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# TRIBAL WATER QUALITY STANDARDS UNDER THE CLEAN WATER ACT: PROTECTING TRADITIONAL CULTURAL USES

William C. Galloway

*Abstract*: Since 1987, the Clean Water Act has allowed Indian tribes to be treated as states for various purposes under the Act. Among the regulatory powers of states under the Clean Water Act is the ability to set water quality standards, subject to approval by the Environmental Protection Agency (EPA). Upstream pollution dischargers must comply with a downstream state's water quality standards once it is established that an upstream discharge demonstrably impacts downstream water quality. The power to set water quality standards represents a new and potentially powerful tool to protect traditional uses and enhance reservation environments, but only if tribes craft the standards carefully. The tribes' successful exercise of this new regulatory authority will depend on the recognition and successful negotiation of potential obstacles posed by the regulatory mechanism itself and the case law addressing interstate disputes under the Clean Water Act and state-tribal disputes.

In 1987, Congress amended the Clean Water Act to allow Indian tribes to be treated as states for several purposes under the Act. This Comment addresses one of those purposes—determining water quality standards binding on all pollution dischargers on or off-reservation whose discharge impacts reservation waters. This regulatory authority brings with it the opportunity for enhanced tribal sovereignty, as well as the risk of conflicts with off-reservation dischargers who resist new tribal authority. A long history of state-tribal conflicts over regulatory jurisdiction makes such conflict more than likely. The existing law addressing disputes between the states is likely to inform that conflict considerably, and the peculiar status of the tribes under federal law and the nature of tribal regulatory authority under the 1987 amendments will also play a significant role in shaping this new area of law.

Part I of this Comment examines the history of federal Indian law as it relates to the 1987 Clean Water Act amendments[1] broadening tribal regulatory authority. Part II describes the Clean Water Act, focusing on the role of water quality standards, the 1987 amendments and their implementing regulations, and the United States Supreme Court's water quality standards decisions. Part III examines *City of Albuquerque v. Browner*,[2] in which a federal district court upheld the Environmental Protection Agency's approval of water quality standards for the Pueblo

1. 33 U.S.C. § 1377 (1988).

2. 865 F. Supp. 733 (D.N.M. 1993).

of Isleta, which lies only a few miles down the Rio Grande River from the outfall of the city's wastewater treatment plant. Part IV examines the process of adopting tribal water quality standards, suggests possible sources of conflict with surrounding non-Indian communities, and proposes ways to avoid those conflicts.

## I. FEDERAL INDIAN LAW AND REGULATION OF THE RESERVATION ENVIRONMENT

The history of federal Indian law reflects many shifts in U.S. government policy against a background of ongoing conflict between Indian and non-Indian communities. Currently, and perhaps permanently, tribes are in the Self-Determination Era, which is characterized by a federal policy that encourages tribes to act on their own behalf under federal supervision.

### *A. Self-Determination Policy—Government-to-Government Relationship*

In the 1820s and 30s, Chief Justice Marshall enunciated the basic legal framework of federal Indian law in the Cherokee cases—a framework that endures to this day. In *Cherokee Nation v. Georgia*,[3] the Court denied the tribe injunctive relief against non-Indian incursions into Cherokee land under newly enacted Georgia state laws. Chief Justice Marshall reasoned that Indian nations are not foreign nations. Under Article III of the U.S. constitution, a tribe would have to be a foreign nation to invoke the original jurisdiction of the Supreme Court; therefore the Court declined jurisdiction.[4] With words that have found their way into much of the Court's subsequent Indian law jurisprudence, the Chief Justice called the tribes "domestic dependent nations."[5] Relations between the tribes and the federal government have focused largely on defining and redefining the nature of that domestic dependency. It is only in the past twenty to twenty-five years, the so-called Self-Determination Era, that Congress has chosen to foster the nationhood of tribes, rather than attempting to assimilate tribal people into the dominant culture.

3. 30 U.S. (5 Pet.) 1 (1831).

4. *Id.* at 20.

5. *Id.* at 17.

The Self-Determination Era began in 1970. In a message to Congress,[6] President Nixon advocated tribal self-determination in the form of the right to control and operate federal programs.[7] He also repudiated the Termination Era, during which Congress had sought with disastrous results to assimilate Indian populations by disestablishing reservations and ending the government-to-government relationship that had been the cornerstone of Indian policy under the Indian Reorganization Act of 1934.[8] Congressional action in response to that policy change included, most notably, the Indian Self-Determination and Education Assistance Act of 1975.[9] That statute gives express authority to the Secretaries of Interior and of Health and Human Services to contract with, and make grants to, Indian tribes and other Indian organizations for the delivery of federal services.

Regulation of reservation lands has been a contentious issue since the establishment of the reservations, with states competing with tribal governments and the federal government for regulatory control. *State of Washington, Department of Ecology v. United States Environmental Protection Agency*,[10] for example, raised the issue of whether states can manage hazardous waste on reservations by delegated federal authority under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA).[11] RCRA offers states the opportunity to administer their own hazardous waste programs, subject to approval by the Administrator of the EPA. Relying on a combination of long-standing principles of Indian law and the norm of deference to agencies' statutory interpretation, the Ninth Circuit held that the EPA had correctly interpreted RCRA not to grant the State of Washington jurisdiction over the activities of Indians on reservations.[12] The state's interim authorization to administer its own hazardous waste program expressly excluded Indian lands because the EPA had concluded that the state did not have the legal authority to exercise jurisdiction over reservations.[13] The Supreme Court has held that, in order to grant a state jurisdiction over Indians in Indian country, Congress must do so

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6. Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 363, 91st Cong., 2d Sess. (1970).

7. *Id.* at 4–5.

8. 25 U.S.C. §§ 461–479 (1988 & Supp. 1993).

9. 25 U.S.C. §§ 450–450n, 455–458e (1988 & Supp. 1993).

10. 752 F.2d 1465 (9th Cir. 1985) [hereinafter *Washington Dep't of Ecology*].

11. 42 U.S.C. §§ 6901–6992k (1988 & Supp. 1993).

12. *Washington Dep't of Ecology*, 752 F.2d at 1472.

13. *Id.* at 1467.

explicitly.[14] Because RCRA is unclear with respect to state regulatory jurisdiction in Indian country, the court deferred to the EPA's reasonable interpretation of the statute and thus denied the state jurisdiction.[15] This conflict is typical of state-tribal jurisdictional disputes; a state, given the opportunity, is likely to attempt to expand its regulatory authority within its border as much as possible, notwithstanding the special status of Indian land.

