignty, is the legal claim that a particular reservation had been diminished by turn-of-the-century allotment programs. *See infra* Part IV.

149. Both by geographic expanse and by number of states, the Ninth Circuit is the largest circuit in the country. In addition to Montana, it encompasses most of the western continental states—Washington, Oregon, California, Arizona, Nevada, and Idaho—as well as Alaska and Hawaii. With large populations of indigenous peoples in each of those states, Ninth Circuit cases account for a significant portion of federal Indian law decisions. Ninth Circuit panels previously decided the first two Indian country environmental regulatory cases. *See* Nance v. EPA, 645 F.2d 701 (9th Cir. 1981) (upholding EPA's approval of a tribal air quality redesignation for its reservation); Wash. Dep't of Ecology v. EPA, 752 F.2d 1465, 1469 (9th Cir. 1985) (upholding EPA's refusal to delegate Indian country hazardous waste management primacy under RCRA to a state). The results of both cases were consistent with the Ninth Circuit's reputation for favorable treatment of Indian claims.

150. *See* Montana v. EPA, 525 U.S. 921 (1998) (mem). Yet, the Ninth Circuit has a history of its Indian cases being overturned by the Supreme Court: the tribes' key losses in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978) (judicially divesting tribal sovereignty over non-Indian criminal actions), *Montana v. United States*, 450 U.S. 544 (1981) (judicially divesting tribal sovereignty over non-Indian hunting and fishing on reservation fee lands), and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (judicially divesting tribal sovereignty over non-Indian land development on certain reservation fee lands) had been victories in the Ninth Circuit.

151. *See, e.g.*, Nance v. EPA, 645 F.2d 701; Wash. Dep't of Ecology v. EPA, 752 F.2d 1465.

152. *See, e.g.*, Montana v. EPA II, 137 F.3d 1135; Arizona v. EPA, 151 F.3d 1205 (9th Cir. 1998).

153. Tribes are sometimes named as additional defendants, *see, e.g.*, Montana v. EPA II, 137 F.3d 1135, or intervene as defendants representing their programs, *see, e.g.*, Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001). In either case, the substantive burden and cost of these roles is nowhere near that borne by EPA.

154. *See, e.g.*, Arizona v. EPA, 151 F.3d at 1212–13 (addressing use of a federal implementation plan to make a tribal redesignation effective).

might implicate directly the tribe's process[155] or substantive program.[156] Regardless, losing the suit primarily means the tribe's program would no longer be approved—perpetuating exactly the Indian country regulatory gap status that existed before the tribe sought primacy.[157]

When EPA wins TAS-related suits, as it has done a significant majority of the time, the tribe's program then has the same legal consequences as similar state programs. For example, EPA's win in *Montana v. EPA II* made the Salish & Kootenai Tribes' water quality value judgments enforceable under federal law.[158] Every federal license and permit issued on the Flathead Reservation by a federal agency must now contain conditions ensuring compliance with the Tribes' WQS.[159] The Tribes' section 401 certification authority ensures that result as it rests upon the Tribes', not EPA's, assessment of each discharge's impact on the Tribes' WQS.[160] The permit conditions required for compliance with the Tribes' WQS also rest in the Tribes' discretion; EPA has no authority to reject or revise them[161] even if the agency believes the conditions are more stringent than necessary for WQS compliance.[162] Discharges in violation of water quality conditions in permits are subject to enforcement by EPA[163] as well

155. *See, e.g.*, *id.* (addressing a tribe's analysis supporting redesignation).

156. *See, e.g.*, Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996) (addressing whether a tribe's stringent WQS were attainable).

157. A critical exception to the result that tribes will simply return to where they were before seeking primacy is the serious risk a diminishment claim will reduce their territory, discussed in Part IV.

158. EPA approval is presumably irrelevant to whether tribal WQS would be enforceable under tribal law. Depending upon a particular tribe's water quality program and background tribal law, tribal WQS could be enforced through a tribal permit condition or other mechanism without EPA involvement. There should be no question the tribe's inherent sovereignty would apply to an individual tribal citizen's or tribal facility's water polluting activities. This is arguably reason enough why even tribes with heavily checkerboarded reservations might consider developing WQS apart from the question of using them via EPA approval and involvement to control non-Indian water polluting activities.

159. 33 U.S.C. § 1341(a)(1).

160. *Id.*; 40 C.F.R. § 124.51(c) (2019). EPA also has an independent duty to ensure such compliance. *See* 33 U.S.C. § 131(b)(1)(C) (permitted discharges must achieve any more stringent standard necessary to attain WQS adopted under state law pursuant to section 510); 40 C.F.R. § 122.4(a), (d) (NPDES permits must ensure the attainment of applicable WQS of all affected states). Tribal TAS approval, of course, means the tribe is a state, whose WQS must then be protected by permit conditions.

161. *See, e.g.*, Lake Erie All. for Prot. of Coastal Corridor v. U.S. Army Corps of Eng'rs, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981) (holding certification is the state's exclusive prerogative); Mobil Oil Corp. v. Kelley, 426 F. Supp. 230, 234–35 (S.D. Ala. 1976) (determining Congress intended states play a paramount role in certification).

162. *See, e.g.*, Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1056–57 (1st Cir. 1982) (finding EPA has no authority to determine if state levels are more stringent than necessary).

163. 33 U.S.C. § 1319(a)(1).

as by affected citizens.[164] Also potentially impactful for some tribes, the Superfund statute[165] requires EPA to ensure any remedial cleanup that leaves hazardous substances onsite attains tribal WQS.[166]

Even more critically for some tribes, EPA's approval of tribal WQS creates a buffer of sorts protecting tribal waters from upstream, off-reservation pollution sources. Like states, tribes with WQS more stringent than the upstream jurisdiction are protected by EPA's insistence that NPDES permits contain conditions attaining the downstream standards.[167] Because of judicial deference to EPA's environmental expertise, courts are hesitant to second-guess its approval of standards even when they appear extremely stringent.[168] And the possibility such WQS might impact economic development in the upstream jurisdiction is not a legal basis for EPA to disapprove of the standards or for a court to vacate EPA's approval of them.[169]

III. The Clean Water Act's Delegation to Tribes of Jurisdiction over Non-Indian Water Polluters

The various issues and possible explanations in Part II.D for why more tribes have not developed WQS mask a fundamental, pressing reality: "Waters

164. *Id.* § 1365(a)(1). Such "citizen suits" against violators on and near reservations hold programmatic potential for tribes beyond the direct impact of halting illegal water discharges. *See* James M. Grijalva, *The Tribal Sovereign as Citizen: Protecting Indian Country Health and Welfare Through Federal Environmental Citizen Suits,* 12 Mich. J. Race & L. 33 (2006) (arguing tribal environmental citizen suits are sovereign actions protecting tribal health and welfare without risking adverse judicial decisions, and provide opportunities for building regulatory capacity).

165. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675.

166. 42 U.S.C. § 9621(d)(2)(A) (treating CWA WQS as "legally applicable or relevant and appropriate standard[s]" ("ARARs") for determining the level of cleanup for remedial actions that leave hazardous substances onsite). Tribal environmental capacity is important here in ensuring EPA has notice of tribal WQS that should or could be considered ARARs. *See* EPA, OLEM Directive 9200.2-187, Best Practice Process for Identifying and Determining State Applicable or Relevant and Appropriate Requirements Status Pilot 1 (2017) (stating "the state [or tribe treated as a state] is responsible for identifying state [or tribal] ARARs and communicating them to EPA in a timely manner").

167. *See, e.g.*, Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996). A similar situation can occur in the CAA. *See* Nance v. EPA, 645 F.2d 701 (9th Cir. 1981) (upholding EPA's approval of a tribe's reclassification of its airshed, leading to new permit conditions imposed on an upwind facility off-reservation).

168. *See, e.g.*, Albuquerque v. Browner, 865 F. Supp. 733, 741–42 (D.N.M. 1993) (upholding EPA approval of tribal WQS the court found "troubling" because of its extreme stringency), *aff'd*, 97 F.3d 415 (10th Cir. 1996).

169. *See* Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001) (affirming EPA's approval of the Sokaogon Chippewa Community's WQS despite the possibility of upstream, off-reservation impacts on state-approved mining).

on *the majority of Indian reservations* do not have water quality standards . . . to protect human health and the environment."[170] EPA made that striking admission in proposing a new interpretation of the CWA TAS provision designed to increase the number of tribal WQS. What EPA did not admit was that the abject lack of enforceable standards for water quality protection in Indian country was an EJ issue of the highest magnitude. Not all tribes face serious risks from hazardous waste or air pollution or underground injection of toxic wastes. But all tribes use surface waters in a variety of ways indispensable to tribal citizens' health, culture, and spirituality. Only a tiny portion of those uses are protected by specifically designed WQS.

A. EPA's 2016 Reinterpretation Rule

The Indian country water quality inequity was obvious to Lisa Jackson, the only EPA Administrator to date who has seriously addressed EJ. In 2011, she announced the agency would consider interpreting the CWA TAS provision as a congressional delegation.[171] If Congress had delegated authority over non-Indian water polluters, then tribes would not face the TAS hurdles of showing inherent jurisdiction over non-Indians, nor would they (or EPA) risk litigation on that contentious issue.

In 2013, the National Tribal Water Council ("NTWC")[172] threw its weight behind congressional delegation, pointedly noting tribes were *not* being treated the same as states because of the jurisdictional requirement, which the Council asserted was preventing tribes from developing WQS.[173] One year later, EPA notified tribes it was initiating consultation procedures on a possible reinterpretation of the CWA TAS provision.[174] In 2015, EPA proposed a rule

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170. 2015 Proposed TAS Reinterpretation, *supra* note 59, at 47,430 (emphasis added).

171. *See* Off. of Gen. Counsel, EPA, Plan EJ 2014 Legal Tools 79 (2011), https://perma.cc/L8GL-U4Q7. This document was unprecedented in publicizing legal tools available for communities seeking EJ. It appropriately addressed the unique legal context of Indian country separately, but the accompanying strategic plan was also unprecedented in its inclusion of tribal communities throughout the agency's priorities, plans and initiatives. *See* EPA, Plan EJ 2014 (2011), https://perma.cc/YDM8-T8QJ.

172. The Council is a technical, scientific body created to assist EPA, tribes, and tribal organizations with research and information for decision-making on water-related issues and concerns impacting Indian communities. *See* National Tribal Water Council, https://perma.cc/WD3G-7EKU.

173. Equal Treatment for Tribes in Seeking Eligibility under EPA Regulatory Programs 1–2 [hereinafter Equal Treatment for Tribes]. This document is unattributed and undated. EPA reports receiving it from the National Tribal Water Council in 2013. *See* Revised Interpretation of CWA Tribal Provision, 80 Fed. Reg. 47,436 (proposed Aug. 7, 2015).

174. Letter from Elizabeth Southerland, Dir., Off. of Sci. & Tech., to Tribal Leaders 1 (Apr. 18, 2014) (on file with author) (stating EPA's reconsideration would focus on whether the CWA TAS provision was a congressional delegation to tribes of jurisdiction over non-Indi-

interpreting the CWA TAS provision as a congressional delegation to tribes of water quality jurisdiction over non-Indians.[175]

The proposal was titled a "Revised Interpretation" of the CWA TAS provision, but its text repeatedly used the term reinterpretation.[176] EPA reprised its 1991 reasoning for not initially interpreting the provision as a congressional delegation, although with a distinct tone suggesting more substantive support for delegation than the agency perhaps admitted in its 1991 rule. EPA said its reliance then on tribal inherent sovereignty instead of delegation was a "cautious approach"[177] taken while awaiting "further congressional or judicial guidance" on whether a delegation interpretation would be proper.[178] The bulk of its announcement described several "significant developments" as well as additional material supporting delegation, and invited comments on its proposed reinterpretation of the CWA TAS provision.[179]

The apparent lack of interest was quite surprising. Tribal jurisdiction generally, and tribal environmental regulatory jurisdiction specifically, directly implicates the governmental authority of over three hundred tribes with reservation lands eligible for CWA TAS status[180] and thirty-two states with Indian reservations.[181] It has the potential to influence control of thousands of industry firms and businesses, most non-Indian owned, and thousands if not

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ans, and if so, such reinterpretation of the Act would replace the existing requirement that tribes show inherent jurisdiction over non-Indians, which "could reduce some of the time and effort for tribes submitting TAS for regulatory programs under" the CWA).

175. 2015 Proposed TAS Reinterpretation, *supra* note 59, at 47,430.

176. *Id.* at 47,430–32, 47,434, 47,436, 47,438–39, 47,441. Even the proposal's electronic contact address reflected this perspective: TASreinterpretationepa.gov.

177. *Id.* at 47,433.

178. *Id.* at 47,431. Apart from the alleged significant developments, EPA also noted it had since 1991 prevailed in five cases under the inherent sovereignty approach. *See* Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001) (affirming EPA's approval of the Sokaogon Chippewa Community's WQS despite the possibility of upstream, off-reservation impacts on state-approved mining); Montana v. EPA I, 941 F. Supp. 945 (D. Mont. 1996) (affirming EPA's approval of the Confederated Salish & Kootenai Tribes of the Flathead Reservation's WQS in face of possible impacts on facilities of the state and its subdivision); Montana v. EPA II, 137 F.3d 1135 (9th Cir. 1998) (same); Montana v. EPA, 141 F. Supp. 2d 1259 (D. Mont. 1998) (affirming EPA's approval of the Assiniboine & Sioux Tribes of the WQS of the Fort Peck Reservation); Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996) (affirming EPA's approval of the Isleta Pueblo's extremely stringent WQS in context of EPA using them to apply new permit conditions to off-reservation city).

179. 2015 Proposed TAS Reinterpretation, *supra* note 59, at 47,434.

180. EPA says there are "over 300 tribes" with reservation lands eligible for CWA TAS. *See* 2016 Baseline WQS Proposal, *supra* note 70, at 66,902 (advance notice of proposed rulemaking Sept. 29, 2016) (to be codified at 40 C.F.R. pt. 131) (including formal reservations, pueblos, and informal reservations, which are lands held in trust by the United States for tribes that are not officially designated as reservations).

