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NINTH CIRCUIT MUDDIES THE WATERS OF TRIBAL SOVEREIGN IMMUNITY AND THE CLEAN WATER ACT IN *DESCHUTES RIVER ALLIANCE V. PORTLAND GE*

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ABSTRACT

Throughout 2011 and 2012, members of the Deschutes River community who fish in the Lower Deschutes River in Oregon noticed a slew of significant changes to their natural environment. The Deschutes River Alliance attributed the changes to the operation of the Pelton Round Butte Hydraulic Project, which is co-owned and operated by Portland General Electric and The Confederated Tribes of the Warm

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Springs. In July 2016, DRA filed a Clean Water Act lawsuit against them.

To rule on the alleged CWA violations, the DRA must first get past the tribal sovereign immunity hurdle. It is long-recognized that American Indian Nations possess sovereign immunity, however, Congress may expressly abrogate immunity or immunity may be waived. The groundbreaking opinion in Deschutes River Alliance v. Portland Gen. Elec. Co. *represents the first time a court has held Congress did not abrogate tribal sovereign immunity under the CWA. Despite decisions from sister circuits, the court dismissed the suit before deciding whether a CWA violation occurred. The Ninth Circuit decided to tread lightly to respect both the principle of tribal sovereign immunity and Congress's authority, but ultimately the court's decision creates a free pass for projects on tribal land to pollute the water with no repercussions.*

I. THERE MUST BE SOMETHING IN THE WATER: AN INTRODUCTION TO THE *DESCHUTES RIVER ALLIANCE* AND TRIBAL SOVEREIGN IMMUNITY

Throughout 2011 and 2012 members of the Deschutes River community who fish in the Lower Deschutes River noticed a slew of significant changes to their natural environment.[1] Insect emergences decreased.[2] The water became cloudy, and fish migration patterns changed.[3] New algae appeared, and the bird population diminished.[4] These environmental changes puzzled and concerned the community.[5]

In 2014, the Deschutes River community formed the Deschutes River Alliance (DRA) and embarked on an in-depth research study to better understand the water quality and other issues impacting the future of the river and the communities it supports.[6] DRA attributed the decreased water quality of the Lower Deschutes River to the operation of the Pelton Round Butte Hydraulic Project (Pelton Project).[7] The Pelton

[1] Greg McMillan, *Our History*, DESCHUTES RIVER ALL., https://deschutesriver alliance.org/our-history (last visited Oct. 12, 2021) (describing history of DRA).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.* (explaining approach of DRA).
[7] DESCHUTES RIVER ALL., 2020 LOWER DESCHUTES RIVER WATER QUALITY REPORT 3-4 (June 2021), available at https://static1.squarespace.com/static/58c778d4414fb5205e 205605/t/610c5538692c9319cd142d53/1628198206212/2020_LDR_Final.pdf (noting cause of water quality changes).

Project is co-owned and operated by Portland General Electric (PGE) and The Confederated Tribes of the Warm Springs (Tribe).[8]

In July 2016, amidst failed attempts to negotiate with PGE and the Tribe, DRA had no choice but to file a Clean Water Act (CWA) lawsuit against them.[9] The central goal of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[10] For the court to rule on the alleged CWA violations, the plaintiff DRA must first get past the tribal sovereign immunity hurdle.[11] To make a determination on sovereign immunity, the court must weigh the important goal of protecting the nation's waters against respecting tribal sovereignty and congressional intent.[12]

Sovereign immunity is "deeply imbedded in our constitutional system of government" and "essential to the sovereignty of a nation."[13] The doctrine of sovereign immunity protects the government and any entity federally recognized as a state from nonconsensual suit.[14] It is long-recognized that American Indian nation-tribes are granted sovereign immunity even though they are "external to the constitutional system of government."[15] Certain circumstances, however, may abrogate that immunity.[16] For instance, Congress may expressly abrogate immunity or immunity may be waived.[17]

The groundbreaking opinion in *Deschutes River Alliance v. Portland GE* represents the first time a court held Congress did not abrogate tribal sovereign immunity under the CWA.[18] In reaching this decision, the United States Court of Appeals for the Ninth Circuit dismissed the reasoning of the United States Court of Appeals for the Eighth Circuit

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[8] Deschutes River All. v. Portland Gen. Elec. Co., 323 F. Supp. 3d 1171, 1174 (D. Or. 2018) (identifying defendant).
[9] *Id.* (explaining why DRA filed suit); McMillan, *supra* note 1 (citing failed negotiation attempts).
[10] 33 U.S.C. § 1251(a).
[11] *See generally* Deschutes River All. v. Portland Gen. Elec. Co., 1 F.4th 1153, 1159 (9th Cir. 2021) (analyzing whether tribal sovereign immunity is abrogated by CWA).
[12] *Id.* at 1159-60 (discussing whether CWA abrogates tribal sovereign immunity).
[13] Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 Tulsa L. Rev. 661, 661, 663 (2002).
[14] *Id.* at 662 (explaining protection provided by sovereign immunity).
[15] *Id.* at 662-63 (recognizing that federal law allows tribes to be recognized as states under the doctrine of sovereign immunity).
[16] *Id.* at 663 (recognizing exceptions to sovereign immunity).
[17] *Id.* at 662 n.7 (exemplifying instances of abrogation).
[18] Michael Campbell & Beth Ginsberg, *Ninth Circuit Finds No Sovereign Immunity Waiver for Tribes Under CWA*, JD SUPRA, (June 24, 2021), https://www.jdsupra.com/legalnews/ninth-circuit-finds-no-sovereign-8412399/ (discussing the Ninth Circuit's decision).

and the United States Court of Appeals for the Tenth Circuit by applying the rules of statutory interpretation to the CWA differently than the other two Circuit Courts had applied the rules to other environmental statutes.[19] Despite these decisions from sister circuits, the Ninth Circuit reasoned *Deschutes River Alliance* warranted dismissal because the court lacked "perfect confidence" that Congress meant to abrogate tribal sovereign immunity.[20] The court dismissed the suit before deciding whether a CWA violation occurred.[21] The Ninth Circuit's decision highlights the tension between the doctrine of sovereign immunity and the fundamental purpose of the CWA. The Ninth Circuit decided to tread lightly to respect both the principle of tribal sovereign immunity and Congress's authority, but ultimately the court's decision creates a free pass for projects on tribal land to pollute the water with no repercussions.