### *B. The EPA Policy Statement*

On January 24, 1983, President Reagan promulgated his federal Indian policy, which stressed two closely related approaches: "(1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis."[16]

On November 8, 1984, Administrator William D. Ruckelshaus acted on President Reagan's initiative by releasing the EPA's Indian Policy (the Policy Statement),[17] containing both its policy statement and guidance for its implementation. The agency recognized that, in many cases, full implementation of the Policy Statement would require not only changes in the regulatory scheme but also statutory amendments. Nonetheless, the agency saw that it could begin to address the underlying procedural aspects of the implementation by, for example, involving tribal governments in regulatory decisions concerning Indian country.

The EPA's exposition of its November 8, 1984 policy squarely addresses the fundamental issue of tribal sovereignty at the core of the President's statement above: that government-to-government relations are the first step to Indian self-determination.[18] The Policy Statement explicitly described tribal jurisdiction as outside that of states or other governments.[19] Further, the EPA recognized the primacy of tribal governments in making both broad policy and specific regulatory decisions on reservations. The agency also committed itself to fostering the regulatory capabilities of tribal governments through consultation

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14. Bryan v. Itasca County, 426 U.S. 373, 376 n.2 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170–71 (1973).

15. *Washington Dep't of Ecology*, 752 F.2d at 1472.

16. Environmental Protection Agency, *Policy for the Administration of Environmental Programs on Indian Reservations* 1 (Nov. 8, 1984) (on file with the *Washington Law Review*).

17. *Id.*

18. *Id.* at 2.

19. *Id.*

and programmatic support.[20] The EPA committed to work towards removing legal and procedural impediments to cooperative efforts and to act as a mediator of sorts in encouraging state and local governments to work with tribes.[21] On the federal front, the agency was to enlist other agencies with jurisdiction and expertise—presumably the Bureau of Indian Affairs, among others—in a common effort to promote tribal sovereignty and assure compliance in Indian country with environmental statutes and regulations.[22] Finally, the Policy Statement expressed the EPA's commitment to program development and, most importantly, to funding for implementation of the Policy Statement's goals.[23]

The Implementation Guidance document, released at the same time as the Policy Statement itself, formed an Indian Work Group, chaired by the Director of the Office of Federal Activities at the EPA and composed of representatives of key regional and headquarters offices, and outlined the responsibilities and activities of that group. The group was to facilitate initial efforts to identify specific projects most ripe for implementation.[24] Initial directives included the following: (1) the Assistant Administrator for External Affairs was to act as coordinator and clearinghouse for Indian policy matters; (2) EPA General Counsel and each Regional and Assistant Administrator were to be represented by a staff-person empowered to speak on his or her behalf; (3) the Assistant and Regional Administrators were to undertake active outreach with the tribes, with the funding necessary to achieve policy goals; and (4) the outreach effort was to consist of program development, consultation, and incorporation of tribal concerns, needs, and preferences into EPA decision-making.[25] By this comprehensive mechanism, the Implementation Guidance sought to achieve the goals outlined in the Policy Statement by fashioning a new cooperative mechanism for achieving compliance with environmental statutes and regulations in Indian country in a manner consistent with the principle of Indian self-government.[26]

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20. *Id.* at 2–3.

21. *Id.* at 3.

22. *Id.* at 3–4.

23. *Id.* at 4.

24. Memorandum from Alvin L. Alm, Deputy Administrator, Environmental Protection Agency, Indian Policy Implementation Guidance 2 (Nov. 8, 1984) (on file with the *Washington Law Review*).

25. *Id.* at 3–5.

26. *Id.* at 6.

### C. *Tribal Regulatory Authority*

Despite Nixon's proclamation of an era of self-determination and President Reagan's self-determination-oriented Indian policy, and despite the subsequent efforts of the EPA to follow those mandates, tribal ability to regulate reservation land owned in fee by non-Indians continues to be hotly litigated. The U.S. Supreme Court, seemingly working at cross purposes with the Congress and the Executive Branch's self-determination policy, has issued two rulings limiting tribal regulatory authority in *Montana v. United States*[27] and *Brendale v. Confederated Tribes and Bands of Yakima.*[28] *Montana* concerned the ability of the tribe to regulate non-Indian hunting and trout fishing on fee land within the boundaries of the Crow Reservation. It established the current test for finding Indian regulatory authority over non-Indians, which focuses on whether the non-Indians' conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[29] The opinion frames the discussion in terms of retained tribal sovereignty and reflects a significant recognition of tribal governmental authority. Presumably, environmental regulation, which is designed to have a direct and positive impact on the health and welfare of the tribe, would meet the *Montana* test.

In *Brendale*, the issue in two consolidated cases was the extent of tribal zoning authority over two parcels of reservation land, both owned by non-members, one a non-Indian and the other a non-member Indian descended from a tribal member. The reservation is divided into two parts: the "closed" area, which is closed to non-members, and the "open" area, which is open to the general public.[30] The open area is almost half owned in fee by non-Indians.[31] The case sought to resolve a conflict between the tribe's zoning ordinance and the county's, both of which claimed to regulate fee lands held by non-Indians.

Two different parties wanted to use their land in ways that conflicted with the Yakama[32] tribal zoning scheme. One party, Wilkinson, a non-Indian, wanted to subdivide 32 of his 40 acres into 20 lots for single-family homes. Though permissible under the "general rural" zoning

27. 450 U.S. 544 (1981).

28. 492 U.S. 408 (1989).

29. *Montana*, 450 U.S. at 566.

30. *Brendale*, 492 U.S. at 415.

31. *Id.* at 416.

32. The Yakima Nation now spells its name "Yakama."

category under the county's ordinance, Wilkinson's proposed land use was impermissible under the Yakama zoning scheme, which classified his land as agricultural. Because, as the parties agreed, Wilkinson's project did not imperil any interest of the tribe, the Court held his land to be exempt from tribal zoning authority and subject to the county's.[33] Discussing Wilkinson's land, Justice Stevens stated his rationale: "Because the open area no longer maintains the character of a unique tribal asset and because the Tribe accordingly lacks a substantial interest in governing land use, the power to zone has 'become outmoded.'"[34] Justice Stevens did not, however, define what constitutes a "unique tribal asset" nor on what basis a court far from the tribe is to decide that issue. Although the tribe is probably best qualified to make such a determination, asking the tribe raises questions of bias because it has a vested interest in a finding that the territory in dispute is a "unique tribal asset," while a federal judge will undoubtedly lack the background to make a sound decision on this point. It is difficult to predict outcomes under a rule whose critical component is undefined.

