William Mitchell Law Review

Environmental Justice and Tribal Environmental Regulation

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Tribal Authority to Protect Water Resources and Reserved Rights Under Clean Water Act Section 401

Volume 41 ✣ Number 2 ✣ 2015

TRIBAL AUTHORITY TO PROTECT WATER RESOURCES AND RESERVED RIGHTS UNDER CLEAN WATER ACT SECTION 401

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I. INTRODUCTION

Industrial activities subject to federal pollution discharge[1] and dredge and fill permits[2] have the potential to affect tribal waters both where the discharge originates and downstream of the proposed activity. These activities can also impact reserved rights to hunt, fish, and gather—both at the point where the discharge originates and downstream. For example, in the Lake Superior Basin, mineral extraction and oil and gas pipeline expansions have the potential to affect water quality on reservations and in ceded territories throughout the basin where usufructuary rights have been reserved.[3] Protection of these waters is vital to secure tribal economic security, health, welfare, and political integrity.

1. 33 U.S.C. § 1342 (2012).
2. *Id.* § 1344.
3. For example, among new infrastructure and mining projects proposed in the Lake Superior Basin as of spring 2015, the proposed Sandpiper Pipeline would cross both reservation and ceded territories in Minnesota. *Compare Sandpiper Pipeline Project*, ENBRIDGE, http://www.enbridge.com/~/media/www/Site%20Documents/Delivering%20Energy/Projects/Sandpiper/ENB2013-Sandpiper-L19.pdf (last visited Dec. 13, 2014) (displaying a map of the proposed pipeline route), *with* EPA, INDIAN LANDS IN U.S. EPA REGION 5 (2012) (displaying a map of ceded territories in Northern Minnesota). *See generally In re* Application of N.D. Pipeline Co. for a Pipeline Routing Permit for the Sandpiper Pipeline Project in Minn., No. PL-6668, 2014 WL 3401019 (Minn. P.U.C. June 9, 2014). The PolyMet NorthMet copper-nickel open-pit mine would affect ceded territories in Minnesota. *See* MINN. DEP'T OF NATURAL RES. ET AL., NORTHMET MINING PROJECT AND LAND EXCHANGE: SUPPLEMENTAL DRAFT ENVIRONMENTAL IMPACT STATEMENT § 4.2.9 (2013) (setting forth the project's expected impact on ceded territories of the Fond du Lac Band of Lake Superior Chippewa, the Bois Forte Band of Chippewa, and the Grand Portage Band of Lake Superior Chippewa). The Penokee/Gogebic Taconite mine would affect ceded territories in Wisconsin. *Compare MFL Land Closed to the Public Due to Mining Activity*, WIS. DEP'T NAT. RESOURCES (Aug. 19, 2014), http://dnr.wi.gov/topic/Mines/documents/gogebic/MFLMap20140819.pdf (displaying the location of mining activities), *with* EPA, *supra* (displaying a map of ceded territories in Wisconsin). For a discussion of the scope of ceded territories in the Lake Superior Basin, see *infra* Part VII.C.

Much has been written about tribal sovereignty and the federal government's trust responsibility to tribes.[4] This article applies these foundational principles to specific tribal authorities available under the Clean Water Act (CWA or "the Act"), and analyzes ways in which section 401 of the CWA may be employed to protect tribal rights to clean water resources on reservations and tribal reserved rights to hunt, fish, and gather in territories ceded to the United States.

Section 401(a)(1) of the Clean Water Act grants states "in which the discharge originates or will originate" the authority to protect water resources when federal permits are granted which may result in discharge of pollutants into navigable waters within the state's jurisdiction.[5] A federal permit may not be issued until a state has either granted certification that the discharge complies with state water quality standards or has waived the right to so certify.[6] A state in which discharge originates may deny certification if the state concludes that discharge under the federal permit would not comply with the state's water quality standards.[7] In addition to conditions addressing water quality standards, a certifying state may also impose conditions that protect state designated uses, even if those conditions do not pertain directly to a water quality standards violation.[8]

Clean Water Act section 401(a)(2) also provides a mechanism for states with downstream jurisdictional waters that may be affected by a discharge to object to federal permits, such as discharge permits or dredge and fill permits.[9] At the time when a state in which the discharge originates grants certification, the U.S.

4. *See, e.g.*, Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 55–69 (2000) (arguing that the tribal consultation requirement is an inadequate recognition of tribal sovereignty); Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1472–77 (examining the Indian trust doctrine in its application to government actions affecting Indian land); Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 111–14 (proposing revisions to the Indian trust doctrine so that it would better protect tribal sovereignty).

5. 33 U.S.C. § 1341(a)(1).

6. *Id.*

7. *Id.*

8. *Id.* § 1341(d).

9. *Id.* § 1341(a)(2).

Environmental Protection Agency (EPA) Administrator must determine whether the discharge "may affect" the water quality of "any other State."[10] If so, the EPA must provide notice to that other state.[11] If the other affected state determines that the discharge will "affect the quality of its waters so as to violate any water quality requirements" in that state, and notifies the EPA and the license permitting agency "of its objection to the issuance of such license or permit and requests a public hearing on such objection" within sixty days, the permitting agency must hold a hearing.[12] The EPA must then submit its "recommendations with respect to any such objection to the licensing or permitting agency."[13] Such federal permitting agency must, in turn, "condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements."[14] The Clean Water Act requires that compliance be assured: "[i]f the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit."[15]

Clean Water Act section 401 creates a substantive and procedural mechanism for state and federal resolution of disputes regarding the protection of water quality and an opportunity for co-management of water resources by more than one sovereign entity affected by the discharge. States' authority under section 401(a)(1) and section 401(a)(2) is justified by the fundamental purposes of the Clean Water Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[16] and, "wherever attainable," to achieve "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water."[17]

Although the Clean Water Act did not initially provide tribes with a mechanism to regulate water quality under its federal regime, in 1987, Congress authorized the EPA to allow tribes to be treated as a state for the purpose of numerous provisions of the

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* § 1251(a).
17. *Id.* § 1251(a)(2). In its optimism, section 1251(a)(2) stated that this was an "interim goal" to be achieved by July 1, 1983. *Id.*

CWA.[18] The EPA has since adopted regulations to determine tribal eligibility for "treatment as a state" (TAS) for purposes of enacting water quality standards under section 303(c) and section 401 certification.[19] These regulations have evolved over time,[20] and the EPA is considering further amendments to make tribal qualification for TAS less burdensome and more efficient.[21] The law is clear that tribes may qualify as states for purposes of water quality standards programs,[22] and that tribes who so qualify have the authority to be treated in the manner of states under section 401 of the Clean Water Act.[23]

There has been some dispute about tribal ability to regulate activities of non-Indians on land owned by non-Indians, even within reservations.[24] However, application of tribal Clean Water Act authority to all reservation waters has been widely recognized as critical to the political integrity, economic security, health, and

18. *Id.* § 1377(e) ("The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, 1344, and 1346 of this title to the degree necessary to carry out the objectives of this section.").

19. *See* 40 C.F.R. § 124.51(c) (2014) (providing qualification under section 401 for tribes that meet section 131.8 requirements); *id.* § 131.4 (authorizing tribes to enact water quality standards once TAS is conferred); *id.* § 131.8 (establishing criteria for TAS for the purpose of enacting water quality standards). Although section 124.51(c) uses the language "treat the Tribe in a manner similar to that in which it treats a State," the Clean Water Act and this article use the phrase "treatment as a state," or "TAS." *See* 33 U.S.C. § 1377(e)(3).

