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Inherent Tribal Sovereignty and the Clean Water Act: The Effect of Tribal Water Quality Standards on Non-Indian Lands Located Both Within and Outside Reservation Boundaries

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COMMENT

INHERENT TRIBAL SOVEREIGNTY
AND THE CLEAN WATER ACT:
THE EFFECT OF TRIBAL WATER
QUALITY STANDARDS ON
NON-INDIAN LANDS LOCATED
BOTH WITHIN AND OUTSIDE
RESERVATION BOUNDARIES

I. INTRODUCTION

In City of Albuquerque v. Browner, the United States Court of Appeals for the Tenth Circuit held, in part, that the Environmental Protection Agency's (EPA) construction of the 1987 amendment to the Clean Water Act (CWA) was permissible because the amendment is in accord with the doctrine of Indian tribal sovereignty. Specifically, the EPA interpreted the amendment as allowing tribes to establish more stringent water quality standards than those imposed by states or the federal government. In Section 1377 of the CWA, Congress did not expressly grant tribes the power to set more stringent wa-

1. 97 F.3d 415 (10th Cir. 1996).
3. See Albuquerque II, 97 F.3d at 423.

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ter quality standards. Section 1377 did, however, allow the EPA to treat tribes like states.⁴ States have the power to set more stringent water quality standards than those created by the EPA or by other states pursuant to section 1370 of the CWA.⁵ Thus, the Tenth Circuit concluded that tribes were able

The Administrator is authorized to treat an Indian tribe as a State for purposes of Subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, and 1344 of this title to the degree necessary to carry out the objectives of the section, but only if—
   (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
   (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and
   (3) the Indian tribe is reasonably expected to be capable, in the Administrator’s judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

Such treatment as a State may include the direct provision of funds reserved under subsection (c) of this section to the governing bodies of Indian tribes, and the determination of priorities by Indian tribes, where not determined by the Administrator in cooperation with the Director of the Indian Health Service. The Administrator, in cooperation with the Director of the Indian Health Service, is authorized to make grants under subchapter II of this chapter in an amount not to exceed 100 percent of the cost of the project. Not later than 18 months after February 4, 1987, the Administrator shall, in consultation with Indian tribes promulgate final regulations which specify how Indian tribes shall be treated as States for purposes of this chapter. The Administrator shall, in promulgating such regulations, consult affected States sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water. Such mechanism shall provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream discharges, economic impacts, and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objective of this chapter.

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharge of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard.
to set and enforce their own water quality standards through their “residual sovereign powers.” The Albuquerque court concluded that the powers enumerated in CWA section 1370 are already guaranteed to tribes by inherent tribal sovereignty and therefore do not need to be expressly incorporated into section 1377.7

In Albuquerque v. Browner, the appellate court unanimously affirmed the district court’s holdings, thereby rejecting Albuquerque’s claim that tribes cannot adopt or enforce water quality standards that are more stringent than those set by the EPA or approved for the state in which the tribe is located.8 As a result, states and cities located upstream from tribes that negatively affect the attainment of more stringent tribal water quality standards may be required to meet tribal standards once approved by the EPA.9

Part II of this Comment briefly describes the background of federal Indian law in the United States, including the jurisdictional disputes between federal, state, and tribal interests. Part II also describes the EPA’s Indian Policy to further illustrate the legal doctrines and policies that help shape current judicial opinions.10 Part III examines Albuquerque v. Browner, in which the Tenth Circuit upheld the EPA’s approval of water quality standards for the Pueblo of Isleta, an Indian tribe whose reservation is located downstream from Albuquerque’s wastewater treatment plant on the Rio Grande River.11 This section illustrates the EPA’s proper interpretation of the CWA, within the context of inherent tribal sovereignty, and subse-

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6. Albuquerque II, 97 F.3d at 423 n.12 (defining residual sovereign powers as those self-governing rights that tribes retain because Congress has not expressly eliminated them), citing United States v. Wheeler, 435 U.S. 313, 323 (1978) (holding that Indian tribes can use their water rights, which are an element of tribal sovereignty, to assert an action against upstream polluters to recover damages for groundwater contamination).

7. See Albuquerque II, 97 F.3d at 423.

8. See id. at 423-424, 429.

9. See id.

10. See discussion infra part II.

11. See discussion infra part III.
quent EPA regulations that may force upstream polluters to comply with a downstream tribe's water quality standards. Part IV discusses Albuquerque, the Ninth Circuit's more recent decision in Montana v. EPA, and the effects of tribal environmental regulation of non-member activities on non-Indian fee land located either within or outside Indian reservations. Montana is the only other appellate court decision addressing the issue of EPA authorization empowering Indian tribes to establish water quality standards. Part V critiques the emerging trend of decisions upholding the EPA's approval and enforcement of more stringent tribal water quality standards on upstream polluters as well as non-members on fee land within a reservation. Part VI concludes that the EPA reasonably interpreted the plain language of the CWA and Supreme Court precedent when implementing their regulations to determine when tribes should be permitted, under Section 1377(e), to promulgate water quality standards.

II. BACKGROUND OF JURISDICTIONAL DISPUTES IN FEDERAL INDIAN LAW BETWEEN TRIBES, STATES AND THE FEDERAL GOVERNMENT

Since Europeans first arrived in North America, most legal disputes involving American Indian tribes and whites have concerned restrictions on tribal sovereignty within America's federal system of government. The United States Supreme

12. 137 F.3d 1135 (9th Cir. 1998).
14. See Albuquerque II; Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998).
Court first established the concepts of tribal sovereignty through three cases known as the "Marshall Trilogy."\footnote{17}

\section*{A. A Brief History of Federal Indian Law and Tribal State Jurisdiction Disputes}

To justify the United States government's control over Indian nations, the U.S. Supreme Court established what many Indian legal scholars consider the foundation of American federal Indian law.\footnote{18} The "Marshall Trilogy," named after then Chief Justice John Marshall, established the legal foundations for resolving sovereign jurisdictional disputes between American Indian tribes, states, and the federal government.\footnote{19} These cases relegated indigenous peoples of the "New World" to the status of dependent nation-states to which the United States owes a trust responsibility.\footnote{20}

The first of the Marshall Trilogy cases, \textit{Johnson v. M'Intosh},\footnote{21} addressed the authority of Indian "chiefs" to grant titles of land in possession of their tribe to non-Indians.\footnote{22} The Court determined that while Indians retained possessory rights over their land, European "discovery" gave the federal government the exclusive right to extinguish this Indian title of occupancy by purchase or conquest.\footnote{23} Using this "doctrine of discovery," the Court reasoned that European-originated na-
tions maintained superior rights over lands occupied by "infidels, heathens, and savages," and encouraged white settlers to acquire the Indian "waste" lands. Thus, Johnson was the first decision to engrain into the fabric of American federal Indian law the idea that Indian peoples could be denied rights that were otherwise provided to the nations of Europe.

In the second case, Cherokee Nation v. Georgia, the Cherokees sought an injunction prohibiting Georgia from enforcing certain laws upon their reservation lands. The Court addressed the issue of whether the Cherokee Nation constituted a foreign, independent, and sovereign nation state, existing separate and apart from the United States government. The Court ruled that Indian nations were not foreign nations but rather "domestic dependent nations." The Court reasoned that although tribes had treaty making powers, they looked to the United States government for protection and were therefore "completely under the sovereignty and dominion" of the federal government. Justice Marshall found that the federal government had exclusive power over Indian tribes, and analogized the relationship as "a ward to his guardian." Thus, the Court created the assumption that tribes were dependent on the United States government to protect their lands from foreign invasion.

25. See Getches, supra note 16, at 71-72 (stating that Johnson provided a legal framework for extinguishing Indian title that was used to acquire the lands of the United States).
28. See id. at 4, 18.
29. Id. at 17.
30. Id.
31. Cherokee Nation, 30 U.S. (5 Pet.) at 17. The notion of the federal government's relationship to Indian tribes as that of "a ward to his guardian" was later expressed as the trust responsibility doctrine. See e.g. United States v. Mitchell (Mitchell II), 463 U.S. 206 (1983) (stating that statutory duties may render the federal government liable to tribes for violation of the trust responsibility).
32. See David H. Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 CALIF. L. REV. 1573, 1578 n.18 (December, 1996) (noting that this theory is criticized because many Indian tribes were more numerous and powerful than the Europeans during the early days of colonization. The author asserts that the major threat to Indian tribes was from European
Finally, in *Worcester v. Georgia*, the Court held that a tribe's dependent status did not extinguish its preexisting tribal powers to govern internal tribal affairs within reservation boundaries. The issue in *Worcester* was whether the State of Georgia's laws could supersede the Cherokee Nations' laws to convict a white missionary for residing within the limits of the Cherokee reservation without a license from the State of Georgia. The Court held that only the federal government may infringe upon tribal authority on reservation lands. In the Court's analysis, Justice Marshall conceded that Indian people were distinct peoples, divided into separate nations, independent from each other and the rest of the world with their own laws. Driven primarily by his federalist convictions, Justice Marshall's decision explicitly established the supremacy of federal power over state power in the area of Indian affairs. Thus, *Worcester* prevented state infringement on Indian lands by strengthening the doctrine of federalism so that it preserves tribal sovereignty, subject only to abridgment by the federal government.