The other party challenging tribal regulatory authority in the consolidated case was Brendale, an Indian who was not a tribal member but was descended from a tribal member who had been allotted a 160-acre parcel near the center of the forested portion of the closed area. Brendale proposed to develop one of his platted 20-acre parcels into ten 2-acre lots to be sold as summer cabin sites, in contravention of the Yakama Nation's ordinance. Brendale's land was in an area that was largely tribal land, unlike Wilkinson's land, which was in an area substantially owned in fee by non-Indians. The Court focused on the power to exclude that is the hallmark of Justice Stevens's property-rights analysis.[35] In the Court's view, if the tribe could designate an area of the reservation "closed"—a right not disputed by the Court—then it could certainly exclude all but tribal members, with the exception of inholders like Brendale. The Court found that zoning by the county was inappropriate, meeting the *Montana* test; zoning in the closed area had a direct effect on the political integrity, the economic security, or the health and welfare of the tribe.[36]

33. *Brendale*, 492 U.S. at 432.

34. *Id.* at 447 (Stevens, J., concurring).

35. *Id.* at 433.

36. *Id.* at 444.

Public comment on the EPA's proposed rule on treating tribes as states under the 1987 Clean Water Act amendments[37] focused on *Brendale*. One such comment asserted that *Brendale* foreclosed treating the tribes as states for the purposes of regulating water quality on non-Indian fee lands within the reservation. In response to this comment, the EPA pointed to the distinction drawn by the U.S. Supreme Court between land use planning, which chooses particular uses for the land, and environmental regulation, which requires control of damage to the environment without specifying uses.[38] The EPA further noted that the Court had relied on the land-use/environmental distinction to support a finding that states retain authority to regulate the environment even where their ability to regulate land use is preempted by federal law.[39] The EPA also found that tribal regulation met the *Montana* test, because any impairment of water quality from activities on non-Indian fee lands is "very likely" to impair the water and critical habitat quality on tribal lands.[40] In addition, the EPA noted that in the legislative history of the 1987 amendments, Congress expressed a preference for tribal regulation of surface water quality to assure achievement of the goals of the Clean Water Act.[41]

*Oliphant v. Suquamish Indian Tribe*,[42] which severely circumscribed the police power of tribal governments against non-Indians, however, presents a potential obstacle to vigorous enforcement of tribal regulations against non-members. In *Oliphant*, the Court held that Indian tribal courts do not have criminal jurisdiction over non-Indians, even when they commit crimes on the reservation.[43] The EPA addressed this problem when it issued its final rule for implementation of the 1987 Clean Water Act amendments by providing that when a tribe lacks the necessary criminal enforcement authority, the EPA may act on behalf of the tribe to enforce its water pollution permit program.[44]

In the implementation guidelines, the EPA provides for direct federal action against tribal facilities based on a determination that sounds, ironically, very much like the *Montana* test. The first prong of the test,

37. *See infra* part II.

38. 56 Fed. Reg. 64,876, 64,879 (1991).

39. *Id.*

40. *Id.* at 64,878.

41. *Id.*

42. 435 U.S. 191 (1978).

43. *Id.* at 212.

44. 56 Fed. Reg. 64,876, 64,892 (1991).

which provides for EPA intervention only where it determines that there is a significant threat to human health or the environment, asks the *Montana* question.[45] The second prong involves an examination of expectations of timely success in bringing the tribal facility into compliance and a discussion of the availability of alternatives that would achieve equally timely results.[46]

Both the president and EPA have consistently reaffirmed the goal of government-to-government relations. On June 14, 1991, President Bush designated his Director of Intergovernmental Affairs in the White House to act as his personal liaison to all Indian tribes.[47] On July 10, 1991, EPA Administrator William Reilly distributed widely within the agency for subsequent distribution to states and tribal governments a memorandum regarding the Agency's Indian policy.[48] Included with that memorandum was a Concept Paper designed to formalize the Agency's role in strengthening tribal management of reservation environmental programs. It acknowledges that a healthy environment is more than an amenity; it is essential to preservation of the reservation itself.[49] This deference to tribal values is an important outcome of the self-determination policy.

Indian tribes have understandable and long-standing concerns about preserving the reservation land base, particularly given past federal assimilationist policies like the Dawes Act.[50] The Dawes Act, which mandated the allotment of tribal lands to individual tribal members and sale of remaining "surplus" reservation lands to non-Indians, initiated the Allotment Era, which saw the reduction, plot by plot, of the acreage in Indian country from 138 million to 52 million acres.[51] The Indian Reorganization Act of 1934[52] halted this dramatic reduction in Indian lands. This background forms the foundation for the EPA's recognition that tribes view environmental degradation as yet another inroad into

45. Alm, *supra* note 24, at 6.

46. *Id.*

47. Office of the Press Secretary (Los Angeles, Cal.), Statement by the President: Reaffirming the Government-to-Government Relationship Between the Federal Government and Tribal Governments (June 14, 1991) (on file with the *Washington Law Review*).

48. Memorandum from William K. Reilly, EPA Administrator, to Assistant Administrators, General Counsel, Inspector General, Regional Administrators, Associate Administrators, and State Office Directors (July 10, 1991) (on file with the *Washington Law Review*).

49. Environmental Protection Agency, Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments 1 (July 10, 1991) (on file with the *Washington Law Review*) (hereinafter EPA Concept Paper).

50. 25 U.S.C. §§ 331–334, 339, 341–342, 348–349, 354, 381 (1988 & Supp. 1993).

51. Charles F. Wilkinson, *American Indians, Time, and the Law* 8 (1987).

52. 25 U.S.C. §§ 461–479 (1988 & Supp. 1993).

their land base, and that pollution prevention constitutes tribal self-preservation.[53] The tribes trust no one but themselves to regulate the reservation environment, given the federal government's failure in the past to protect the tribal land base and the tribes' long-standing difficulties with state governments.

For their part, state governments have asserted their solidarity with non-Indian business-owners and residents on the reservations.[54] These non-Indians and non-member Indians lack voting power on the reservations. States thus argue that they must be able to regulate on-reservation, lest the tribal government act in a discriminatory fashion.