This Note examines the Ninth Circuit's decision in *Deschutes River Alliance*, beginning with a discussion of the facts in Part II.[22] Part III details the legal background surrounding *Deschutes River Alliance*, including a discussion of the CWA and decisions from the Eighth and Tenth Circuits on abrogating tribal sovereign immunity.[23] Part IV illustrates the Ninth Circuit's analysis, and Part V critically examines the court's decision in light of the intent behind the CWA and the decisions of sister circuits.[24] Finally, because of the potential for attention from the United States Supreme Court, Part VI discusses the impact of *Deschutes River Alliance* on the CWA and tribal sovereign immunity.[25]

II. GETTING YOUR FEET WET: FACTUAL BACKGROUND OF *DESCHUTES WATER ALLIANCE*

The Pelton Project is on the Deschutes River situated within and adjacent to the Confederated Tribes of the Warm Springs Reservation

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[19] *See id.* (discussing the court's treatment of other circuits).
[20] *Id.* (explaining the court's analysis).
[21] Deschutes River All. v. Portland Gen. Elec. Co., 1 F.4th 1153, 1156 (9th Cir. 2021).
[22] For a further discussion of the facts in *Deschutes River All.*, *see infra* notes 25-53 and accompanying text.
[23] For a further discussion of the legal background of the Ninth Circuit's decision in *Deschutes River All.*, *see infra* notes 54-110 and accompanying text; for a further discussion of the Ninth's Circuit's reasoning in *Deschutes River Alliance*, *see infra* 111-56 and accompanying text.
[24] For further discussion of the Ninth's Circuit's analysis in *Deschutes River Alliance*, *see infra* notes 157-92 and accompanying text.
[25] For further discussion on the impact of decision in *Deschutes River Alliance*, *see infra* notes 193-210 and accompanying text.

(Reservation).[26] The Reservation is home to the Tribe and is reserved for their exclusive use through an 1855 treaty.[27] The Tribe is committed to enhancing all Tribal natural resources.[28] Resources are managed as sustainable assets available for cultural, subsistence, economic and social purposes in furtherance of the treaty status.[29]

PGE began work on the Pelton Project in 1951 after the Federal Power Commission (FPC) authorized its construction.[30] The goal of the Pelton Project is "to improve water quality and enhance habitat for fish" throughout the Deschutes River.[31] Currently, the Pelton Project provides enough emission-free hydropower to power more than 150,000 homes.[32]

In 1980, the successor of the FPC, the Federal Energy Regulatory Commission (FERC), amended the Pelton Project license to permit construction of the Round Butte Dam (Dam) and power generation facilities.[33] In 2001, PGE and the Tribe filed competing applications for a new license to operate facilities as part of the Project.[34] They subsequently decided to reach an agreement and entered into a Global Settlement and Compensation Agreement (Settlement Agreement).[35] The Settlement Agreement established an Ownership and Operation Agreement, which designates PGE as the operator of the Pelton and Round Butte facilities and describes the Tribe's property as generation facilities.[36] Shortly after, PGE and the Tribe jointly applied for a new

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[26] Deschutes River All. v. Portland Gen. Elec. Co., 323 F. Supp. 3d 1171, 1174 (D. Or. 2018) (identifying defendant).

[27] *Id.* (noting Tribe is legal successor in interest of 1855 treaty). The Tribe consists of three Indian tribal groups: the Warm Springs, the Wasco, and the Paiute. *See also id.* (listing tribes involved in Pelton Project).

[28] *Natural Resources*, CONFEDERATED TRIBES OF WARM SPRINGS, https://warmsprings-nsn.gov/tribal-programs/natural-resources (last visited Oct. 11, 2021) (discussing mission of Tribe).

[29] *Id.* (explaining guiding principles of Tribe). The Tribe has a Fisheries Department charged with protecting and enhancing fisheries habitat on the reservation and monitoring natural production. The Tribe also has a Water & Soil Department that is committed to the protecting the natural resources of water, soil, and air as to maintain a safe and productive ecosystem.

[30] *Deschutes River All.*, 323 F. Supp. at 1174 (issuing 50-year license to PGE).

[31] *Our Story*, PORTLAND GEN. ELEC. CO., https://portlandgeneral.com/about/rec-fish/deschutes-river/our-story (last visited Oct. 11, 2021) (discussing purpose for implementing Pelton Project).

[32] *Id.* (noting impact of Pelton Project on Tribe).

[33] Deschutes River All. v. Portland Gen. Elec. Co., 1 F.4th 1153, 1157 (9th Cir. 2021) (amending license to designate PGE and Tribe as joint licenses for Pelton Project).

[34] *Id.* (explaining history of license for the Pelton Project).

[35] *Id.* (explaining history of 2005 approval of Settlement Agreement by FERC).

[36] Deschutes River All. v. Portland Gen. Elec. Co., 323 F. Supp. 3d 1171, 1174-75 (D. Or. 2018) (clarifying roles of PGE and Tribe).

license and a CWA Section 401 certification from the Tribe's Water Control Board (WCB) and Oregon's Department of Environmental Quality (DEQ).[37]

In 2005, FERC approved the Settlement Agreement and issued a new license to PGE and the Tribe incorporating the DEQ water quality certification.[38] Notably, the Settlement Agreement included a Fish Passage Plan to facilitate fish movement through the Pelton Project.[39] In 2009, PGE installed a Selective Water Withdrawal facility (SWW) to facilitate fish passage and improve compliance with water quality standards.[40]

Shortly after the SWW began operation, the DRA formed amidst Oregon residents' mounting concerns about river water quality based on pH value, temperature, and oxygen standards.[41] The group researched and studied the changes in the river patterns.[42] Their research revealed the inattention of both tribal and municipal bodies supposedly committed to water quality improvement.[43] By the end of 2015, DRA published numerous reports on the biological health of the Lower Deschutes River.[44] DRA attempted to negotiate with PGE, the Tribe, and other governmental agencies, but failed to reach an agreement.[45] The group brought suit against PGE under the citizen suit provision of the CWA in the United States District Court for the District of Oregon.[46] DRA alleged hundreds of ongoing violations of the Pelton Project's CWA Section 401 Certification from DEQ, which is a condition of the 2005

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[37] *Deschutes River All.*, 1 F.4th at 1157 (detailing joint application). PGE and the Tribe also participated in a Settlement Working Group to address concerns about the project. *Id.*

[38] *Id.* (describing new license).

[39] *Id.* (explaining Settlement Agreement).

[40] *Id.* (drawing water from both surface and bottom of Lake Billy Chinook).

[41] *Deschutes River All.*, 323 F. Supp. 3d at 1175-76.

[42] *See* McMillan, *supra* note 1 (discussing first step to addressing changes in Lower Deschutes River).

[43] *Id.* (expressing concern for future of Deschutes River).

[44] *Id.* (discussing findings of DRA studies).

[45] *Id.* (explaining ways to mitigate damage Pelton Project was making).

[46] *Id.* (noting foundation of lawsuit).