As a result of the Marshall trilogy and other more recent cases, federal law generally prohibits states from exercising regulatory authority on Indian lands unless Congress has encroachment onto their lands. Therefore, protection was needed from colonialism rather than foreign military invasion).

33. *31 U.S. (6 Pet.) 515 (1832).*
34. *Worcester v. Georgia, 31 U.S. (6 Pet.) at 561.* The Court noted: "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress." *Id.*
35. *See id. at 531.*
36. *See id. at 594.*
37. *See id. at 542, 543.*
38. *See Getches, supra note 32, at 1582* (asserting the triumph of tribal government over Indian country was made possible by the presumption that tribal sovereignty was only subject to the legislative authority of the United States. Justice Marshall found support for this presumption in the Indian Commerce Clause, *U.S. CONST. art. I, 8, cl. 3*, which granted to Congress the power to regulate commerce with Indian tribes). *See also Worcester, 31 U.S. at 559.*
authorized such action. Nevertheless, the rules established by the Marshall cases continue to be criticized by many Indian legal scholars as unjustly asserting congressional power over Indian affairs based on a self-legitimating colonialist theory. Despite such criticism, the Marshall trilogy was remarkable for its time because it recognized tribal autonomy by significantly limiting state powers over Indian lands.

B. MODERN ADJUDICATORY DOCTRINES REGARDING TRIBAL-STATE JURISDICTION DISPUTES

The Supreme Court's principles for the adjudication of tribal-state jurisdictional disputes have fluctuated significantly since Chief Justice Marshall's time. For over a century, the Court was faithful to the principles set out in the Marshall trilogy and consistently held that, although the United States federal government can abrogate tribal powers, it can only do so through legislation. However, the Supreme Court's principles for resolving jurisdictional disputes in the twentieth century have departed from this precedent and are described by legal scholars as the "Modern Era" (1959-1980) and the "Subjective Era" (1980-present).


41. See generally Robert N. Clinton, Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law, 46 ARK. L. REV. 77 (1993) (discussing the continued debate among Indian legal scholars over the morality of federal Indian law (or American law as applied to Indians), and its roots in conquest and discovery which serve to falsely legitimate congressional plenary power and Congress' ability to alter the powers of Indian tribes). But see Getches, supra note 32, at 1581 ("It is too late in the day to revisit two centuries of consistently and firmly reiterated precedent or to expect a basic reformation of the historical legal relationship of the United States to Indian tribes").

42. See Getches, supra note 32, at 1581 n.24.

43. See e.g., Rey-Bear, supra note 16, at 224 n.29 ("On the larger issue of tribal status within the United States, Congress has expressed quite varying views of tribal sovereignty while the courts have taken an increasingly dim view of it").

44. See Getches, supra note 32, at 1630.

45. See GETCHES, supra note 16. See also Getches, supra note 32, at 1574 n.4.
1. *The Strengthening of Foundational Principles in the “Modern Era”*

During the Modern Era, from 1959-1980, the majority of the Supreme Court's decisions reflected the premise established in the Marshall trilogy, that state power was prevented from encroaching upon tribal sovereignty unless Congress provided express permission through legislation.\(^46\) In *Williams v. Lee*,\(^47\) the first case of the Modern Era, a unanimous Supreme Court held that state courts had no jurisdiction over a civil claim filed by a non-Indian against an Indian for a contract entered into on the Navajo reservation.\(^48\) In *Williams*, the Court stated that allowing state jurisdiction over such claims would undermine the authority of tribal courts over reservation affairs, thereby infringing on the right of Indians to govern themselves.\(^49\) Thus, the Court continued to view reservation boundaries as barriers to state regulation absent congressional action to the contrary.\(^50\)

Another Modern Era case, *McClanahan v. Arizona State Tax Commission*,\(^51\) served to strengthen traditional notions of tribal self-government.\(^52\) In *McClanahan*, the Court held that Arizona could not tax an individual Navajo's earned income because she had earned it exclusively from reservation sources.\(^53\) The Court reasoned that, since the Navajo reservation was established by the federal government for the exclusive use and occupancy of Navajo people, they retained sovereignty over their lands, free from the State's intrusion.\(^54\) The *McClanahan* Court was the first to define this approach to Indian jurisdiction cases as one of reliance on federal preemp-

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46. See Getches, *supra* note 32, at 1631.
48. See *Williams v. Lee*, 358 U.S. 217, 219 (1959) (finding that state law was permitted only where "essential tribal relations" are not involved).
49. See id. at 223.
50. See id.
53. See id. at 181.
54. See id. at 174-175.
tion. Under federal preemption analysis, courts focus on the federal statutes and treaties at issue while recognizing traditional notions of tribal self-government in Indian country. Thus, preemption analysis under McClanahan favors tribal sovereignty unless it is usurped by congressional action.

Williams and McClanahan are just two examples of the Supreme Court's decisions during the Modern Era that served to uphold the traditional principles found in the Marshall trilogy. The Supreme Court's adherence to the traditional principle that tribal sovereignty exists subject only to Congressional modification was due primarily to the presence of Justices Brennan, Marshall, and Blackmun on the Court. However, the current Supreme Court has strayed from traditional notions of inherent tribal sovereignty toward a subjective view that attempts to balance the interests of Indians and non-Indians. This approach may subject tribes to state controls without Congressional action.

55. See Getches, supra note 32, at 1590 (illustrating that the Indian sovereignty doctrine continued to play a central role in McClanahan although demoted to a "backdrop" against which the relevant treaties and statutes must be read).

56. See generally McClanahan, 411 U.S. 164. However, the Court also noted that since few federal statutes are clear regarding state jurisdiction, a court must determine whether Congress's intent was to pre-empt state jurisdiction by looking at the language, legislative history, or circumstances of their enactment. Thus, a court can consider the state's legitimate interests in regulating the affairs of non-Indians on reservations. See id. at 171.

57. See id.

58. See also New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 344 (1983) (holding that New Mexico was preempted from regulating hunting and fishing by non-Indians on trust lands within the reservation because the tribe and federal government had extensively regulated these rights). See also Fisher v. District Court, 424 U.S. 382, 389 (1976) (granting tribal jurisdiction over child placement proceedings for any child who resides on the reservation or is a ward of the tribe).

59. See Getches, supra note 32, at 1630-1631.

60. See id. at 1630-1631 (noting that only Chief Justice Rehnquist and Justice Stevens have demonstrated serious interest in Indian cases although neither adheres to the traditional view that the judiciary should leave modifications of tribal sovereignty to Congress).
2. The Degradation of Foundational Principles in the “Subjective Era”

While the current United States Supreme Court, led by Chief Justice Rehnquist, has not openly rejected the traditional principle that tribal sovereignty survives until curtailed by Congress, the Court has, nonetheless, given great deference to non-Indian interests in reservation jurisdictional disputes over the past seventeen years.\(^{61}\) Swayed by arguments that effects on non-Indians would be severe if tribal sovereignty were upheld, the Rehnquist Court frequently departs from the traditional foundations of Indian law.\(^{62}\)

*Oliphant v. Suquamish Indian Tribe*\(^{63}\) was the first Subjective Era Supreme Court case to substantially deviate from traditional principles of Indian law.\(^{64}\) The *Oliphant* Court held that tribal authorities lack criminal jurisdiction over non-Indians for crimes committed on reservations.\(^{65}\) Writing for the majority, Justice Rehnquist argued that tribal exercise of criminal jurisdiction over non-Indian defendants would subject them to an unfair system of justice.\(^{66}\) However, the Court ex-

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62. See *Getches*, suprano note 32, at 1594. "The new tendency in the Court's tests, rules, and rhetoric is to define tribal powers according to policies, values, and assumptions prevalent in non-Indian society." *Id.*


66. See *id.* at 210-211. Two non-Indians were arrested on various criminal charges including assaulting a police officer, resisting arrest, and reckless driving. The Tribe attempted to try the non-Indians in tribal court according to its Law and Order Code, which extended tribal jurisdiction over both Indians and Non-Indians. *Id.* The U.S. Supreme Court ruled that in criminal cases tribes do not have inherent jurisdiction over non-Indians. The Court based its decision, in part, on the fact that non-Indians were excluded from Suquamish Tribal court juries, therefore potentially infringing on the due process rights of non-Indians. *Id.* at 194-195. But see *Getches*, supra note 32, at 1597 n.98 (noting that the record in Oliphant did not reflect any
plicitly stated that its ruling restricted only tribal criminal juris­
diction, thereby leaving “untouched the tribes’ more impor­
tant civil jurisdiction over non-Indians.” Oliphant is signifi­
cant because it reflects the Rehnquist Court’s willingness to
protect non-Indian interests over Indian sovereignty.