The states' arguments ring hollow. Many U.S. citizens do business and live in other countries without complaining that they cannot directly influence local politics. The situation for non-Indians on reservations does differ from their status in foreign countries, since they can never become tribal members. Tribes' desire for economic development, however, creates a strong incentive for them to give non-Indian businesses favorable treatment, even extending to limited waivers of tribal sovereign immunity in contracts with non-Indians.

Against this background of acknowledgment of the tribal interest in securing a healthy environment, the EPA Concept Paper prescribes principles and procedures for the EPA action. The EPA refuses to allow checkerboarding of regulatory authority on reservations, viewing them as single administrative units and allowing tribal or state governments to manage reservation programs only where a government can demonstrate jurisdiction over pollution sources reservation-wide.[55] In cases in which a tribe cannot demonstrate jurisdiction over one or more sources, the EPA will regulate directly.[56]

The EPA Concept Paper expresses the goal of cooperative relationships between tribes and the non-Indian community, citing the joint RCRA program developed by the state of Wisconsin and the Menominee Tribe.[57] In order to obtain community input into tribal rule-making, the EPA encourages tribes to develop administrative procedure acts because EPA regulations typically require public participation prior to approval of new regulations.[58] Such participation involves the non-

53. EPA Concept Paper, *supra* note 49, at 1.

54. *Id.* at 2.

55. *Id.* at 3.

56. *Id.* at 3–4.

57. *Id.* at 4.

58. *Id.*

Indian reservation residents in decision-making—involvement they would be denied under many standard tribal procedures, since they are non-members and cannot vote. Where there is a dispute between a state and a tribe, the EPA agrees to act as "moderator" for discussions, unless the governing statute designates another role.[59]

## II. CLEAN WATER ACT

### *A. Section 518—The 1987 Amendment Offering Tribes Status as States*

In 1987, Congress undertook a dramatic realization of its self-determination policy for the Indian nations when it amended the Clean Water Act. Congress added Section 518 in the 1987 amendments,[60] making tribes eligible for treatment as states. Subsection (e) provides in relevant part:

> The Administrator [of the EPA] 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 this section . . . .[61]

The listed opportunities for exercising regulatory authority include establishing water quality standards, various reporting functions, monitoring, enforcement, certification of compliance with water quality standards by prospective federal licensees and permit-holders, National Pollution Discharge Elimination System (NPDES) permitting, and dredge and fill permitting. Section 518 also contemplates grants for a wide range of research, pollution control and prevention programs, and clean lakes programs.

In order to qualify for treatment as a state, the tribe must prove (1) that it has a government that carries out "substantial governmental duties and powers;" (2) that its program targets tribal lands; and (3) that the tribe is capable of administering its program in a manner that is consistent with applicable law and regulations.[62] Passing this test requires a fairly substantial infrastructure, including technical expertise. After the

59. *Id.* at 5.

60. 33 U.S.C. § 1377 (1988).

61. *Id.* § (e).

62. *Id.*

Administrator's approval of a tribe's application, the tribe can begin to exercise regulatory authority in the same manner as states.

### *B. Water Quality Standards*

Section 303 of the Clean Water Act provides that water quality standards consist of designated uses and water quality criteria based on those uses.[63] Designated uses are codified by assigning water bodies or portions of them to classes and defining the classes by reference to use. States often use a system promulgated in 1980 by the EPA, which suggests classifying waters for any of three designated uses: recreational use, fisheries, or industrial use. Most states have separate classifications for especially high-quality waters of recreational or ecological significance.[64]

In addition to designated uses, the standards also include pollutant criteria, which can be expressed in three different ways. The EPA's preferred mode is through numerical values (e.g., parts per million), such as those for conventional pollutants like fecal coliform bacteria, dissolved oxygen, phosphorus, total suspended particulates, total dissolved solids, and acidity.[65] Bioassay results are a second method, encompassing such humane measures as the LC50 value, which determines the concentration of a pollutant that will kill one half of a given number of test organisms.[66] The third method, upheld in the D.C. Circuit,[67] is narrative criteria: such aspirational statements as "free from substances attributable to man-caused point source . . . discharges" that result in undesired consequences like objectionable color, odor, or taste.[68] Toxic pollutants are also addressed by water quality standards, both in terms of specific criteria and catch-all narratives condemning toxics.[69] For example, an inorganic toxin like DDT can be present in the aquatic food chain without being detectable in water, since inorganic toxins can be insoluble in water.

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63. 33 U.S.C. § 1313(c)(2)(A) (1988).

64. William H. Rodgers, Jr., *Environmental Law* 344 (2d ed. 1994).

65. *Id.* at 342–43.

66. Jeffrey M. Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 Vand. L. Rev. 1167, 1205 (1983) (citing EPA, *Draft Water Quality Standards Handbook* (1982)).

67. Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275, 288 (D.C. Cir. 1981), *aff'g* 13 Env't Rep. Cas. (BNA) 1867 (D.D.C. 1979).

68. Gaba, *supra* note 66, at 1205 n.192.

69. *Id.*

The 1972 amendments to the Clean Water Act created a dominant role for effluent standards in the regulation of pollution discharge by use of permits under the National Pollution Discharge Elimination System (NPDES) and relegated water quality standards to an important but interstitial function.[70] Water quality standards can be significant, however, especially when a downstream state or tribe adopts or revises them in ways that can impact NPDES permit-holders in upstream states or on upstream reservations. Section 301(b)(1)(C) of the Clean Water Act[71] provides for the incorporation of water quality standards into the permitting process, establishing those standards as a benchmark for setting effluent discharge limits. In fact, many provisions in NPDES permits exist solely to satisfy the additional obligations created by the water quality standards.[72]

### *C. The EPA Rule-making on Tribal Water Quality Standards*

On December 12, 1991, the EPA issued its final rule for reservation water quality standards.[73] In response to public comments, the EPA addressed such issues as the scope of tribal regulatory authority[74] and the procedural requirements for tribes to prove their regulatory capabilities.[75] Defining the geographical scope of tribal authority, the EPA included not only lands within a reservation but also trust lands formally set aside for the use of Indians, even if not denominated "reservation."[76] When there are risks of conflict of interest, such as where a tribe is issuing a permit to a tribal agency, the EPA chose not to require a demonstration of separation of powers but, instead, opted to consider such issues in the process of delegating NPDES permitting authority,[77] presumably on a case-by-case basis.

The EPA also addressed the issue of resolving disputes between tribes and states over water quality standards. The Agency chose a decidedly middle-ground approach, refusing to disapprove either a state or a tribal standard as a means of resolution.[78] Doing so would have required the

70. Rodgers, *supra* note 64, at 350–51.

71. 33 U.S.C. § 1311(b)(1)(C) (1988).