20. *See* Indian Tribes; Eligibility for Program Authorization, 59 Fed. Reg. 64,339 (Dec. 14, 1994) (codified as amended at 40 C.F.R. pts. 123, 124, 131, 142, 144, 145, 233, and 501); Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876 (Dec. 12, 1991) (codified as amended at 40 C.F.R. pt. 131).

21. *See Under Consideration: Potential Reinterpretation of a Clean Water Act Provision Regarding Tribal Eligibility to Administer Regulatory Programs*, EPA, http://water.epa.gov/scitech/swguidance/standards/wqslibrary/tribal.cfm (last visited Jan. 21, 2015) ("EPA is considering reinterpreting Clean Water Act Section 518 as a delegation by Congress of authority to eligible tribes to administer Clean Water Act regulatory programs over their entire reservations. This reinterpretation would replace EPA's current interpretation that applicant tribes need to demonstrate their inherent regulatory authority [over land in non-tribal ownership].").

22. *See* 33 U.S.C. § 1377(e); 40 C.F.R. § 131.8.

23. 40 C.F.R. §§ 124.51(c), 131.4(c).

24. *See* Montana v. United States, 450 U.S. 544 (1981); discussion *infra* Part IV.A.

welfare of tribes.[25] Where the EPA serves as the permitting agency, stringent tribal water quality standards—generally more restrictive than state standards—have been applied to protect reservation waters, even when the non-Indian activity affected is off-reservation.[26] However, tribal authority has not been exercised under section 401(a)(2) to object to federal permits for off-reservation activities that may affect tribal waters.[27]

There is long-standing jurisprudence limiting off-reservation activities to protect both reservation waters and treaty rights implicated beyond the boundaries of the reservation.[28] Although legal barriers are often interposed when tribes assert trust obligations,[29] federal government fiduciary responsibilities may be engaged to protect tribal resources and reserved off-reservation rights.

This article reviews the precedent and policies that support an expansive view of tribal authority under section 401 of the Clean Water Act to veto, condition, or deny federal permits affecting water quality and reserved usufructuary rights. It summarizes statutes, regulations, and evolving jurisprudence related to the certification of water quality compliance under section 401 of the Clean Water Act;[30] the treatment of tribes in the manner of states under the Clean Water Act;[31] the inherent sovereign authority of tribes to protect water quality where conduct threatens their political integrity, economic security, health, or welfare;[32] and federal authority and potential trust responsibility to protect off-

25. *Montana*, 450 U.S. at 566; *see* Oneida Tribe of Indians of Wis. v. Vill. of Hobart, 732 F.3d 837 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2661 (2014); Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998); Hoover v. Colville Confederated Tribes, 6 CCAR 16, 3 CTCR 44 (Colville App. 2002); discussion *infra* Part IV.A–B.

26. *See* City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996); discussion *infra* Part IV.B.

27. Conversations throughout 2014 with staff of the Fond du Lac Band of the Lake Superior Chippewa as well as the lack of any documentation of this exercise in any EPA administrative case or filing confirms the absence of exercise to date.

28. *See* discussion *infra* Parts IV–V. Protection of tribal reserved fishing rights off-reservation dates back to *United States v. Winans*, 198 U.S. 371 (1905), discussed *infra* Part VII.B–C.

29. *See* discussion *infra* Part VI; *see generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.05 (Nell Jessup Newton ed., 2012), *available at* LEXIS.

30. *See infra* Part II.

31. *See infra* Part III.

32. *See infra* Part IV.A–B.

reservation tribal rights.[33] Finally, this article proposes specific and actionable federal guidance and practices—based on the above jurisprudence as well as the evolving regulations of the EPA regarding treatment of tribes in the manner of states under the Clean Water Act—that should be employed to recognize and implement tribal authority to protect tribal waters and off-reservation reserved rights under section 401 of the Clean Water Act.[34]

These recommendations can be summarized in four categories. First, the EPA should facilitate tribal exercise of section 401(a)(1) certification authority when discharge originates within a reservation, including authority to prevent degradation of water quality and to require conditions that protect off-reservation reserved rights.[35] Second, the EPA should develop guidance to facilitate tribal exercise of section 401(a)(2) authority where off-reservation activities may affect tribal waters.[36] The EPA should explicitly recognize tribal sovereignty and expertise and should recommend conditions by which the permitting agencies would ensure compliance with both numeric and narrative tribal water quality standards, protection of designated uses, and preservation of reserved rights identified by tribes in their objections to a federal permit.[37] Third, the EPA should interpret existing statutes and regulations to facilitate tribal protection of reserved rights in ceded territories that depend on water quality under section 401(a)(2) of the Clean Water Act.[38] Fourth, and finally, the EPA should begin a process of consultation with tribes, pursuant to the federal government's trust responsibility, to extend Clean Water Act treatment, as a state management function, to ceded territories so that tribes may protect their political integrity, economic security, health, and welfare from water pollution that affects reserved rights.[39]

33. *See infra* Parts V–VI.
34. *See infra* Part VII.
35. *See infra* Part VII.A.
36. *See infra* Part VII.B.
37. *See infra* Part VII.B.
38. *See infra* Part VII.C.1.
39. *See infra* Part VII.C.2.

II. STATE CERTIFICATION UNDER CLEAN WATER ACT SECTION 401

A. Veto Authority Under Section 401(a)(1) for a State Where a Discharge Originates

The Federal Water Pollution Control Act Amendments of 1972, popularly known as the Clean Water Act, declares that its goal is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[40] The overarching policy supporting Congress's enactment of the CWA was "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."[41]

The CWA provides that pollution discharge shall be unlawful unless such discharge complies with "water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations" under authority reserved for the states by the Act.[42] The Act preserves the inherent sovereignty of states to protect water quality.[43]

> [N]othing in [the Clean Water Act] shall preclude or deny the right of any State . . . to adopt or enforce any standard or limitation respecting discharges of pollutants, or any requirement respecting control or abatement of pollution; except that . . . such State . . . may not adopt or enforce any . . . standard of performance which is less stringent

than that set under the CWA.[44] Nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."[45]

The CWA requires states to submit their pollution regulations to the EPA for approval,[46] and establishes a regulatory framework for federal approval of state water quality standards in order to

40. 33 U.S.C. § 1251(a) (2012).
41. *Id.* § 1251(b).
42. *See id.* § 1311(b)(1)(C).
43. *Id.* § 1370.
44. *Id.*; *see also* 40 C.F.R. § 124.55(c) (2014) (regarding EPA permits, "[a] State may not condition or deny a certification on the grounds that State law allows a less stringent permit condition").
45. 33 U.S.C. § 1370(2).
46. *Id.* § 1313(a).

ensure control of toxic pollutants, the protection of designated uses, and that "standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter."[47] Section 401 of the CWA empowers states to ensure that pollution discharge does not violate state water quality standards (which are approved by the EPA) by authorizing states to veto federal licenses or permits that threaten to undermine the quality of state waters. Specifically, section 401(a)(1) requires "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, [to] provide the licensing or permitting agency [with] a certification from the State in which the discharge originates or will originate."[48] Furthermore, section 401(a)(1) requires that the discharge does not threaten the water quality standards that the state has implemented pursuant to other provisions of the Act.[49]

As noted in the 1973 Senate Report for the CWA, "[t]he purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements."[50] As stated in an EPA Clean Water Act handbook:

> [F]ederal licenses and permits subject to [section] 401 certification include CWA [section] 402[51] NPDES permits in states where EPA administers the permitting program, CWA [section] 404 permits for discharge of dredged or fill material issued by the Army Corps of Engineers (Corps),[52] Federal Energy Regulatory Commission (FERC) hydropower licenses,[53] and Rivers and Harbors

47. *Id.* § 1313(c)(2)(A).