Three years after Oliphant, the Rehnquist Court extended
its subjective approach to preclude tribal jurisdiction over non-
Indians on non-Indian fee land within a reservation. In Mon­
tana v. United States, the Supreme Court held that the Crow
Indian Tribe lacked authority to regulate non-members’ hunt­
ning and fishing on non-Indian owned land within the Crow res­
ervation boundaries. The Montana Court’s denial of tribal
authority over non-members was based, in part, on the Court’s
subjective view that regulation of non-members’ hunting and
fishing activities on non-Indian lands located within a reserva­
dation did not bear a clear relationship to tribal self-government
or internal relations. In reaching its decision, the Court cited
Oliphant for the general proposition that the inherent sover­
eign powers of an Indian tribe do not extend to non-members of
the tribe. Nonetheless, the Montana Court created two excep­
tions to its rule. First, a tribe may retain jurisdiction over non-
Indians engaged in consensual relationships through contracts,
leases, or other arrangements with a tribe or its members.
Second, and most important in the area of environmental
regulation, a tribe may exercise civil jurisdiction over the con­
duct of non-Indians on fee lands within its reservation when
that conduct threatens or has some direct effect on the “politi­
cal integrity, the economic security, or the health or welfare of
the tribe.” Some commentators believe that this second ex-

67. Oliphant, 435 U.S. at 196 n.7. See also Getches, supra note 32, at 1598.
68. See generally Getches, supra note 32, at 1599 (noting that when a case did not
involve the liberty or property of non-Indians, tribal sovereignty was upheld).
71. See id. at 564.
72. See id. at 565.
73. See id. at 566-67.
74. Id.
ception leaves the fate of tribal sovereignty up to the subjective evaluations of future courts. 75

While the Rehnquist Court's subjective trend has not totally usurped traditional principles, three themes have emerged. 76  First, the Court has stepped back from established methods of interpreting Indian sovereignty rights. 77  Second, nineteenth-century policies of assimilation and allotment are sometimes cited as justification for limiting Indian autonomy. 78  Third, the Court has presumed the right of balancing non-Indian interests against tribal interests so that tribal sovereignty comports with the Court's own idea of what it should include. 79  Nevertheless, a return to the bedrock principles of Indian law is occurring through congressional legislation authorizing federal agencies like the EPA to enact regulations allowing tribes to exercise authority over non-member activities that have a serious and substantial impact on the health and welfare of the tribe. 80

C. OVERVIEW OF THE EPA's INDIAN POLICY AND THE CLEAN WATER ACT

The EPA encourages tribal self-determination through both the administration of the CWA and its "Indian Policy." 81  These two EPA functions foster the expansion of tribal involvement in EPA program implementation. This policy empowers tribes

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75. See Getches, supra note 32, at 1610.
76. See id. at 1620.
77. See id.
78. See id.
79. See id. at 1620-1630.
80. See generally the Clean Air Act (CAA), 42 U.S.C. 7601(d)(2) (1994); the Clean Water Act (CWA), 33 U.S.C. 1377(e) (1994), and the Safe Drinking Water Act (SDWA), 42 U.S.C. 300j-11(b)(1) (1994) (provisions providing Treatment as a State (TAS) status to qualifying tribes, thereby allowing tribes to make individual fact-based findings showing that the activity sought to be regulated would present a serious and substantial threat to the health, safety or welfare of the tribe). See also discussion infra part II.C.
81. See EPA Policy for the Administration of Environmental Programs on Indian Reservations (November 8, 1984) (Internal EPA Policy Memo on file with author) [hereinafter the "Indian Policy"].
with as much authority as states to protect the natural resources and the health and welfare of their peoples. 82

1. The EPA's Indian Policy And Tribal Self-determination

In November of 1984, the EPA implemented a policy called the Administration of Environmental Programs on Indian Reservations (hereinafter the “Indian Policy”). 83 In this policy, the EPA states that its fundamental objective is to protect the human health and environment on Indian reservations. 84 The policy also emphasizes tribal self-determination and the establishment of official relationships between federal and tribal governments. 85 Under the Clinton administration, the EPA reaffirmed the Indian Policy and proposed the creation of a national Indian Program Office to encourage the expansion of tribal involvement in EPA program implementation. 86

The EPA's Indian Policy contains nine mission statements with a brief description of each. 87 First, the EPA is ready to work with Indian tribal governments on a direct basis, rather than as subdivisions of other governments. 88 Second, the EPA recognizes “tribal governments as the primary parties for setting standards, making environmental policy decisions, and managing programs for reservations, consistent with agency

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83. See the Indian Policy.
84. See id. at 1.
85. See id.
86. See e.g. Lynn H. Slade and Walter E. Stern, Environmental Regulations on Indian Lands—A Question of Jurisdiction, http://www.lectlaw.com/files/env21 (citing 59 Fed. Reg. 13820 (March 23, 1994) and 59 Fed. Reg. 38460, 38461 (July 28, 1994)). The authors declare the EPA a strong proponent of tribal environmental regulation and predict that, as a result, tribes will develop their own regulatory programs under federal environmental statutes—eventually obtaining regulatory primacy under these federal laws. See id. at 2.
87. See the Indian Policy at 2-4.
88. See id. at 2. “EPA recognizes tribal governments as sovereign entities with primary authority and responsibility for the reservation populace.” Id. Thus, the EPA seeks to work directly with tribal governments as the primary authority for reservation affairs, rather than as political subdivisions of states or the federal government. See id.
standards and regulations.\textsuperscript{89} Third, the EPA vows to "take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands.\textsuperscript{90} Fourth, the EPA will take steps "to remove existing legal and procedural impediments to working directly and effectively with tribal governments on reservation programs.\textsuperscript{91} Fifth, in keeping with the federal trust responsibility doctrine, the EPA "will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments.\textsuperscript{92} Sixth, the "EPA will encourage cooperation between tribal, state, and local governments to resolve environmental problems of mutual concern.\textsuperscript{93} Seventh, the EPA will work with other federal agencies that have similar responsibilities to cooperate in helping tribes assume environmental program responsibilities on reservations.\textsuperscript{94}

\textsuperscript{89} Id. Since the EPA's deliberation policies have usually involved the interests and/or participation of state governments, the EPA will look directly to tribal governments to play the lead role for matters affecting reservation environments. See id.

\textsuperscript{90} Id. The EPA pledged to work with interested tribal governments to develop programs that help them assume regulatory authority for reservation lands and resources. Aid will be made available to qualifying tribes and may include providing grants and other assistance that is similar to those provided to state governments. However, until tribal governments are willing to assume full responsibility for managing programs, the EPA will retain authority. See id.

\textsuperscript{91} Id. The EPA noted that a number of serious constraints and uncertainties exist in the language of environmental statutes that inhibit the Agency's ability to work directly with tribes. Thus, the EPA pledged to remove these impediments, with tribal input, as they are discovered. See id.

\textsuperscript{92} The Indian Policy at 3. The EPA recognized the trust responsibility doctrine historically derived from the relationships between the federal government and tribes as expressed in treaties and federal Indian law. Thus, the EPA endeavors to protect the environmental interests of Indian tribes when carrying out its responsibilities regarding issues that may affect reservation environments. See id.

\textsuperscript{93} Id. The EPA stated that sound environmental planning requires the cooperation of neighboring governments, whether they are neighboring states, tribes or local governments. Thus, the EPA will encourage early communication and cooperation between all interested parties. However, this policy does not lend federal support to any one party to the jeopardy of the interests of the others. Rather, it recognizes that, in environmental regulation, problems are often shared and cooperation helps benefit all parties involved. See id.

\textsuperscript{94} See id. The EPA seeks to promote cooperation between federal agencies to protect human health and the environment on reservations. The EPA will work with other agencies to clearly identify and delineate the roles, responsibilities, and relationships of the respective organizations to assist tribes to develop and manage environmental programs for reservation lands. See id.
Eighth, the EPA "will strive to assure compliance with environmental statutes and regulations on Indian reservations."95 Finally, the EPA will absorb these Indian policy goals into its planning and management activities, including its budget, operating guidance, legislative initiatives, management accountability and ongoing policy and regulation development processes.96

The EPA has adopted these mission statements into its planning and management activities since 1984.97 In addition, it has used its legal authority to approve tribal water quality standards on Indian reservations.98 For example, one EPA statement made in support of its decision to approve a tribe's water quality standards noted that: "In keeping with the principle of Indian self-government, the EPA policy provides that tribal governments are the primary parties for setting standards ... and managing programs for reservations. Moreover, federal courts have approved the EPA's decisions to grant Indian Tribes the same degree of autonomy to determine the quality of their environment as was granted to the States."99 Thus, the EPA refuses to place a limit on tribal water quality

95. Id. at 4. When facilities owned or managed by tribal governments are not in compliance with federal environmental statutes, the EPA pledges to work cooperatively with tribal leadership to develop means to achieve compliance. Nonetheless, direct EPA action through the judicial or administration process will be considered when the Agency determines, in its judgment, that: "(1) a significant threat to human health or the environment exists; (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the federal government cannot utilize other alternatives to correct the problem in a timely fashion." Id. Yet, when the reservation facilities are clearly owned or managed by private parties, the Agency will generally respond to noncompliance as it would by the private sector elsewhere in the country. See id.

96. See id. The EPA sought "to ensure that the principles of this policy are effectively institutionalized by incorporating them into the Agency's ongoing and long-term planning and management processes." Id.