72. Rodgers, *supra* note 64, at 349.

73. 56 Fed. Reg. 64,876 (1991).

74. *See supra* notes 40–41 and accompanying text.

75. 56 Fed. Reg. at 64,881.

76. *Id.*

77. *Id.* at 64,882.

78. *Id.* at 64,886–87.

EPA to promulgate a less stringent federal standard and impinge on the authority of states and tribes to set standards more restrictive than the federal minimums. Congress's explicit grant of regulatory authority to tribes did not include Section 510, which allows states to set water quality standards in excess of the statutory minimums.[79] Despite this omission, the EPA affirmed its reading of the 1987 amendments to grant tribes the same right states have: to establish water quality standards in excess of those mandated as minimums in the statute and regulations.[80] In addition, the Agency refused to set a time limit for dispute resolution, arguing that flexibility is necessary to achieve an optimal outcome.[81] The EPA also chose not to define what constitutes an "unreasonable consequence" triggering the dispute resolution process, opting instead to vest regional administrators with the discretion to initiate dispute resolution in appropriate circumstances.[82]

The EPA also described three options for setting tribal water quality standards, spanning a range from least resource-intensive to most. First, a tribe may negotiate a cooperative agreement with an adjoining state to apply state standards.[83] Second, the tribe may adopt the adjoining state's standards, with or without revision.[84] Finally, a tribe may adopt standards independently to account for unique site-specific conditions and designated uses.[85] For example, three Rio Grande pueblos, the Pueblos of Isleta, Sandia, and San Juan, have all designated the Rio Grande as "primary contact ceremonial use and primary contact recreational use."[86] The EPA also chose to allow tribes a full three-year review cycle in which to develop their standards.[87] In order to assist tribes in developing standards, the EPA issued a reference guide to water quality standards for Indian tribes in January 1990 and held an informational meeting for tribes on August 28–30, 1990, in Denver, Colorado. The standards of the state where the reservation is located apply during the interim period when tribal standards are under

79. 33 U.S.C. § 1370 (1988).

80. 56 Fed. Reg. at 64,886.

81. *Id.* at 64,887.

82. *Id.* at 64,888.

83. *Id.* at 64,889.

84. *Id.*

85. *Id.*

86. Tribes prefer not to elaborate on what ceremonial use entails, other than that, like recreational use, it can involve some ingestion of water. *See, e.g.*, City of Albuquerque v. Browner, 865 F. Supp. 733, 740 (D.N.M. 1993).

87. 56 Fed. Reg. at 64,889.

development,[88] though the rule does not designate who is responsible for enforcing those standards. Federal promulgation of standards occurs only as a last resort.[89]

The 1991 rule also briefly addresses the issues of groundwater and Indian reserved water rights. It enumerates the two specific instances in which the Agency regulates underground waters: (1) when there is a direct hydrological connection between groundwater and surface waters and (2) when the subterranean component is sufficiently stream-like that fish and other aquatic life move between the surface and underground portions of the water body.[90] Although Sections 101(g)[91] and 518(a)[92] are unambiguous in not affecting state quantitative water rights, the regulations implementing Section 518 reaffirm that water quality standards have no impact on rights to quantities of water.[93]

The 1991 regulations also specify the process for tribes to obtain treatment as states and outline the dispute resolution mechanism. Like the statute,[94] the regulation requires (1) that the tribe be federally recognized; (2) that the tribe have a governing body carrying out substantial governmental duties and powers; (3) that the tribal regulatory program pertain to waters in Indian country; and (4) that the tribe, in the Regional Administrator's judgment, be capable of carrying out an effective water quality standards program in a manner consistent with the Clean Water Act and applicable regulations.[95] The regulations also specify the form of documentation of those requirements, as well as the process by which the Regional Administrator will provide notice of consideration of the application and its approval, where applicable.[96] The available dispute resolution mechanisms include mediation, non-binding arbitration, or a default dispute resolution mechanism.[97] The default mechanism involves appointment by the Regional Administrator of a single official or panel, which will issue a written recommendation.[98] All of the dispute resolution options are voluntary, and

88. *Id.* at 64,991.

89. *Id.*

90. *Id.* at 64,892.

91. 33 U.S.C. § 1251(g) (1988) (authority of states over water).

92. *Id.* § 1377(a) (1988) (provisions of § 518 to be carried out in accordance with § 101(g)).

93. 40 C.F.R. § 131.4 (1993).

94. *See supra* note 62 and accompanying text.

95. 40 C.F.R. § 131.8(a)(1)–(4) (1993).

96. *Id.* § 131.8(b)–(c).

97. *Id.* § 131.7(f).

98. *Id.* § 131.7(f)(3).

their recommendations are not binding; however, the expense and delay of litigating disputes makes recourse to the dispute resolution probable.

### *D. The Supreme Court's Water Quality Standards Jurisprudence*

The history of hostility between tribes and states indicates that disputes are inevitable under the new regulatory scheme created by the EPA's 1991 rule. It seems equally inevitable that despite the rule's dispute resolution mechanisms, a significant number of these controversies will lead to litigation. In fact, although only four tribes have established water quality standards as of December 1994, such a dispute has already reached federal district court.[99] Analysis of three cases, where the Supreme Court has resolved interstate disputes regarding water quality, establishes a framework for predicting the outcome of state-tribal disputes in the district courts, as is clear from litigation regarding the Pueblo of Isleta's water quality standards in the District of New Mexico.[100]

#### *1.* Milwaukee II

The Supreme Court had its first opportunity to resolve an interstate dispute under the 1972 Clean Water Act amendments in *Milwaukee v. Illinois*.[101] At issue was the availability of federal common law after passage of the 1972 amendments. Illinois alleged public nuisance resulting from inadequate treatment of sewage at Milwaukee's wastewater treatment plant and from storm water overflows, which caused direct discharge of untreated sewage into Lake Michigan and which in turn carried the pollutants to Illinois. In an earlier related decision, the Court had held that, because federal laws were not the only remedy available at that time, Illinois could avail itself of a federal common law action in district court. The Court declined original jurisdiction because the dispute was only between a state and a party in another state, not between two states.[102] Illinois duly filed suit in federal district court, but, in the interim, Congress passed the 1972 Clean Water Act. When the dispute returned to the Supreme Court, it held, in an

99. *See infra* part III.