181. *See Indian Lands in the United States*, BUREAU OF INDIAN AFFS., https://perma.cc/6LMZ-AJ6P.

tens of thousands of individual Indian and non-Indian people. And the extent of tribal jurisdiction, particularly over non-Indians, is a matter of interest for dozens of non-governmental organizations supporting tribes, states, and industry. But the proposed rule generated *only forty-four comments*.[182]

The majority of commenters—including eighteen tribes, three tribal organizations, some members of the public, and two states[183]—strongly supported the agency's interpretation.[184] The minority—six states,[185] several local governments, industry, and one member of the public—argued against delegation. The negative comments did not sway EPA. The agency addressed them directly, laying out its strongest responses, and finalized its interpretation of the CWA TAS provision as a congressional delegation to tribes of jurisdiction over reservations including non-Indian fee lands.[186]

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182. *See* Revised Interpretation of Clean Water Act Tribal Provision, 81 Fed. Reg. 30,183, 30,184 (May 16, 2016) (codified at 40 C.F.R. pts. 123, 131, 233, 501) [hereinafter 2016 TAS Reinterpretation]. In 2014, EPA conducted tribal "consultation" under Executive Order 13175 via distance webinars. *Id.* at 30,197–98. Interestingly, EPA met *in person* with ten national and regional state associations and held "additional informational meetings" with state associations and some individual states. *Id.* The final rule reported twenty-one tribal comments. *Id.*

183. Not all states have a knee-jerk reaction to assertions of tribal sovereignty. Of the thirty-two states with Indian reservations, twenty-four did not comment on EPA's proposed reinterpretation. *See* EPA, Rulemaking Docket EPA-HQ-OW-2014-0461, Revised Interpretation of CWA Tribal Provision, https://perma.cc/36NG-6V3X. Of the eight states that did comment, two were supportive of the delegation's reinterpretation. *See* Larry Wolk, Exec. Dir., Colo. Dep't of Pub. Health and Env't, Comment Letter on Revised Interpretation of CWA Tribal Act Provision 1 (Oct. 1, 2015), https://perma.cc/UX8Y-MRFP (indicating Colorado is "generally in favor of tribes obtaining treatment as a state under the Clean Water Act and therefore supportive of the reinterpretation" and also noting a specific federal law addressing state and tribal jurisdiction on the Southern Ute Reservation); John Linc Stine, Comm'r, Minn. Pollution Control Agency, Comment Letter on Revised Interpretation of CWA Tribal Act Provision 1 (Oct. 2, 2015), https://perma.cc/9ZQM-GXAA (stating "[h]istorically the Minnesota Pollution Control Agency has supported Minnesota tribes when they apply to EPA for treatment as a state (TAS) approval" and that when disagreements have arisen the State agency has worked with EPA and the tribe to find a cooperative resolution).

184. 2016 TAS Reinterpretation, *supra* note 182, 81 Fed. Reg. at 30,184.

185. Two of the six states did not attack EPA's legal basis for its reinterpretation. Their comments focused on ensuring the new approach did not trench on special federal laws specifically addressing state and tribal environmental jurisdiction in those states. *See* Janet T. Mills, Me. Att'y Gen., Comment Letter on Revised Interpretation of CWA Tribal Provision 1–6 (Sept. 8, 2015), https://perma.cc/L2Y5-L9KK (asserting the Maine Indian Land Claims Settlement Act, 25 U.S.C. §§ 1721–1735, provided the state with environmental authority over all lands in the state including Indian reservations), and comment of Scott Thompson, Executive Director, Okla. Dep't of Env't Quality 1–2 (Sept. 6, 2015), https://perma.cc/B2HX-T2CX (noting the miscellaneous provision of a federal transportation law providing for joint tribal-state water quality regulation in Oklahoma).

186. 2016 TAS Reinterpretation, *supra* note 182, 81 Fed. Reg. at 30,183.

B. Judicial Developments Supporting Delegation

Perhaps the agency's strongest claim for "guidance" on delegation came from the 1996 decision in *Montana v. EPA I*.[187] There, the federal district court held EPA rationally applied its operating rule to determine the Salish and Kootenai Tribes had showed inherent jurisdiction over non-Indian water polluters.[188] Since the case turned on tribal inherent sovereignty, congressional delegation was irrelevant. And yet the court's attention to that topic was piqued by an amicus argument offered by the Assiniboine & Sioux Tribes of the Fort Reservation, also in Montana, whose WQS TAS application was then pending.[189]

The court's analysis of that extraneous issue was appropriately succinct; a closer look reveals its conclusion is fully supportable. The court noted the Supreme Court decision EPA had overlooked in the 1991 rule, *Mazurie*, and its holding that Congress may delegate to tribal governments regulatory jurisdiction over non-Indians.[190] The federal law there authorized tribal regulation of liquor sales in Indian country.[191] *Mazurie* upheld federal convictions of non-Indians who sold liquor on-reservation *without a tribal license*.[192] The fact the defendants' bar was on fee land did not protect them because the archetypal Indian country definition encompassed "all land within the limits of any Indian reservation . . . *notwithstanding the issuance of any [non-Indian] patent*."[193]

The *Montana* court found plain evidence of a congressional delegation over non-Indians in the statutory language of two CWA provisions. One was the CWA's definition of Indian country, a nearly verbatim recitation of the statute used in *Mazurie*, including its "notwithstanding" proviso that encompassed non-Indian fee lands.[194] The other provision was the TAS eligibility criterion that authorized tribal regulatory authority over "water resources which are . . . otherwise within the borders of an Indian reservation."[195]

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187. Montana v. EPA I, 941 F. Supp. 945 (1996) (upholding EPA's approval of the Salish & Kootenai Tribes' WQS).

188. *Id.*

189. *Id.* at 951.

190. 419 U.S. 544, 556–58 (1975). *Rice v. Rehner*, 463 U.S. 713 (1983), is often cited for the same proposition. *See, e.g.*, Ariz. Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1301–02 (D.C. Cir. 2000) (Ginsburg, J., dissenting in part). It is true that *Rehner* said as much, *see* 463 U.S. at 716, 729, 734, but it did so not by analyzing the question (which was not before the court) but in using *Mazurie*'s holding on that issue to find the federal Indian country liquor statute had not preempted the *state* from concurrently regulating on-reservation liquor sales. *See id.* at 726–34.

191. *Mazurie*, 419 U.S. at 547 (citing 18 U.S.C. § 1161).

192. *Id.* at 546.

193. Montana v. EPA I, 941 F. Supp. at 951 (citing 33 U.S.C. § 1377(h)).

194. *Id.*

195. 33 U.S.C. § 1377(e)(2).

The *Montana* court noted that Justice White (and three other Justices) cited the CWA TAS provision as an express congressional delegation in *Brendale v. Yakima Indian Nation*.[196] The issue in *Brendale* was whether a tribe had zoning authority over development of non-Indian fee land on reservation. In noting the tribe did not contend Congress had delegated such zoning power, Justice White cited the archetype Indian country definition, the liquor delegation statute from *Mazurie*, and the CWA TAS provision.

Finally, the *Montana* court recognized delegation "comports with common-sense for it seems highly unlikely" Congress intended tribal WQS apply only to water segments appurtenant to Indian lands while state WQS applied to adjacent segments next to non-Indian lands on the reservation.[197]

C. Contemporary Delegation in the Clean Air Act TAS Provision

EPA found additional congressional and judicial guidance on delegation from a sister statute. Congress added a TAS provision to the CAA three years after enacting the CWA TAS provision.[198] The two were similar but not identical. The CWA provision offered tribes regulatory functions over "water resources . . . otherwise within the borders of an Indian reservation."[199] The CAA provision offered tribes regulatory functions over "air resources within the exterior boundaries of the reservation *or other areas within the tribe's jurisdiction*."[200] And the CWA provision defined reservation (as including non-Indian lands);[201] the CAA provision did not define reservation.[202] Despite these subtle differences, EPA determined "[b]y their plain terms, both statutes thus treat reserva-

196. 941 F. Supp. at 951–52 (citing Justice White's decision for the Court in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 428 (1989)).

197. *Id.* at 952; *accord* 1991 WQS Rule, *supra* note 59, at 64,878 ("EPA 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.").

198. Clean Air Act Amendments, Pub. L. No. 101-549, §§ 107(d), 108(i), 104 Stat. 2464, 2467 (1990) (codified at 42 U.S.C. § 7601(d)).

199. 33 U.S.C. § 1377(e)(2).

200. 42 U.S.C. § 7601(d)(2)(B) (emphasis added).

201. 33 U.S.C. § 1377(h)(1).

202. It seems inevitable that complex legislation contains internal inconsistencies created inadvertently rather than by design. The CAA's legislative history contains no explanation for why section 301(d) that authorizes tribal treatment as a state for nearly every air program lacks a definition of reservation, *see* 42 U.S.C. § 7601(d)(2), whereas section 110(o) that focuses only on Tribal Implementation Plans does, *see id.* § 7410(o). And section 164(c), the country's first tribal state-like role, adopted administratively by EPA in 1974 and codified by Congress in 1977, provides that the default air quality classification set for the Prevention of Significant Deterioration program may be redesignated by the tribe "within the exterior boundaries of reservations" without defining the latter term. S*ee id.* § 7474(c).

tion lands and resources the same way and set such areas aside for tribal programs."[203] But, whereas EPA declined to interpret the CWA TAS provision as a delegation in 1991, seven years later EPA's Tribal Air Rule announced the CAA TAS provision was a congressional delegation of jurisdiction over non-Indian air polluters.[204]

The inevitable legal challenge—brought by a menagerie of thirteen non-Indian business and utility groups whose operations and profit margins could be greatly affected by effective air pollution management in Indian country[205]—was soundly rejected in *Arizona Public Service Co. v. EPA*.[206] The court found EPA's interpretation of delegation comported with the statute's text, structure, purpose, and legislative history.[207] The TAS provision's disjunctive text regarding reservation air resources *and other areas within a tribe's jurisdiction* was a "clear distinction" implying Congress considered all reservation areas "to be *per se* within the tribe's jurisdiction."[208] In other words, Congress had delegated jurisdiction over all reservation air pollution sources.

That conclusion complemented EPA's expert view that a fragmented parcel-by-parcel checkerboard approach would not serve the CAA's purpose of effective air quality management. Air pollutants are highly mobile, disperse widely, and present significant health and welfare risks.[209] "[A] territorial approach to air quality regulation best advances rational, sound air quality management."[210]

And finally, the court noted Congress had rejected language limiting tribes to management functions "within the area of the tribal government's jurisdiction."[211] That "strongly suggested" Congress viewed all areas within reservations

203. 2015 Proposed TAS Reinterpretation, *supra* note 59, 80 Fed. Reg. at 47,435.

204. Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254, 7254–58 (Feb. 12, 1998) (codified at 40 C.F.R. pts. 9, 35, 49, 50, 81) [hereinafter Tribal Air Rule].

205. Claims that EPA's view impinged on states' sovereignty peppered the suit, but curiously, no state or state environmental agency lodged a petition. The State of Michigan did intervene, and when it later sought Supreme Court review three other states—South Dakota, Nevada and New Mexico—submitted an amicus brief. Four Indian tribes with emerging air programs—Gila River Indian Community, Navajo Nation, Salt River Pima-Maricopa Indian Community, and Shoshone-Bannock Tribes—intervened on EPA's side.

206. 211 F.3d 1280 (D.C. Cir. 2000).

207. *See id.* at 1288.

208. *Id.*.

209. *Id.* (citing Indian Tribes: Air Quality Planning and Management, 59 Fed. Reg. 43,956, 43,959 (Aug. 25, 1994)).

210. Indian Tribes: Air Quality Planning and Management, 59 Fed. Reg. at 43,959.

211. 211 F.3d at 1289 (quoting S. 1630, 101st Cong. § 113(a) (1990)).

as subject to tribal jurisdiction, and also showed Congress knew how to draft language requiring tribes show jurisdiction to qualify for TAS.[212]

One judge dissented, arguing that it seemed reasonable that Congress would be clear when delegating tribal authority over non-Indians.[213] Delegation intent was clear, for example, in section 110(o) that authorized Tribal Implementation Plans over "*all areas* . . . located within the exterior boundaries of the reservation, *notwithstanding* the issuance of any patent, and including rights-of-way running through the reservation."[214] There is the archetype Indian country definition again: something everyone seems to interpret as congressional delegation language, just as EPA has done with the CWA TAS provision. The *Arizona Public Service Co.* dissent thus characterized the *notwithstanding* proviso as the "gold standard" for tribal delegations, and found its omission from the CAA TAS provision fatal to EPA's conclusion.[215]

The majority rejected the dissent's asserted gold standard.[216] *Mazurie* did turn on the *notwithstanding* proviso, but since that was the statutory language before the Court it had no occasion to consider other possible formulations.[217] That Congress used different language in the 1990 CAA amendments was thus not dispositive.[218] Indeed, the court suggested (wrongly) the difference might have been motivated by EPA's hesitation in 1989 to read the CWA's notwithstanding proviso as a delegation.[219] EPA had exercised caution there because of

212. *Ariz. Pub. Serv. Co.*, 211 F.3d at 1289. Compare the SDWA TAS eligibility criterion: "the functions to be exercised by the Indian Tribe *are within the area of the Tribal Government's jurisdiction.*" 42 U.S.C. § 300j-11(b)(1)(B).

213. *Ariz. Pub. Serv. Co.*, 211 F.3d at 1300 (Ginsburg, J., dissenting).

214. 42 U.S.C. § 7410(o) (emphasis added).

215. *Ariz. Pub. Serv. Co.*, 211 F.3d at 1303 (Ginsburg, J., dissenting). A key case missed by the dissent, the majority, and EPA might have buttressed that conclusion. *Montana v. United States* also explicitly referenced the *notwithstanding* proviso: "If Congress had wished to extend tribal jurisdiction to lands owned by non-Indians, it could easily have done so by incorporating . . . the definition of 'Indian country [*notwithstanding* proviso].'" 450 U.S. 544, 562 (1981).

216. *Ariz. Pub. Serv. Co.*, 211 F.3d at 1289.

217. *Id.* at 1290.

218. *Id.* at 1289. Indeed, the court noted the CWA WQS provision contained the dissent's "gold standard" and yet EPA declined to find a delegation from it. *Id.* An option different than delegation arose shortly thereafter. In *United States v. Lara*, 541 U.S. 193, 198–200 (2004), the Court held Congress had constitutionally "adjust[ed]" the status of tribal inherent sovereignty by "recogniz[ing] and affirm[ing]" it included criminal prosecution of nonmember Indians. Although the CWA had no similar language, tribal attorney and professor Ann Tweedy used *Lara*'s analysis to argue the TAS provision should be read as a congressional delegation. *See* Ann E. Tweedy, *Using Plenary Power as a Sword: Tribal Civil Regulatory Jurisdiction Under the Clean Water Act After* United States v. Lara, 35 ENV'T L. 471, 486 (2005).

219. *Ariz. Pub. Serv. Co.*, 211 F.3d at 1289 ("We can assume that Congress was aware of EPA's contemporaneous interpretation of the Clean Water Act, first proposed in 1989 (while Congress contemplated the 1990 Amendments) . . . . Thus, Congress' failure to use the same

the CWA's ambiguous and inconclusive legislative history, which the court found was not true for the subsequent CAA amendments.[220] The court thus upheld the Tribal Authority Rule's provision for approving tribes' reservation air programs based on congressional delegation (without requiring a showing of inherent jurisdiction over non-Indians).[221]

In addition to adding a significant win in its long streak of judicial successes for its Indian Program,[222] EPA viewed *Arizona Public Service Co.* as "useful guidance from Congress regarding its similar intent in 1987 [in the CWA

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language in [the CAA TAS provision] does not at all imply that it meant to avoid delegation to the tribes; rather, it may suggest just the opposite."). This ostensibly logical assumption is belied by the actual timing of the CAA TAS provision. It first appeared, in the same form as the enacted provision, on May 11, 1989, more than four months *before* the 1989 Proposed WQS Rule was issued on September 22, 1989. *See* Clean Air Restoration Act of 1989, H.R. 2323, 101st Cong. § 604 (1989).