97. See the Indian Policy at 1.


99. Id. at 378 n.89 (quoting an EPA statement made in support of the Proposed Water Quality Standards for the Colville Indian Reservation in the State of Washington). See also 40 C.F.R. § 131.8 (1998).
standards, asserting that since states are not limited in their strictness of standards, tribes should also not be limited. 100

2. Treating Tribes as States Under the Clean Water Act

Congress passed the Clean Water Act (CWA) to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” through the reduction and eventual elimination of the discharge of pollutants into those waters. 101 While the CWA is a federal statute, its implementation involves congressional and executive delegation of enforcement programs to the states. 102 To reach its goals, the CWA mandates a partnership between the federal government and the states, giving the states “primary responsibilities and rights” to regulate water pollution. 103

Congress provided that the EPA may treat tribes as states under the CWA if the EPA promulgates regulations “which specify how Indian tribes shall be treated as states,” and if the Administrator finds that the tribe fulfills certain specified requirements. 104 First, the CWA requires that the Indian tribe have a governing body that carries out substantial duties and holds substantial powers. 105 Second, the tribe’s proposed actions must pertain to the management and protection of water resources within the tribe’s jurisdiction or otherwise within the

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100. See Baker, supra note 98, at 376 n.89 (noting that the EPA claimed that there was no sign that Congress intended to treat tribes as “second class” states under the CWA). See also 40 C.F.R. § 131 (1998).


102. CWA, 33 U.S.C. § 1251(b) (1994). This section provides:

   It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. Id.


104. See supra note 4 and accompanying text, CWA, 33 U.S.C. § 1377(e); 33 U.S.C. § 1377(e)(1) (providing possible TAS status if an Indian Tribe has a governing body that carries out substantial governmental duties and powers; functions would pertain to the management and protection of water resources held by the Tribe; and the Administrator deems the Tribe capable of carrying out the functions proposed).

105. See id. A governing body with substantial duties and powers may include a tribal council that passes legislation and votes on proposals. See also 40 C.F.R. 131.8 (1998).
borders of the reservation. \textsuperscript{106} Third, the Administrator must regard the tribe as capable of carrying out the functions of all applicable regulations consistent with the statute and other applicable regulations. \textsuperscript{107}

EPA's regulations also set out procedural requirements to which Indian tribes must adhere when applying for treatment as a state (TAS) status. \textsuperscript{108} Tribes must submit a detailed application to the EPA Regional Administrator showing that the tribe satisfies the prescribed criteria for TAS status. \textsuperscript{109} The Administrator provides notice of the application to all appropriate governmental entities and allows 30 days for the submission of comments. \textsuperscript{110} If public comments challenge a tribe's authority, the Regional Administrator determines whether the tribe meets the requirements of the CWA. \textsuperscript{111} These requirements were created to ensure the due process rights of all interested parties. \textsuperscript{112}

The implementation of federal environmental statutes in Indian country, through TAS provisions, is based on Congressional delegation to the EPA. \textsuperscript{113} In turn, the EPA delegates significant powers to qualified Indian tribes on a tribe-by-tribe basis. \textsuperscript{114} Thus, under the CWA, a tribe's water quality standards could potentially affect the activities of non-members on fee lands, both within or outside a reservation's exterior boundaries. \textsuperscript{115} At least two tribal groups have succeeded in obtaining TAS status and have overcome judicial challenges to

\textsuperscript{106} CWA 33 U.S.C. § 1377 (e)(2). \textit{See supra} note 4 and accompanying text.
\textsuperscript{107} CWA 33 U.S.C. § 1377 (e)(3). \textit{See supra} note 4 and accompanying text.
\textsuperscript{108} \textit{See generally} 40 C.F.R. 131.8 (b)(c) (1998).
\textsuperscript{109} \textit{See 40 C.F.R. 131.8 (b).}
\textsuperscript{110} \textit{See 40 C.F.R. 131.8 (c)(3).}
\textsuperscript{111} \textit{See 40 C.F.R. 131.8(c)(4).}
\textsuperscript{112} \textit{See generally} 40 C.F.R. 131.8.
\textsuperscript{113} \textit{See supra} note 80 and accompanying text.
\textsuperscript{114} \textit{See supra} notes 101-102 and accompanying text.
\textsuperscript{115} \textit{See Albuquerque II, 97 F.3d at 423;} \textit{See also Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998).}
the EPA's authority to empower them to establish water quality standards.¹¹⁶

III. ALBUQUERQUE v. BROWNER: JUDICIAL APPROVAL OF EPA REGULATIONS AND THE ENFORCEMENT OF DOWNSTREAM TRIBAL WATER QUALITY STANDARDS

The United States Court of Appeals for the Tenth Circuit was the first appellate court to consider the issue of tribal authority to set water quality standards.¹¹⁷ The court found that the EPA's authorization of the Pueblo Tribe to establish water quality standards for purposes of the CWA was "in accord with powers inherent in Indian tribal sovereignty."¹¹⁸ Thus, the court upheld EPA enforcement of the Tribe's more stringent downstream water quality standards against the City of Albuquerque.¹¹⁹

A. FACTS AND PROCEDURAL HISTORY

The Rio Grande River flows from north to south through New Mexico, then turns east to form the border between Texas and Mexico.¹²⁰ The City of Albuquerque, located in New Mexico, discharges treated wastewater effluent into the Rio Grande.¹²¹ This discharge travels five miles downstream to the Isleta Pueblo Indian Reservation, which is located on the eastern side of the river.¹²² Plaintiff, the City of Albuquerque, acquires its water from two wells which draw on an aquifer hav-
ing a high arsenic content. Since the aquifer is continually being depleted, the arsenic concentrations in Albuquerque's water increase. This increase results in elevated arsenic and ammonia concentrations in the wastewater discharged from Albuquerque's waste treatment facility into the Rio Grande. When these elevated levels of pollutants flow downstream, they affect the Isleta Pueblo's use of river water for ceremonial use and crop irrigation purposes.

Albuquerque's waste treatment facility operates under an EPA issued National Pollution Discharge Elimination System (NPDES) permit. Albuquerque's NPDES permit ensured that it met the state of New Mexico's water quality standards. In an attempt to obtain more control over the Rio Grande River's water quality on the reservation, the Isleta Pueblo applied for TAS status. On October 12, 1992, after the thirty-day comment period, the EPA recognized the Isleta Pueblo as a state for purposes of 33 U.S.C. § 1377(e). This

123. See Janet K. Baker, Tribal Water Quality Standards: Are There Any Limits?, 7 DUKE ENVT'L L. & POL'Y F. 367, 381 n.79 (1997) (Janet Baker's personal communication with EPA Office of Regional Counsel, Region VI, Dallas, Texas (October 1996)).
124. See id. at 381 n.114.
125. See id.
126. See Albuquerque II, 97 F.3d at 428 (describing ceremonial uses to include bathing and some possible ingestion of river water). See also http://www.Indianpueblo.org/isleta.html. Agriculture is the principle occupation of the Isleta people. Thus, water from the Rio Grande River is used for irrigation of food crops. See id.
127. See Albuquerque II, 97 F.3d at 419.
128. See id. Water Quality requirements under the CWA are implemented through a permit process known as the National Pollutant Discharge Elimination System (NPDES). The CWA prohibits the discharge of any pollutant, from a point source, into the nation's waters except as approved through an NPDES permit. See 33 U.S.C. § 1311(a) (1994) ("except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful"). Point source polluters are facilities, or specific locations, from which water is discharged into any surface or subsurface drainage system. See 33 U.S.C. § 1362 (14) (1994) defining "Point source" as:
any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.
129. See Albuquerque II, 97 F.3d at 419, 426 (noting the City of Albuquerque received a full and fair opportunity for public notice, comment, and hearings under the
allowed the Isleta Pueblo to promulgate their own water quality standards, which the EPA approved in December 1992. The Isleta Pueblo's standard for arsenic in the Rio Grande was 1,000 times more stringent than the federal Safe Drinking Water Standard, and was below the concentration that could accurately be measured by then existing laboratory equipment. The Pueblo's standards were also more stringent than the State of New Mexico's because their designated use of the water included primary contact ceremonial and recreational uses. While tribal members refused to describe the details of ceremonial use, they defined "Primary Contact Ceremonial Use" as "the use of a stream, beach, lake, or impoundment for religious or traditional purposes by members of the Pueblo of Isleta; such use involves immersion and intentional or incidental ingestion of water."

On January 25, 1993, Albuquerque filed a complaint in the United States District Court for the District of New Mexico to challenge the EPA's approval of the Pueblo of Isleta tribe's water quality standards on several grounds. One challenge was procedural: Albuquerque asserted that the EPA failed to follow the required procedures in approving the tribe's water quality standards. Two other challenges were substantive. First, Albuquerque asserted that the EPA misinterpreted two provisions of the CWA. Second, Albuquerque claimed the EPA approved standards that were unconstitutional.


130. See Albuquerque I, 865 F. Supp. at 736.
131. See id. at 742. See infra notes 141-145 and accompanying text.
133. Albuquerque II, 97 F.3d at 428.
134. See Albuquerque I, 865 F. Supp. at 736.
135. See id.
136. See id. at 736.
137. See id.
1. Albuquerque's Procedural Challenge under the Administrative Procedure Act

Albuquerque's procedural challenge asserted the EPA's decision to approve the Isleta Pueblo's TAS status was "arbitrary and capricious" under the Administrative Procedure Act (APA). Albuquerque claimed that the EPA's actions were arbitrary and capricious because "compliance with non-detectable discharge limits would require reverse osmosis [a treatment that reduces arsenic levels prior to discharge] with a cost to the city of 248 million dollars in capital improvements and 26 million dollars in annual operating costs." Albuquerque also alleged, under the APA, that the EPA should have rejected the Pueblo's water quality standards unless an independent EPA record found each particular provision sound based on a rational basis standard.