License.[47] The alleged violations included failure to maintain the proper pH levels, dissolved oxygen standards, and temperature standards.[48]

PGE moved to dismiss for failure to join the Tribe as a required party.[49] The district court denied the motion, acknowledging the Tribe as a required party but finding it could not be joined to the suit due to its "legally protected interest in the subject."[50] DRA then filed an amended complaint joining the Tribe as an additional defendant.[51]

On August 3, 2018, the district court granted PGE's and the Tribe's motions for summary judgment, holding the Project abided by its Section 401 certificate and did not exceed water quality standards.[52] DRA appealed, and PGE and the Tribe cross-appealed.[53] The Ninth Circuit reversed the district court's summary judgment grant and held the CWA does not abrogate tribal sovereign immunity, leaving the question of whether PGE violated the CWA unanswered.[54]

III. STILL WATERS RUN DEEP: LEGAL BACKGROUND SURROUNDING THE NINTH CIRCUIT HOLDING

Pollution was traditionally seen as primarily a state and local problem.[55] It was not until the mid-1900s that Congress began regulating pollution in interstate waters.[56] Since then, the laws and regulations have

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[47] *Id.* (discussing allegations made in complaint). DRA's claim arises under Section 505(a)(1) of the CWA, codified under 33 U.S.C. § 1365(a)(1). Deschutes River All. v. Portland Gen. Elec. Co., 323 F. Supp. 3d 1171, 1174 (D. Or. 2018) (citing 33 U.S.C. § 1365(a)(1)). Specifically, the DRA alleges PGE violated three conditions set by the DEQ: "(1) Condition E.1, requiring that the facility be operated in accordance with the pH Management Plan contained in the WQMMP; (2) Condition C.1, requiring that the SWW facility be operated in accordance with the Temperature Management Plan; and (3) Condition S, which requires that no wastes be discharged and no activities conducted that would violate state water quality standards."

[48] Complaint at 6-8, Deschutes River All. v. Portland Gen. Elec. Co., 323 F. Supp. 3d 1171. 1176 (D. Or. 2018) (3:16-cv-1644-) (explaining violations).

[49] *Deschutes River All.*, 325 F. Supp. 3d at 1174-75 (D. Or. 2018) (moving to dismiss). The Tribe, not originally designated as a party, appearing as amicus, argued in support of the motion.

[50] Deschutes River All. v. Portland Gen. Elec. Co., 1 F.4th 1153, 1163 (9th Cir. 2021) (explaining district court's holding).

[51] First Amended Complaint at 1-2, Deschutes River All. v. Portland Gen. Elec. Co., 323 F. Supp. 3d 1171 (D. Or. 2018) (3:16-cv-1644-SI) (adding Defendant).

[52] *Deschutes River All.*, 1 F.4th at 1158 (discussing district court's holding).

[53] *Id.*

[54] *Id.* at 1163 (dismissing suit).

[55] EPA, *History of the Clean Water Act,* https://www.epa.gov/laws-regulations/history-clean-water-act (last visited Sept. 11, 2021) (discussing history of water pollution protection).

[56] *Id.* (providing history of water quality regulation).

been repeatedly amended, contributing to confusion in courts.[57] Native Americans have been living on reservation land and using the water therein since before these laws.[58] The Tribe was organized in 1937, more than ten years before the first federal law addressing water pollution was enacted.[59] Since then, the Eighth, Ninth, and Tenth Circuits have grappled with the issue of sovereign immunity, but not until now under the CWA.[60]

A. The Clean Water Act

The United States legislation addressing water pollution began with the Federal Water Pollution Control Act of 1948 (FWPCA).[61] Congress further amended the FWPCA in 1972 amid rising public concern over water pollution.[62] Following this amendment, the FWPCA became commonly known as the CWA.[63] The CWA regulates the discharge of pollutants into the nation's waters and regulates water quality standards.[64] The CWA forbids any person from polluting waters without obtaining a permit.[65]

At the time of the CWA's enactment, the federal government did not authorize tribes to regulate water quality under the Act.[66] In 1987, however, Congress amended the statute to treat tribes as states under the

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[57] *See id.* (noting amendments to CWA).
[58] *See History*, CONFEDERATED TRIBES OF WARM SPRINGS, https://warmsprings-nsn.gov/history/ (last visited Oct. 11, 2021).
[59] *Id.* (adopting a constitution and bylaws).
[60] *See* Campbell & Ginsberg, *supra* note 17 (describing Ninth Circuit's decision to be first time a court has found that the CWA does not abrogate tribal sovereign immunity).
[61] *See History of the Clean Water Act*, *supra* note 54 (describing history of water pollution protection).
[62] *Id.* (noting need for amendment). The 1921 amendments include: establishing a basic regulation structure, giving the EPA the authority to implement pollution control programs, maintaining existing requirements, and making it unlawful to discharge pollutants.
[63] *Id.* (discussing history of CWA).
[64] EPA, *Summary of the Clean Water Act*, https://www.epa.gov/laws-regulations/summary-clean-water-act (last visited Sept. 12, 2021) (detailing purpose and effect of Clean Water Act).
[65] *Id.* (discussing history of Clean Water Act). Congress amended the CWA again in 1981 and 1987. *See History of the Clean Water Act, supra* note 54 (explaining amendments to Clean Water Act). The former amendments streamline the municipal constructions' grant process. The later amendment also replaced the construction grants program with the Clean Water State Revolving Fund to better address water quality needs.
[66] EPA, *Tribes and EPA: 50 Years of Environmental Partnership*, https://www.epa.gov/tribal/tribes-and-epa-50-years-environmental-partnership (last visited April, 12, 2022) (noting history of Clean Water Act regulations).

CWA.[67] The CWA now permits tribes to act as States for the purpose of water quality standards programs under 33 U.S.C § 1341.[68] Nevertheless, disputes still arise over whether tribes may regulate activities of non-Indians on land owned by non-Indians, even though it is widely recognized that "tribal Clean Water Act authority [applies] to all reservation waters."[69]

Section 401 of the CWA enables both states and tribes "to grant, deny, or waive certification of proposed federal licenses or permits" for discharging pollutants into navigable waters.[70] Congress enacted Section 401 to encourage collaboration between states and federal agencies to protect water quality.[71] Under Section 401 of the CWA, "an applicant for a federal license to engage in activity that may result in a discharge of a pollutant must obtain a water quality certification from the relevant State or interstate agency."[72] A Section 401 certification attests that the activity will comply with the applicable laws, including state laws.[73] Once approved, the applicable laws become part of the certificate's requirements, which become conditions of the federal license.[74]

The CWA authorizes citizen suits "against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation" of the Act.[75] A "person" is defined to include a "municipality."[76] A "municipality" is defined to include an "Indian tribe or an authorized Indian tribal organization."[77]