220. *Ariz. Pub. Serv. Co.*, 211 F.3d at 1291.

221. *Id.* at 1284. The court also endorsed EPA's treatment of tribal trust lands and pueblos as informal reservations entitled to the benefit of the CAA delegation, *see id.* at 1292–94, and by extension, lent support for EPA's long held similar view for TAS primacy under the CWA, *see* 1991 WQS Rule, *supra* note 59, 56 Fed. Reg. at 64,881.

222. *See, e.g.*, Nance v. EPA, 645 F.2d 701 (9th Cir. 1981) (upholding EPA's approval of the Northern Cheyenne's prevention of significant deterioration (PSD) redesignation); Wash. Dep't of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985) (upholding EPA's refusal to delegate RCRA hazardous waste in Indian country programs to state); Phillips Petrol. Co. v. EPA, 803 F.2d 545 (10th Cir. 1986) (upholding EPA's direct implementation of the SDWA underground injection program in Indian country); Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996) (upholding EPA's approval of the Isleta Pueblo's WQS); Montana v. EPA I, 941 F. Supp. 945 (D. Mont. 1996) (upholding EPA's approval of the Salish & Kootenai Tribes' WQS); Montana v. EPA II, 137 F.3d 1135 (9th Cir. 1998) (upholding EPA's approval of the Salish and Kootenai Tribes' WQS); Montana v. EPA, 141 F. Supp. 2d 1259 (D. Mont. 1998) (upholding EPA's approval of the Assiniboine & Sioux Tribes' WQS); Arizona v. EPA, 151 F.3d 1205 (9th Cir. 1998) (upholding EPA's approval of the Yavapai Apache's PSD redesignation), *modified*, 170 F.3d 870 (9th Cir. 1999); Hydro Res., Inc. v. EPA, 198 F.3d 1224 (10th Cir. 2000) (upholding EPA's direct implementation of the SDWA underground injection program on lands whose Indian country status was in dispute); *Ariz. Pub. Serv. Co.*, 211 F.3d at 1288 (upholding EPA's interpretation of the CAA TAS provision as a congressional delegation to tribes of jurisdiction over on-reservation non-Indians); Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001) (upholding EPA's approval of the Sokaogon Chippewa Community's WQS).

EPA's Indian program has suffered some losses. *See, e.g.*, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) (rejecting EPA direct implementation of the RCRA solid waste program on the Yankton Reservation); Wyoming v. EPA, 875 F.3d 505, 511 (10th Cir. 2017) (vacating EPA's approval of the Northern Arapahoe & Eastern Shoshone Tribes' CAA program); Backcountry Against Dumps v. EPA, 100 F.3d 147 (D.C. Cir. 1996) (vacating EPA's approval of the Campo Band of Mission Indians' RCRA solid waste program); Arizona v. EPA, 151 F.3d at 1212–13 (invalidating EPA's attempt to make the Yavapai Apache's PSD redesignation effective through a Federal Implementation Plan); Michigan v. EPA, 268 F.3d 1075 (D.C. Cir. 2001) (invalidating EPA's rule for direct implementation of the federal operating permit program on lands whose Indian country status was in question).

TAS] to provide for uniform tribal regulation of mobile environmental pollutants within reservations."[223]

D. EPA and Tribal Experience with the TAS Requirement for Inherent Tribal Jurisdiction

EPA found additional support for its delegation interpretation in tribes' and EPA's experience in developing and processing CWA TAS applications.[224] It noted TAS Tribes have "repeatedly" expressed concern that demonstrating inherent jurisdiction "is challenging, time consuming and costly," and "many tribes" have said it constituted "the single greatest administrative burden" of the TAS application process.[225] Unfortunately, the clearly intended broad impact of those facially significant generalizations in the Federal Register was eroded somewhat by the proposal's underlying and uncited documentation showing they were based on input from just eight tribes.[226] That tiny sample size also weakened the agency's claim that this "general experience confirm[ed]" the jurisdiction requirement imposed unintended administrative hurdles on tribes and required substantial commitments of limited tribal resources.[227]

The dataset for EPA's work in reviewing tribal applications was somewhat larger. The agency reviewed twenty-nine tribes whose TAS applications were approved after enhanced TAS review procedures were adopted in 1998.[228] Of those, fourteen had reservations with non-Indian fee lands, twelve had no non-

223. 2016 TAS Reinterpretation, *supra* note 182, 81 Fed. Reg. at 30,186.

224. 2015 Proposed TAS Reinterpretation, *supra* note 59, 80 Fed. Reg. at 47,436.

225. *Id.*

226. *See* EPA, EPA ICR No. 2515.02, Information Collection Request for Revised Interpretation of Clean Water Act Tribal Provision (Final INterpretive Rule) 3 (2016), https://perma.cc/Y4CE-SQV9. This analysis focused on the anticipated administrative burden and cost of proposed federal actions on other governments and private actors. EPA's conclusions were based on methodological analysis of data from those eight tribes, although commonsense and long experience with administrative agencies suggests EPA's conclusions were also influenced by unquantified, and perhaps extensive, interactions with tribes since 1991 when the original WQS rule became effective. That assumption is, perhaps, partially corroborated by the National Tribal Water Council's 2013 assertion that the inherent jurisdictional showing "has prevented many tribes from establishing federally approved [WQS]." Equal Treatment for Tribes, *supra* note 173, at 1.

227. 2015 Proposed TAS Reinterpretation, *supra* note 59, 80 Fed. Reg. at 47,436. EPA correctly noted that eliminating unintended administrative burdens is not a legal justification for its reinterpretation, but said it offered a strong policy basis for reconsideration especially in light of the reinterpretation's consistency with agency and executive branch policy favoring tribal self-determination. *Id.*

228. *See* Memorandum from Robert Perciasepe, Asst. Adm'r, Nat'l Indian Program, and Jonathan Z. Cannon, Gen. Counsel, EPA, (March 19, 1998) (Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations). This document is no longer available on EPA's website, but it is summarized in the 2015 Proposed TAS Reinterpretation, *supra* note 59, 80 Fed. Reg. at 47,439 n.15.

Indian fee lands and three lacked information.[229] EPA's analysis of the twenty-six applications indicated the agency took an average of 1.6 years longer to approve tribes with non-Indian fee lands on their reservations than those without such lands.[230] This reality no doubt contributed to the NTWC's 2013 assertion that the inherent jurisdictional showing "has prevented many tribes from establishing federally approved [WQS]."[231]

Without questioning the bona fides of the tribes or EPA, their assertions are puzzling in light of the 1991 WQS Rule's operating rule's "relatively simple showing" to demonstrate tribal inherent jurisdiction.[232] The rule asked only that tribes (1) show their reservation had surface waters used by tribal members and subject to protection under the CWA, and (2) *assert* that non-Indian water pollution would have a serious and substantial effect on tribal health and welfare.[233] Except for delegation, showing jurisdiction can get no easier. States certainly felt that way. When the State of Montana (unsuccessfully) sought Supreme Court review of *Montana v. EPA II*, eleven states filed an amicus brief complaining about EPA's operating rule: "In place of careful, fact-intensive historical inquiry into the status of a reservation, EPA has concocted *a simplistic, wooden formula under which no tribe could ever fail to receive state status* under the

229. EPA, Analysis of TAS Processing Times 1 (2015), https://perma.cc/Z4BG-UFVE.

230. 2016 TAS Reinterpretation, *supra* note 182, 81 Fed. Reg. at 47,436. The finding did include time tribes spent refining the application and providing additional materials EPA requested *after* application submission but did not attempt any assessment of the time it took tribes to complete the TAS application *before* submission.

231. Equal Treatment for Tribes, *supra* note 173, at 1. The most logical reading of the Council's assertion (it offered no data or anecdotal information) is that most tribes have consciously decided not to develop WQS programs. It could also have meant tribes whose submitted programs languished in EPA's bureaucracy for years. *See, e.g.*, Chaitna Sinha, Off. of the Reservation Att'y, Confed. Tribes of the Colville Reservation, Comment Letter on Proposed Rule Revised Interpretation of Clean Water Act Tribal Provision 3 (Oct. 6, 2015), https://perma.cc/2RMZ-E9KN (reporting the Tribes' preparation of its CWA TAS application took "a period of years" before submission in 2013 and still had not been approved by October 2015). EPA did approve the Colville Tribes' WQS three years later in 2018 (about 4.4 years after submission). *See EPA Actions on Tribal Water Quality Standards and Contacts*, EPA, https://perma.cc/5EUP-JZ2D. This is historically interesting in that Colville was the first and only Indian reservation for which EPA issued federal WQS, some twenty-nine years earlier. *See* WQS for the Colville Indian Reservation in the State of Washington, 54 Fed. Reg. 28,622 (July 6, 1989). The Tribes had developed their own WQS program in 1984 before Congress added the TAS provision in 1987, *see* 53 Fed. Reg. 26,968, 26,970 (proposed July 15, 1988), and pressed EPA in 1986 to issue them as federal WQS legally enforceable across CWA programs, *see* 54 Fed. Reg. at 28,622. EPA did so just two months before proposing CWA TAS regulations for approving tribal WQS. *Id.* EPA made clear the Colville approach was not "a model" or "a precedent" for the future since EPA now had congressional authorization for approving tribal WQS. *Id.*

232. 1991 WQS Rule, *supra* note 59, 56 Fed. Reg. at 64,879.

233. *Id.*

Clean Water Act."[234] Perhaps, but tribes had to apply first. In 2015, EPA candidly acknowledged its prior expectation that the operating rule's simple burden would spur more tribal applications had not been realized.[235]

IV. Continued Litigation Risk Despite Delegation Fix

A third category of comments submitted on EPA's 2015 reinterpretation proposal was arguably the most pernicious and raised a different kind of litigation risk for tribes and EPA. The comments did not challenge the extent of tribal sovereignty directly. Instead, they argued the geographic extent of some Indian reservations had contracted to contain only Indian lands, and by extension, tribal sovereignty (and EPA's Indian Program) was similarly limited. These comments were based on the so-called Diminishment Doctrine, created by the Supreme Court to address disputes arising from an historical reality based on outmoded policies with significant, modern consequences.

A. Judicial Diminishment of Indian Reservations

The historical reality from which Diminishment Doctrine arose was the misguided, turn-of the-century Assimilation and Allotment Era. From roughly 1887–1932, Congress passed dozens of laws authorizing conveyances of private "allotments" to individual Indians from formerly communal tribal land. Once each individual male member of the tribe received an allotment, the federal government frequently treated the remaining reservation lands as "surplus" because presumably they were no longer needed by the tribe. Thus, those surplus lands were often opened to non-Indian ownership.[236]

The congressionally-introduced presence of non-Indians in Indian reservations was ostensibly for the benefit of indigenous peoples. A Senate Report for one such act suggested in the accepted ethnocentric tone of the time: "The occupation of the land released by [the Indians] by actual settlers under the homestead law bringing [the Indians] in close contact with the frugal, moral, and industrious people who will settle there will stimulate individual effort and make [the Indians' assimilative] progress much more rapid than heretofore."[237] Perhaps some Euro-Americans truly believed that notion and the legitimacy of its purported goal. History suggests a more likely, and less altruistic, congressional motivation: simply making more land available for the continuing tide of

234. Brief of Amici Curiae States of Arizona, et al., in Support of Petition for Writ of Certiorari at 11, Montana v. EPA II, 137 F.3d 1135 (9th Cir. 1998) (No. 97-1929) (emphasis added).

235. 2015 Proposed TAS Reinterpretation, *supra* note 59, 80 Fed. Reg. at 47,436.

236. 1 Felix S. Cohen, Cohen's Handbook of Federal Indian Law § 1.04 (Nell Jessup Newton et al. eds., 2019).

237. Yankton Sioux Tribe v. S. Mo. Waste Mgmt. Dist., 890 F. Supp. 878, 884 (D.S.D. 1995) (quoting S. Rep. No. 196, 53d Cong., 2d Sess., 1 (1894)).

European immigrants.[238] Indeed, Indian tribes lost some ninety million acres or more in the allotment process.[239]

In the middle of the Allotment Era the Court unleashed Congress' so-called "plenary" authority over Indian affairs, legitimizing a flood of Indian land takings in violation of solemn treaty promises.[240] Yet two years later, the Court said "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress."[241] Such action was clear, for example, from statutes that "restored" portions of Indian reservations to the public domain.[242]

The more difficult question was whether the Allotment Acts, which made way for non-Indian ownership of lands within reservations not explicitly restored to the public domain, also diminished reservations. The Court consistently rejected arguments that the mere purchase of reservation lands by non-Indians meant the reservation had been diminished as to those lands.[243] Instead, the Court repeatedly framed the question with a well settled canon of construction: statutory ambiguities are to be interpreted in favor of tribes.[244] Reservation

238. *See, e.g.*, D.S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 18–19 (1973) (quoting Colorado Senator Henry M. Teller that "the real aim [of allotment] was to get at the Indian lands and open them up to settlement. The provisions for the apparent benefit of the Native Americans are but the pretext to get at his lands and occupy them. . . . If this were done in the name of Greed, it would be bad enough; but to do it in the name of Humanity . . . is infinitely worse."); *cf.* DeCoteau v. Dist. County Ct., 420 U.S. 425, 431 (1975) ("But familiar forces soon began to work upon the Lake Traverse Reservation. A nearby and growing population of white farmers, merchants, and railroad men began urging authorities in Washington to open the reservation to general settlement."). *See generally* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. STATE L.J. 1 (1995).

239. *See* COHEN, *supra* note 236, § 1.04.

240. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

241. United States v. Celestine, 215 U.S. 278, 285 (1909); *accord* Solem v. Bartlett, 465 U.S. 463, 470 (1984) ("[O]nly Congress can divest a reservation of its land and diminish its boundaries.").

242. *See, e.g.*, United States v. Pelican, 232 U.S. 442, 445–46 (1914) (explaining that a specified portion of the reservation was "vacated and restored to the public domain"); Sioux Tribe of Indians v. United States, 316 U.S. 317, 323 (1942) (explicating that the President ordered lands previously reserved for Indian use "restored to the public domain . . . the same being no longer needed for the purpose for which they were withdrawn from sale and settlement"); Seymour v. Superintendent, 368 U.S. 351, 354 (1962) (saying that the Act which "vacated and restored to the public domain" certain reservation lands diminished the reservation as to those lands).

243. *Seymour*, 368 U.S. at 357 (noting that the issue had "been squarely put to rest" by the statutory definition of Indian country including lands within reservations "notwithstanding the issuance of any patent" to non-Indians (quoting 18 U.S.C. § 1151(a)).