The appellate court noted that the CWA permits "the EPA and states to force technological advancement to attain higher water quality." In its analysis, the district court looked to the language of the CWA and determined that the EPA only reviews proposed water quality standards to determine if they meet the minimum standards already required by the EPA. The EPA is not authorized to reject proposed standards because they are more stringent than the minimum federal requirements. Thus, the district court found that although the

138. Albuquerque I, 865 F. Supp. at 737-739 (citing the Administrative Procedure Act (5 U.S.C. §706(2)) which requires courts to determine whether the agency action under review was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ... without observance of procedure required by law; ... or unsupported by substantial evidence," and Colorado Health Care Ass'n v. Colorado Dept. of Social Services, 842 F.2d 1158, 1164 (10th Cir. 1991), which noted that the arbitrary and capricious standard demands considerable deference to the agency decisions and presumes the validity of the agency's action).


140. See Albuquerque II, 97 F.3d at 426.

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

142. See Albuquerque I, 865 F. Supp. at 741 (referring to 40 C.F.R. §§ 131.5; 131.11(a) (1992)).

143. See id. (citing 56 Fed.Reg. 64,886 (1991)).
Tribe's arsenic standard was strict, the EPA lacked authority to reject stringent standards on the grounds of harsh economic or social effects. Consequently, both the district and appellate court rejected plaintiff's argument that the EPA violated the APA by forcing Albuquerque to implement innovative technology and expensive procedures to clean up its waste water.

2. Albuquerque's Substantive Challenges to the EPA's Actions

In its substantive arguments, Albuquerque claimed that the EPA violated the CWA in two ways. First, Albuquerque asserted that the EPA failed to create a procedure that resolved disputes when a state and Tribe imposed different standards on a common body of water. A second, somewhat contradictory argument, was that the EPA had failed to ensure that the Pueblo standards were stringent enough to protect the designated use for drinking water.

The district court rejected Albuquerque's first argument and granted summary judgment to the EPA, finding that the EPA had followed the necessary procedures for accepting the Pueblo's proposed water quality standards. The district court found that the EPA's decisions were carefully made, with all the relevant factors considered. Albuquerque appealed the

144. See id. at 741 (citing Homestake Mining Co., v. EPA, 477 F. Supp. 1279, 1283 (D.S.D. 1979)).
145. See id. at 738. See also Albuquerque II, 97 F.3d at 426.
146. See Albuquerque II, 97 F.3d at 736.
147. See id. at 740. Albuquerque alleged that EPA's regulations were insufficient because they allow only a state or tribe to initiate the resolution process and other affected parties should also have this option to initiate the process. Id. Albuquerque claimed that limiting this power to invoke violated the APA's requirement that an established mechanism for resolving disputes be used when a state and a tribe impose different water standards on the same body of water. Id. The Court rejected this argument, finding the EPA's regulations were fair because only the tribes and states may modify the water quality standards in question. Id.
148. See id. (finding Albuquerque's argument that the Tribe's water quality standards were not safe enough under the Safe Drinking Water Act unpersuasive because the Tribe's use was not for everyday drinking water).
149. See id. at 739, 742 (finding that the EPA abided by all the CWA's procedural requirements and thereby fulfilled the purposes of the APA).
150. See Albuquerque I, 865 F. Supp. at 742. See supra note 4 and accompanying text for factors.
district court's decision, claiming that the CWA does not allow tribes to establish water quality standards that are more stringent than federal standards and does not allow tribal standards to be enforced beyond reservation boundaries. The Tenth Circuit disagreed, affirmed the district court's holding, and found that the EPA reasonably interpreted the CWA.

Albuquerque's second argument, that the Pueblo's water quality standards were not strict enough under the Safe Drinking Water Act (SDWA), was also unpersuasive to the district court. Albuquerque claimed that the Pueblo's standards were not stringent enough to protect people who came into contact with the water during ceremonial or recreational use. Because some ceremonial use might involve ingestion of the river water, Albuquerque argued that the Safe Drinking Water Act, 42 U.S.C. § 300(f), should apply. The district court rejected this argument, calling it "far-fetched," because the SDWA was intended to protect people who ingest water on a daily basis. The court found this statute inapplicable in the immediate case because water would only be ingested during periodic ceremonial or recreational use.

B. THE DISTRICT COURT'S ANALYSIS WAS ACCURATE AND ITS FINDINGS WERE PROPER UNDER THE CWA

The United States Court of Appeals for the Tenth Circuit affirmed the district court's findings and held that Indian tribes may exercise "their inherent sovereign power to impose standards or limits that are more stringent than those imposed by the federal government." In addressing Albuquerque's charge that the EPA interpreted the CWA incorrectly, the Tenth Circuit approached the case in two ways. First, the

151. See Albuquerque II, 97 F.3d at 421 (referring to 33 U.S.C. § 1377 (1996)).
152. See id. at 429.
154. See id.
155. See id.
156. See id.
158. Albuquerque II, 97 F.3d at 423.
159. See Albuquerque II, 97 F.3d at 421-423.
court applied the two-step "Chevron test" established by the United States Supreme Court in *Chevron USA, Inc. v. Natural Resources Defense Council.* The Court created the *Chevron* test to guide judicial review of agency interpretations of acts of Congress. The appellate court applied this test to determine whether the EPA violated its regulatory authority under the CWA. The second part of the *Albuquerque* court's analysis focused on the purpose of the CWA as a whole in order to determine whether the EPA had overstepped its authority in granting TAS status to the Pueblo Tribe.

The appellate court's analysis relied, in part, on traditional notions of federal preemption and inherent tribal sovereignty. The court found that the Pueblo Tribe was allowed to set more stringent water quality standards, "absent an express statutory elimination of those powers." The court ultimately held that the EPA has authority to require upstream NPDES dischargers to comply with stricter downstream tribal standards; that the EPA's approval of the ceremonial use standard in connection with approval of tribal standards did not violate the establishment clause; and the tribal standards were not unconstitutionally vague.

1. **Stricter Tribal Water Quality Standards**

The Tenth Circuit applied the two-step *Chevron* test to determine whether the EPA's approval of the Pueblo Tribe's more stringent water quality standards was permissible. The first

162. *See Albuquerque II,* 97 F.3d at 422.
163. *See id.* at 422-423 (noting 33 U.S.C. § 1251(a) and Congress's objective in the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"). *See also* 33 U.S.C. § 1251(b). Congress designed the Clean Water Act to provide for a comprehensive regulatory scheme that recognized and preserved a primary role to the states in eliminating pollution from the nation's waterways. *See id.*
164. *See Albuquerque II,* 97 F.3d at 423.
165. *Id.*
166. *See id.* at 429. *See infra* notes 182, 189-190 and accompanying text.
167. *See Albuquerque II,* 97 F.3d at 421.
part of the *Chevron* test requires the reviewing court to determine whether congressional intent is clear and unambiguous regarding the specific question at issue. When congressional intent is clear, the second part of the test need not be applied. However, if congressional intent is unclear, regarding the specific issue, courts must apply the second part of the *Chevron* test, which is an analysis of whether the agency's interpretation is based on a permissible construction of the statute.

Under the first part of the test, the *Albuquerque* court examined Congress's intent and questioned whether it was clear regarding a Tribe's power to set more stringent standards. The court found Congress's intent unclear because CWA section 1377(e), which authorizes the Administrator to treat qualifying Tribes as states, did not expressly incorporate section 1370, which allows states to adopt more stringent water quality standards than other states or the EPA. Instead, the court relied on the EPA's argument that section 1370 is a "savings clause that merely recognizes powers already held by the states." Thus, the court found that Indian tribes may exercise their inherent sovereign power to establish limits that are more stringent than states or the federal government when there is no express statutory elimination of those powers. Since the *Albuquerque* court did not find express statutory limits on these powers, it determined that congressional intent

168. See *Chevron*, 467 U.S. at 842-843.
169. See *Albuquerque II*, 97 F.3d at 422.
170. See *Chevron*, 467 U.S. at 842-843.
171. See *Albuquerque II*, 97 F.3d at 422.
172. See id. at 423. 33 U.S.C. § 1377(e) specifically includes 33 U.S.C. Sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, and 1344. The court refused to find clear Congressional intent because § 1370 was not expressly listed in § 1377(e). See supra note 4 and accompanying text.
173. *Albuquerque II*, 97 F.3d at 423. The Court agreed with the EPA's argument that 33 U.S.C. § 1370 is a "savings clause" that reiterates rights already held by states. For instance, states already have the right to exercise their sovereign power to set water standards or limits that are more stringent than those imposed by the federal government. Thus, tribes with state status may also exercise these powers. See id.
174. See id. (citing United States v. Wheeler, 435 U.S. 313, 323 (1978) (finding that Indian tribes could use their water rights, which are an element of tribal sovereignty, to assert an action against upstream polluters to recover damages for groundwater contamination).
was ambiguous.\textsuperscript{175} Thus, the court proceeded to the second part of the \textit{Chevron} Test in its attempt to determine whether the EPA had exceeded its authority in interpreting the CWA.\textsuperscript{176}