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[67] *Id.* (explaining when tribes became recognized under Clean Water Act).
[68] EPA, *Overview of CWA Section 401 Certification*, https://www.epa.gov/cwa-401/overview-cwa-section-401-certification (last visited April, 12 2022).
[69] Paula Goodman Maccabee, *Tribal Authority to Protect Water Resources and Reserved Rights Under Clean Water Act Section 401*, 41 WM. MITCHELL L. REV. 618, 622-23 (2015) (explaining a dispute about tribal abilities).
[70] EPA, *Section 401 of the Clean Water Act,* https://www.epa.gov/cwa-401 (last visited Sept. 12, 2021).
[71] EPA, *Clean Water Act Section 401 Guidance For Federal Agencies, States And Authorized Tribes,* https://www.epa.gov/sites/default/files/2019-06/documents/cwa_section_401_guidance. pdf (last visited Sept. 12, 2021) (giving states and tribes direct role in licensing processes).
[72] 33 U.S.C. § 1341(a)(1); Deschutes River All. v. Portland Gen. Elec. Co., 1 F.4th 1153, 1157 (9th Cir. 2021) (explaining certification process).
[73] 33 U.S.C. § 1341(a)(1), (d); *Deschutes River All.*, 1 F.4th at 1157 (noting meaning of section 401 certificate).
[74] 33 U.S.C. § 1341(d); *Deschutes River All.*, 1 F.4th at 1157 (explaining citizen suit provision).
[75] 33 U.S.C. § 1365(a)(1) (authorizing civil action).
[76] 33 U.S.C. § 1362(5) (defining person).
[77] 33 U.S.C. § 1362(4) (defining municipality).

The Ninth Circuit grapples with the two step definitional chain in its analysis.[78]

B. Statutory Interpretation

In 1803, Chief Justice Marshall announced that it is "emphatically the province and duty of the Judicial Department to say what the law is."[79] The Supreme Court has not developed a clear system for interpreting statutes; however, courts often begin with the plain meaning rule.[80] The plain meaning rule instructs courts to assign the words in the statute their plain and natural meaning.[81] Courts should interpret those words, though, in light of the full statutory text.[82] The Supreme Court lamented "statutory construction … is a holistic endeavor."[83] Further, the Supreme Court has explained that a provision that may seem ambiguous can be clarified by the "remainder of the statutory scheme."[84] When interpreting a statute's text, courts may look to the statute's title, section headings, preambles, internal cross-references and definitions.[85] If the statute is still ambiguous, courts will turn to the canons of construction.[86] For example, the *expressio unius est exclusion alterius* canon provides the expression of one thing implies the exclusion of others.[87] This canon is most helpful when items in a statute are expressed as members of a group or series.[88] This justifies the inference that items not mentioned were excluded by choice.[89]

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[78] *Deschutes River All.*, 1 F.4th at 1160 (discussing statutory definitions).
[79] Marbury v. Madison, 5 U.S. 137, 177 (1803) (establishing federal courts have power to overturn act of Congress on grounds that it violated Constitution).
[80] VALERIE C. BRANNON, CONG. RSCH. SERV., RL45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 1, 19 (2018) (discussing ordinary meaning).
[81] *Id.* at 19-20 (explaining how to use plain meaning rule to interpret statutes).
[82] *Id.* at 23 (emphasizing importance of complete statutory context).
[83] *Id.* (citing United Sav. Ass'n of Tex v. Timbers of Inwood Forest Ass'n., Ltd., 484 U.S. 365, 371 (1988)).
[84] *Id.* (citing *United Sav. Ass'n of Tex*, 484 U.S. at 371).
[85] *Id.* at 24 (discussing where to get statutory context from).
[86] *Id.* at 25 (discussing canons of statutory construction).
[87] *Id.* at 54 (explaining semantic canons).
[88] *Id.* (detailing *expressio unius* canon).
[89] *Id.* at 54-55 (noting when *expressio unius* canon is at its strongest).

C. Eighth Circuit Found Abrogation of Tribal Sovereign Immunity in *Blue Legs v. United States Bureau of Indian Affairs*

The Ninth Circuit dismissed the applicability of the Eighth Circuit's holding in *Blue Legs v. United States Bureau of Indian Affairs*.[90] In *Blue Legs*, individual members of the Oglala Sioux Tribe (Sioux Tribe) brought suit against the Environmental Protection Agency (EPA) and the Sioux Tribe itself under the Resource Conservation and Recovery Act (RCRA).[91] The members alleged garbage dumps located on their reservation violated the RCRA because most of the sites are located in the vicinity of houses, schools, and streams or springs and lack supervision, fences, and sanitary trenches.[92] Under the RCRA, citizens may bring suit "against any person (including (a) the United States, and (b) any other governmental instrumentality or agency)."[93] Under the RCRA, "person" is defined to include a municipality, and municipality is defined to include "an Indian tribe or authorized tribal organization."[94] Neither tribes nor tribal immunity are mentioned in the citizen-suit provision, which allows the filing of suits such as the one at issue.[95] The Eighth Circuit followed the definitional chain from person to municipality to tribe, and relied on a House Report that included "specific examples of harm to be avoided, including Indian children playing in dumps on reservations."[96] The Eighth Circuit held that Congress clearly indicated its intent to abrogate tribal immunity in the RCRA.[97]

D. Tenth Circuit Found Abrogation of Tribal Sovereign Immunity in *Osage Tribal Council v. United States DOL*

The Ninth Circuit distinguished *Deschutes River Alliance* from *Osage Tribal Council v. United States DOL*, a Tenth Circuit case, because the enforcement provision in question did not mention sovereign

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[90] Deschutes River All. v. Portland Gen. Elec. Co., 323 F. Supp. 3d 1171, 1181 (D. Or. 2018) (dicussing Eigth Circuit's holding).
[91] Blue Legs v. U.S. Bureau of Indian Affairs, 867 F.2d 1094, 1095 (8th Cir. 1988) (explaining basis of the suit).
[92] *Id.* (detailing background of suit).
[93] *Id.* at 1097 (permitting civil suits).
[94] *Id.* (defining person and municipality under RCRA).
[95] *Id.* (noting tribe is not specifically stated in the provision at issue).
[96] *Id.* (explaining reasoning of court).
[97] *Id.* (affirming district court's ruling).

immunity.[98] In *Osage Tribal Council*, the Osage Tribal Council (Council) petitioned for review of an order by the Administrative Review Board of the Department of Labor in a proceeding under the employee protection provisions of the Safe Drinking Water Act (SDWA).[99] The dispute arose after Chris White was fired from his job as an environmental inspector for the Council.[100] His duties included filing violation reports, which could and did trigger SDWA enforcement actions by the regional EPA office.[101] The memorandum directing his termination referenced various specific complaints against White and cited "serious misconduct" and "disloyalty" as reasons for his termination.[102] Mr. White alleged the Council terminated him for filing environmental violation reports – an action protected by the SDWA.[103] In response, the Council argued the SDWA did not explicitly abrogate its tribal sovereign immunity, and therefore, the Council could not be subject to the SDWA's enforcement provisions.[104] The Tenth Circuit held the enforcement provision for whistleblowers in the SDWA is "unambiguous," establishing that Congress "unequivocally waived tribal immunity."[105]

E. Ninth Circuit Did Not Find Abrogation of Tribal Sovereign Immunity in *Miller v. Wright*

In *Deschutes River Alliance*, the Ninth Circuit distinguishes its own holding in *Miller v. Wright*.[106] In *Miller*, plaintiffs (an enrolled tribal member, a retailer of cigarettes, and two purchasers) filed suit against defendants (a Tribe and tribal officers) to challenge the taxes and fees