48. *Id.* § 1341(a)(1).

49. *Id.*; *see also* 40 C.F.R. § 124.53 (prohibiting issuance of permits by the EPA until certification is granted or waived under CWA section 401(a)(1)); *id.* § 124.55(a) (stating that if "certification is required . . . no final permit shall be issued (1) If certification is denied, or (2) Unless the final permit incorporates the [state's] requirements . . . under § 124.53(e)").

50. STAFF OF S. COMM. ON PUB. WORKS, 93D CONG., 1ST SESS., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1487 (Comm. Print 1973).

51. 33 U.S.C. §§ 1341–1342.

52. *Id.* § 1344.

53. Hydropower licenses are issued and renewed under 16 U.S.C. § 808.

> Act [section] 9 and [section] 10 permits[54] for activities that have a potential discharge in navigable waters issued by the Corps.[55]

A state is not required to review a proposed permit for certification. Section 401(a)(1) of the Act provides that if a state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application."[56] However, if a state chooses to act, the state may effectively veto a federal permit.[57] "No license or permit shall be granted if certification has been denied by the State."[58]

Where State certification is conditional, the federal permitting agency must accept all conditions in a Section 401(a)(1) certification. Section 401(d) of the CWA states: "Any certification provided under this section shall set forth any effluent limitations *and other limitations*, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations *and other limitations*," under various sections of the CWA, "*and with any other appropriate requirement of State law* set forth in such certification."[59] Any such limitations identified "shall become a condition on any Federal license or permit subject to the provisions of this section."[60] As discussed below, courts have interpreted the "other limitations"

54. Permits required by the Rivers and Harbors Appropriation Act of 1899, §§ 9–10, ch. 425, 30 Stat. 1151 are issued, respectively, under 33 U.S.C § 401 ("Construction of bridges, causeways, dams or dikes generally; exemptions . . . .") and § 403 ("Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in . . . .").

55. EPA OFFICE OF WETLANDS, OCEANS, AND WATERSHEDS, CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION: A WATER QUALITY PROTECTION TOOL FOR STATES AND TRIBES 1–2 (2010) [hereinafter EPA 2010 SECTION 401 HANDBOOK] (internal citations not in the original).

56. 33 U.S.C. § 1341(a)(1); *see also* 40 C.F.R. § 124.53(c) (2014) (noting that if state certification is not received by the time a draft EPA permit is prepared, the EPA provides a state with notice that certification will be waived if the state does not act within a reasonable time, not to exceed sixty days).

57. *See* Anne E. Carlson & Andrew Mayer, *Reverse Preemption*, 40 ECOLOGY L.Q. 583, 586 (2013) ("This refusal to certify can be used to override the decision by a federal agency to allow the activity to proceed.").

58. 33 U.S.C. §1341(a)

59. *Id.* § 1341(d) (emphasis added).

60. *Id.*

language in section 401(d) to mean that, once a discharge is implicated under section 401(a)(1), the certifying state may impose conditions that address water resource issues that are not specific to the violation of its water quality standards.

In the lead case of *PUD No. 1 of Jefferson County v. Washington Department of Ecology*,[61] the United States Supreme Court affirmed that a state may condition section 401 certification "upon *any* limitations necessary to ensure compliance with state water quality standards or any other 'appropriate requirement of state law,'" including protection of designated uses.[62] The Court upheld the State of Washington's imposition of minimum flow requirements at a hydroelectric dam in order to protect the designated use of the Dosewallips River for salmon spawning and migration, on the grounds that the CWA requires states to "take into consideration the use of waters for 'propagation of fish and wildlife'" in setting water quality standards.[63]

The Court held that "[section] 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied."[64] The Court supported the EPA's interpretation of the CWA to give the states authority to make sure that "*activities*—not merely discharges—must comply with state water quality standards."[65]

The EPA interprets section 401(d) to mean that "[o]nce a potential discharge triggers the requirement for [section] 401, the certifying agency may develop 'additional conditions and limitations on the activity as a whole.'"[66] Such additional conditions must then "become conditions of the resulting federal permit or license."[67] According to the EPA, "[t]he federal agency may not select among conditions when deciding which to include and which to reject."[68] In addition, "[i]f the federal agency chooses not

61. 511 U.S. 700 (1994).

62. *Id.* at 713–14 (emphasis added) (quoting 33 U.S.C. § 1341(d)).

63. *Id.* at 714–15 (quoting 33 U.S.C. § 1313(c)(2)(A)).

64. *Id.* at 712.

65. *Id.* (citing EPA regulation 40 C.F.R. § 121.2(a)(3), which requires a state to find that "there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards").

66. EPA 2010 SECTION 401 HANDBOOK, *supra* note 55, at 10 (quoting *Jefferson Cnty.*, 511 U.S. at 712).

67. *Id.*

68. *Id.* (citing Am. Rivers, Inc. v. FERC, 129 F.3d 99, 110–11 (2d Cir. 1997)).

to accept all conditions placed on the certification, then the permit or license may not be issued."[69] The EPA also advises that "[c]onsiderations can be quite broad so long as they relate to water quality."[70]

The Supreme Court also approved state minimum flow conditions on a federal hydroelectric dam permit to protect migratory fish in *S.D. Warren Co. v. Maine Board of Environmental Protection*.[71] The Court rejected a narrow definition of "discharge," which would have required that the water must contain pollutants.[72] Instead, the Court found that in order to achieve the Act's purpose to "'restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'" the definition of "discharge" under section 401 of the CWA should be interpreted to include "'the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.'"[73]

The Court in *S.D. Warren* emphasized that the policy of section 401, allowing a state "'to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State,'" was intended to "have a broad reach."[74] The Court quoted from the congressional record:

69. *Id.* (citing 33 U.S.C. 1341(a)(1); Am. Rivers, Inc. v. FERC, 129 F.3d 99, 110–11 (2d Cir. 1997); Puerto Rico Sun Oil Co. v. EPA, 8 F.3d 73, 74–75 (1st Cir. 1993); Del Ackels v. EPA, 7 F.3d 862, 868 (9th Cir. 1993); United States v. Marathon Dev. Corp., 867 F.2d 96, 99 (1st Cir. 1989); Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1056 (1st Cir. 1982)).

70. *Id.* at 23 ("The U.S. Supreme Court has stated that, once the threshold of a discharge is reached . . . the conditions and limitations included in the certification may address the permitted activity as a whole." (citing *Jefferson Cnty.*, 511 U.S. at 712)).

71. 547 U.S. 370 (2006).

72. *Id.* at 384.

73. *Id.* at 384–85 (quoting 33 U.S.C. §§ 1251(a), 1362(19)) (citing *Jefferson Cnty.*, 511 U.S. at 714). The Court reasoned that the "national goal" of the CWA was "to achieve 'water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water,'" and that "[t]o do this, the Act does not stop at controlling the 'addition of pollutants,' but deals with 'pollution' generally." *Id.* at 385 (citation omitted) (quoting 33 U.S.C. § 1251(a)–(b)). The court found that altering flow had the potential to affect oxygen and nitrogen content, impacting fish and other aquatic organisms. *Id.* at 385

74. *Id.* at 380 (quoting S. REP. NO. 92-414, at 3735 (1972), *reprinted in* 1072 U.S.C.C.A.N. 3668, 1971 WL 11307).