100. *See infra* note 152 and accompanying text.

101. 451 U.S. 304 (1981) (*Milwaukee II*).

102. Illinois v. Milwaukee, 406 U.S. 91, 101 (1972) (*Milwaukee I*).

opinion by Justice Rehnquist, that the 1972 amendments preempted any remedy at federal common law.[103]

The Court's preemption analysis focused on the comprehensiveness of the 1972 amendments. Distinguishing preemption of state law, where preemption must be express or forcefully implied by Congress, the Court articulated its assumption that Congress, not the courts, should set the standards to be applied under federal law.[104] Thus it found a structural limitation on the development of federal common law—where Congress has chosen to regulate, the courts' function is to enforce that statutory scheme, notwithstanding any federal common law, conflicting or not. Looking to legislative history, the Court found clear intent to regulate comprehensively, reaffirming its similar conclusion in an earlier case.[105] Given the unavailability of an action under federal common law, Illinois' only recourse besides a Clean Water Act suit was to petition the permitting authority in Wisconsin—a remedy that Illinois had failed to seek.[106] Though the Court did not make much of the fact, it did remark that the Wisconsin Department of Natural Resources had undertaken enforcement action to bring Milwaukee's wastewater treatment system into compliance with federally mandated effluent standards.[107]

*Milwaukee II* essentially limits tribes to bringing action under federal statutes for enforcement of their water quality standards, since state courts are likely to be hostile to tribal plaintiffs. While, in theory, a tribe might bring a nuisance action in state court, the history of state-tribe relations makes success in, and therefore the bringing of, such a suit unlikely. For example, in *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson*,[108] the Washington State Supreme Court held that implementing a federal district court ruling on Indian treaty fishing rights would violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution by treating Indians differently from non-Indian citizens.[109] In *United States v. Washington*,[110] the so-called Boldt decision, the federal district court held

103. *Milwaukee II*, 451 U.S. at 317–19.

104. *Id.* at 316–17.

105. *Id.* at 318–19 (citing Train v. City of New York, 420 U.S. 35 (1975)).

106. *Id.* at 326.

107. *Id.* at 311.

108. 89 Wash. 2d 276, 571 P.2d 1373 (1977), *vacated sub nom.* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

109. *Id.* at 285–86, 571 P.2d at 1378.

110. 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

that under the Stevens treaties of 1854–55, Indians are entitled to fifty percent of the Pacific northwest fishing harvest. The Washington court, however, ignored several long-standing tenets of Indian law, basing its holding on the injustice of giving 0.028 percent of the population at large fifty percent of the fishing resource.[111] Such an assertion is directly contrary to the U.S. Supreme Court's holding in *United States v. Shoshone Tribe*[112] that treaties are to be construed as the Indians would have understood them at the time of signing.[113] Such hostility to the rights of Indians bodes ill for any state law nuisance action brought by a tribe to enforce its water quality standards.[114]

*2.* International Paper Company v. Ouellette

The Court revisited interstate water quality disputes in *International Paper Company v. Ouellette*,[115] where the Court addressed the issue of which state's law to apply to an interstate water quality dispute. Ouellette and the other plaintiffs were property owners on the Vermont shore of Lake Champlain, which forms a portion of the New York-Vermont border. International Paper Company operates a pulp and paper mill on the New York side of the lake and discharges effluent into the lake by means of a pipe which ends a short distance from the border that divides the lake. Plaintiffs/respondents alleged a "continuing nuisance" under Vermont common law, and asked for damages and injunctive relief.[116] The Court held that state law actions must be resolved under the laws of the state where the source is located.[117] The Court based its holding on the subordinate role that states play under the Clean Water Act in regulating pollution that originates beyond their boundaries.[118] Since they lack authority to block issuance of permits in other states, affected states are relegated to an advisory role, with an opportunity to be heard by the issuing authority.[119] The Administrator, however, may

111. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 89 Wash. 2d at 285, 571 P.2d at 1378.

112. 304 U.S. 111 (1938).

113. *Id.* at 116.

114. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 384 (1886) ("Because of the local ill feeling, the people of the states where [Indians] are found are often their deadliest enemies.").

115. 479 U.S. 481 (1987).

116. *Id.* at 484.

117. *Id.* at 487.

118. *Id.* at 490–91.

119. *Id.*

block the permit if he or she concludes that the discharge in question will have an undue impact on interstate waters.[120] The Court also pointed to the potential for chaos if the regulated community were to be subject to the plenary authority of several governments—an outcome belied by the comprehensiveness of the Clean Water Act and the predictability of its regulatory scheme.[121] The Court stopped short of preempting all state law, however, reasoning that application of the source state's nuisance law would not disturb the balance struck in the Clean Water Act between federal, source-state, and affected-state interests.[122] Finally, the Court rejected the paper company's forum argument that only state courts should hear these disputes and held that a district court sitting in diversity is competent to hear the case and apply the law of the source state.[123]

*Ouellette* is a more hopeful ruling from the standpoint of tribes. Despite the potential application of state law to water quality standards enforcement actions, tribes still have the opportunity to be heard in federal court, rather than risking a hostile state court.

### 3. Arkansas v. Oklahoma

In *Arkansas v. Oklahoma*,[124] the Supreme Court reached the issue of enforcement of out-of-state water quality standards against NPDES permit-holders. The City of Fayetteville, Arkansas, had applied in 1985 for a NPDES permit for its new sewage treatment plant. The permit was duly issued. Oklahoma challenged the permit in administrative proceedings before the EPA on the basis that the permitted discharge would violate water quality standards for the Illinois River, designated as a "scenic river area."[125] Writing for the Court, Justice Stevens held (1) that the EPA's decision to require the City of Fayetteville's sewage treatment plant to comply with a downstream state's standards was a reasonable exercise of the discretion granted to the EPA by statute,[126] and (2) that allowing the discharge to continue was also an acceptable exercise of statutory discretion in enforcement of standards where no

120. *Id.*
121. *Id.* at 496–97.
122. *Id.* at 498–99.
123. *Id.* at 500.
124. 112 S. Ct. 1046 (1992).
125. *Id.* at 1051 & n.3.
126. *Id.* at 1057.

harm to the river had been demonstrated by the downstream state.[127] The Court found that, while Oklahoma could not veto issuance of the permit, the Administrator retained the authority to block any permit that would not comply with the Clean Water Act.[128]