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[98] Deschutes River All. v. Portland Gen. Elec. Co., 1 F.4th 1153, 1161 (9th Cir. 2021) (discussing difference in statutory language between CWA and Safe Drinking Water Act).
[99] Osage Tribal Council v. U.S. Dep't of Labor, 187 F.3d 1174, 1177 (10th Cir. 1999) (describing basis for suit).
[100] *Id.* at 1178 (detailing onset of litigation).
[101] *Id.* (noting why White was deemed disloyal).
[102] *Id.* (explaining termination).
[103] *Id.* (alleging improper termination).
[104] *Id.* at 1180 (stating Council's argument).
[105] *Id.* (affirming district court's decision). *See also* Deschutes River All. v. Portland Gen. Elec. Co., 1 F.4th 1153, 1161 (9th Cir. 2021) (noting that the "the Tenth Circuit mistakenly wrote 'waived' rather than 'abrogated," the proper term for Congress's treatment of sovereign immunity in the SDWA).
[106] Deschutes River All. v. Portland Gen. Elec. Co., 1 F.4th 1153, 1162 (9th Cir. 2021) (explaining court only noted decisions of Eighth and Tenth Circuit and did not endorse their holdings).

imposed on cigarette sales.[107] The Ninth Circuit held the plaintiffs failed to show abrogation of sovereign immunity.[108] Additionally, the court found the Tribe did not waive tribal sovereign immunity simply by entering a contract with the State of Washington regarding cigarette taxes.[109] Moreover, compliance with the contract's legal requirements did not evidence a clear waiver by the Tribe of its sovereign immunity.[110] Nor did the inclusion of a mediation provision to resolve disputes between the State and the Tribe evidence a clear and explicit waiver of immunity.[111]

IV. NINTH CIRCUIT POLLUTES THE WATERS: A NARRATIVE ANALYSIS OF *DESCHUTES WATER ALLIANCE*

DRA argued that the Ninth Circuit should affirm the district court's holding that the CWA abrogated tribal immunity.[112] The Tribe and PGE argued that the district court erred in concluding that the language of the CWA abrogated tribal immunity and the Ninth Circuit should reverse the district court's holding.[113] The Ninth Circuit held that Congress did not abrogate the Tribe's sovereign immunity in the CWA and that the district court should have dismissed DRA's suit.[114] The court did not discuss whether the Project violates the CWA.[115]

A. Discussion of Tribal Sovereign Immunity and Text of Clean Water Act

The Ninth Circuit explained that Indian tribes are protected from suits by sovereign immunity unless Congress abrogates the immunity or the tribe waives its own immunity.[116] First, DRA argued the Tribe explicitly waived its immunity through the Project's Implementation Agreement (PIA) when it agreed not to assert sovereign immunity from a

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[107] Miller v. Wright, 705 F.3d 919, 922 (9th Cir. 2013) (describing basis of suit).
[108] *Id.* at 928 (affirming district court's decision).
[109] *Id.* (explaining sovereign immunity existed).
[110] *Id.* at 924 (finding no clear evidence of waiver).
[111] *Id.* at 925 (detailing mediation provisions are not sufficient for waiver).
[112] Deschutes River All. v. Portland Gen. Elec. Co., 1 F.4th 1153, 1159 (9th Cir. 2021) (describing the argument of the plaintiff).
[113] *Id.* at 1159 (describing defendant's argument).
[114] *Id.* (reversing district court's grant of summary judgment).
[115] *Id.* at 1156 (dismissing case under Rule 19 without discussing violations).
[116] *Id.* at 1159-60 (internal citation omitted) (explaining standard in sovereign immunity cases).

suit brought by a party to the agreement.[117] The court did not find DRA's waiver argument convincing amid a "strong presumption against waiver of tribal sovereign immunity."[118] Moreover, DRA is not a party of the PIA, and a waiver would not apply to suits by parties outside of the agreement.[119]

Next, DRA argued that Congress intended to abrogate immunity in the text of the CWA.[120] The Ninth Circuit explained that Congress must "unequivocally" express its intent to abrogate immunity.[121] The court emphasized that it "must be able to say with perfect confidence that Congress meant to abrogate . . . sovereign immunity."[122] Accordingly, the Ninth Circuit decided to tread lightly in absence of clear legislative intent to respect both the principle of tribal sovereign immunity and the authority of Congress.[123]

The court held the CWA does not provide the "perfect confidence" required to find abrogation.[124] The court found Section 1365, the citizen suit provision, under which the dispute arises, is the only section of the CWA dealing with sovereign immunity and it makes no mention of Indian tribes or tribal immunity.[125] Moreover, the court reasoned "clause (i) explicitly waives the United States' immunity, but Clause (ii) does not mention States specifically."[126] The Ninth Circuit explained if Congress intended to abrogate tribal sovereign immunity, then it would be stated in this provision.[127]

Next, the Ninth Circuit argued the definitional chain is insufficient evidence of congressional intent.[128] Section 1362(5) defines a "person," to include a "State" and a "municipality."[129] Section 1362(4) defines municipality as "an Indian tribe or an authorized Indian tribal organization."[130] DRA argued that reference to an Indian tribe in the definitional change is evidence of abrogation.[131] The court, however, found the mere mention of an Indian tribe not enough to exemplify a

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[117] *Id.* at 1159 (explaining DRA's waiver argument).
[118] *Id.* (internal citation omitted) (dismissing DRA's argument).
[119] *Id.* (explaining why argument lacks merit).
[120] *Id.* at 1159-60 (discussing DRA's second argument).
[121] *Id.* at 1159 (explaining high standard for congressional intent).
[122] *Id.* at 1159-60 (emphasizing standard for congressional intent).
[123] *Id.* at 1159 (clarifying importance of respecting tribal Indian law).
[124] *Id.* at 1159-60 (dismissing DRA's argument).
[125] *Id.* (showing statute lacks Congressional intent to abrogate).
[126] *Id.* (pointing out absence of clear congressional intent).
[127] *Id.* at 1160 (discussing absence of tribal sovereign immunity in immunity provision).
[128] *Id.* (addressing whether CWA shows clear congressional intent to abrogate immunity).
[129] *Id.* (emphasis removed).
[130] *Id.* (emphasis removed).
[131] *Id.* (discussing DRA's definitional chain argument).