In the second part of the \textit{Chevron} Test, the Albuquerque court questioned whether the EPA's approval of the more stringent Pueblo standards was based on a permissible construction of the CWA.\textsuperscript{177} In making its determination, the court gave deference to the EPA's interpretation of the CWA because the EPA is charged with administering the Act.\textsuperscript{178} The court rejected Albuquerque's argument that the EPA misinterpreted the CWA because section 1377 (empowering the EPA to treat tribes as states) does not expressly permit tribes to enforce standards under section 1311 (prohibiting the discharge of any pollutant) upon upstream, off-reservation, point source polluters.\textsuperscript{179} Instead, the court reasoned that because section 1377(e) incorporates sections 1341 and 1342 (giving the EPA authority to issue NPDES permits in compliance with tribal water quality standards), the 1987 amendment to the CWA clearly provides tribes with the authority to establish NPDES permit requirements with the EPA.\textsuperscript{180} It is the EPA, rather than the tribe, that uses the NPDES permit system against upstream polluters to enforce the downstream Pueblo tribe's water quality standards.\textsuperscript{181} Consequently, the court found that the EPA's construction of the Act (that tribes may promulgate water

\textsuperscript{175} See id. at 422.
\textsuperscript{176} See id.
\textsuperscript{177} See id.
\textsuperscript{178} See Albuquerque II, 97 F.3d at 422 (citing Arkansas v. Oklahoma, 503 U.S. 91, 112 (1992), which criticized the Tenth Circuit for failing to give the EPA's interpretation of the Clean Water Act "an appropriate level of deference").
\textsuperscript{179} See id. at 423. The court found that Albuquerque misconstrued the CWA by selectively reading sections rather than the act as a comprehensive regulatory scheme.
\textsuperscript{180} See id. at 423-424. See also 33 U.S.C. § 1341(a)(1) (1994), providing in part that:

any applicant for a Federal license or permit to conduct any activity ... which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate ... that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

\textsuperscript{181} See id. at 424 (reasoning that since the EPA would be enforcing the Tribe's water quality standards, the Tribe did not exceed the scope of its jurisdiction over nonmembers by reaching beyond the boundaries of the reservation).
quality standards more stringent than those imposed by the federal government) was in accordance with the powers of inherent Indian tribal sovereignty. 182

2. EPA's Enforcement of Tribal Water Quality Standards Upon Upstream Polluters

The second question the Tenth Circuit addressed was whether section 1377 of the Clean Water Act allowed Indian tribes to enforce their standards upon upstream point source dischargers outside the reservation boundaries. 183 The court held that, under the CWA, tribes are not enforcing their water quality standards beyond reservation boundaries. 184 Instead, the EPA is exercising its own authority to require upstream NPDES discharges to comply with downstream tribal standards through the NPDES permit system. 185 The court also acknowledged that tribes may have jurisdiction over non-Indian conduct that has some direct effect on the health and welfare of the tribe. 186 This "health and welfare" theory, first articulated by the Supreme Court in Montana v. United States, asserts that tribes may have inherent jurisdiction over non-Indian resources if there is "some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 187 Nevertheless, the court avoided reliance on this less utilized "health and welfare" exception by finding that it was the EPA, rather than the tribe, who would enforce more stringent tribal water quality standards upon off-reservation, non-Indian parties. 188 Albuquerque's constitutional challenges

182. See id. at 423.
183. See id. at 423-424.
184. See Albuquerque II, 97 F.3d at 424:
185. See id. (citing Arkansas v. Oklahoma, 503 U.S. 91, 112 (1992) (holding that the EPA's requirement that NPDES dischargers must comply with the downstream State's water quality standards was a reasonable exercise of the agency's statutory discretion pursuant to §§ 1341, 1342).
186. Id. at 424 n.14 (citing Montana v. United States, 450 U.S. 544 (1981) (finding that tribes have inherent jurisdiction over non-Indian conduct or non-Indian resources if there is "some direct effect on the political integrity, the economic security, or the health or welfare of the tribe").
188. See Albuquerque II, 97 F.3d at 424. The court found a stronger basis for the Albuquerque decision by relying on Congress's delegation of power to the EPA rather
based on First Amendment violations\textsuperscript{189} and vagueness\textsuperscript{190} were also defeated by the appellate court.

than the less utilized Montana exception, apparently because the Montana court limited inherent sovereign authority to non-Indian conduct on non-Indian fee lands within a reservation when it threatens the political integrity, economic security or health or welfare of the tribe. \textit{id.}

189. See \textit{id.} at 428-429. Albuquerque alleged that because the Pueblo's water quality standards included "Primary Contact Ceremonial Use" for religious purposes by members of the Tribe, the EPA's approval violated the Establishment Clause. The First Amendment provides that "Congress shall make no law respecting an establishment of religion." \textit{id.} (citing U.S. \textsc{const.} amend. I). The court rejected this claim, noting that government action does not violate the Establishment Clause if "the challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion." \textit{id.} (citing \textsc{lamb's chapel v. center moriches union free school district}, 508 U.S. 384, 395 (1993)).

Albuquerque used the Establishment Clause to challenge the ceremonial use standard in three ways. First, Albuquerque claimed that the reason for the designated use was explicitly sectarian. The court disagreed and found that the EPA's purpose in approving the designated use had a clear secular purpose, namely to promote the goals of the Clean Water Act. \textit{See Albuquerque II}, 97 F.3d at 428-429. EPA's approval of the Tribe's standards did not violate the Establishment clause because EPA's purpose in approving the Tribe's designated use was unrelated to the Pueblo's religious reasons for establishing it. \textit{id.}. Second, Albuquerque argued that the EPA's action had the primary effect of advancing the Pueblo's religion because it created and maintained conditions that furthered the practice of the religion by requiring sufficient water quality standards. The court also rejected this argument, finding that the primary effect of the EPA's action was to advance the goals of the CWA, with any benefits the Pueblo received to their religion incidental. In fact, the court stated that: "the agency's approval furthers the free exercise of religion, consistent with the policy expressed in the American Indian Religious Freedom Act." \textit{id.} at 429 n.20. The Act provides that "It shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian ... including but not limited to ... freedom to worship through ceremonial and traditional rites." \textit{id.} at 429 (quoting 42 U.S.C. § 1996 (Supp. 1994)). Finally, Albuquerque claimed that the EPA's approval of the designated ceremonial use results in excessive governmental entanglement with religion because the tribe and the EPA would have to consistently check with each other to see whether the standards adequately protected religious use of the river water. The court found instead that the EPA's approval of the standard did not require governmental involvement in the Pueblo's religious practices because the EPA simply incorporated the Pueblo's standards into the issuance of future NPDES permits. Thus, the court found that the EPA's purpose in approving the tribe's water quality standards was to promote the goals of the CWA and not the Tribe's religion. \textit{id.} at 428-429.

190. See \textit{id.} at 429. Albuquerque alleged that the Pueblo's water quality standards were unconstitutionally vague, thereby depriving them of their due process rights, because they were set in narrative terms prohibiting "floating materials,' 'contaminants [which]...impart unpalatable flavor of fish,' 'nutrients [which] produce objectionable algal densities,' 'waters [which are]...virtually free of pathogens." \textit{id.} (quoting Appellant's Br. at 48-49). The court found "a strong presumption that
The Albuquerque court ultimately upheld the EPA’s interpretation of the CWA, its underlying congressional intent, and the doctrine of inherent tribal sovereignty upon which it based the decision to grant TAS status to the Isleta Pueblo tribe. Albuquerque’s subsequent petition to the United States Supreme Court for a writ of certiorari was denied without comment.

IV. THE COURT’S ANALYSIS IN ALBUQUERQUE V. BROWNER IS SOUND AND THE REASONING SHOULD BE FOLLOWED BY OTHER COURTS WHEN EVALUATING EPA APPROVAL AND ENFORCEMENT OF DOWNSTREAM TRIBAL WATER QUALITY STANDARDS

Because water flows through borders, the ongoing debate in this area of law concerns the scope of Indian tribal authority to affect non-Indian activities on non-Indian lands located both within and upstream from reservation boundaries. This dispute is not about the technical content of approved water quality standards, but rather involves the power struggle between tribes, states, and the federal government to promulgate their own water quality standards even if each has significant impacts on the other respective jurisdictions.

...
A. THE ALBUQUERQUE COURT'S REASONING STRENGTHENED TRADITIONAL NOTIONS OF INHERENT TRIBAL SOVEREIGNTY

The Albuquerque court's decision strengthened the notion of inherent tribal sovereignty in two ways. First, by adopting the EPA's interpretation of the CWA that tribes may set more stringent water quality standards under section 1370, the Albuquerque court recognized that tribes, like states, retain their inherent sovereign powers unless expressly eliminated by Congress. This notion, established in cases like Williams v. Lee, protects the authority of Indian governments to regulate their reservations.

Second, the Court recognized the Montana v. United States public health and welfare exception; that tribes may exercise civil jurisdiction over non-Indian conduct on fee land within a reservation when that conduct has some direct effect on the health and welfare of the tribe. The Albuquerque court's recognition of the validity of the Montana exception offered support to the Ninth Circuit's decision in Montana v. EPA, where it confronted the issue of enforcement of tribal water quality standards on non-Indian fee lands within the reservation.