> No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements.[75]

Circuit courts interpreting state authority under section 401 have affirmed the efficacy of state section 401 certification. The First Circuit held in *United States v. Marathon Development Corp.* that a state may set water quality standards more stringent than federal requirements, deny certification for a nationwide general permit, and prohibit the federal government from authorizing activities within its jurisdiction that would violate state standards.[76] In *American Rivers, Inc. v. FERC*, the Second Circuit overturned a federal licensing decision on a hydroelectric dam, holding that the federal agency had no authority to refuse to include in federal licenses conditions imposed by the State of Vermont in its section 401(a)(1) certification.[77] In *Snoqualmie Indian Tribe v. FERC*, the Ninth Circuit rejected a cross-petition for rehearing by Puget Sound Energy opposing FERC's requirement that minimum water flows comply with conditions set by the State of Washington in its section 401(a)(1) certification.[78] The court found that the State's instream flow requirement was "an acceptable application of state and federal antidegradation regulations" and that FERC's adoption of this condition as a condition of its license was "required by [section] 401 of the CWA."[79]

75. *Id.* at 386 (quoting 116 CONG. REC. 8984 (1970) (statement of Sen. Edmund Muskie)).

76. 867 F.2d 96, 101–02 (1st Cir. 1989) (affirming Massachusetts' denial of section 401 certification for a nationwide general permit on which a developer sought to rely).

77. 129 F.3d 99, 112 (2d Cir. 1997).

78. 545 F.3d 1207, 1219 (9th Cir. 2008).

79. *Id.* at 1218. The court in *Snoqualmie* also held that the limitation on access to the falls resulting from the dam did not impose a substantial burden on the ability of tribal members to practice religion under the Religious Freedom Restoration Act. *Id.* at 1214–15. The court did not consider whether a condition to protect religious practices might be imposed as a section 401 condition.

Similarly, where the federal government proposed a vessel general permit[80] affecting multiple jurisdictions, the District of Columbia Circuit Court affirmed in *Lake Carriers Ass'n v. EPA* that the EPA, in proposing a vessel general permit, "did not have the ability to amend or reject conditions in a state's CWA 401 certification."[81] As a result, the EPA included approximately 100 conditions as part of its national vessel permit, incorporating all conditions required by "[t]wenty-five states, two tribes, and one territory" pursuant to section 401 certifications.[82] The court explained that the vessels must "adhere to the [permit's] general provisions . . . with respect to all discharges, and are further required to adhere to any Part VI certification condition imposed by a state into the waters of which the vessel is discharging pollutants."[83]

B. Section 401(a)(2) Protection of Water Quality for a Downstream Affected State

Section 401(a)(2) of the CWA provides downstream states with jurisdictional waters that may be affected by a discharge with a mechanism to object to federal permits, such as federal NPDES permits issued by the EPA or dredge and fill permits issued by the Army Corps of Engineers.[84] The statute requires the EPA to provide notice if the EPA determines that the proposed discharge "may affect" the water quality of "any other State."[85] If the other affected state then determines that the "discharge will affect the quality of its waters so as to violate any water quality requirements" in that

80. Since 2008, the EPA has regulated discharges incidental to the normal operation of commercial vessels greater than seventy-nine feet in length through the Vessel General Permit. *Vessel General Permit*, EPA, http://water.epa.gov/polwaste/npdes/vessels/Vessel-General-Permit.cfm (last visited Dec. 1, 2014).

81. Lake Carriers Ass'n v. EPA, 652 F.3d 1, 10 (D.C. Cir. 2011) (internal quotation marks omitted). Note, however, that at least one court has found that a state certification can be challenged as arbitrary and capricious where the state failed to explain its denial with record evidence. Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot., 482 F.3d 79, 83 (2d Cir. 2006).

82. *Lake Carriers Ass'n*, 652 F.3d at 5.

83. *Id.* The court further explained, "Each state's certification applies only to discharges in its own waters, and a state does not lose authority to certify such a discharge simply because a vessel moves and then discharges in another state as well." *Id.* at 7.

84. *See* 33 U.S.C. § 1341(a)(2) (2012).

85. *Id.*

state and notifies the EPA and the licensing or permitting agency "of its objection to the issuance of such license or permit and requests a public hearing on such objection," the licensing or permitting agency must hold a hearing.[86] The EPA then must submit its recommendations "with respect to any such objection to the licensing or permitting agency."[87] The federal permitting agency must, in turn, "condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements."[88] CWA section 401(a)(2) requires that compliance be assured: "If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit."[89]

Judicial interpretation of CWA section 401(a)(2) has been limited to situations where the challenged federal permit was an NPDES permit issued by the EPA. In *Arkansas v. Oklahoma*, the United States Supreme Court reversed a circuit court decision and upheld the EPA's issuance of a permit for an Arkansas sewage plant, despite Oklahoma's claim that the permit would violate its non-degradation water quality standards.[90] The Court deferred to the conclusion of the administrative law judge and the EPA that "discharges from the new source would not cause a detectable violation of Oklahoma's water quality standards" and thus "satisfied the EPA's duty to protect the interests of the downstream State" under section 401(a)(2) of the CWA.[91] The Court noted that the EPA permit included conditions required in order to comply with the downstream state's water quality standards,[92] and found "the EPA's requirement that the [Arkansas] discharge comply with Oklahoma's water quality standards to be a reasonable exercise of

86. *Id.* An affected state is only entitled to a public hearing and conditions requiring compliance with its water quality standards if the state's comments assert that the state water quality standards would be violated as a result of the discharge. *See, e.g.*, EPA, RESPONSE TO COMMENTS ON THE DRAFT NPDES PERMIT FOR THE CITY OF PLUMMER WASTEWATER TREATMENT PLAN (PERMIT ID0022781) 4 (2012).

87. 33 U.S.C. § 1341(a)(2).

88. *Id.*

89. *Id.*

90. 503 U.S. 91, 94–98 (1992).

91. *Id.* at 94–95. On remand from the EPA's chief judicial officer, the administrative law judge considered the downstream state's water quality standards but "found that there would be no detectable violation of any of the components of Oklahoma's water quality standards." *Id.* at 97.

92. *Id.* at 95.

the Agency's substantial statutory discretion."[93] Although *Arkansas v. Oklahoma* did not uphold the specific challenge made by a downstream state, the Court affirmed the requirement that federal pollution discharge permits "shall not be issued '[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.'"[94]

The recent First Circuit case of *Upper Blackstone Water Pollution Abatement District v. EPA*[95] cited *Arkansas v. Oklahoma* to rule that the CWA both "grants the EPA authority to require in NPDES permits conditions which ensure compliance with the water quality requirements of downstream states"[96] and that issuance of a permit is precluded "[i]f the imposition of conditions cannot insure such compliance."[97] Interestingly, in the administrative determination from which the appeal was taken, the EPA Environmental Appeals Board opined that section 401(a)(2) required compliance with an affected state's water quality standard, similar to section 401(a)(1) authority: "The statute's prohibition under section 401(a)(2) of issuing a permit that does not 'insure' compliance with water quality standards of all affected states serves a largely parallel function to the certification requirement under section 401(a)(1), which the permit applicant must obtain from the state where the discharge originates."[98]

In *Upper Blackstone*, the court upheld the EPA's imposition of effluent limitations on a sewage plant located in Massachusetts in order to comply with Rhode Island water quality standards.[99] The court affirmed the EPA's obligation under section 401(a)(2) to notify both the origin state and the downstream state "[w]hen an application is made for a discharge which may affect the water

93. *Id.* at 107.