"clear and unequivocal expression of Congressional intent to abrogate" immunity.[132] The Ninth Circuit acknowledged the definitional chain but held that it was not enough to submit Indian tribes to unconsented suit.[133] Further, the court noted precedent already decided the statute does not abrogate immunity for States, so there is no reason to conclude the opposite for tribes.[134] Thus, the court held Congress did not intend to abrogate immunity under the CWA.[135] DRA's arguments relied on the precedent of *Blue Legs*, *Osage Tribal Council*, and *Miller*, none of which the Ninth Circuit found persuasive in its analysis.[136]

B. Discussion of *Blue Legs*

The Ninth Circuit held that in *Blue Legs*, the Eighth Circuit did not reach the correct conclusion in holding that the RCRA abrogates tribal sovereign immunity.[137] The Ninth Circuit explained that it was improper to rely on the definitional chain because the legislative history did not indicate that Congress intended to abrogate tribal immunity by defining Tribes as municipalities.[138] The court reasoned that, even if the Eighth Circuit reached the proper conclusion, there are differences in the legislative history between the RCRA and the CWA.[139] The court supported this distinction through the Eighth Circuit's reliance on Congress's expressed concern for the hazards created on Indian Reservations.[140] The Ninth Circuit found Congress expressed no such concern in the legislative history of the CWA.[141]

C. Discussion of *Osage Tribal Council*

Similarly, the Ninth Circuit found the Tenth Circuit's reasoning in *Osage Tribal Council* unpersuasive.[142] Unlike *Blue Legs*, the Ninth

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[132] *Id.* (holding definitional chain is not enough).
[133] *Id.* (dismissing DRA's definitional chain argument).
[134] *Id.* (first citing Nat. Res. Def. Council v. California Dep't of Transp., 96 F.3d 420, 42 (9th Cir. 1996); and then citing Burnette v. Carothers, 192 F.3d 52, 57 (2d Cir. 1999)).
[135] *Id.* at 1161 (holding Congress did not intend to subject tribes to unconsented suit under CWA).
[136] *Id.* (dismissing holdings of Eighth and Tenth Circuits).
[137] *Id.* (citing Subtitle D Regulated Facilities; State/Tribal Permit Program Determination of Adequacy; and State/Tribal Implementation Rule (STIR), 61 Fed. Reg. 2584, 258 (proposed Jan. 26, 1996, by the Environmental Protection Agency)).
[138] *Id.* at 1161-62 (noting difference in legislative histories of RCRA and CWA).
[139] *Id.* (distinguishing CWA from RCRA).
[140] *Id.* at 1162 (noting legislative history of RCRA).
[141] *Id.* (exemplifying difference between CWA and RCRA).
[142] *Id.* (deciding not to discuss correctness of Tenth Circuit's holding).

Circuit did not critique the result in *Osage Tribal Council* but instead distinguished the case by noting the differences between the SDWA and the CWA.[143] The court found the case for abrogation under the SDWA stronger than in the CWA.[144] The Tenth Circuit emphasized the SDWA enforcement provision language that provides redress for "[a]ny employee who believes that he has been discharged or otherwise discriminated against by any person."[145] The court noted that the "SDWA then defines 'person' to include 'municipality' and 'municipality' to include 'an Indian tribe.'"[146] The Ninth Circuit noted the enforcement provision of the SDWA does not mention sovereign immunity, unlike the citizen-suit provision in the CWA.[147] Because the SDWA does not have a specific sovereign immunity provision, the Ninth Circuit concluded there is a stronger argument the SDWA's definitional chain abrogates tribal sovereign immunity than that in the CWA.[148]

D. Discussion of *Miller*

The Ninth Circuit acknowledged its previous holding in *Miller* but emphasized that although it distinguished *Miller* from *Blue Legs* and *Osage Tribal Council*, it did not explicitly endorse those holdings.[149] The court explained its brief reference to *Blue Legs* and *Osage Tribal Council* was only "in passing without due consideration of the alternatives."[150] Because of this, the court did not conclude *Blue Legs* and *Osage Tribal Council* were properly decided.[151]

E. Judge Bea Concurring in Judgment and Dissenting in Part

Writing separately, Judge Carlos T. Bea agreed the CWA does not expressly abrogate tribal sovereign immunity but disagreed with the majority's use of the CWA's legislative history.[152] Instead of using the legislative history to decide whether the CWA abrogated tribal sovereign

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[143] *Id.* (deciding it is not necessary to comment on the correctness of Tenth Circuits opinion).
[144] *Id.* (comparing RCRA and CWA).
[145] *Id.* (stating premise for suit in *Osage Tribal Council*).
[146] *Id.* (exemplifying definitional chain).
[147] *Id.* (comparing RCRA and CWA citizen suit provisions).
[148] *Id*. (distinguishing between RCRA and CWA).
[149] *Id.* (explaining Ninth Circuit has not endorsed holdings of Eighth and Tenth Circuits).
[150] *Id.* (citing United States v. McAdory, 935 F.3d 838, 843 (9th Cir. 2019)).
[151] *Id.* (discussing why Ninth Circuit is not tied to *Blue Legs* and *Osage Tribal Council* precedent).
[152] *Id.* at 1164 (Bea, K., concurring in part and dissenting in part).

immunity, Judge Bea argued the court should have relied on statutory interpretation.[153] Specifically, he advocated for implementing the *expression unius est exclusio alterius* doctrine, which presumes when a statute designates "persons, things, or manners of operation," all omissions should be understood as exclusions.[154] Judge Bea emphasized the citizen-suit provision of the CWA expressly qualified the sovereign immunity of the United States and other governmental entities.[155] Thus, Judge Bea concluded the omission of "Indian tribes" in the citizen-suit provision of the CWA means that Congress did not intend to abrogate tribal sovereign immunity.[156] In other words, because Congress omitted listing tribes in the citizen-suit provision, the provision does not affect the tribes' sovereign immunity.[157]

V. DIVING DEEPER: A CLOSER LOOK AT THE NINTH CIRCUIT'S HOLDING IN *DESCHUTES RIVER ALLIANCE*

If the Ninth Circuit had considered the meaning of the CWA in light of the entire statute and adopted the reasoning of the Eighth and Tenth Circuits, it would likely have held the CWA does abrogate tribal sovereign immunity and then determine whether the Pelton Project violated the CWA.[158] The first rule of statutory interpretation is to interpret the statute according to its plain meaning absent clear congressional intent to the contrary.[159] A particular provision's meaning is considered in the context of the entire statute.[160] Reading the CWA as a whole and applying the plain meaning to its terms, DRA argued the statute is unambiguous.[161] The CWA provides any citizen may bring an action against any "person."[162] The CWA's statutory language broadly defines "person" to include "municipalities."[163] The CWA further defines "municipality" to include "an Indian tribe or an authorized Indian tribal