244. *See, e.g.*, Choate v. Trapp, 224 U.S. 665, 675 (1912) (saying that "doubtful expressions" (in an allotment act) are to be resolved in favor of the tribe); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586 (1977) ("In determining [congressional diminishment] intent, we are cautioned to follow 'the general rule that '(d)oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection

diminishment, then, required a clear expression of congressional intent in the particular allotment and surplus land act(s).[245]

That apparently straightforward statutory inquiry was, however, significantly complicated by the political realities of the past:

> Another reason why Congress did not concern itself with the effect of surplus land acts on reservation boundaries was the turn-of-the-century assumption that Indian reservations were a thing of the past. Consistent with prevailing wisdom, members of Congress voting on the surplus land acts believed to a man that within a short time—within a generation at most—the Indian tribes would enter traditional American society and the reservation system would cease to exist. Given this expectation, *Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation*.[246]

Nonetheless, the Court states it has "never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land act."[247] Rather, "it is settled law that some surplus land acts diminished reservations and other surplus land acts did not."[248]

In making that determination, of course, all courts focused primarily on the statutory language, which is the "most probative evidence of congressional intent."[249] That analysis was often problematic, however, not only because of Congress' alleged belief Indian country would wither away, but also because the idea that reservation status "might not be coextensive with Indian land ownership was unfamiliar" at that time.[250]

Legislation that made "[e]xplicit reference to cession" or an "unconditional commitment . . . to compensate the Indian tribe for its opened land" is com-

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and good faith'" (quoting McClanahan v. Ariz. State Tax Comm'n, 441 U.S. 163, 174 (1973))); Hagen v. Utah, 510 U.S. 399, 410 (1994) ("Throughout the [diminishment] inquiry, we resolve any ambiguities in favor of the Indians.") (citing *Solem*, 465 U.S. at 470).

245. *See, e.g.*, *Seymour*, 368 U.S. at 355 (finding no congressional language "expressly vacating" a portion of the reservation); Mattz v. Arnett, 412 U.S. 481, 504 n.22 (1973) ("Congress has used clear language of express termination when that result is desired."); *Solem*, 465 U.S. at 470 ("Diminishment . . . will not be lightly inferred."); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) (explaining that Congress' intent to diminish treaty terms establishing an Indian reservation must be "clear and plain") (quoting United States v. Dion, 476 U.S. 734, 738–39 (1986)); Nebraska v. Parker, 136 S. Ct. 1072, 1079 (2016) (explaining that Congress' intent to diminish the reservation "must be clear") (quoting *Solem*, 465 U.S. at 470).

246. *Solem*, 465 U.S. at 468 (emphasis added) (footnote omitted).

247. *Id.* at 468–69.

248. *Id.* at 469 (citations omitted).

249. *Id.* at 470.

250. *Id.* at 468.

monly viewed as diminishing the reservation.[251] Congressional references that tribal lands shall be "'restored' to the public domain" generally extinguish the former use as an Indian reservation.[252] Or Congress might speak of a reservation as being "discontinued," "abolished," or "vacated."[253]

Ambiguities in the statutory language were not uncommon, and so courts attempting to resolve them often looked at the historical context surrounding passage of the act(s). This was not a question of legislative history: the inquiry was whether the historical context revealed "a widely held, contemporaneous understanding the affected reservation would shrink . . . , [in which case] we have been willing to infer Congress shared [that] understanding."[254]

That questionable logic was stretched nearly to the breaking point by a third area of inquiry: the subsequent settlement and governmental treatment of the area in question. These facts were sometimes used by courts to help "decipher" Congress's intent in enacting the original statute.[255] The Court claims it "has never relied *solely*" on that third area of inquiry.[256] Yet state regulatory incursions in disputed areas frequently raise exaggerated judicial concern for upsetting assertedly "justifiable expectations" of non-Indians, and disrupting the administration of state and local government programs, which often become compelling justifications for finding diminishment.[257]

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251. *Id.* at 470.

252. Hagen v. Utah, 510 U.S. 399, 412 (1994) (citing Sioux Tribe v. United States, 316 U.S. 317, 323 (1942)).

253. Mattz v. Arnett, 412 U.S. 481, 504 n.22 (1973) (citations omitted).

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

255. *Id.* The Court admitted (in a footnote) that using subsequent demographic history as a method of statutory interpretation "is, of course, . . . unorthodox and potentially unreliable," but since Congress was generally unfocused on diminishment in the surplus land acts, "the technique is a necessary expedient." *Id.* at 472 n.13. For one pointed criticism of this claim, *see* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers,* 109 YALE L.J. 1, 19 (1999) ("The conceptual problem with this approach, of course, is that post enactment developments reveal nothing about original congressional intent, much less intent sufficiently clear to satisfy the canon [requiring ambiguous statutes to be construed in favor of tribal interests].").

256. Nebraska v. Parker, 136 S. Ct. 1072, 1081 (2016) (emphasis added).

257. *See, e.g.*, DeCoteau v. Dist. County Ct., 420 U.S. 425, 449 (1975) (speculating that ending state jurisdiction after 80 years "would be *calamitous* for all the residents of the area") (emphasis added); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 604–05 (1977) (claiming "the single most salient fact is the unquestioned actual assumption of state jurisdiction" for seventy years that "has created justifiable expectations which should not be upset"); *Solem*, 465 U.S. at 471 n.13 (asserting that finding an area predominantly populated by non-Indians remains Indian country "*seriously burdens* the administration of State and local governments" (emphasis added)); *Hagen*, 510 U.S. at 421 (citing *Rosebud*, 430 U.S. at 604–05) (suggesting, in light of long-exercised state jurisdiction, that finding no diminishment "would *seriously disrupt* the justifiable expectations of the people living in the area" (emphasis added)); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 357 (1998) (finding support for a diminish-

B. EPA's Programmatic Actions Implicating Diminishment Issues

Nothing in the historical development of EPA's Indian program[258] suggests a goal of curbing diminishment claims by limiting state environmental regulatory incursions into Indian country. For the most part, as discussed below, EPA's programmatic actions were aimed at helping tribes achieve environmental self-determination and directly or indirectly limited state environmental roles. EPA made two notable exceptions in the 1990s, both relating to water quality regulation, when practical considerations induced the agency to depart from the program norm of tribal self-determination.[259] EPA's most recent action—the 2016 CWA TAS reinterpretation—gave limited weight to state and local governments' diminishment comments, returning apparently to its core approach of preserving tribal (and federal) regulatory authority in Indian country.

EPA's first Indian program action—its 1973 CWA regulations—made clear the agency would not delegate water quality programs to states for implementation over Indian activities on Indian lands.[260] The presumed bar on state delegation quickly expanded to the agency's other key regulatory programs in 1980 regulations indicating that EPA will assume a state lacked authority over Indian lands "unless the state affirmatively asserts authority and supports its assertion with an analysis from the state's attorney general."[261]

EPA immediately rejected one state's bare assertion that a federal environmental law's provisions for state regulation in lieu of EPA implementation constituted congressional authorization for state authority in Indian country, and prevailed in the Ninth Circuit.[262] That court also accepted EPA's clarification of its early references to Indian lands as meaning Indian country,[263] which fed-

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ment conclusion from the "State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing virtually unchallenged to the present day").

258. *See* Grijalva, *Origins*, *supra* note 138 (examining the historical development of EPA's Indian program from the agency's creation in 1970 through the adoption of its 1984 Indian Policy and 1985 Implementation Guidance).

259. *See infra* text accompanying note 268 (describing EPA's assumption that state WQS apply to reservations without TWQS), and note 273 (describing EPA's assumption that state-issued water pollution permits apply to reservations lacking a tribal permit program).

260. National Pollutant Discharge Elimination System, 38 Fed. Reg. 13,528, 13,530 (May 22, 1973) (codified at 40 C.F.R. § 125.2(b)). EPA noted that for the few states with specific congressional authorization for Indian country implementation, it would address those programs on a case-by-case basis. *Id.*

261. Consolidated Permit Regulations: RCRA Hazardous Waste; SDWA Underground Injection Control; CWA NPDES; CWA Section 404 Dredge or Fill Programs; and CAA PSD, 45 Fed. Reg. 33,290, 33,378 (May 19, 1980) (codified at 40 C.F.R. pts. 122–25).

262. Wash. Dep't of Ecology v. EPA, 752 F.2d 1465, 1469–71 (9th Cir. 1985) (holding that "EPA reasonably interpreted [the RCRA hazardous waste management programs] not to grant state jurisdiction over the activities of Indians in Indian country.").

263. *Id.* at 1467 n.1.

eral Indian law defines as including non-Indian fee land.[264] One year later a different court upheld EPA's direct implementation of another regulatory program in Indian country,[265] accepting the parties' concessions the state had no implementation authority.[266] Indeed, EPA has said on multiple occasions that but for a very few states with unique congressional authorizations, it has never approved a state water quality regulatory program for Indian country.[267]

On their face, these consistent actions precluded states from developing a history of exercising environmental jurisdiction in Indian country. Yet EPA has departed twice from its foundational approach and taken the opposite view, and both departures were in the specific context of Indian country water quality protection. In both its 1989 proposal and the 1991 final WQS TAS rule, the agency said "if States have established [water quality] standards that purport to apply to Indian reservations, EPA will *assume without deciding* that those standards remain applicable until a Tribe is authorized to establish its own standards."[268] This seemingly significant departure from EPA's Indian Policy was "not an assertion that State standards do necessarily apply as a matter of law" to reservation waters, but that "fully implementing a role for Tribes under the CWA will require a transition period" and ignoring developed state WQS would create "a regulatory void" unbeneficial to reservation water quality.[269] EPA thus asserted that defaulting to "previously developed State standards in the interim period . . . was the best approach to an intractable problem" of protecting the reservation environment and thus "fully consistent" with its Indian Policy.[270]

Similar practical concerns were offered as justification for the agency's second clear departure from its foundational approach of keeping states out of Indian country just two years later. In 1993, EPA issued TAS regulations for a broader array of CWA programs, including the section 402 program for issuing

264. *Id.* (citing 18 U.S.C. § 1151).

265. Phillips Petrol. Co. v. EPA, 803 F.2d 545, 563 (10th Cir. 1986) ("EPA is empowered by [SDWA] to implement underground injection control programs on Indian lands.").

266. *See id.* at 549.

267. *See, e.g.*, 2016 TAS Reinterpretation, *supra* note 182, 81 Fed. Reg. at 30,195; 2016 Baseline WQS Proposal, *supra* note 70, 81 Fed. Reg. at 66,902; Memorandum from Cynthia C. Dougherty, Dir., Permits Div., to Water Mgmt. Div. Dirs., Regions I, II, IV–X at 1 n.1 (Nov. 16, 1993) [hereinafter Dougherty Memorandum].

268. 1989 Proposed WQS Rule, *supra* note 68, 54 Fed. Reg. at 39,104 (emphasis added) (quoting a letter from Lawrence Jensen, Gen. Counsel, EPA, to Dave Frohnmayer, Or. Att'y Gen. (Sept. 9, 1988)); *see also* 1991 WQS Rule, *supra* note 59, 56 Fed. Reg. at 64,890–91 (citing the same letter).

269. 1991 WQS Rule, *supra* note 59, 56 Fed. Reg. at 64,891.

270. *Id.*

NPDES permits to point source water pollution dischargers.[271] EPA candidly acknowledged some states were issuing NPDES permits in Indian country without agency authorization.[272] Without EPA authorization it seemed clear those permits lacked legal effect, yet EPA again said it "assume[d], without deciding," that existing permits on Indian reservations issued by States *without specific authorization* contained enforceable limits.[273] With no legal analysis, EPA simply repeated its reason from the WQS rule: until tribes (or EPA) assumed permit-issuing responsibility, there would be a regulatory gap in Indian country if existing state permits were not valid.[274]

More than two decades later, there have not been further dramatic programmatic departures from the Indian Policy. More common are efforts aimed at decreasing state environmental incursions into Indian country. A pertinent example is EPA's treatment of state and local government comments in the 2016 CWA TAS reinterpretation that implicitly or explicitly raised diminishment in the context of challenging EPA's reinterpretation.[275]

One state said EPA's revised interpretation would not foreclose debates over reservation boundaries.[276] Another asserted states would continue to assert authority over "disputed reservations" regardless of EPA's TAS interpretations.[277] And a third state described a reservation almost wholly owned in fee by non-Indians that still was not found to be disestablished.[278] Three counties in one state jointly submitted a comment describing decades of diminishment litigation over two reservations, noting its success in the Supreme Court in one case, apparently in support of their suggestion EPA adopt a bright line rule excluding fee lands settled by non-Indians within Indian reservations pursuant

271. *See* Treatment of Indian Tribes as States for Purposes of Sections 308, 309, 401, 402, and 405 of the CWA, 58 Fed. Reg. 67,966 (Dec. 22, 1993) (codified at 40 C.F.R. pts. 122, 123, 124, 501).

272. *See id.* at 67,974 (quoting letter from Lawrence Jensen, *supra* note 268); *see also* Dougherty Memorandum, *supra* note 267, at 3 (noting there are no known EPA approvals of state section 402 programs in Indian country but that some states are acting as "the *de facto* NPDES permitting authority" on reservations).

273. Treatment of Indian Tribes as States for Purposes of Sections 308, 309, 401, 402, and 405 of the CWA, 58 Fed. Reg. at 67,974.

274. *Id.* EPA spoke directly to existing state-issued permits (and existing state WQS). It did not say whether its policy allowed states to assert new WQS or issue new 402 permits, although the obvious logical answer was yes.

275. *See* EPA, *supra* note 183.

276. Idaho Dep't of Env't Quality, Barry N. Burnell, Water Quality Division Administrator, Comment Letter on Revised Interpretation of CWA Tribal Provision 2 (Oct. 6, 2015), https://perma.cc/2MRF-WSVP.

277. Bill Schuette, Mich. Att'y Gen. & Dan Wyant, Dir., Mich. Dep't of Env't Quality, Comment Letter on Proposed Rule Revised Interpretation of CWA Tribal Provision 9–10 (Oct. 6, 2015), https://perma.cc/6CTT-4C5K.