94. *Id.* at 105 (quoting 40 C.F.R. § 122.4(d) (1991)).

95. 690 F.3d 9 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2382 (2013).

96. *Id.* at 15 (citing Arkansas v. Oklahoma, 503 U.S. 91, 105 (1992)).

97. *Id.* at 15 ("[The permitting agency] shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit." (quoting 33 U.S.C. § 1341(a)(2) (2012))); *see also id.* ("No permit may be issued . . . [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States . . . ." (quoting 40 C.F.R. § 122.4(d))).

98. *In re* Upper Blackstone Water Pollution Abatement Dist., Nos. 08-11 to -18, 09-06, 2010 WL 2363514, at *35 (EAB May 28, 2010).

99. *Upper Blackstone*, 690 F.3d at 21.

quality of a downstream state."[100] The court then affirmed the EPA's imposition of lower numeric limits on nitrogen and phosphorus discharge that the EPA had calculated to meet narrative eutrophication standards[101] of Rhode Island (the downstream state).[102]

The court recognized that formulation of effluent limitations to comply with narrative standards "required substantial scientific and technical expertise"; accordingly, its review of both the EPA's interpretation of the CWA and the agency's decision on the effluent limits was deferential.[103] The court held that "where a complex administrative statute, like those the EPA is charged with administering, requires an agency to set a numerical standard, courts will not overturn the agency's choice of a precise figure where it falls within a 'zone of reasonableness.'"[104] The EPA overcame objections by the discharger as to the "uncertainty" of the science and set numeric effluent limits in order to comply with Rhode Island narrative water quality standards to protect fish and wildlife and prevent eutrophication.[105]

100. *Id.* at 15 (citing 33 U.S.C. § 1341(a)(2)).

101. Generally, narrative standards describe a condition to be avoided, such as the impairment of fish or biota, or the presence of undesirable slimes, sediments, or residues. *See Water Quality Criteria*, EPA WATER QUALITY STANDARDS, http://water.epa.gov/scitech/swguidance/standards/crit.cfm (last visited Nov. 30, 2014). Numeric standards are effluent limitations on specific pollutants. *See id.*

102. *Id.* at 21. The court noted that the permits had been reviewed and approved in a 106 page opinion by the Environmental Appeals Board. *Id.* at 19 ("After thorough review of the record materials, the Board considered and addressed each of the parties' various objections to the permit's nitrogen, phosphorus, and aluminum limits. It found the [sic] that the available science and data concerning both the District's discharge as well as the quality of the affected waters supported the EPA's judgment to impose the tighter permit limits on the three chemical elements." (citation omitted)).

103. *Id.* at 20–21.

104. *Id.* at 28.

105. *Id.* at 23–24. Rhode Island's narrative water quality regulations required that waters "be free of pollutants in concentrations that adversely affect the composition of fish and wildlife; adversely affect the physical, chemical, or biological integrity of the habitat; interfere with the propagation of fish and wildlife; or adversely alter the life cycle functions, uses, processes, and activities of fish and wildlife." *Id.* at 16. "With respect to nutrient pollution," Rhode Island's standards required that waters "be free of nutrients in such concentration that would impair any [designated uses] . . . or cause undesirable or nuisance aquatic species associated with cultural eutrophication." *Id.*

In other situations, the EPA has interpreted CWA section 401(a)(2) to prevent the Agency from issuing or allowing an upstream state to issue an NPDES permit that would have violated a downstream state's water quality standards. In an administrative case involving Massachusetts' Attleboro Wastewater Treatment Plant, the EPA Environmental Appeals Board declined to review a federal NPDES permit that imposed effluent limits based on the water quality standards of the downstream state of Rhode Island.[106] As in the *Upper Blackstone* case, the EPA imposed permit conditions on a Massachusetts discharger under the authority of section 401(a)(2) in order to comply with the narrative water quality standards of downstream Rhode Island.[107] In the *Attleboro* proceeding, the EPA explained that compliance with downstream state water quality requirements was mandated under both section 401(a)(2) and under federal regulations implementing the NPDES program.[108] Since the downstream state had narrative criteria, but no numeric criteria, to prevent eutrophication, the EPA was obligated to follow regulatory guidance on how to translate state narrative water quality standards into numeric requirements.[109]

106. *In re* City of Attleboro, MA Wastewater Treatment Plant, 14 E.A.D. 398 (EAB 2009).

107. *Id.* at 405, 409.

108. *Id.* at 404–05.

109. *Id.* at 407, 407–08 n.11 ("Where a State has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable State water quality standard, the permitting authority must establish effluent limits using one or more of the following options: (A) Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived using a proposed State criterion, or an explicit State policy or regulation interpreting its narrative water quality criterion, supplemented with other relevant information which may include: EPA's Water Quality Standards Handbook, October 1983, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents; or (B) Establish effluent limits on a case-by-case basis, using EPA's water quality criteria, published under section 304(a) of the Clean Water Act, supplemented where necessary by other relevant information; or (C) Establish effluent limitations on an indicator parameter for the pollutant of concern." (citing 40 C.F.R. § 122.44(d)(1)(vi) (2009)).

Several years before, the EPA had similarly required compliance with downstream Rhode Island's water quality standards to limit cooling water withdrawals for New England's largest power station.[110] Rhode Island had objected that the permit conditions, as originally proposed, would have resulted in a violation of its temperature regulations and its narrative criteria for the protection of aquatic life.[111] The EPA Environmental Appeals Board acknowledged that permits must reflect the most stringent standards of any downstream state[112] and held that it was appropriate for the EPA to rely on the downstream state's interpretation of its own water quality standards.[113] The parties eventually reached a settlement that limited flow and heat by ninety-five percent and required a closed-cycle cooling system to comply with both Massachusetts and Rhode Island standards, including narrative general criteria to protect aquatic life.[114]

These cases confirm that federal NPDES permits must ensure compliance with the water quality standards of a downstream state and that the EPA's determination of what is required for compliance will be accorded deference by the courts. Section 401(a)(2) relies on the EPA to effectuate its authority, but when properly applied it can be a powerful mechanism to protect downstream water quality. The strength of the EPA's commitment to its obligation and the efficacy of section 401(a)(2) are closely related. The role played by the EPA is particularly important when tribes qualify for TAS to establish tribal water quality standards and assert authority under section 401.

III. TRIBAL TREATMENT AS A STATE AND THE CLEAN WATER ACT

In 1987, Congress added section 518 to the Clean Water Act, authorizing the EPA to provide TAS to eligible tribes under numerous provisions of the CWA.[115] Available programs include

110. *In re* Dominion Energy Brayton Point, LLC, 12 E.A.D. 490 (EAB 2006).

111. *Id.* at 638–39, 639 n.236.

112. *Id.* at 635–37 (citing 33 U.S.C. § 1311(b)(1)(C) (2006) and 40 C.F.R. § 122.4(d) (2005)).

113. *Id.* at 638–39, 641.

114. *Brayton Point Station: Final NPDES Permit*, EPA, http://www.epa.gov/region1/braytonpoint/index.html (last visited Dec. 1, 2014).