## III. CONFLICTS BETWEEN TRIBES AND NON-INDIANS OVER WATER QUALITY STANDARDS

The only litigation to date regarding tribal water quality standards involved a challenge by a city faced with major overhaul of its wastewater treatment plant to comply with a downstream tribe's newly issued water quality standards. In *City of Albuquerque v. Browner*,[129] the federal district court upheld the EPA's approval of water quality standards submitted by the Pueblo of Isleta.[130] Having recognized the tribe's status as a state for purposes of the Clean Water Act, the EPA approved its standards on December 24, 1992. The city challenged that approval and moved for a temporary restraining order and then for a preliminary injunction; both motions were denied.[131] In its complaint, the city made three allegations: (1) that the EPA had failed to follow the required approval procedures; (2) that the Agency had misinterpreted two provisions of the Clean Water Act in approving the standards; and (3) that the EPA had approved standards that are unconstitutional.[132]

The court reviewed the EPA's decision under the Administrative Procedure Act, using an "arbitrary and capricious" standard. The court framed its inquiry as "whether the agency based its decision on relevant evidence a reasonable mind might accept as appropriate to support such a decision."[133] Asserting the narrowness of its standard of review, the court noted the broad discretion afforded an agency when faced with conflicting technical opinions, even to the point of affirming a reasoned decision contrary to the one at which the court itself might arrive.[134] Even if the court were to find that the agency had acted arbitrarily or

127. *Id.* at 1060.

128. *Id.* at 1055 (citing 33 U.S.C. § 1342(d)(2), which provides for notice to and review by the Administrator of all permits).

129. 865 F. Supp. 733 (D.N.M. 1993).

130. *Id.* at 741.

131. *Id.* at 736.

132. *Id.*

133. *Id.* at 737.

134. *Id.*

outside the scope of its authority, it would remand to the agency for reconsideration.[135]

In its review of the EPA's approval procedures, the court found that the agency had met all statutory requirements. The city first challenged the EPA's failure to hold public hearings regarding its approval of the tribe's standards. The court found that the Clean Water Act requires that EPA and states give notice when they promulgate standards.[136] The tribe had provided notice of a hearing held August 7, 1991, and an opportunity for comment prior to submission of its standards to the EPA.[137]

In response to the city's assertion of statutory misinterpretation by the agency, the court also upheld the EPA's interpretation of Section 518[138] as incorporating Section 510,[139] which allows states to set more stringent standards than the minimum required by the Act.[140] Reasoning that limiting tribes to the federal minimum standards would render Section 518 essentially meaningless, the court also pointed to the principle of federal Indian law, which requires interpretation of Section 510 as a savings clause, recognizing sovereignty retained by the tribes, like that of the states.[141]

The city also challenged the failure of the EPA's dispute resolution mechanism to allow anyone other than the state or tribe to initiate the process. Although the EPA did consider in its rule-making whether affected parties should be involved in the resolution process, it determined only that they could be invited to participate.[142] Allowing only states and tribes to initiate the process was a reasonable regulatory interpretation of the statute, since they are the only entities authorized to revise or modify the standards.[143]

The city's constitutional argument alleged a violation of the Establishment Clause because enforcement of the tribe's standards aimed at protecting ceremonial uses of the river constituted imposition of a mandate aiding tribal religion at the expense of the city.[144] Reasoning

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135. *Id.*

136. *Id.* at 739.

137. *Id.*

138. 33 U.S.C. § 1377 (1988).

139. 33 U.S.C. § 1370 (1988).

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

141. *Id.* at 739.

142. *Id.* at 740.

143. *Id.*

144. *Id.* at 740.

that the standard, which contemplates some ingestion of water, resembles a fishable/swimmable standard that is one of the goals of the Clean Water Act, the court found that the tribe's designation of a ceremonial use did not invalidate the overall secular goals of the Act—quite the contrary, in fact.[145] There was no "excessive entanglement" between government and religion.[146]

The city also argued that the standards were unconstitutionally vague, but the court summarily rejected this argument.[147] First, the court found that narrative descriptions are permissible under the EPA regulations.[148] The court also pointed out that it is the NPDES permit, not the standards themselves, that governs the city's conduct.[149]

Finally, the court addressed the attainability of the tribe's standards. Despite the city's concerns about the expense of compliance, the court found that the "EPA lacks the authority to reject stringent standards on the grounds of harsh economic or social effects."[150] Although the city argued that the tribe should include provisions for periods of low flow, the tribe replied that, because ceremonial use is more intensive during low-flow periods, it would be inappropriate to relax the standards at those times.[151] On the basis of agency deference, the court refused to require modification.[152]

The court raised one prospective question, looking to the city's draft modified NPDES permit. Citing *Arkansas v. Oklahoma*,[153] the court questioned the EPA's inclusion of limits in the city's NPDES permit in order to meet the tribe's standards without first concluding that the quality of the river five miles downstream would be measurably improved. In addition, the city's drinking water source, an aquifer, contains arsenic at higher levels than natural background in the river, and thus higher than the tribe's standards allow. Thus, the city's uncontaminated drinking water could constitute an actionable pollutant. Furthermore, it was not clear that currently available technology could meet or measure progress towards the tribe's standard. Hence, the court

145. *Id.*

146. *Id.* at 740–41.

147. *Id.* at 741.

148. *Id.* *See supra* notes 67–68 and accompanying text.

149. *Id.* at 742.

150. *Id.* at 741.

151. *Id.*

152. *Id.*

153. *See supra* notes 124–29 and accompanying text.

was concerned both about the efficacy of limitations in protecting the tribe's water quality and about the ability of the city to meet the standards with available technology. The court, however, declined to reach the issue, since the NPDES permit was not before the court.[154]

In April 1994, Albuquerque, the New Mexico Environment Department, the EPA, and the tribe entered into a Stipulation and Agreement[155] to resolve all questions raised in the reissuance of the city's NPDES permit, including the pueblo's water quality standards. In that agreement, all parties waived any right to challenge the reissued permit.[156] Among the other provisions is one requiring a water quality study focusing on arsenic, aluminum, cyanide, and silver in the Rio Grande River. Thus, despite the reluctance of the non-Indian community to accept Indian regulatory jurisdiction, a workable compromise was achieved.

Other kinds of disputes are likely to arise under the new tribal water quality standards. One likely source of conflict is objections to tribal regulation of non-Indian fee owners on reservations. Though no documentation is available because the matter is still pending, the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana have applied for treatment as a state. Their application has been at the EPA for two years, apparently delayed by the objections of non-Indian fee owners, though officials at the EPA headquarters were unwilling to discuss the matter in May 1994.