B. THE ALBUQUERQUE COURT'S ANALYSIS REGARDING INHERENT TRIBAL SOVEREIGNTY WAS CORRECT, AS EVIDENCED BY MONTANA v. EPA

The Albuquerque court's opinion was recently cited favorably by the United States Court of Appeals for the Ninth Circuit in Montana v. EPA, in which the court upheld the EPA's grant of TAS status to the Confederated Salish and Kootenai Tribes of the Flathead Reservation. Now, two circuit court opinions

194. See City of Albuquerque v. Browner, 97 F.3d 415 at 423 (10th Cir. 1996) (hereinafter "Albuquerque II").
195. See infra notes 48-50 and accompanying text.
196. 137 F.3d 1135 (9th Cir. 1998).
197. See Montana v. EPA, 137 F.3d 1135, 1138 (9th Cir. 1998).
198. See id. The Court noted that: "Our decision is also fully consistent with the only other circuit opinion that has yet considered the issue of tribal authority to set water quality standards." Id. at 1141. (citing City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996)). The Ninth Circuit opinion remains good law as the United
are in accord regarding the issue of tribal authority to set water quality standards. \textsuperscript{199} \textit{Montana v. EPA} illustrates the expansion upon the \textit{Albuquerque} court's holding that the EPA is authorized to treat eligible Indian tribes in the same manner as states, thereby allowing the EPA to enforce more stringent downstream tribal water quality standards upon upstream polluters. \textsuperscript{200}

In \textit{Montana v. EPA}, the Ninth Circuit logically expanded the \textit{Albuquerque} court's reasoning to include the enforcement of tribal water quality standards on non-members located on fee land within reservation boundaries. \textsuperscript{201} If the Ninth Circuit in \textit{Montana} had instead found that tribes possessed inherent authority to establish water quality standards for tribal and Indian trust lands only, NPDES permits for point source polluters on non-Indian lands within the reservation's watershed would still require compliance with downstream tribal water quality standards pursuant to \textit{Albuquerque}, and the United States Supreme Court's decision in \textit{Arkansas v. Oklahoma}. \textsuperscript{202} Thus, there is little difference between forcing non-Indian, off-reservation, polluters to comply indirectly with downstream tribal water quality standards and forcing non-Indian, reservation polluters to comply directly with such standards. \textsuperscript{203}

At issue in \textit{Montana v. EPA} was whether the EPA's regulations granting TAS status to the Confederated Salish and Kootenai Tribes on the Flathead Reservation allowed the tribes to exceed the permissible scope of their authority over non-members living within the reservation on fee land. \textsuperscript{204} The

\textsuperscript{199} \textit{Albuquerque II}, 97 F.3d at 429. \textit{See also Montana v. EPA}, 137 F.3d 1135 (9th Cir. 1998).

\textsuperscript{200} \textit{See Albuquerque II}, 97 F.3d at 429.

\textsuperscript{201} \textit{See id. at 423. See also Montana v. EPA}, 137 F.3d at 1142.

\textsuperscript{202} \textit{See Arkansas v. Oklahoma}, 503 U.S. at 106 (holding that Arkansas must comply with downstream Oklahoma's water quality standards). \textit{See also Albuquerque II}, 97 F.3d at 423.

\textsuperscript{203} \textit{See Rey-Bear, supra note 193, at 212.}

\textsuperscript{204} \textit{See Montana v. EPA}, 137 F.3d at 1138 (claiming that the EPA regulations permitting tribes to be treated as states for the purpose of setting their own water quality standards are not subject to the EPA's NPDES permitting regime).

Ninth Circuit found that the EPA's regulations were valid and reflected the "appropriate delineation and application of inherent tribal regulatory authority over non-consenting non-members." 205

1. Facts and Procedural History of Montana v. EPA

The Flathead Indian Reservation encompasses roughly 1.2 million acres and contains 4,000 natural stream miles. 206 In 1992, the Tribes were granted TAS status over all surface waters within the reservation. 207 The Flathead Reservation's dominant feature is Flathead Lake, which provides water for domestic, industrial, and agricultural uses within the reservation. 208 The land within the reservation reflects a checkerboard pattern of ownership between tribal and non-tribal entities. 209 The non-tribal entities include the state, county, and municipalities that operate discharge waste facilities into reservation waters pursuant to existing NPDES permits. 210

In their application for TAS status, the Tribes identified several facilities located on non-Indian fee lands within the reservation that threatened the impairment of the reservation's water quality. 211 Potential point source polluters included private and government operated slaughterhouses, hydroelectric facilities, wood processing plants, and three wastewater treatment plants. 212 Additional reservation commercial activities included feedlots, mine tailings, dumps, landfills, and auto wrecking yards. 213 The Tribes submitted a detailed map with their TAS application, illustrating that all lands located
within the reservation’s boundaries drain into the Tribes’ Lower Flathead River.\textsuperscript{214}

The plaintiffs (hereinafter “Montana”) included state and municipal entities that own fee land on the reservation.\textsuperscript{215} The defendants included the EPA and the Confederated Salish and Kootenai Tribes.\textsuperscript{216} Montana opposed the Tribes TAS application stating that, if granted, the regulations would permit the Tribes to exercise excessive authority over non-members that was broader than necessary for tribal self-governance.\textsuperscript{217} The district court granted summary judgment to the defendants and the Ninth Circuit subsequently affirmed.\textsuperscript{218}

2. \textit{The Ninth Circuit Court's Analysis}

The issue in \textit{Montana} was whether the EPA violated section 1377(e) of the CWA, which requires the EPA to develop and implement regulations that enumerate how Indian tribes shall be treated as states for purposes of section 1377(e).\textsuperscript{219} The EPA had determined that the Tribes should be authorized to establish water quality standards for non-Indian fee lands as well as Indian lands within the reservation, based on the EPA's determination that water pollution from non-member activities on non-Indian lands would have serious and substantial impacts on the health and welfare of the Tribes.\textsuperscript{220} Montana argued that the EPA's regulations permitted the Tribes to exceed their inherent tribal sovereignty to impermissibly exercise jurisdictional authority over non-members.\textsuperscript{221} The court held that the EPA's regulations providing TAS status to the Tribes was valid and reflected the appropriate delineation and application
of inherent tribal regulatory authority over non-consenting non-members.  

In its analysis, the Ninth Circuit first looked to the CWA and the TAS provisions. The court then examined the EPA's regulations at issue and found the EPA's third requirement, that a tribe's water quality standards program must pertain to the protection of waters within the reservation, to be of particular importance because it intended to reflect the scope of a tribe's inherent sovereign powers. To determine if the Tribes could exercise authority over the activities of the non-member plaintiffs on non-Indian fee lands, the court relied on the public health and welfare exception articulated in Montana v. United States, which the EPA adopted into its regulations. The Montana exception and EPA rules require tribes to show that the regulated activity affects "the political integrity, the economic security, or the health or welfare of the tribe," and that the impact on the tribe is "serious and substantial." Under the EPA's Final Rules, this determination is made on a case-by-case basis, based in part on the tribe's scope of inherent authority and the EPA's generalized findings that water quality and human health are closely linked.

222. See Montana v. EPA, 137 F.3d at 1140-1141.
224. Montana v. EPA, 137 F.3d at 1139 (citing 40 C.F.R. 131.8(a)(1)-(4) (1998)). EPA regulations require: "(1) the tribe must be federally recognized and exercising governmental authority; (2) the tribe must have a governing body carrying out 'substantial governmental duties and powers'; (3) the water quality standards program which the tribe seeks to administer must 'pertain to the management and protection of water resources,' which are 'within the borders of an Indian reservation'; (4) the Indian tribe is reasonably expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Clean Water Act and regulations".
225. See id. at 1139 (citing Montana v. United States, 450 U.S. 544, 565-66 (1981), and EPA's Final Rule codified at 56 Fed. Reg. at 64, 877-78). The EPA adopted the Montana exception by requiring a Tribe to show that the regulated activities affect "the political integrity, economic security, or the health and welfare of the tribe," and the potential impacts must be "serious and substantial." Montana, 137 F.3d. at 1139.
226. Montana v. United States, 450 U.S. at 566. See also 40 C.F.R. § 131.8(b)(3).
227. See Montana v. EPA, 137 F.3d at 1139 (citing 40 C.F.R. § 131(b)(3) requiring tribes to assert that: (1) there are waters within the reservation used by the tribe, (2) the waters and critical habitat are subject to protection under the CWA, and (3)
In analyzing the facts of the case, the court first noted the general rule established in *Montana v. United States* that Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, absent express authorization by federal statute or treaty.\(^{228}\) However, the court found the second *Montana* exception applicable to this case, despite some precedent that cast doubt on its viability.\(^{229}\) The court cited *Colville Confederated Tribes v. Walton*\(^{230}\) to support its finding that the powers of inherent tribal sovereignty may be invoked by tribes to exercise civil authority over non-Indian conduct on fee lands on the reservation when that conduct threatens the health and welfare of the tribe.\(^{231}\) *Colville* also supported the EPA's generalized findings that, due to the mobile nature of contaminates in surface water, it would be impracticable to separate the effects of water quality impairment on non-Indian fee land from impairment on tribal portions of reservation land.\(^{232}\) The court thereby upheld the EPA's previous decision, finding that the activities of the nonmembers on the Flathead Reservation posed a serious and substantial threat to the Tribes' health and welfare, thereby requiring tribal regulation.\(^{233}\)

\(^{228}\) See id. at 1140.

\(^{229}\) See *Montana v. EPA*, 137 F.3d at 1140-1141. The court noted that while the United States Supreme Court disagreed in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), about how to apply the second *Montana* exception, the majority nonetheless agreed that it controlled. The Ninth Circuit then found that the Court reaffirmed the *Montana* exception in *State v. A-I Contractors*, 117 S. Ct. 1404, 1409 (1997), which found that the *Montana* exception applies if there is a nexus between the regulated activity and tribal self-governance. *Id.*

\(^{230}\) 647 F.2d 42 (9th Cir. 1981).