115. Water Quality Act of 1987, Pub. L. No. 100-4, § 518(e), 101 Stat. 7, 77 (1987) (codified as amended at 33 U.S.C. § 1377 (2006)).

setting water quality standards and designating impaired waters,[116] certification of federal permits under section 401,[117] and issuing permits for pollution discharge.[118] Tribes are also included as "states" in the Act's policy goals to preserve rights to allocate water quantity within a state's (or tribe's) jurisdiction.[119] This reinforces the Act's commitment that "[f]ederal agencies shall co-operate with State[, tribal,] and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."[120]

Some scholars have suggested that "the CWA TAS provisions[] were enacted in response to states failing to adequately protect tribal water quality," particularly where water bodies carrying mining and industrial pollution flowed into Indian country.[121] As mining, drilling, and pipeline expansions are proposed across vast stretches of the United States, tribal and non-Native communities alike have concerns about regulatory capture and lack of state diligence in requiring compliance with water quality standards.[122]

116. 33 U.S.C. § 1313.

117. *Id.* § 1341.

118. *Id.* § 1342; *see id.* § 1377(e). The EPA was also authorized to treat tribes as states for research funding (§ 1254), pollution control grants (§ 1256), water quality reports (§ 1315), inspecting pollution sources (§ 1318), enforcing violations of water quality standards (§ 1319), grants to control lake eutrophication (§ 1324), identifying best management practices for non-point source pollutants (§ 1329), state dredge and fill permits (§ 1344), and monitoring coastal beaches for pathogens (§ 1346). *See* 33 U.S.C. § 1377(e).

119. *See* 33 U.S.C. § 1251(g).

120. *Id.*

121. Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental "Laboratories,"* COLO. L. REV. (forthcoming) (manuscript at 13), *available* at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2395729; *see also* M. Julia Hook, *Federal Regulatory Delegations to States and Indian Tribes*, 104A ROCKY MTN. MIN. L. INST., ch. 13 (1999); Richard A. Monette, *Treating Tribes as States Under Federal Statutes in the Environmental Arena: Where Laws of Nature & Natural Law Collide*, 21 VT. L. REV. 111, 114 (1996) (explaining that tribes in New Mexico began actively lobbying Congress for TAS status after the State of New Mexico "exempted from its water quality regulations a stretch of the San Juan River which flowed through several mining and industrial areas, and then into Indian Country, particularly Acoma and Isleta Pueblos").

122. The author has had direct experience for the past five years with communities raising concerns, including that state regulatory authorities have issued or indefinitely extended wastewater discharge permits that lack effluent limitations, granted variances and extended compliance schedules that allow violations of water quality standards, and allowed wetlands destruction that

Determining tribal qualification for TAS is currently a somewhat complicated process. The CWA specifies that in order to qualify, a tribe must (1) demonstrate that it "has a governing body carrying out substantial governmental duties and powers"; (2) describe "the functions to be exercised . . . pertain[ing] to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation"; and (3) demonstrate that "the Indian tribe is capable . . . of carrying out the functions to be exercised."[123]

EPA regulations elaborate on these statutory requirements. Tribes are required to map and establish the basis for their authority over the reservation surface waters they propose to regulate and allow comments from other entities regarding the tribe's assertion of authority.[124] These EPA regulations pertaining to tribal treatment as a state include amendments made in 1991[125] and 1994[126] to make the prequalification process less burdensome to tribes.[127] Yet, of more than 566 recognized tribes in the United States,[128] only 48 have been found eligible to administer a water

compromises water quality and habitats needed to support tribal exercise of usufructuary rights. This problem is not unique to state officials. *See* Sidney A. Shapiro, *Blowout: Legal Legacy of the Deepwater Horizon Catastrophe: The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221, 221–23 (2012). The problem is not even unique to the United States. *See generally* Greg Simmons, *Clearing the Air? Information Disclosure, Systems of Power, and the National Pollution Release Inventory*, 59 MCGILL L.J. 9 (2013).

123. 33 U.S.C. § 1377(e).

124. 40 C.F.R. § 131.8(b)(i), (c)(3) (2014).

125. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876 (Dec. 12, 1991) (codified as amended at 40 C.F.R. pt. 131).

126. Indian Tribes; Eligibility for Program Authorization, 59 Fed. Reg. 64,339 (Dec. 14, 1994) (codified as amended at 40 C.F.R. pts. 123–124, 131, 142, 144–145, 233, 501).

127. *See id.* ("The Agency's 'TAS' prequalification process has proven to be burdensome, time-consuming and offensive to tribes. Accordingly EPA has adopted a new policy to improve and simplify the process and this regulation implements the new policy.").

128. According to the Bureau of Indian Affairs, "there are 566 federally recognized American Indian and Alaska Native tribes and villages" in the United States. *See Frequently Asked Questions*, BUREAU INDIAN AFF., http://www.bia.gov/FAQs (last visited Nov. 10, 2014).

quality standards program under section 303(c) of the CWA and 39 of these have had their initial water quality standards approved by the EPA.[129] No tribes have qualified for TAS to secure authority to issue NPDES pollution permits, and no tribes have qualified either to identify impaired waters or to set load allocations for pollutants under the total maximum daily load process.[130]

The EPA has taken the position that the Agency must make a separate determination of tribal qualification before approving each CWA program,[131] although section 518 of the CWA contains no such requirement.[132] The EPA has yet to provide guidance on

129. *Indian Tribal Approvals*, EPA, http://water.epa.gov/scitech/swguidance/standards/wqslibrary/approvtable.cfm (last visited Dec. 1, 2014). Tribes with TAS approval under section 303 of the CWA include: Assiniboine and Sioux Tribes, Bad River Band of Lake Superior Chippewa Tribe; Big Pine Band of Owens Valley Paiute Shoshone Indians; Blackfeet Tribe; Confederated Salish and Kootenai Tribes; Confederated Tribes of the Chehalis Reservation; Confederated Tribes of the Umatilla Reservation; Confederated Tribes of the Warm Spring Reservation; Coeur D'Alene Tribe; Dry Creek Rancheria of Pomo Indians; Havasupai Tribe; Hoopa Valley Tribe; Hopi Tribe; Hualapai Indian Tribe; Kalispel Indian Community; Lac du Flambeau Band of Lake Superior Chippewa Indians; Lummi Tribe; Makah Indian Tribe; Miccosukee Tribe of Indians; Fond du Lac Band of Lake Superior Chippewa Tribe; Grand Portage Band of Lake Superior Chippewa Tribe; Navajo Nation; Northern Cheyenne Tribe; Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony; Pawnee Nation; Port Gamble Indian Community; Pueblo of Acoma; Pueblo of Isleta; Pueblo of Nambe; Pueblo of Picuris; Pueblo of Pojoaque; Pueblo of San Juan; Pueblo of Sandia; Pueblo of Santa Clara; Pueblo of Taos; Pueblo of Tesque; Puyallup Tribe; Pyramid Lake Paiute Tribe; Saint Regis Mohawk Tribe; Seminole Tribe of Florida; Shoshone-Bannock Tribes of the Fort Hall Reservation; Sokaogon Chippewa Community; Spokane Tribe; Swinomish Indians; Tulalip Tribes of the Tulalip Reservation; Twenty-Nine Palms Band of Mission Indians; Ute Mountain Tribe; and White Mountain Apache Tribe. *Id.*

130. Sarah Furtak, *Rulemaking to Provide More Opportunities for Tribes to Engage in the Clean Water Act Impaired Water Listing & Total Maximum Daily Load Program*, EPA 7 (Apr. 29, 2014), http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/webinar-tas-303d-rule-042914.pdf. However, 266 tribes have received pollution control grants from the EPA. *Id.*

131. Indian Tribes: Eligibility for Program Authorization, 59 Fed. Reg. at 64,340 ("EPA believes that the Agency must make a specific determination that a tribe has adequate jurisdictional authority and administrative and programmatic capability before it approves each tribal program.").