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[153] *Id.* (critiquing Ninth Circuit reasoning).
[154] *Id.* (discussing use of statutory interpretation).
[155] *Id.* (discussing absence of a waiver in immunity provision).
[156] *Id.* (explaining omission).
[157] *Id.* (concurring in judgment).
[158] *See* Appellant's Third Br. on Cross Appeal at 25-27, Deschutes River All. v. Portland Gen. Elec. Co., No. 3:16-cv-1644-SI (9th Cir. Nov. 6, 2020) [hereinafter Appellant's Third Br.] (discussing *Blue Legs* and *Osage Tribal Council*); *Deschutes River All.*, 1 F.4th at 1164 (Bea, K. concurring in part and dissenting in part).
[159] For a further discussion of statutory interpretation see s*upra* note 78-88 and accompanying text (describing statutory interpretation analysis).
[160] BRANNON, *supra* note 79 at 54 (explaining plain meaning rule).
[161] *See* Appellant's Third Br., *supra* note 158, at 24 (arguing CWA is unambiguous).
[162] *Id.*; 33 U.S.C § 1365(a)(1) (noting provision at issue).
[163] Appellant's Third Br., *supra* note 158, at 24; 33 U.S.C. § 1362(5) (defining person).

organization."[164] The "two-step inclusion of 'Indian tribes' in the definition of 'persons' subject to a citizen suit is clear."[165] The "inclusions are direct, not attenuated," therefore abrogating immunity.[166] Thus, the statute shows congressional intent when the statute is plainly read as a whole.[167]

Case law previously relied upon by the Ninth Circuit supports this plain language reading.[168] The Ninth Circuit in *Deschutes River Alliance* held its 2013 *Miller* decision did not find the reasoning in *Blue Legs* and *Osage Tribal Council* persuasive because it only considered these holdings in passing.[169] Nonetheless, the Ninth Circuit in *Miller* used the Eighth Circuit's rationale in *Blue Legs* when determining that sovereign immunity is abrogated "where the laws at issue express in explicit legislation."[170] Additionally, the *Miller* court was persuaded by the Tenth Circuit's reasoning in *Osage Tribal Council*.[171] The court cited to the definitional chain the Tenth Circuit used in *Osage Tribal Council*.[172] Thus, the reasoning the Ninth Circuit used in *Miller* should have been applied here.[173]

Even if the Ninth Circuit had not already adopted the reasoning used in *Blue Legs* and *Osage Tribal Council*, the Ninth Circuit improperly distinguished the CWA from the statutes at issue in those cases.[174] First, in *Blue Legs*, the Eighth Circuit relied on the exact definitional chain at issue in *Deschutes River Alliance* to hold that the text of the statute

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[164] Appellant's Third Br., *supra* note 158, at 24; 33 U.S.C. § 1362(4) (defining municipalities).
[165] Appellant's Third Br., *supra* note 158, at 27 (emphasizing definitional chain is not too remote).
[166] *See id.* (finding definitional chain is sufficient to show clear congressional intent).
[167] *Id.* at 24 (explaining statute clearly abrogates tribal immunity when read under plain meaning rule).
[168] *See id*. at 25-26 (relying on *Blue Legs* and *Osage Tribal Council*).
[169] Deschutes River All. v. Portland Gen. Elec. Co., 1 F.4th 1153, 1162 (9th Cir. 2021) (emphasizing Ninth Circuit's decision in *Miller* does not imply correct decisions in *Blue Legs* and *Osage Tribal Council*).
[170] Appellant's Third Br., *supra* note 158, at 25 (internal quotations omitted) (quoting Miller v. Wright, 705 F.3d 919, 922 (9th Cir. 2013)) (quoting Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1056 (9th Cir. 2004)) (discussing Ninth Circuit use of *Blue Legs*); *see also* Blue Legs v. U.S. Bureau of Indian Affairs, 867 F.2d 1094, 1095 (8th Cir. 1988) (holding statute showed Congressional intent to abrogate tribal sovereign immunity).
[171] Appellant's Third Br., *supra* note 158, at 25-26 (noting use of *Osage Tribal Council* opinion in *Miller*).
[172] *Id.* (specifying reasoning used by Ninth Circuit in *Miller*).
[173] *Id.* (explaining existence of precedent).
[174] *Id.* at 33-34 (showing holdings from Eighth and Tenth Circuit are important precedents).

clearly indicates congressional intent to abrogate tribal sovereign immunity.[175] The Ninth Circuit dismissed the Eighth Circuit's holding because it held there is no indication in the legislative history of the CWA that Congress intended to abrogate immunity.[176] Yet, Judge Bea in his concurrence explains a discussion of the legislative history in this case is "superfluous and irrelevant" because legislative history is not a proper means to interpret legislation or to distinguish statutes.[177] Legislative history should not be examined unless the statutory text is ambiguous.[178] Thus, there is little distinction between the statutes at issue in *Deschutes River Alliance* and *Blue Legs*.[179] As a result, the Ninth Circuit erred by not applying the Eighth Circuit's reasoning.[180]

Second, the Tenth Circuit in *Osage Tribal Council* relied on the same definitional chain as in *Deschutes River Alliance* to hold that the SDWA is unambiguous, establishing Congress had unequivocally waived tribal immunity.[181] The Ninth Circuit attempted to distinguish the SDWA from the CWA because the SDWA's enforcement provision does not mention sovereign immunity.[182] The Ninth Circuit overlooked the Tenth Circuit's reasoning that the "degree of explicitness" (seen in the CWA's specific inclusion of "the United States" in the citizen suit section) is not required.[183] Moreover, the Tenth Circuit explained that although Congress "could have been more clear," the language in the statute is unambiguous and no more is needed to show that Congress intended to abrogate tribal immunity.[184] The Ninth Circuit's efforts to distinguish *Deschutes River Alliance* from *Osage Tribal Council* are therefore unpersuasive.[185]

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[175] *Id.* at 34 (noting similar language in statute, *Deschutes River Alliance*, and *Blue Legs*); *Blue Legs*, 867 F.2d at 1095 (holding statue clearly abrogates tribal sovereign immunity).
[176] Deschutes River All. v. Portland Gen. Elec. Co., 1 F.4th 1153, 1161-62 (9th Cir. 2021) (distinguishing legislative history in *Blue Legs* from *Deschutes River All.*).
[177] *Id.* at 1164 (finding legislative history improper for interpretation).
[178] *See* BRANNON, *supra* note 79, at 37 (discussing debate over statutory interpretation).
[179] *See* Appellant's Third Br., *supra* note 158, at 24 (discussing RCRA and CWA).
[180] *Id*. at 26 (describing *Blue Legs* as strong support for congressional abrogation).
[181] Osage Tribal Council v. U.S. Dep't of Labor, 187 F.3d 1174 (10th Cir. 1999), 187 F.3d 1174, 1177 (10th Cir. 1999) (holding SDWA is unambiguous); *Deschutes River All.*, 1 F.4th at 1161 (noting language of SDWA and CWA).
[182] *Deschutes River All.*, 1 F.4th at 1162.
[183] Appellant's Third Br., *supra* note 158, at 28-29 (quoting *Osage Tribal Council*, 187 F.3d at 1182 (quoting Davidson v. Board of Governors, 920 F.2d 441, 443 (7th Cir. 1990))).
[184] *Id.* at 29 (explaining Congress's purpose can be derived without specific expression of purpose in statute).
[185] *Id.* (analyzing difference in two cases).