278. Kathleen Clarke, Dir., Utah Pub. Lands Pol'y Coord. Off., Comment Letter on Revised Interpretation of CWA Tribal Provision 4 (Oct. 6, 2015), https://perma.cc/T69Z-9MFH.

to surplus land acts.[279] Three towns within those counties also commented, expressly incorporating by reference the counties' comments, and then essentially reiterated them anyway.[280] A fourth town in a different state, but with even more animosity to the reservation that overlaps its borders, listed extensive historical events with no clear or logical connection to its assertion that the reservation has been diminished or disestablished.[281]

All those comments were of course publicly available in the electronic rulemaking docket for the 2016 reinterpretation. They are not, however, as publicly prominent as the Federal Register announcement of the agency's final rule. Nowhere in the Federal Register response did the agency name the Diminishment Doctrine or even use the term diminishment. Instead, EPA blandly characterized comments from several local governments as "seeking clarification of the geographic scope of [CWA] TAS."[282] The local governments, EPA reported, noted "the complex histories of congressional treatment" of some reservations that were opened by statute to non-Indian settlement, and that in certain situations courts found those surplus land acts resulted in fee lands losing their reservation status.[283] The agency said the local governments urged EPA expressly exclude from its rule fee lands settled by non-Indians within Indian reservations pursuant to surplus land acts.[284]

EPA's response did not note that the local government's bright line suggestion directly conflicted with the federal definition of Indian country expressly including non-Indian fee lands within Indian reservations.[285] Nor did EPA observe that the Supreme Court has rejected that bright line.[286] Instead, the agency flipped the local governments' logic on them: several had cited their involvement in litigation over decades on these complex and intensely fact-specific issues, so EPA observed it would be "inappropriate [for EPA's rule] to establish a single one-size-fits-all approach."[287] Ultimately though, EPA simply

279. Ron Winterton, Chairman, Duchesne County, et al., Comment Letter on Revised Interpretation of CWA Tribal Provision 1–11 (Oct. 6, 2015), https://perma.cc/58EJ-WGAN.

280. RoJean Rowley, Mayor, City of Duchesne, Vaun D. Ryan, Mayor, City of Roosevelt and Kathleen Cooper, Mayor, City of Myton, Comment Letter on Revised Interpretation of CWA Tribal Provision 1–10 (Oct. 6, 2015), https://perma.cc/7G9X-JTWD.

281. Andrew J. Vickers, Hobart Vill. Adm'r, Comment Letter on Revised Interpretation of CWA Tribal Provision 4–8 (Sept. 8, 2015), https://perma.cc/T7XM-GQCP. Hobart's long-standing claim the Oneida Reservation was diminished or disestablished was recently rejected by the Seventh Circuit. *See* Oneida Tribe of Indians v. Village of Hobart, 732 F.3d 837 (7th Cir. 2020).

282. 2016 TAS Reinterpretation, *supra* note 182, 81 Fed. Reg. at 30,191.

283. *Id.*

284. *Id.*

285. *See* 18 U.S.C. § 1151.

286. *See* Solem v. Bartlett, 465 U.S. 463, 469 (1984) ("[S]ome surplus land acts diminished reservations, and other surplus land acts did not.").

287. 2016 TAS Reinterpretation, *supra* note 182, 81 Fed. Reg. at 30,192.

said the geographic scope of CWA TAS was not at issue, as the rule did not change the agency's prior approach of limiting TAS to reservation waters.[288]

C. EPA's Program Losses from Diminishment Claims

EPA's avoidance of the term diminishment was surely intentional. Diminishment claims threaten the absolute loss of tribal homelands. The Diminishment Doctrine is also a poignant anamnesis of the history of indigenous relations with colonizing nations. That story is fundamentally about land loss, and land appropriation, and it is not equitable. New law students learn in studying property law that all American land titles trace their roots directly to the Doctrine of Discovery, an "extravagant . . . pretension" that the arrival of Christian colonizers on lands occupied by "heathens" constituted "discovery" vesting absolute legal title in the former and reducing the first possessor's rights to mere occupancy.[289]

For most tribes, the story of land loss did not end there. The Standing Rock and Cheyenne River Sioux Tribes of the Dakotas, for example, have suffered chronic land-related trauma for generations. That experience shed revealing light on their objections to the Dakota Access oil pipeline, installed immediately upstream from their reservations. An amicus brief educated the court (and the public): the Great Sioux Nation's traditional territory was dramatically reduced to a reservation in 1851;[290] the reservation was further reduced in 1868;[291] after the illegal discovery of gold and the Tribes' refusal to sell more land, the government unilaterally took the Black Hills in 1877;[292] in 1889, the reservation was split into six small ones;[293] and, from the 1940s to 1960s, the same federal agency now authorizing the oil pipeline built dams that

288. *Id.* at 30,191. As required by the 1991 WQS Rule, the applicant tribe would still submit a map or legal description of the area over which the Indian Tribe asserted authority to regulate surface water quality, *see* 40 C.F.R. § 131.8(b)(3)(i) (2019), and identify the surface waters for which the Tribe proposed to establish water quality standards, *see id.* § 131.8(b)(3)(iii).

289. Johnson v. M'Intosh, 21 U.S. 543, 591, 577 (1823).

290. Brief for Great Plains Tribal Chairmen's Ass'n as Amicus Curiae Supporting Intervenor-Plaintiff at 9–10, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F. Supp. 3d 77 (2017) (No. 16-1534) [hereinafter Great Plains Chairmen's Brief] (citing EDWARD LAZARUS, BLACK HILLS/WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT 5 (1991)); *see* Treaty of Fort Laramie with Sioux, 11 Stat. 749 (1851).

291. Great Plains Chairmen's Brief, *supra* note 290, at 11 (citing Treaty with the Sioux and Arapaho, 15 Stat. 635 (1868)).

292. Act of Feb. 28, 1877, 19 Stat. 254 (1877); United States v. Sioux Nation of Indians, 448 U.S. 371, 423 (1980) (finding this an unconstitutional taking and ordering payment of just compensation).

293. Act of Mar. 2, 1889, ch. 405, 25 Stat. 889.

flooded the fertile bottomlands, ancestral villages, and burial grounds of the remaining reservations.[294]

During the international attention over the Dakota Access Pipeline, the American Psychological Association explained that historic trauma of this sort has been linked to significant health disparities, and urged alternative pipeline action.[295] The association's president reported that "chronic, systemic loss and mistreatment [like that of many American Indians] may lead to historical trauma in which the pain experienced by one generation is transferred to subsequent generations."[296]

Decades before, EPA arguably recognized the intergenerational impact of land loss in the specific context of environmental protection. The agency realized environmental protection of Indian country is intrinsically related to preservation of indigenous homelands:

> Indian tribes, for whom human welfare is tied closely to the land, see protection of the reservation environment as essential to *preservation of the reservations themselves*. Environmental degradation is viewed as a form of *further destruction of the remaining reservation land base*, and pollution prevention is viewed as an act of tribal self-preservation that cannot be entrusted to others.[297]

Lost diminishment cases mean of course the loss of the reservation land base, giving pause to tribes when deciding whether to seek TAS status and EPA in deciding whether to approve tribal applications. Nonetheless, environmental values must be protected, and tribal self-determination must mean tribes decide for themselves when and how they exercise their inherent sovereignty. A recent case, *Wyoming v. EPA*,[298] illustrated the risk diminishment poses for tribal environmental self-determination.

In 2008, the Eastern Shoshone and Northern Arapahoe Tribes of the Wind River Reservation in Wyoming applied to EPA for TAS for several CAA programs.[299] These varied programs are essentially entry-level and focus on information access and capacity development. With TAS, the Tribes would

294. Great Plains Tribal Chairmen's Brief, *supra* note 290, at 12–14.

295. Statement from Antonio E. Puente, President, Am. Psych. Ass'n (Jan. 26, 2017), https://perma.cc/LZV6-2JT5.

296. Susan McDaniel, President, Am. Psych. Ass'n, *Historical Trauma in the Present: Why APA Cannot Remain Silent on the Dakota Access Pipeline* (Nov. 16, 2016), https://perma.cc/AX2M-EC4S.

297. Memorandum from William K. Reilly, Adm'r, EPA (July 10, 1991) (Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments) (emphasis added).

298. 875 F.3d 505 (10th Cir. 2017).

299. Approval of Application by Eastern Shoshone Tribe and Northern Arapaho Tribe for Treatment as a State Under the CAA, 78 Fed. Reg. 76,829 (Dec. 19, 2013).

be eligible for grants for air pollution-related planning activities.[300] EPA would notify them whether air quality on the Reservation that attains the National Ambient Air Quality Standards indicates that the current air quality designation should be revised.[301] The Tribes would gain access to risk management plans submitted by stationary sources.[302] As an "affected state," they would receive notices from Wyoming and adjacent jurisdictions of permit applications and proposed permits, and can recommend permit terms and conditions.[303] They would also get notice of new, modified or existing major stationary sources that may have cross-boundary impacts,[304] and could participate in interstate air pollution and visibility transport regions and commissions.[305]

All of these programs are non-regulatory: they include no permit-issuing authority or other direct regulatory powers over air pollution sources. Despite that, and the limited powers at stake, after EPA's Regional Administrator notified various governmental entities,[306] the State of Wyoming and others submitted comments asserting the Reservation had been diminished by a 1905 federal act.[307] EPA consulted with the Department of the Interior, which issued a Solicitor's Opinion (Oct. 26, 2011) concluding the 1905 Act did not diminish the Wind River Indian Reservation.[308] Based on the Solicitor's Opinion, additional information provided by the Tribes, and other information, EPA concluded the Tribes' map and descriptions accurately depicted the undiminished Reservation.[309]

The State sued and a two-judge majority of the Tenth Circuit applied *Solem v. Bartlett*'s[310] three-factor test and decided Congress diminished the Wind River Reservation in 1905.[311] The majority's analysis and conclusions show how challenging it is for a tribe to assess its likelihood of success on a diminishment claim. On *Solem* factor one, the statutory language of land cession was nearly identical to cases finding diminishment, but the guaranteed payment central in those cases was missing.[312] Seeking clear intent using *Solem*

300. 42 U.S.C. § 7405.
301. *Id.* § 7407(d)(3).
302. *Id.* § 7412(r)(7)(B)(iii).
303. *Id.* § 7661d(a)(2).
304. *Id.* § 7426.
305. *Id.* §§ 7492, 7506a, 7511c.
306. *See* 40 C.F.R. § 49.9(b) (2019).
307. *See* Decision Document, Approval of Application Submitted by the Eastern Shoshone Tribe and the Northern Arapaho Tribe For Treatment in a Similar Manner as a State for Purposes of Clean Air Act Sections 105, 505(a)(2), 107(d)(3), 112(r)(7)(B)(iii), 126, 169B, 176A and 184, at 8 (Dec. 6, 2013).
308. *Id.*
309. *See id.* at 13.
310. 465 U.S. 463 (1984).
311. Wyoming v. EPA, 875 F.3d 505, 525 (10th Cir. 2017).
312. *Id.* at 513–17.

factor two, the majority uncovered a predecessor bill from fourteen years earlier that would have clearly changed the Reservation boundaries had it been enacted (and also promised a full payment up front for the land),[313] and claimed it had a "continuity of purpose" with the 1904 bill lacking both express boundary changes and a lump sum payment.[314] Other unusual provisions in the 1905 Act did not dissuade the majority from finding clear intent, but it did note on *Solem* factor three that all parties had submitted "volumes of material" of subsequent treatment of the area "so rife with contradictions and inconsistencies as to be of no help to either side."[315]

The dissent's methodical explanation of the significant differences between the precedents used by the majority and the case facts was unable to convince his colleagues.[316] The majority vacated EPA's approval of the Wind River Tribes' TAS as to the diminished lands,[317] illustrating the risk diminishment poses for tribal environmental self-determination. The opportunities Congress explicitly provided for tribes in 1990 to build air pollution regulatory capacity—by developing baseline air quality data, evaluating facility permits and risk management plans, receiving information on cross-jurisdictional pollution, and collaborating with adjacent air quality regions on transboundary issues—were brushed aside[318] by an eighty-five-year-old statute myopically focused on land acquisition with no genuine attention to whether the Reservation territory would change.

The insidious nature of the Diminishment Doctrine is not, however, limited to assertions of tribal sovereignty. EPA's Indian Program actions apply primarily in Indian country, which means that when a court finds that a reser-

313. *Id.* at 517–18.

314. *Id.* at 522.

315. *Id.* at 523 (quoting Solem, 465 U.S. at 478).

316. *See id.* at 525 (Lucero, J., dissenting).

317. *Id.* at 525.

318. The particular nature of the CAA provisions at issue, and EPA's Indian Program special adaptations, make this conclusion an overstatement in practice. First, the court's vacatur did not affect the Tribes' TAS for the rest of the 2.2-million-acre Reservation, so there remains plenty of tribal air quality authority and work to be done. Second, while stationary sources in the diminished area are now subject to state rather than federal regulation, the CAA provisions relating to cross-border air pollution transport are immediately applicable to regulated actions there as the area directly abuts the remaining Reservation. Finally, EPA treats Indian trust lands as "informal" reservations entitled to the same treatment as formal reservations, *see* Tribal Air Rule, *supra* note 204, 63 Fed. Reg. at 7257–58, an Indian Policy approach previously upheld by the D.C. Circuit, *see* Ariz. Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1292–94 (D.C. Cir. 2000). Seventy-five percent of the area found diminished in *Wyoming v. EPA* is trust land. So, following the vacatur, the agency revised its TAS approval to exclude the twenty-five percent of fee lands, and approved tribal CAA authority over the remaining seventy-five percent as an informal reservation. *See* Revision to Approval of Application by Eastern Shoshone Tribe and Northern Arapaho Tribe for Treatment as a State Under the CAA, 84 Fed. Reg. 7823 (Mar. 5, 2019).

vation is diminished, the diminished portion of the reservation is no longer Indian country over which EPA has authority. Despite the tribal self-determination preference intrinsic to EPA's Indian Policy and the TAS provisions, the reality is that what little environmental regulation actually occurs in Indian country occurs primarily through direct implementation by EPA.[319] The lesson that EPA's Indian country work is also at risk from diminishment claims was made clear in the only Indian country environmental law case to make it to the Supreme Court to date, *South Dakota v. Yankton Sioux Tribe*.[320]

EPA's direct implementation authority in *Yankton Sioux* was somewhat different than the typical command and control regulatory program. The program at issue was the Resource Conservation and Recovery Act's ("RCRA") requirements for municipal solid waste landfills. EPA's programmatic role is to prescribe criteria for sanitary landfills ensuring no reasonable probability of adverse health or environmental effects from waste disposal.[321] All landfills must comply with the federal requirements unless EPA has approved an alternate state plan,[322] which may vary from the federal requirements so long as it meets EPA's performance requirements for health and environmental protection. One federal requirement states often drop because of its expense is the mandate for a composite plastic liner beneath the entire landfill to stop leachate from leaking into groundwater.

Yankton Sioux arose when four South Dakota counties formed a waste management district and purchased non-Indian fee land within the boundaries of the Yankton Sioux Tribe's Reservation for the construction of a new solid waste landfill.[323] The waste district *sought from the state* a construction permit, and requested a variance from the federal requirement for a composite liner, proposing instead an inexpensive bed of compacted clay.[324] That action was curious because at the time South Dakota did not have an EPA-approved alternate solid waste plan. The state quickly submitted a plan, which EPA granted

319. *See* EPA, Direct Implementation of Federal Environmental Programs in Indian Country 1 (2016), https://perma.cc/J63Z-BGBZ ("EPA retains responsibility for implementing the vast majority of federal environmental programs in Indian country.").

320. 522 U.S. 329 (1998).

321. *See* 42 U.S.C. § 6944(a); 40 C.F.R. pt. 258 (2019) (prescribing extensive requirements for the location, construction, operation and closure of solid waste landfills).