132. *See* 33 U.S.C. § 1377(e)(2) (2012) (requiring that any tribal functions exercised pertain to waters over which the tribe has authority, but not requiring separate qualification processes to exercise more than one function under the statute).

how tribes qualified for a water quality standards program may assume NPDES permitting authority or exercise authority to identify waters that are impaired due to excessive pollution.[133] However, EPA regulations clearly provide that a tribe found to meet the criteria authorizing TAS "for purpose[s] of the Water Quality Standards program is likewise qualified" for TAS for section 401(a)(1) certification authority.[134] The tribe need not make a separate application for certification authority under section 401.[135]

With TAS status, a tribe has section 401(a)(1) veto authority over federal permits if the discharge originates in waters within its reservation over which the tribe has authority.[136] This authority applies to section 404 dredge and fill permits issued by the Corps and to EPA general permits,[137] as well as to EPA section 402 NPDES discharge permits and FERC hydroelectric dam licenses that are subject to section 401.[138] The EPA has stated that "[m]any state and tribal governments use [section] 401 certification as one of their primary regulatory tools for protecting water quality."[139] States vary

133. Furtak, *supra* note 130, EPA, at 2–3, 8.

134. 40 C.F.R. § 124.51(c).

135. *See* Indian Tribes: Eligibility for Program Authorization, 59 Fed. Reg. at 64,342 ("It is EPA's position that tribes clearly have 401 authority once they receive approval of their WQS . . . ."); *see also* EPA 2010 SECTION 401 HANDBOOK, *supra* note 55, at 6.

136. *See* 33 U.S.C. §§ 1341(a)(1), 1377(e); 40 C.F.R. § 131.8; *see also* EPA 2010 SECTION 401 HANDBOOK, *supra* note 55, at 6.

137. EPA general permits cover discharges in areas where the EPA is the NPDES permitting authority and may cover multiple facilities that have similar discharges and are located in a specific geographic area, including general permits for pesticide application and vessels. *NPDES General Permit Inventory*, EPA, http://cfpub.epa.gov/npdes/permitissuance/genpermits.cfm (last visited Dec. 25, 2014). EPA also issues general permits to cover stormwater discharge from construction activities, *EPA Construction General Permit (CGP)*, EPA, http://water.epa.gov/polwaste/npdes/stormwater/EPA-Construction-General-Permit.cfm (last visited Dec. 25, 2014); stormwater discharge associated with industrial activity, *EPA's Multi-Sector General Permit (MSGP)*, EPA, http://water.epa.gov/polwaste/npdes/stormwater/EPA-Multi-Sector-General-Permit-MSGP.cfm (last visited Dec. 25, 2014); and various offshore discharges, *NPDES General Permits*, EPA http://www.epa.gov/Region6/water/npdes/genpermit/index.htm (last visited Dec. 25, 2014).

138. EPA 2010 SECTION 401 HANDBOOK, *supra* note 55, at 1–2; *see* 33 U.S.C. § 1377(e).

139. EPA 2010 SECTION 401 HANDBOOK, *supra* note 55, at 21 (citing ENVTL. LAW INST., STATE WETLAND PROGRAM EVALUATION: PHASE I, at 96 (2005) [hereinafter ENVTL. LAW INST., PHASE I]; ENVTL. LAW INST., STATE WETLAND

in the frequency with which they waive section 401 certification.[140] Certifications are rarely denied,[141] and conditional certifications may or may not be sufficiently stringent to protect water resources.

Several cases describe how tribes have exercised section 401 certification authority to condition or exclude tribal waters from application of general federal permits. In *Lake Carriers Ass'n v. EPA*, two tribes, as well as twenty-five states and one territory, proposed conditions that were incorporated into the national EPA vessel general permit.[142] In 2013, the Coeur d'Alene Tribe and the Shoshone Bannock Tribe denied certification for a general NPDES permit that would allow small suction dredges for Idaho mines.[143] As a result of tribal exercise of section 401 authority, the general permit for these small dredges does not apply to any of the five reservations with land in Idaho.[144] Tribes have also used section 401 authority to limit the application of a multi-sector general permit allowing stormwater discharge from industrial activities, such as mining, manufacturing, and oil and gas extraction.[145] In several

PROGRAM EVALUATION: PHASE II, at 14 (2006) [hereinafter ENVTL. LAW INST., PHASE II]).

140. Some states rarely waive section 401 certification. *See* ENVTL. LAW INST., PHASE I, *supra* note 139, at 30 (finding that less than 1% of certificates were waived in Arkansas). Other states waive a substantial proportion of certificates. *See* ENVTL. LAW INST., STATE WETLAND PROGRAM EVALUATION: PHASE III, at 82 (2007) (finding that 20% of certifications are waived; in Minnesota, for several years, nearly all certifications were waived); ENVTL. LAW INST., STATE WETLAND PROGRAM EVALUATION: PHASE IV, at 41 (2007) [hereinafter ENVTL. LAW INST., PHASE IV] ("In 2001, the MPCA [Minnesota Pollution Control Agency] §401 water quality certification program was scaled back, due to budget constraints, and between 2001 and 2006, most federal applications needing §401 certification were waived. The MPCA receives an annual average of 60 to 70 applications for projects requiring individual §404 certification, and so roughly 300 applications for §401 certification were received during this five-year period. Only one application was denied.").

141. *See, e.g.*, ENVTL. LAW INST., PHASE IV, *supra* note 140, at 22, 41, 107, 117, 141 (finding that "a small number" of section 401 certificates were denied in Delaware, 1%–2% were denied in Indiana, less than 5% were denied in Nevada, approximately 5% were denied in New Hampshire, and in Oklahoma only one certification request was denied in six years).

142. Lake Carriers Ass'n v. EPA, 652 F.3d 1, 5 (D.C. Cir. 2011); *see supra* Part II.A.

143. Final Issuance of General NPDES Permits (GP) for Small Suction Dredges in Idaho, 78 Fed. Reg. 20316-01 (Apr. 4, 2013).

144. *Id.*

145. Final National Pollutant Discharge Elimination System (NPDES) General

states where these general permits were allowed for dischargers—including Alaska, Idaho, Oregon, and Washington—certain reservations and other Indian lands were excluded from the stormwater permit through tribal exercise of section 401 authority, and various limitations and conditions in the certifications were included in the general permit.[146]

Lack of qualification for TAS may prevent tribes from broader exercise of section 401(a)(1) rights. For example, in *Tacoma v. FERC*, the Skokomish Tribe challenged a hydroelectric plant license that diverted water from the North Fork River, seriously impairing the Tribe's reserved fishing rights.[147] The Tribe's primary claim was that FERC erred by conducting a relicensing proceeding rather than an original licensing proceeding, and this claim was rejected by the court.[148] However, the court criticized the State's section 401 certification as non-compliant with law[149] and authorized the Secretary of the Interior to impose conditions under the Federal Power Act to mitigate impacts on the Tribe's reserved rights.[150] Potential tribal section 401 objections or conditions were not considered, since the Skokomish Tribe had not been qualified for TAS.[151]

Permit for Stormwater Discharges From Industrial Activities, 74 Fed. Reg. 8789 (Feb. 26, 2009).