Additionally, the Ninth Circuit failed to address another potential reason why Congress included the express abrogation of the United States' immunity in the enforcement provision and did not mention tribes.[186] The district court explained Congress intended to expand the definition of "persons" in Section 1365(a)(1) from that used in Section 1362(5).[187] Congress decided not to include a parallel statement about Indian tribes in section 1365(a)(1) because the "existing definition [of 'persons'] already expressly provided for suits against Tribes."[188] Thus, Congress did not intend to make Section 1365(a)(1) the sole provision dealing with immunity.[189] Following the same reasoning, Judge Bea's argument is, like the majority's, unpersuasive because Congress did not intend to make the citizen suit provision the only provision dealing with immunity.[190]

For the foregoing reasons, the Ninth Circuit erred in finding Congress did not unambiguously abrogate tribal immunity.[191] The Ninth Circuit improperly rejected other circuits' reasoning and found ambiguity in the CWA where there is not any.[192] Thus, the court should have affirmed the district court's decision and held the CWA allows citizen suits against tribes because the CWA shows congressional intent to abrogate tribal immunity.[193]

VI. A LARGER PROBLEM RISES TO THE SURFACE: THE IMPACT OF *DESCHUTES RIVER ALLIANCE*

The Ninth Circuit's dismissal of *Deschutes River Alliance* prevented the court from addressing the alleged violations and harmful effects of the Pelton Project.[194] In an attempt to protect the Tribe from unconsented suit, the Ninth Circuit subjected the residents on the Deschutes River, including tribal members, to polluted waters and depleted fish passage.[195]

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[186] *Id.* (noting additional reason for Congress's decision to draft statute).
[187] *Id.* (introducing amendment timeline as possible reason for not including tribes in enforcement provision).
[188] *Id.* (discussing existing definition already included tribes so there is no need to repeat it).
[189] *Id.* (emphasizing theory of congressional intent).
[190] *See id.* (discussing district court's reasoning).
[191] *See generally id.* (arguing Ninth Circuit should affirm district court decision).
[192] *See generally id*. (discussing why Ninth Circuit should find CWA abrogates tribal immunity).
[193] *See generally id.* (holding CWA clearly abrogates tribal sovereign immunity).
[194] *See* Deschutes River All. v. Portland Gen. Elec. Co., 1 F.4th 1153, 1163 (9th Cir. 2021) (dismissing suit because Congress did not clearly abrogate tribal sovereign immunity).
[195] *See id.* (noting court did not decide whether PGE and Tribe violates CWA).

Over a decade of operation, the SWW at the Pelton Project has degraded the quality of the water flowing into the Lower Deschutes River.[196] The water is now warmer, pH levels greatly exceed water quality standards set by the state of Oregon, and nuisance algae now blanket the riverbed.[197] The fate of the Deschutes River and its surrounding communities might have been prevented had the Ninth Circuit interpreted the CWA in light of the entire statutory text and applied the precedent it set in *Miller*.[198]

The Ninth Circuit decided to take a softer approach in this case to respect both the principle of tribal sovereign immunity and the authority of Congress, but, ultimately, the court's decision contradicts the purpose of the CWA.[199] The SWW operations "have imposed great financial cost on ratepayers and substantial harm … to aquatic life."[200] Such harm "is fundamentally inconsistent with" the CWA's critical goal of maintaining the biological integrity of the nation's waters.[201] Moreover, the Project's fish reintroduction program has not produced consistent, sustainable return of fish as promised.[202] The Ninth Circuit may be trying to protect the Pelton Project. More likely, the Ninth Circuit was too concerned with infringing on tribal sovereignty and submitting the Tribe to unconsented suit. The Ninth Circuit's holding effectively permits sovereign immunity to function as a broad exception to CWA application. If a CWA permit is obtained on tribal land, the lower courts will turn a blind eye to the permit's enforcement as long as the project is partnered with a tribe. The Ninth Circuit's holding could thus have massive effects on the nation's waters.[203]

The Ninth Circuit's decision in *Deschutes Water Alliance* also muddies the waters for other courts ruling on whether a statute abrogates

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[196] DESCHUTES RIVER ALL., POSITION STATEMENT RE. CURRENT SWW TOWER OPERATIONS AT ROUND BUTTE DAM, available at https://static1.squarespace.com/static/58c778d4414fb5205e205605/t/5e9df488bbc2c7572a07c4b6/1587410056962/DRA+Position+Statement+-+Short+%28pdf%29.pdf (last visited Oct. 12, 2021) [hereinafter POSITION STATEMENT] (attributing changes in Deschutes River to Pelton Project).
[197] *Id.* (detailing specific changes to Deschutes River because of Pelton Project).
[198] *See id.* (emphasizing destruction caused by Pelton Project).
[199] *See id.* (emphasizing harm to water and aquatic life is inconsistent with CWA); *see also Deschutes River All.*, 1 F.4th at 1159 (deciding to tread lightly).
[200] POSITION STATEMENT, *supra* note 195 (detailing effect of SWW operations).
[201] *Id.* (emphasizing clear violations of CWA); *see also* EPA, *Summary of the Clean Water Act*, https://www.epa.gov/laws-regulations/summary-clean-water-act (last visited Sept. 12, 2021) (detailing purpose and effect of Clean Water Act).
[202] POSITION STATEMENT, *supra* note 195 (finding efforts to improve water quality standards by PGE were insufficient).
[203] *See id.* (discussing effects of Pelton Project).

tribal sovereign immunity.[204] The Ninth Circuit's decision not only provides a hook for disagreement with the Eighth and Tenth Circuits, but it also casts doubt on the Eighth Circuit's reasoning.[205] Because the Ninth Circuit reasoned differently than the other two circuits with respect to whether the statute at issue abrogated tribal sovereign immunity, it set a different precedent than the other two circuits.[206]

Future courts that are not bound by the precendent of these three circuit courts will likely need to reconcile the conflict between circuits.[207] The groundbreaking opinion in *Deschutes River Alliance* is sure to attract the attention of other circuits and environmental advocates everywhere.[208]

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[204] *See* Deschutes River All. v. Portland Gen. Elec. Co., 1 F.4th 1153, 1163 (9th Cir. 2021) (holding CWA does not abrogate tribal sovereign immunity); *see* Blue Legs v. U.S. Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir. 1988) (holding RCRA abrogates tribal sovereign immunity); *see* Osage Tribal Council v. U.S. Dep't of Labor, 187 F.3D 1174 (10th Cir. 1999) (holding SDWA abrogates tribal sovereign immunity).

[205] *Deschutes River All.*, 1 F.4th at 1160-61 (discussing holding in *Blue Legs*).

[206] *See id.* (holding CWA does not abrogate tribal sovereign immunity and reversing trial court opinion).

[207] *See id.* (dismissing holdings of Eighth and Tenth Circuits).

[208] *See id.* (dismissing suit because CWA did not clearly abrogate tribal sovereign immunity).