322. *See* Subtitle D Regulated Facilities; State/Tribal Permit Program Determination of Adequacy; State/Tribal Implementation Rule (STIR), 61 Fed. Reg. 2584, 2585 (Jan. 26, 1996) (explaining that the federal landfill requirements of 40 C.F.R. pt. 258 do not apply to states that have approved alternate plans, providing flexibility in certain performance standards).

323. *See* Yankton Sioux Tribe v. S. Mo. Waste Mgmt. Dist., 890 F. Supp. 878, 888–89 (D.S.D. 1995), *aff'd*, 99 F.3d 1439 (8th Cir. 1996), *rev'd sub nom.* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).

324. *S. Mo. Waste Mgmt. Dist.*, 890 F. Supp. at 889.

except as to Indian reservations.[325] The state amended its application asserting the proposed landfill was in an area diminished by a federal act, and EPA tentatively agreed.[326]

The Tribe sued EPA and the federal district court found no diminishment,[327] holding that until EPA approved either the state or Tribal[328] program, the landfill must comply with federal requirements including installation of a composite liner.[329] The State appealed the district court's diminishment holding, and the Eighth Circuit affirmed.[330] The Supreme Court accepted the State's petition for certiorari and as usual began its analysis with a perfunctory recitation of the "rules" that facially support tribes[331]: only Congress can change the boundaries of reservations, its intent to do so must be "clear and plain," and most emblematic of the Court's claimed commitment to justice for indigenous peoples, that all statutory ambiguities would be resolved in their favor and the Court would thus "not lightly find diminishment."[332]

Of course, Congress' 1894 statute, which ratified the 1892 agreement between the Tribe and federal negotiators, said nothing of reservation diminishment or changed boundaries.[333] Instead, reflecting its principal function as a property transaction, it employed property law terms commonly used for conveyances. The Tribe agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation."[334] Combined with a promised lump sum payment of $600,000, that language created "an almost unsurmountable presumption of diminishment."[335]

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325. South Dakota; Final Determination of Adequacy of State/Tribal Municipal Solid Waste Permit Program, 58 Fed. Reg. 52,486, 52,488 (Oct. 8, 1993).

326. South Dakota; Tentative Determination of Adequacy of State's Municipal Solid Waste Permit Program over Non-Indian Lands for the Former Lands of the Yankton Sioux, Lake Traverse (Sisseton-Wahpeton) and Parts of the Rosebud Indian Reservations, 59 Fed. Reg. 16,647, 16,649 (Apr. 7, 1994).

327. *S. Mo. Waste Mgmt. Dist.*, 890 F. Supp. at 888.

328. During the dispute, the Tribe submitted a solid waste management plan for EPA approval. *See id.* at 890.

329. *Id.*

330. Yankton Sioux Tribe v. S. Mo. Waste Mgmt. Dist., 99 F.3d 1439, 1457 (8th Cir. 1996).

331. Professor David Getches made this point more generally four years earlier using in part the then most recent Supreme Court diminishment case, *Hagen v. Utah*, 510 U.S. 399 (1994). *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1621 (1996) ("While the Court may continue to cite the canons, it is difficult to attribute any significance to them in many recent cases.")

332. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 333–34 (1998).

333. Act of Aug. 15, 1894, ch. 290, 28 Stat. 286.

334. *Yankton Sioux*, 522 U.S. at 344.

335. *Id.* at 344 (quoting Solem v. Bartlett, 465 U.S. 463, 470 (1984)). While attributing dispositive impact to the lump sum, the Court relegated to a footnote the Court of Claims' later

The suggestion that a government's sale of real property somehow also surrenders its territorial sovereignty would be laughable in any other context.

> [N]o one thinks [federal patents to homesteaders] diminished the United States's claim to sovereignty over any land. To accomplish that would require an act of cession, the transfer of a sovereign claim from one nation to another. And there is no reason why Congress cannot reserve land for tribes in much the same way, allowing them to continue to exercise governmental functions over land even if they no longer own it communally.[336]

And yet in diminishment cases, despite the Indian law canons of construction, the Court frequently accepts this patently illogical position. The *Yankton* Court said its inquiry "was informed by" *Solem*'s unconsidered assertion that at the turn of the century Congress did not view the distinction between Indian property ownership and Indian country jurisdiction "as a critical one" because the concept that reservation status might not be coextensive with tribal ownership was "unfamiliar."[337] What seems patently obvious, and appropriate for analysis rather than assertion, is that Congress had simply not yet considered the jurisdictional consequences of sales to non-Indians of lands within undiminished reservations.

Despite the asserted clarity of the allotment statute, the *Yankton* Court rotely engaged *Solem* factor two, admitting without a hint of discomfort the federal negotiators' bareknuckle tactics for demanding further land cessions from the Tribe. It quoted extensively their explicit threats to *break prior treaty commitments* of food, clothing, and other resources, leaving the Tribe to starve in the approaching Northern Plains winter if it did not agree to sell as contemporary evidence of Congress' intent to diminish the Reservation.[338] And on *Solem* factor three, over two-thirds of the area is populated by non-Indians and the State immediately assumed jurisdiction over it and has continued to do so to the present.[339] Thus, finding diminishment, the Court overruled the Eighth Circuit,[340] leaving the landfill subject to the State's more lenient alternate management plan instead of EPA's minimum requirements.

Diminishment losses like *Wyoming v. EPA* and *Yankton Sioux* have negative impacts for programmatic environmental protection of Indian country, and their risk chills potential assertions of authority by both tribes and EPA. The resulting checkerboard of affected lands, and their varying jurisdictional respon-

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conclusion the payment was "unconscionable and grossly inadequate." *Id.* at 338 n.2 (quoting Yankton Sioux Tribe v. United States, 224 Ct. Cl. 62, 98 (1980)).

336. McGirt v. Oklahoma, 140 S. Ct. 2452, 2464 (2020) (citation omitted).

337. *Yankton Sioux*, 522 U.S. at 343 (quoting *Solem*, 465 U.S. at 470).

338. *Id.* at 346–47.

339. *Id.* at 356–57.

340. *Id.* at 358.

sibilities, breeds confusion and inefficiency.[341] Checkerboard regulation is antithetical to the unitary management regime most effective at regulating mobile media and pollutants[342] because it intrinsically presents the complexities of transboundary issues, as each jurisdiction has authority to make different value judgments on applicable standards.[343] That reality also increases the likelihood of unreasonable consequences arising from differing standards, for example, different WQS set for common bodies of water.[344]

Tribal cultural values suffer when reservations are diminished. The loss of tribal sovereignty over those lands precludes tribally derived environmental standards and programs designed specifically for preservation of cultural uses. EPA's Indian Policy promises special consideration of tribal interests like cultural uses during federal direct implementation, but diminished lands are no longer Indian country, so EPA lacks direct implementation authority there. States have almost never shown interest in considering, let alone protecting, the unique uses their indigenous residents make of the natural environment.

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341. *E.g.*, Moe v. Confed. Salish and Kootenai Tribes, 425 U.S. 463, 478 (1976) (noting checkerboard jurisdiction is impractical and contrary to the intent embodied in existing federal statutory law of Indian jurisdiction); Seymour v. Superintendent, 368 U.S. 351, 358 (1962) (rejecting an interpretation of the federal criminal Indian country statute that would base jurisdiction on tract book search); *accord* 1991 WQS Rule, *supra* note 59, 56 Fed. Reg. at 64,878 ("EPA 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 WQS when two different sovereign entities are establishing standards for the same small stream segments").

342. *See, e.g.*, Washington Department of Ecology; Underground Injection Control Program for Indian Lands, 53 Fed. Reg. 43,080, 43,082 (Oct. 25, 1988) (codified at 40 C.F.R. pt. 147) (testimony by Alan Moomaw, Env't Coord., Confed. Tribes of the Colville Reservation, EPA Public Hearing, July 11, 1984) ("*The need for unitary management of water sources on Indian reservations is without question*, as the dangers posed by [underground injection] activities to underground aquifers as well as to surface waters *demand the imposition of a single comprehensive management scheme* by EPA.") (emphasis added); Memorandum from William K. Reilly, *supra* note 297, at 2.

343. *See* Administrator v. EPA, 151 F.3d 1205 (9th Cir. 1998) (addressing whether a very small Indian reservation had sufficient air quality values to justify redesignation to Class I status under CAA, which could potentially affect air pollution sources on adjacent lands designated by the State as Class II).

344. *See* 33 U.S.C. § 1377(e) (directing EPA to develop mechanisms for resolving disputes over such unreasonable consequences); s*ee, e.g.*, Albuquerque v. Browner, 97 F.3d 415, 428 (10th Cir. 1996) (holding that a downstream tribe could establish water quality standards more stringent than federal standards affecting proposed permit conditions for a city sewage plant outfall).

D. New Opportunities for Local Government Diminishment Challenges

The Court's Diminishment Doctrine was well established in 1991 when EPA promulgated its original WQS rule.[345] Nothing in the agency's explanation of the final 1991 rule hinted at concern for the risk diminishment posed to EPA's environmental authority in Indian country. Of course, that was several years before *Yankton Sioux*, which illustrated the risk clearly. As noted above,[346] the primary focus of commenters and EPA then was on discerning the *Montana* test for inherent tribal sovereignty over non-Indians and applying it to the environmental context. Yet, EPA perhaps unwittingly opened the door for the kind of non-Indian animosity that drives diminishment claims by creating a new, semi-public comment process.

When a tribe submitted a TAS application, EPA would notify "appropriate governmental entities"[347] for a thirty-day comment period specifically on the tribe's assertion of authority.[348] The stated purpose was ensuring the tribe had adequate authority to administer the program, and not giving "veto power" to neighboring governments.[349] Ironically, EPA said the process was not intended as a barrier to tribal program assumption.[350] Some commenters asked for clarification on appropriate governmental entities, which EPA then defined as states, other tribes, and other federal entities.[351] Local governments like cities and counties were not included and EPA would not accept comments from them directly.[352] States were responsible for coordinating with their subdivisions, although EPA said it would place notices in "appropriate" newspapers.[353]

Twenty-five years later, the several local governments commenting on the 2015 CWA delegation proposal renewed the call for local involvement in this preliminary process.[354] EPA fell back on the impact of promulgating an interpretive rule; it did not (and could not) change the existing governmental notice and comment process, so any suggestion for expanding "appropriate governmental entities" was beyond the scope of the instant administrative action.[355] At any rate, EPA asserted the existing process (presumably posting notice in local newspapers) provided "appropriate notice to potentially interested parties."[356]

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345. *See, e.g.*, *Seymour*, 368 U.S. 351; Mattz v. Arnett, 412 U.S. 481 (1973).
346. *See* text accompanying *supra* note 84.
347. 40 C.F.R. § 131.8(c)(2)(ii) (2019).
348. *Id.* § 131.8(c)(3).
349. 1991 WQS Rule, *supra* note 59, 56 Fed. Reg. at 64,884.
350. *Id.*
351. *Id.*
352. *Id.*
353. *Id.*
354. 2016 TAS Reinterpretation, *supra* note 182, 81 Fed. Reg. at 30,194–95.
355. *Id.* at 30,195.
356. *Id.*

In 2019, President Trump's EPA quietly reversed course in a memorandum labeled "for internal EPA use only" with the exhortation "*do not distribute outside of EPA*."[357] The memorandum announced a new "focus" on ensuring local governments within and contiguous to Indian country were notified of and had an opportunity to comment on tribal TAS applications.[358] EPA noted the existing CWA and CAA regulations required notice to "appropriate governmental entities,"[359] defined as states, tribes, and other federal entities, but it had also used its discretion to inform the public and local governments.[360] Such discretion no longer existed; Headquarters would henceforth "*verify* that the regional office *effectively* reached out to local governments."[361] No comment was made on how this extra process aligned with the goal of EPA's Strategic Plan to "streamline those processes by which EPA reviews and approves state and tribal actions."[362]

Since existing regulations limited the comment process to the tribe's assertion of authority, once EPA reinterpreted the CWA TAS provision as a congressional delegation, the only jurisdiction-related issue left was diminishment. The memorandum implicated diminishment in requiring the local notice to "describe . . . the area covered."[363] As the city and county comments on the 2016 reinterpretation reflected, the real and perceived impacts of tribal jurisdiction over non-Indians are often felt acutely at the local level, and those impacts not infrequently foster an intense and visceral anti-Indian sentiment especially among those unfamiliar with (or uninterested in) the complexities of Indian law and history. So, regardless of whether local outreach might fan the flames leading to an actual diminishment suit, it is likely to provoke diminishment allegations, forcing EPA analysis into that complex area and making the TAS approval process even longer.

Increasing already long waiting times was the main theme of the NTWC's objection to EPA's new focus of increased local outreach.[364] Fifteen years earlier, EPA's lengthy delays in TAS review triggered pointed criticism from the

357. Memorandum from W.C. McIntosh, Asst. Adm'r, Off. of Int'l & Tribal Affs., to David Ross, Asst. Adm'r, Off. of Water, et al., at 2 (Aug. 13, 2019) [hereinafter McIntosh Memorandum] (on file with author) (emphasis added).

358. *Id.*

359. *See, e.g.*, 40 C.F.R. § 131.8(c) (2019) (CWA WQS); *id.* § 130.16(c) (CWA Impaired Water Listing and Total Maximum Daily Load programs); *id.* § 49.9 (CAA).

360. McIntosh Memorandum, *supra* note 357, at 1–2.

361. *Id.* at 3.

362. *See* Working Together: FY 2018–2020 U.S. EPA Strategic Plan 27 (2019), https://perma.cc/7HJX-2QPE (Goal 2: More Effective Partnerships).

363. McIntosh Memorandum, *supra* note 357, at 2. That requirement was redundant since tribal TAS applications included maps and/or legal descriptions of the area covered. *See* 40 C.F.R. § 131.8(b)(3)(i).

364. *See* Letter from Ken Norton, Chairman, Nat'l Tribal Water Council, to W.C. McIntosh, Asst. Adm'r, Off. of Int'l & Tribal Affs. (Jan. 9, 2019), https://perma.cc/J4BG-RTZY.

Government Accountability Office.[365] EPA responded in 2008 with an extensive strategy guidance for improving the timeliness and efficiency of TAS review.[366] The NTWC reminded EPA the strategy said it "should consult" with tribal applicants on *whether* local outreach would be beneficial, *and if so*, "should tailor" such outreach to the particular circumstances.[367] More to the point, the NTWC noted local governments already had opportunities to comment through their states' role in the process, and cited two cases where the outreach process created needless delays.[368] Like EPA, the NTWC either overlooked or did not want to mention diminishment when it asserted there simply was no point in soliciting local input on TAS applications for reservations since Congress had delegated tribal authority there.[369]

E. A New Light at the End of the Diminishment Tunnel?

In 1996, Professor David Getches, one of the most influential Indian law scholars of the modern era, documented a disturbing "subjectivist trend" of the Supreme Court abandoning foundational principles of Indian law in favor of bending tribal sovereignty to fit the Court's perceptions of non-Indian interests.[370] Getches argued persuasively that the Court was "arrogat[ing] to itself" the prerogative formerly attributed to the political branches of government, redesigning the sovereignty of Indian tribes as a function of changing conditions, primarily by weighing non-Indian interests and the expectations they created in the minds of affected non-Indians.[371] Getches methodically chronicled the last fifteen years of decisions, including the then most recent diminishment case.[372] But his most damning evidence might have been a confidential deliber-

365. *See* Gov't Account. Off., GAO-06-95, Indian Tribes: EPA Should Reduce the Review Time for Tribal Requests to Manage Environmental Programs 5 (2005), https://perma.cc/C852-2Z8K.