## IV. IMPLEMENTATION OF TRIBAL WATER QUALITY STANDARDS

Avoiding conflict with non-Indians is certainly the optimal approach to implementing tribal water quality standards. Through careful designation of uses and thoughtful selection of pollutant criteria, tribes can protect traditional and other water and attendant land uses without precipitating conflict. To affect the operation of an upstream facility, a tribe must demonstrate that the facility demonstrably impacts water quality. Unlike the strict-liability scheme of the Comprehensive Environmental Response, Compensation, and Liability Act[157] (CERCLA), where anyone who has disposed of hazardous waste at an

154. *City of Albuquerque*, 865 F. Supp. at 742.

155. On file with the *Washington Law Review*.

156. *Id.* at 2–3.

157. 42 U.S.C. §§ 9601–9675 (1988 & Supp. 1993).

offfending site is liable for the entire cost of cleanup, regardless of a demonstrated source of the environmental damage, the Clean Water Act places a heavy burden of proof for the downstream state or tribe to meet the standard of *Arkansas v. Oklahoma*—i.e., direct causation. This section addresses the options available to tribes in undertaking Section 518 regulatory authority and addresses potential for conflict.

### *A. Designated Uses*

Designating uses is the first step in establishing standards, once a tribe has achieved status as a state. In 1980, the EPA published a system for designating uses. That system suggested three options: recreational, fisheries, or industrial use. Four tribes, the Pueblos of Isleta, Sandia, and San Juan, as well as the Puyallup of Washington, have EPA-approved standards.[158] The three pueblos have each gone outside the EPA guidance, however, and designated portions of the Rio Grande river as "primary contact ceremonial use."[159] The district court's recognition of traditional, spiritual uses of water as a valid designated use under the Clean Water Act is probably the most significant aspect of *City of Albuquerque*, since native people have had great difficulty persuading the courts to recognize and protect their spiritual values regarding their lands.[160] Northwest tribes are likely to submit applications for treatment as a state to the EPA, with the express goal of protecting hatchery water quality from upstream discharges.[161]

### *B. Pollutant Criteria*

The greatest potential for conflict lies in the designation of pollutant criteria. The pollutant criteria, to be effective, must be set at levels that are both measurable and attainable. Though this issue was beyond the scope of the district court's inquiry in *City of Albuquerque v. Browner*,[162] the court did express concern that the tribe's arsenic standard might

158. Electronic correspondence from Patti Morris, EPA, to author (Jan. 10, 1995) (on file with the *Washington Law Review*). The Seminole of Florida have received approval for treatment as a state. Santa Clara Pueblo, Nambe Pueblo, Picuris Pueblo, and Povonque Pueblo await EPA approval of both their applications for treatment as states and their water quality standards. The Confederated Salish and Kootenai Tribes of the Flathead reservation await approval of their application for treatment as a state. *Id.*

159. *See supra* note 86 and accompanying text.

160. *See, e.g.*, Lyng v. Northwest Indian Cemetery Protection Ass'n, 485 U.S. 439 (1988).

161. The author is assisting the Suquamish Tribe with its application for treatment as a state.

162. 865 F. Supp. 733 (D.N.M. 1993). *See supra* notes 129–54 and accompanying text.

present enforcement problems. Because the background level of arsenic in the groundwater that is Albuquerque's drinking water source is higher than that of the Rio Grande, the city argued against its approval, since meeting that standard would require it to remove arsenic below naturally occurring levels. A further difficulty is the ability of currently available technology to measure the difference. In *Arkansas v. Oklahoma*,[163] the Court found that it was an acceptable exercise of the EPA's statutory discretion to allow a discharge to continue at the risk of violating the downstream state's water quality standards, so long as the downstream state had failed to demonstrate harm to the river.[164] An unenforced water quality standard is of little use; thus, tribes should give careful consideration to both measurability and attainability.

A tribe has three options for setting standards. The first is to negotiate a cooperative agreement with an adjoining state to apply that state's standards.[165] Tribes may be reluctant to undertake this option, despite its apparent convenience, given the history of animosity between state and tribal governments. Concerned about the appearance of abdicating sovereignty, a tribe may choose to promulgate standards different from the adjoining state's, even when the state's standards might be sufficiently protective of tribal resources. Here, the goal of conflict avoidance may have to give way to concerns over protecting tribal sovereignty, since adoption of state standards may limit a tribe's ability to alter them in the future to meet new needs or threats.

A second option involves adopting the adjoining state's designated uses and pollutant criteria, with or without modification.[166] This course of action enables the tribe to exercise directly its regulatory authority without undertaking the rather resource-intensive process of developing its designated uses and pollutant criteria from scratch. Since the adjoining state has presumably done substantial scientific investigation to meet the statutory requirements for developing water quality standards, the tribe can take advantage of that investigative work and modify the standards to meet the special needs of the reservation or other tribal property. This option allows the tribe to retain control and avoid any appearance of giving up sovereign powers.

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163. 112 S. Ct. 1046 (1992).

164. *Id.* at 1060.

165. 56 Fed. Reg. 64,876, 64,889 (1991) (final rule on tribal water quality standards).

166. *Id.*

The final option, adopting standards independently,[167] is both the most resource-intensive and the most likely to produce disputes with surrounding NPDES permit-holders. Resistant to change, permit-holders are increasingly likely to challenge the standards if they are required to make capital investments or expenditures to comply with them. At the same time, when tribal needs differ substantially from those of the surrounding state, as in the case of the Rio Grande pueblos,[168] creating standards independently may be the only way for a tribe to realize the goal of protecting its waters to serve particular tribal needs. It is here that a tribe must be most careful to create scientifically defensible standards, given the risk of costly litigation against the surrounding non-Indian communities.

## V. CONCLUSION

The power to regulate the reservation environment is a vital aspect of tribal sovereignty. Tribes identify with their land in ways that non-Indian society is only beginning to understand. Tribes' love for their land could also lead to improvements in the reservation and neighboring environments, since they seem likely to establish more stringent standards than the surrounding states. The fruits of this enterprise could also provide examples of prudent development on reservations that could be helpful in similarly situated communities around the world. Though conflicts with non-Indians seem inevitable, careful crafting of water quality standards can be an important part of protecting tribal culture by preserving and enhancing their remaining land base.

167. *Id.*

168. *See supra* note 86 and accompanying text.