\(^{231}\) See id. at 1141 (quoting *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52-54 (9th Cir. 1981)). In *Colville*, the Ninth Circuit held, in part, that the State of Washington's potential authority to regulate a watershed located entirely within the Colville Reservation was preempted by federal creation of the Reservation, thereby leaving regulatory jurisdiction to the tribe and federal government. *Montana v. EPA*, 137 F.3d at 1141.

\(^{232}\) See *Montana v. EPA*, 137 F.3d at 1141 (citing *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (1981), noting that a water system is a unitary resource so that the actions of one user have an immediate and direct effect on other users).

\(^{233}\) See id.
Although the Ninth Circuit noted that the scope of inherent tribal authority was a question of law for the courts, not the EPA, it nonetheless upheld the EPA's regulations as an appropriate interpretation of inherent tribal regulatory authority.\textsuperscript{234} Montana v. EPA reaffirmed the Albuquerque court's conclusion that the EPA reasonably construed and applied the CWA by finding the EPA's regulations were in accord with Congressional intent and inherent tribal sovereignty.\textsuperscript{235} Although the issues were not exactly the same in Albuquerque and Montana, the courts used similar legal reasoning in reaching their decisions by looking to the plain language of the CWA and the intent of Congress to find that tribes may be treated as states, having the ability to set more stringent water quality standards than the federal government.\textsuperscript{236} The decisions issued by the Ninth and Tenth Circuits were logical and fully consistent with each other because they strengthened the purpose and intent of the CWA to provide tribal governments with the power to exercise authority over "water resources held by the tribe, or by members, or over water resources otherwise within the borders of an Indian reservation."\textsuperscript{237}

V. OTHER COURTS SHOULD FOLLOW THE DECISIONS SET FORTH IN ALBUQUERQUE V. BROWNER AND MONTANA V. EPA BECAUSE TRIBAL WATER QUALITY STANDARDS ARE LIKELY TO PROMOTE THE HEALTH, SAFETY, AND WELFARE OF TRIBES

As a result of applying ideas of tribal sovereignty to intergovernmental relationships with tribes, the EPA became the first federal agency to recognize and incorporate concepts of inherent tribal sovereignty into its regulatory policies. Specific

\textsuperscript{234} See Montana v. EPA, 137 F.3d at 1140 (citing Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837, 834-44 (1984), which found that while the EPA may not determine the scope of inherent tribal authority, its decision to adopt the standard of inherent tribal authority as the standard intended by Congress may be given deference because the CWA's language and legislative history were not entirely clear).


\textsuperscript{236} See Albuquerque II, 97 F.3d at 418-419. See also Montana v. EPA, 137 F.3d at 1138-1139.

\textsuperscript{237} 33 U.S.C. § 1377(e)(2).
cally, states with federally recognized tribes may find themselves having to abide by EPA-approved standards that are more stringent than the state or federal government's standards. These regulations, which uphold and apply higher levels of water quality standards over jurisdictions sharing a common water source, should continue to be upheld because a water system is a unitary resource and the actions of one user often have an immediate effect on other users.238

A. A RETURN TO TRADITIONAL PRINCIPLES OF INDIAN LAW THROUGH CONGRESSIONAL DELEGATION IN THE CWA

Traditional principals of federal Indian law begin with a broad inquiry into concepts of self-government and existing federal policies that promote tribal self-sufficiency.239 Although considerations of tribal sovereignty do not control over jurisdictional issues, sovereignty considerations are nonetheless important because they help protect against state encroachment by creating a presumption of federal preemption.240

The Ninth and Tenth Circuits have logically approved the EPA’s test that, when considering whether tribes should be granted TAS status for purposes of setting water quality standards for waters that flow through or adjacent to fee lands on a reservation, the EPA will look to the facts of the case and whether the activities of non-members have “serious and substantial” effects “on the political integrity, the economic security, or the health or welfare of the tribe.”241 In order to comport with Supreme Court precedent, the EPA carefully crafted its regulations to require that a tribe’s inherent authority must

239. See generally Judith V. Royster & Rory SnowArrow Faussett, Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion, 64 WASH. L. REV. 581 (1989) (analyzing the delegation of environmental program authority to tribes).
240. See generally David H. Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 CALIF. L. REV. 1573, 1620 (December, 1996).
be determined on a case-by-case basis by considering whether the non-member activities posed a serious and substantial risk to the tribe's welfare. The EPA found the tribes in Albuquerque and Montana faced substantial risks from water pollution based on the detailed evidence provided by the tribes in their applications.

While these decisions were made on a case-by-case basis, tribes are again being viewed by the courts as retaining inherent sovereign authority not otherwise "ceded by treaty, excised by federal legislation, or diverted by the courts." The plain language of the CWA further strengthens the Albuquerque and Montana courts' decisions because it lacks language that diminishes tribal regulatory authority. Instead, the CWA reflects Congress' intent to authorize the EPA to treat qualified tribes in the same manner as states. Section 1377(e)(2) provides that Indian tribes may receive TAS status not only with respect to land held by or on behalf of the tribe or its members, but also with respect to land that is otherwise within the borders of a tribe's "reservation." Section 1377(h) defines the term "Federal Indian reservation" as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." This definition is analogous to the description of a reservation as "Indian country," which the Supreme Court has consistently held, prior to the enactment of section 1377 in 1987, to include "lands held in fee by non-Indians within reservation boundaries." Thus, the plain language of the CWA precludes states like New Mexico and Montana from being viewed as having the same authority as Indian tribes.


243. See City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1998) (hereinafter "Albuquerque II"). See also Montana v. EPA, 137 F.3d 1135, 1141 (9th Cir. 1998).

244. United States v. Wheeler, 435 U.S. 313 (1978) (holding that Indian tribes possess those parts of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status).


246. See CWA, 33 U.S.C. § 1377(e)(2). See also supra note 4 and accompanying text.


tana from arguing that the EPA is barred from treating tribes as states with respect to reservation lands owned in fee by non-Indians.249

The reasoning of Albuquerque and Montana should be followed by subsequent courts when addressing similar issues. Tribes must be able to set requirements on the quality of waters that enter their reservations from outside sources in order to properly regulate the quality of water that flows through their lands.250 Similarly, tribes with checkerboard land ownership on their reservations, including Indian trust lands and non-Indian fee lands, must also be able to assert full, uniform jurisdiction over water quality standards in order to protect the health and welfare of the tribe.251 As previously mentioned, this is especially true considering that upstream reservation polluters would have to comply with downstream water quality standards anyway.252 Thus, if Montana's health and welfare exception has any real validity, it must provide for the protection and promotion of clean water on all reservation lands through the regulation of all sources of water pollution.

B. FUTURE CHALLENGES TO MORE STRINGENT TRIBAL WATER QUALITY STANDARDS MUST BE FACT SPECIFIC TO SUCCEED

It is settled law that the EPA's construction of the CWA, regarding treating Indian tribes as states, and its subsequent agency regulations, are constitutional and in accord with the intent of Congress.253 Future challenges to more stringent tribal water quality standards must be fact specific to distinguish the cases at hand and be successful. In Montana v. EPA, the State did not challenge the EPA's factual findings that deg-

249. See supra note 4 and accompanying text.
251. See id.
253. See Albuquerque II, 97 F.3d at 415. See also Montana v. EPA, 137 F.3d at 1141.
radation of the reservation’s waters would have a serious and substantial impact on the Tribes. Thus, the court reviewed only the challenges under the APA, in which it gave the EPA deference. Both the Ninth and Tenth Circuits have found the EPA’s interpretation of Supreme Court precedent and the CWA reasonable with regard to inherent tribal authority over non-members in promulgating their own water quality standards. Future courts should continue to follow this sound precedent.

VI. CONCLUSION

This Comment focused on the TAS provisions provided by the EPA to qualifying tribes under the CWA in the two recent circuit court opinions of City of Albuquerque v. Browner and Montana v. EPA. While the CWA’s TAS provisions may logically be justified under both federal preemption and sovereignty analyses, courts should continue to recognize tribal sovereignty as the determining factor. The argument for inherent tribal authority is important because “in every instance where tribes, with inherent powers to act, act instead under a delegation of federal authority, the perception of inherent tribal authority is diminished.” As long as courts continue to use non-Indian interests or federal authority as the determining factors, sovereignty issues will become even more obscured.

Because tribes are sovereign entities, non-Indians choosing to live or do business on reservations must realize the likelihood of being subject to tribal civil regulatory jurisdiction if their activities have a serious and substantial impact on the health, safety and welfare of the tribe. Although the EPA makes a case-specific determination for each tribe, it has also made generalized findings that there is a close relationship between water quality and the public’s health and welfare. Thus, the EPA should presumptively accept tribal assertions of

255. See Montana v. EPA, 137 F.3d at 1141.
256. See Albuquerque II, 97 F.3d at 415; Montana v. EPA, 137 F.3d at 1141.
257. Royster & Fausett, supra note 239, at 597.
258. See 56 Fed. Reg. at 64,878.
259. See DAVID H. GETCHES ET. AL., FEDERAL INDIAN LAW at 625 (4TH ed. 1998).
the effects on health and welfare unless rebutted by opposing parties. 260

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See id.

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