366. *See* Memorandum from Marcus Peacock, Deputy Adm'r, EPA, to Asst. Adm'rs & Reg'l Adm'rs, EPA, Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs (Jan. 23, 2008), https://perma.cc/K5RY-3LJG.

367. Letter from Ken Norton to W.C. McIntosh, *supra* note 364, at 2 (quoting Memorandum from Marcus Peacock to Asst. Adm'rs, *supra* note 366, at 2). NTWC did not comment on EPA's attempt to keep the "new focus" document private.

368. *Id.* at 2–3 (describing delays attributed to local outreach for approval of the Navajo Nation's TAS amendment and the still pending Seneca Nation TAS application).

369. *Id.* at 3.

370. Getches, *supra* note 331, at 1575.

371. *Id.*

372. *Id.* at 1622 (noting that *Hagen v. Utah*, 510 U.S. 300 (1994), dispensed with the canon of construing ambiguous statutes in favor of tribes by finding Congress expressed clear intent to disestablish the reservation in an *unenacted* allotment statute that was followed by a statute enacted without the key disestablishment terms of the earlier one).

ation memorandum by Justice Scalia, explaining to a fellow Justice why in a pending case he had flipped from his initial vote for tribal jurisdiction:

> [O]pinions in [the Indian Law field] have not posited an original state of affairs that can subsequently be altered only by explicit legislation, but *have rather sought to discern what the current state of affairs ought to be* by taking into account all legislation, and the congressional "expectations" that it reflects, down to the present day.[373]

Getches said Scalia's sense that the Court's recent decisions adjusted tribal jurisdiction and sovereignty based on current conditions and the expectations of nonmembers put the Court's subjectivist trend "into sharp relief."[374] Getches' article ended with an expressed hope that the newer members of the Court might take the intellectual leadership to bring Indian law back in line with its fundamental principles and stop the "rudderless exercise in judicial subjectivism."[375] Two years later, the unanimous decision in *Yankton Sioux* made that hope look naïve. Two decades later, the Court's second-most junior Justice, Neil M. Gorsuch, authored *McGirt v. Oklahoma*,[376] just last term, taking the tiller decisively and offering a hopeful light at the end of the diminishment tunnel in a dramatic setting that cheered tribal advocates and surely made Getches smile.[377]

On a 5–4 vote, *McGirt* held the Muscogee (Creek) Territory was a reservation, and was not diminished by a turn-of-the-century allotment act, meaning that three million acres of Oklahoma *including its second largest city of Tulsa* are Indian country.[378] Perhaps betraying frustration with the subjectivist approach taken by parties and prior court decisions, the Court began its analysis with some painfully basic rules: the power to breach solemn promises and treaties by diminishing reservations "belongs to Congress alone"; "States have no authority to reduce federal reservations"; and "courts have no proper role in the adjustment of reservation borders."[379]

The historical record revealed a series of treaties that established and diminished the Muscogee Territory the Court treated as a reservation, and then,

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373. *Id.* at 1575 (quoting Memorandum from Justice Antonin Scalia to Justice William J. Brennan, Jr. (Apr. 4, 1990), *in* PAPERS OF JUSTICE THURGOOD MARSHALL (emphasis added) (regarding Duro v. Reina, 495 U.S. 676 (1990))).

374. Getches, *supra* note 331, at 1575.

375. *Id.* at 1576.

376. 140 S. Ct. 2452 (2020).

377. Unfortunately for Indian country, Professor Getches walked on in 2011.

378. *See* 140 S. Ct. at 2482 (Roberts, C.J., dissenting). Apparently for dramatic effect, the dissent suggested the Court's reasoning means that four other tribes now have reservations that "encompass the entire eastern half of the State—19 million acres that are home to 1.8 million people, only 10%–15% of whom are Indians." *Id.*

379. *Id.* at 2462.

with respect to the land at issue in the case, a failed federal effort to press the Tribe to sell a third time.[380] The sole result was an agreement to allot, but not to sell, particular Tribal lands that Congress ratified by statute.[381] With none of the total land cession hallmarks of diminishment to rely on, the State pressed a tired argument forcing the Court to say, again: "For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument."[382]

With no statutory basis for its diminishment claim, Oklahoma trolled for the Court's subjectivist tendencies by detailing historical State practices and non-Indian demographics it asserted the Court was required to consider as *Solem's* second and third "steps."[383] The Court's response was unequivocal: Oklahoma's reading of *Solem* was "mistaken."[384] "[T]he only 'step' proper for a court of law" was "to ascertain and follow the original meaning of the law before us."[385] Sometimes contemporaneous usages, customs and practices shed light on ambiguous statutory language, but Oklahoma could find none. Contemporary and later practices cannot drive decisions "*instead of* the laws Congress passed."[386]

Extratextual considerations cannot "supply the blank check" states desire to rid themselves of Indian reservations.[387] "Evidence of the subsequent treatment of the disputed land . . . has 'limited interpretive value'"[388] because it is the "least compelling" form of evidence.[389]

> To avoid further confusion, we restate the point. There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help "clear up . . . not create" ambiguity about a statute's original meaning.[390]

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380. *Id.* at 2460–63.

381. *Id.* at 2463.

382. *Id.* at 2464. That statement was supported with the statute defining Indian country as including non-Indian patented land within reservations, 18 U.S.C. § 1151(a), and *Seymour v. Superintendent*, 368 U.S. 351, 357–58 (1962), stating the Court "long ago rejected the notion that the purchase of lands by non-Indians is inconsistent with reservation status[,]" *McGirt*, 140 S. Ct. at 2504 n.3.

383. *McGirt*, 140 S. Ct. at 2468.

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.* at 2469.

388. Parker v. Nebraska, 136 S. Ct. 1072, 1082 (2016) (quoting South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 355 (1998)).

389. *Yankton Sioux*, 522 U.S. at 356.

390. *McGirt*, 140 S. Ct. at 2469.

To be sure, *McGirt* did not completely eliminate the risk of diminishment claims for tribes. But it significantly undercut the litigation chill for many tribes. No longer can states bootstrap their unjustified historical intrusions in Indian country, when the federal government was stepping back from its responsibilities and tribes were fighting just to survive, into "evidence" that Congress meant Indian country to disappear. For the time being at least, tribes desiring TAS, and EPA considering direct implementation for protecting the environmental interests of tribes without program primacy, can focus on capacity-building and worry less about "the perils of [states] substituting stories for statutes."[391]

V. Developing Federal Water Quality Standards for Indian Country

There has been movement since the 2016 reinterpretation: ten tribes received basic CWA TAS status, and four tribes submitted TAS applications.[392] Yet only two tribes developed WQS and received approval, bringing the total to forty-five of three hundred tribes or just fifteen percent of eligible tribes. Whether the failing falls on EPA, tribes, states, non-Indians, courts, or a combination of them, nearly all of Indian country still lacks enforceable WQS. That reality hinders effective implementation of many CWA programs, especially the section 402 NPDES permit program. The most feasible and prompt solution consistent with the national policy of tribal self-determination and EPA's longstanding Indian Policy recognizing tribes as the primary governments responsible for Indian country environmental management is clear, although it sounds incongruent: EPA should promulgate FWQS for all of Indian country not already covered by tribal WQS.

Federal direct implementation has been a cornerstone of EPA's Indian Program since its inception in 1973 when the agency retained jurisdiction over water pollution discharges "from any Indian activity on Indian lands under the jurisdiction of the United States" rather than delegate program responsibility to states.[393] Both the 1980 and 1984 Indian Policies, however, viewed direct implementation as an interim solution to the regulatory gap while tribes prepared for and then assumed program primacy as an exercise of environmental self-determination.[394] The Indian Policies recognized that would take time, and promised tribes assistance in that effort as well as invited their participation in federal direct implementation. And even in the agency's startling misstep in assuming unauthorized state WQS were valid in Indian country,[395] EPA said it

391. *Id.* at 2470.

392. *See* WQS TAS Table, *supra* note 132.

393. *See* Final Rules, National Pollutant Discharge Elimination System, 38 Fed. Reg. 13,528, 13,530 (May 22, 1973) (codified at 40 C.F.R. § 125.2(b)).

394. 1980 Indian Policy, *supra* note 40, at 6; 1984 Indian Policy, *supra* note 45, at 2.

395. 1991 WQS Rule, *supra* note 59, 59 Fed. Reg. at 64,890–91.

would "give serious consideration to Federal promulgation of water quality standards on Indian lands where it finds a particular need."[396] If it was not then, the need today is particularly clear.

A. Foundations of Federal Water Quality Standards in Indian Country

There is direct, relevant agency experience suggesting that this is a feasible solution. Recall the first WQS in Indian country were federal standards for a particular reservation in 1989.[397] The idea for expanding the geographic scope to all of Indian country came a decade or so later when only thirteen tribes had approved WQS.[398] EPA's initial actions around 2000 were initiating discussions among the federal and tribal members of EPA's national Tribal Operations Committee, leading EPA to propose a national "core framework" of FWQS filling the "not insignificant" gap in Indian country water quality protection.[399] Fifteen years later, with just fourteen percent of eligible tribes having approved WQS,[400] in 2016 EPA again raised the possibility of federal "baseline" WQS applicable to Indian country nationwide.[401]

The nature and timing of these actions, however, created no additional Indian country water quality protection. The first action was specific to the Colville Indian Reservation, and because it occurred in 1987 just as Congress authorized CWA TAS, EPA logically assumed that further FWQS would be unnecessary.[402] The core standards concept was issued as an "unofficial, pre-publication" proposed rule in the final days of President Clinton's administration.[403] Within days of George W. Bush's Presidential inauguration, EPA withdrew the proposal "for additional review,"[404] and thereafter the core standards simply disappeared. Something similar happened to the Baseline WQS proposal. It was officially published as an "advance notice of proposed rulemaking" just four months before the end of President Obama's administration.[405] Thirty-eight comments, mostly in favor of proposing federal WQS, arrived by

396. *Id.* at 64,891.

397. *See* WQS for the Colville Indian Reservation, 54 Fed. Reg. 28,622 (July 6, 1989) [hereinafter Colville FWQS].

398. WQS TAS Table, *supra* note 132.

399. EPA, FWQS for Indian Country and Other Provisions Regarding FWQS (Jan. 18, 2001) [hereinafter 2001 Core WQS Proposal], https://perma.cc/H9YW-XSP5 (pre-publication proposed rule).

400. *See* WQS TAS Table, *supra* note 132.

401. 2016 Baseline WQS proposal, *supra* note 70 (advance notice of proposed rulemaking).

402. Colville FWQS, 54 Fed. Reg. at 28,622.

403. 2001 Core WQS Proposal, *supra* note 399, at 1.

404. *Id.*

405. 2016 Baseline WQS Proposal, *supra* note 70, 81 Fed. Reg. at 66,900. An advance notice of proposed rulemaking is a preliminary step an agency may use to collect public input for shaping a subsequent proposed rule. *See A Guide to the Rulemaking Process*, OFF. OF THE

the December 28, 2016 closing date.[406] President Trump was inaugurated the next month, and no action has been taken since.

These FWQS initiatives stalled primarily for political as well as practical reasons, and yet they set foundations for effectively closing the Indian country water quality protection regulatory gap. First and foremost, EPA has legal authority to implement federal WQS in Indian country. Where a state simply fails to submit WQS, or submits standards inconsistent with the CWA, Congress requires EPA to respond to that gap with FWQS.[407] Arguably, the existence of approximately 260 tribes that have not submitted WQS but could do so as "states" upon application also triggers EPA's duty to "promptly prepare" FWQS. The agency's duty to fill the Indian country water quality protection gap also appears more generally in Congress' mandate the agency promulgate FWQS "in any case" where it determines revised or new standards are necessary to meet a CWA requirement.[408]

The CWA's minimum requirements could reasonably encompass indigenous cultural, traditional, and treaty-based uses.[409] Just as states' (and tribes') WQS must, EPA's FWQS would have to designate the so-called fishable/swimmable uses for reservation waters.[410] The requirement that water quality protect aquatic organisms[411] has long been interpreted by EPA as water quality levels that allow fish, shellfish, and aquatic wildlife not only to thrive, but also allow them to be safely consumed.[412] For tribes whose lives and culture have depended on fish from time immemorial, the Supreme Court has recognized that fishing is "not much less necessary to the existence of the Indians than the atmosphere they breathe[ ]."[413]

Almost two decades ago, EPA's National Environmental Justice Advisory Council recommended:

FED. REG., https://perma.cc/86JE-8ZQH (follow hyperlink, "How does an agency involve the public in developing a proposed rule?").

406. *See* EPA, *supra* note 70, Over seventy written comments were submitted by tribal representatives on the prior Core WQS Pre-proposal and docketed. *See* 2001 Core WQS Proposal, *supra* note 399, at 5. While the proposal remains online, the docket is no longer available there.

407. 33 U.S.C. § 1313(b)(1)(A)–(B).

408. *Id.* § 1313(c)(4)(B).

409. *See, e.g.*, Colville FWQS, *supra* note 397, 54 Fed. Reg. at 28,627 (designating ceremonial and religious water uses).

410. *See* 33 U.S.C. § 1251(a)(2).

411. *Id.*

412. *See, e.g.*, EPA, HUMAN HEALTH AMBIENT WATER QUALITY CRITERIA AND FISH CONSUMPTION RATES FREQUENTLY ASKED QUESTIONS 1 (2013), https://perma.cc/6YW3-7V6S.

413. United States v. Winans, 198 U.S. 371, 381 (1905).

> Because many American Indian and Alaska Native . . . communities are particularly prone to environmental harm due to their dependence on subsistence fishing, hunting, and gathering . . .
>
> . . . until tribes are able to assume responsibility for [federal environmental] programs . . . *EPA should promptly develop effective and appropriate regulatory strategies for setting, implementing, and attaining water quality standards within Indian country.*[414]

Determining safe levels of contamination depends critically on the rate of consumption, which is often significantly higher for native peoples, particularly those who rely on a subsistence lifestyle.[415] Data also increasingly shows more complex contaminant exposures associated with traditional collection and consumption of traditional foods, and the inability of current risk assessment approaches to identify and address such risks.[416]

The CWA's other minimum goal of protecting human recreational uses[417] seems less relevant, but combined with the directive that uses are to protect public health and welfare,[418] could also reasonably encompass non-consumptive indigenous cultural and traditional uses. In a legal challenge involving a stringent tribal WQS based on ceremonial uses the Tribe was unwilling to explain to nonmembers, the court approved of EPA accepting the Tribe's description of its use as a "primary contact" standard involving incidental ingestion of water.[419] EPA's Baseline WQS proposal similarly noted that cultural ceremonial uses involving full body immersion and body washings come within the CWA's protection of recreational uses.[420] Presumably, EPA's standard primary contact numeric criteria would be protective of the variety of water-based ceremonial uses without requiring tribes to specifically define them.

Any legitimate FWQS program for Indian country would have to protect at least one important category of cultural and traditional uses that do not fall within the CWA's minimum fishable/swimmable uses. Many tribes make cultural uses of aquatic plants, harvesting them for food (like wild rice, cattails, and wapato), cultural products (like reeds, sedges, and rushes for basket weaving,

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414. Nat'l Env't Justice Advisory Council, Fish Consumption and Environmental Justice iv (2002) (emphasis added), https://perma.cc/VR9F-SLZ4.

415. *See, e.g.*, *id.* at 136–39; 2016 Baseline WQS Proposal, *supra* note 70, 81 Fed. Reg. at 66,908 (listing options for using consumption rates six to eight times higher than the American default rate, in part based on a survey by the Columbia River Intertribal Fish Commission).

416. *See, e.g.*, Nat'l Tribal Toxics Comm'n, Understanding Tribal Exposures to Toxics (2015), https://perma.cc/BW7Q-Y4CZ (arguing that current risk assessment techniques inadequately consider tribal exposures to toxics leaving them unnecessarily at significant risk).

417. 33 U.S.C. § 1251(a)(2).

418. *Id.* § 1313(c)(2)(A).

419. Albuquerque v. Browner, 97 F.3d 415, 428 (10th Cir. 1996).

420. 2016 Baseline WQS Proposal, *supra* note 70, 81 Fed. Reg. at 66,905.

nets, and cordage), and medicines (like Rat-tail, Bitterroot, Stinkweed, and Labrador Tea). The variations among tribes and regions would make comprehensively identifying the plants and their uses labor-intensive, and reliable data for particular pollutants' effects on them may not exist. The CWA is capable of handling such situations where numeric standards that quantitatively define water quality concentrations of pollutants cannot be determined, by directing states (and tribes) to adopt "narrative" standards that describe the water quality conditions necessary to attain a particular designated use.[421] Where EPA is promulgating FWQS, it must follow this requirement as well.[422] So, for example, EPA might adopt a narrative WQS that waters must be free from pollutants in amounts that prevent the growth of aquatic plants regularly harvested by tribes for cultural or traditional activities.[423]

B. Challenges for Federal Water Quality Standards in Indian Country

Designing a narrative FWQS covering the variety of national indigenous uses highlights the obvious challenge of adopting FWQS for reservations nationwide that effectively address varying environmental conditions. The best solution is of course having each individual tribe adopt WQS specific to their waters and their priority uses. Thus, any FWQS program adopted for an Indian country should be clear it is not intended to nor does it bar tribes from adopting their own standards.[424] Further, it should not apply to tribes with approved WQS, and as soon as a tribe's WQS are approved they supersede the federal standards.[425] The (expressed) hope should be the federal action spurs tribes to develop their own WQS.

Consistent with its Indian Policy,[426] EPA should make clear how tribes can influence the federal program's application to their particular interests in particular locations. One option is when specific actions like NPDES permits are proposed on or near a reservation, the agency could consult with a tribe[427] on "site-specific interpretations" of FWQS for developing permit conditions

421. 40 C.F.R. § 131.11(b)(2).

422. *Id.* § 131.22(c).

423. *See* 2016 Baseline WQS Proposal, *supra* note 70, 81 Fed. Reg. at 66,906.

424. *See* 2001 Core WQS Proposal, *supra* note 399, at 4; 2016 Baseline WQS Proposal, *supra* note 70, at 66,904.

425. *See id.*

426. 1984 Indian Policy, *supra* note 45, at 2 (Principle 3).

427. Consistent with President Obama's 2009 Memorandum on Tribal Consultation, 74 Fed. Reg. 57,879 (Nov. 9, 2009), https://perma.cc/355C-6VTG, EPA issued formal guidance. *See* EPA, EPA Policy on Consultation and Coordination with Indian Tribes (2011), https://perma.cc/B3DQ-KJL3 (implementing 1984 Indian Policy commitment to "assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect" tribes).

necessary to protect identified cultural uses.[428] Another option is "tailoring" the federal program by adding, amending, or deleting WQS as suggested by particular tribes to better protect their specific interests.[429] EPA has used both of these approaches in other regulatory programs, twice receiving positive responses from courts.[430]

Tribes' longer experience with and dependence on the environment, and the reality that environmental impacts may be felt more acutely by tribal communities, suggests tribal input could offer new insights for improving western models and approaches.[431] For environmental regulatory programs, that idea is presently unrealistic since few if any tribes have environmental programs not modeled on federal laws. But in the uncertain future we face from climate change, tribal Traditional Ecological Knowledge set in a paradigm thinking seven generations into the future may spawn tribal management approaches with great value.[432]

A critical reminder: FWQS for Indian country—indeed, any federal environmental direct implementation in Indian country—addresses the current regulatory gap but also carries the potential risk of judicial diminishment. [433] That looming threat hangs over not just tribal jurisdiction, but also federal Indian affairs authority. In the environmental context, where primacy for most regulatory programs are delegated to states, federal direct implementation applies only if Indian country exists to create gaps. *Yankton Sioux* was a clear warning.

428. *See* 2001 Core WQS Proposal, *supra* note 399, at 5.

429. *See* 2016 Baseline WQS Proposal, *supra* note 70, 81 Fed. Reg. at 66,905.

430. *See, e.g.*, Phillips Petrol. Co. v. EPA, 803 F.2d 545, 562 (10th Cir. 1986) (upholding EPA's SDWA underground injection program tailored for the Osage Reserve accounting for tribal preferences); Backcountry Against Dumps v. EPA, 100 F.3d 147, 152 (D.C. Cir. 1996) (noting EPA's offer to accept the Tribe's request for a site-specific regulation revising federal requirements for on-reservation landfill design).

431. *See, e.g.*, Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental "Laboratories,"* 86 U. Colo. L. Rev. 789 (2015) (suggesting tribal environmental programs, because of indigenous cultural connections to the land, can offer states and the federal government different approaches to environmental protection).

432. *See, e.g.*, Daniel Cordalis & Dean B. Suagee, *The Effects of Climate Change on American Indian and Alaska Native Tribes*, 22 Nat. Res. & Env't 45 (2008) (explaining that case studies on the effects of climate change on Alaska natives suggest that tribes must be included in conversations with states and local governments when addressing adaptation policies); Elizabeth Ann Kronk Warner, *Indigenous Adaptation in the Face of Climate Change*, 21 J. Env't & Sustain. L. 129 (2015) (describing the climate change adaptation plans of four tribes to identify trends other tribes might use in developing their own adaptation plans).

433. At least two states raised this issue in commenting on EPA's Baseline WQS announcement. *See* Barry N. Burnell, Water Quality Div. Adm'r, Idaho Dep't of Env't Quality, Comment Letter on Federal Baseline WQS: Indian Reservations 2 (Dec. 22, 2016), https://perma.cc/LS5E-7PPW (urging EPA to exclude reservations "where the existence of the reservation or its boundaries are in dispute"); Teresa Seidel, Chief, Water Res. Div., Mich. Dep't of Env't Quality 3 (Dec. 28, 2016), https://perma.cc/CY58-CDFJ (suggesting the proposal "categorically exclude waters inside disputed reservations").

The Tribe's trustee's stringent requirement for an impermeable composite liner did not apply because the landfill was on diminished land and therefore not Indian country.[434] Instead, the landfill was constructed with the minimum protections set by South Dakota's alternate program, and no other federal or tribal regulations applied.[435]

RCRA's unique structure and requirements for municipal landfills, however, is also a reminder that federal environmental programs are not monolithic. Indeed, the CWA's water quality protection program offers creative ways for promulgation of FWQS without a serious risk of provoking a diminishment challenge. EPA cannot change the status of Indian country[436] but can design program mechanisms helping insulate tribal interests from diminishment threats and impacts. For example, EPA extends TAS and direct implementation programs to trust lands outside formally designated Indian reservations because the Supreme Court has treated such lands as "informal" reservations.[437] That benefits tribes without formal reservations and can address tribal diminishment losses. After *Wyoming v. EPA* held the Wind River Reservation diminished, EPA revised its TAS decision to exclude only non-trust lands in the diminished area, leaving tribal primacy over the trust lands that made up over seventy-five percent of the area as an informal reservation.[438]

Another mechanism can address the chilling effect of state and state subdivisions' diminishment assertions and ensure tribal interests are protected during any litigation that ensues. The Tenth Circuit endorsed an EPA rule under SDWA treating "disputed lands" as Indian country and thus subject to federal (or tribal), and not state, jurisdiction until the lands were found otherwise.[439] Using the disputed lands approach, a FWQS could be applied to a proposed discharge on fee lands within a reservation despite a diminishment allegation.

The D.C. Circuit rejected a similar but broader mechanism under the CAA for lands "in question," indicating there must be a genuine dispute on land status, and EPA must have procedures for resolving the dispute to avoid perpetual federal jurisdiction.[440] In the particular context of the CAA, the court

434. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 340–42 (1998).

435. *See id.*

436. Hydro Res., Inc. v. EPA, 198 F.3d 1224, 1242 (10th Cir. 2000).

437. *See, e.g.*, 1991 WQS Rule, *supra* note 59, 56 Fed. Reg. at 64,881 (citing Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 111 S. Ct. 905, 910 (1991)); Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254, 7258 (Feb. 12, 1998). The D.C. Circuit upheld EPA's approach in the CAA TAS Rule. *See* Ariz. Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1284 (D.C. Cir. 2000), *cert. denied sub nom.* Michigan v. EPA, 532 U.S. 970 (2001).

438. Notification of Final Action, 84 Fed. Reg. 7823 (Mar. 5, 2019); Wyoming v. EPA, 875 F.3d 505, 518 (10th Cir. 2017).

439. *See, e.g.*, *Hydro Res.*, 198 F.3d at 1233.

440. Michigan v. EPA, 268 F.3d 1075, 1082–87 (D.C. Cir. 2001).

found no congressional authority for EPA to assert and maintain permanent federal air quality regulation.[441]

But again, not all federal environmental programs are exactly the same. An extremely valuable aspect of the WQS program is its transboundary requirements for ensuring compliance with adjacent jurisdictions' differing standards. States and tribes must meet the minimum federal requirements of fishable/swimmable water uses and corresponding federal criteria, but they may also go beyond them, setting water quality criteria they deem necessary to protect those more stringent uses.[442] Upstream jurisdictions must take account of more stringent downstream standards both in developing their programs, and in issuing permits.[443] The Supreme Court has confirmed EPA's authority to require upstream regulatory authorities to impose permit conditions on dischargers to ensure compliance with downstream WQS.[444] And a federal appellate court has extended that analysis to require off-reservation non-Indian dischargers to comply with more stringent WQS of downstream tribes.[445]

In the context of FWQS for Indian country, apart from the benefit of the disputed lands approach for on-reservation dischargers, EPA could simply take the reasonable position that there is no need to resolve an asserted diminishment claim: even if the on-reservation discharger's land is not Indian country because of diminishment, the CWA transboundary provisions can apply to require the discharger's permit be conditioned on the FWQS for the adjacent Indian country.

Conclusion

When Congress enacted the modern CWA in 1972, it gave states that did not already have WQS six months to develop them, ninety days for the Administrator to approve them if consistent with the Act, and if not, then ninety days for the state to make them so or EPA would issue FWQS.[446] That is, within one year every state would have enforceable WQS or EPA would fill the gap for them. More than three decades since Congress authorized tribal WQS, only fifteen percent of tribes have approved WQS. The gap in Indian country water quality protection is indisputable and unacceptable.

441. *Id.* at 1082.

442. Albuquerque v. Browner, 97 F.3d 415, 423 (10th Cir. 1996) (holding that EPA's construction of the CWA allowing tribes, like states, to establish WQS more stringent than the minimum federal WQS is permissible because it is in accord with the inherent powers of tribal sovereignty).

443. 40 C.F.R. § 131.11 (2019).

444. Arkansas v. Oklahoma, 503 U.S. 91, 102 (1992).

445. *Albuquerque*, 97 F.3d at 422–24.

446. 33 U.S.C. § 1313(a)(3).

The gap alone does not prove environmental injustice. Determining tribal citizens in Indian country face disproportionate health risks requires data on reservation water quality. So does developing WQS. If no WQS have been developed, that generally means no data have been collected. Thus, current risk cannot be determined, nor can trends be identified. And permits cannot contain conditions protective of site-specific uses when no uses have been designated. We know generally that many Indians make cultural, traditional, and treaty rights–based water uses, but without water quality criteria, even concerned permit writers lack the information needed to draft effective permit conditions. Most aquatic cultural foods, items, and medicines are thus simply invisible uses left unprotected. Fish consumption is one exception: it is a recognized use with a criterion based on the ninetieth percentile of Americans—twenty-two grams per day. Native subsistence fishers eat between 142 and 175 grams per day.

Tribal WQS would not make that mistake. Tribes could make their culturally important uses, and the water quality criteria they determine necessary for effective protection, the local value judgments Congress expected would drive the CWA programs. Once approved by EPA, federal and state permit writers would be required to translate those tribal value judgments into conditions legally enforceable against non-Indians inside and adjacent to reservations. Tribal certification under section 401 would ensure those conditions are genuine and adequate.

Whatever the reasons for so few tribal WQS, EPA can no longer justify inaction. The federal trust responsibility and environmental justice are relevant moral imperatives. Congress' goal of nationwide environmental coverage is a stark contrast to a regulatory gap the size of New England. The practical risks of transboundary pollution from unregulated reservations and onto them further complicates the national protection goal. Legally, the CWA does not authorize EPA to abdicate its Indian country responsibility to states; the Act's preference for tribal primacy on reservations is clear. The law is also clear EPA must fill gaps that local governments do not. As the first federal agency to embrace tribal self-determination, EPA has the longest running Indian program and is arguably better suited than other agencies to craft a direct implementation program that genuinely encompasses indigenous cultural and traditional interests, drawing on tribal input and providing opportunities for tailoring where specific needs require different treatment. Politics stopped the first two inquiries into FWQS; perhaps a petition for a rulemaking from tribes or tribal organizations could break the interminable inertia and finally achieve a measure of environmental protection for indigenous peoples denied far too long.[447]

447. *See* 5 U.S.C. § 553(e) (requiring agencies give interested persons the right to petition for a rulemaking). A rulemaking petition from states and organizations broke EPA's political and practical reticence to begin addressing the most significant environmental challenge facing humankind—climate change. *See* Massachusetts v. EPA, 549 U.S. 497 (2007) (forcing EPA to regulate greenhouse gas emissions from new motor vehicles).