146. *See id.* at 8790 ("Since September 2008, EPA received final certifications under the Clean Water Act Section 401 from the States of Alaska and Idaho; the Lummi Tribe, the Confederated Tribe of the Umatilla Indians; and the Puyallup Tribe of Indians. Accordingly, permit coverage under the MSGP is now available to dischargers in the following areas: The State of Alaska, except Indian Country lands; The State of Idaho, except Indian Country lands; Indian Country lands within the State of Idaho, except Duck Valley Reservation lands; Indian Country lands within the State of Oregon, except Fort McDermitt Reservation lands; Indian Country lands within the State of Washington; and Federal facilities in the State of Washington, except those located on Indian Country lands. Pursuant to CWA section 401(d), the limitations and requirements contained in these certifications are now conditions of the MSGP and are included in Part 9.10 of the permit.").

147. 460 F.3d 53, 59, 62 (D.C. Cir. 2006) ("[T]he Tribe relies on article 4 of the Treaty of Point No Point, which provides in relevant part: '[t]he right of taking fish at usual and accustomed grounds and stations is . . . secured to said Indians . . . .' While the Tribe arguably still has the right to 'tak[e] fish at usual and accustomed grounds,' that right is now of little value, because the water has disappeared, and with it, the fish." (citation omitted)).

148. *Id.* at 64.

149. *Id.* at 67–68.

150. *Id.* at 67.

151. As of 2014, the Skokomish Tribe has not qualified for TAS. *See Indian*

In addition to the difficulty in qualifying for TAS, geography may limit application of section 401 to protect water resources of tribes potentially impacted by mining, pipelines, or other industrial activities. Tribal reservations in many areas of the United States are relatively small areas of land.[152] Even if reservation acreage is not small, resources that tribal members seek to harvest may be outside reservation boundaries.[153] In either case, threats to water quality could originate off the reservation. The following sections of this article discuss the scope of tribal authority under the CWA and the protection of tribal resources both within and outside of reservations, laying a foundation for broader utilization of section 401 to protect tribal waters and reserved rights.

IV. SCOPE OF TRIBAL CLEAN WATER ACT AUTHORITY

Tribal jurisdiction under the CWA to regulate water quality extends to non-Indian activities on non-Indian fee land within a reservation. Although constraints have been applied to the exercise of other forms of tribal authority where a reservation has a "checkerboard" pattern of land ownership,[154] neither the courts nor

Tribal Approvals, *supra* note 129 (providing the most current information regarding tribes that have qualified for treatment as states).

152. For example, reservations in Northeastern Minnesota where new and expanded mines have been proposed are relatively small. *See Minnesota's Tribal Reservations and Communities*, MINN. DEP'T HEALTH, http://www.health.state.mn.us/divs/opi/gov/chsadmin/governance/tribal.html (last visited Dec. 1, 2014). It is instructive to compare boundaries of Minnesota reservations with lands ceded to the United States under treaties. *See Mdewakanton Band of the Dakota Nation (Part II)*, HENNEPIN COUNTY LIBR., https://apps.hclib.org/collections/mplshistory/?id=2 (last visited Dec. 1, 2014) (map of Native land cessions in Minnesota, 1837-1889).

153. For example, the Penokee Range iron deposits in Wisconsin (sought to be mined by the Gogebic Taconite mining project) are outside the boundaries of Wisconsin's Bad River Reservation. *See Penokee Range Iron Deposit*, LAND INFO. & COMPUTER GRAPHICS FACILITY, http://www.lic.wisc.edu/glifwc/web/mining/Badriv1.jpg (last visited Dec. 1, 2014).

154. The term "checkerboard" refers to a pattern of reservation land ownership that has its legacy in the federal government's policy of allotment in the late nineteenth century, in which parcels of communally held reservation land were allotted to individual Indians. Many of these allotted parcels were eventually transferred to non-Indians. Today, many of these non-Indian parcels are interspersed with parcels owned by individual Indians as well as trust lands held by the tribe, creating a "checkerboard" pattern. *See* Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf*, 38 Tulsa L. Rev. 5, 7 (2002).

the EPA have found such constraints applicable to tribal regulation of water quality under the CWA.

A. Tribal Jurisdiction and Regulatory Authority on Non-Indian Fee Land

The lead case suggesting that tribal regulatory authority over non-Indians on non-Indian fee land within a reservation may be restricted is *Montana v. United States*,[155] decided by the United States Supreme Court in 1981. The Crow Tribe of Montana, by tribal resolution, "prohibit[ed] hunting and fishing within its reservation by anyone who [was] not a member of the tribe."[156] "The state of Montana, however, continued to assert its authority to regulate hunting and fishing by non-Indians within the reservation."[157] The United States, "in its own right and as fiduciary for the Tribe," attempted to resolve the conflict through a quiet title action asserting federal ownership and trusteeship on the disputed lands.[158]

The Supreme Court concluded that the Crow Tribe did not have the power to regulate non-Indian fishing and hunting on non-Indian fee land within the reservation pursuant to the Tribe's treaties[159] or its inherent sovereignty.[160] However, the Court also defined two exceptions where Indian tribes would "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."[161] The Court held that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[162] The Court additionally held that "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[163]

155. 450 U.S. 544 (1981).
156. *Id.* at 544.
157. *Id.*
158. *Id.* at 549.
159. *Id.* at 559.
160. *Id.* at 564–65.
161. *Id.* at 565.
162. *Id.*
163. *Id.* at 566.

The Supreme Court continued to struggle with the concept of Indian authority to regulate the activities of non-Indians on non-Indian fee land in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*.[164] In *Brendale*, the Court reviewed tribal zoning authority over fee land owned in a "checkerboard pattern" throughout the reservation of the Yakima Nation.[165] The Court applied the exceptions in *Montana v. United States* to deny the Tribe authority over a parcel in the "open area" of the reservation, where much of the land was owned in fee by Indians and non-Indians, on the grounds that the use of the non-Indian fee land had no effect on the Tribe and thus implicated no protectable interest.[166] As to a parcel in the "closed area" of the reservation closed to the general public, where most of the land was held in trust by the United States for the Tribe, a plurality of the Court affirmed tribal authority to enforce zoning limitations on development.[167]

Justice White, delivering the plurality opinion for the "open area" property over which regulatory authority was denied,[168] relied on *Montana* to hold that the Yakima Nation's regulatory power under its treaty did not extend "to lands held in fee by non-Indians."[169] However, the Court held that "a tribe's treaty power . . . is not the only source of Indian regulatory authority":

> [T]ribes have inherent sovereignty independent of that authority arising from their power to exclude. Prior to the

164. 492 U.S. 408 (1989).

165. *Id.* at 414 (plurality opinion for Nos. 87-1697 and 87-1711).

166. *Id.* at 431–32.

167. *Id.* at 432–33. "Open" and "closed" areas of the reservation are described *id.* at 415. The Brendale property was owned by a part-Indian, who was not a member of the Yakima Nation in the "closed area" of the reservation, and the Wilkinson parcel was owned by a non-Indian in the in the "open area" of the reservation. *Id.* at 417–18.

168. Justice White was joined by Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy in rendering the plurality opinion that the Tribe had no zoning authority over the Wilkinson property, located in the "open area" of the reservation. *Id.* at 414–21.

169. *Id.* at 425. The treaty between the United States and the Yakima Indian Nation provided that the Tribe would retain its reservation for its "exclusive use and benefit," and that "no white man [shall] be permitted to reside upon the said reservation without [the Tribe's] permission." *Id.* at 414. Justice White, for the Court's plurality, found that alienations under the Allotment Act abrogated the exclusive use of lands already allotted and that the subsequent enactment of the Indian Reorganization Act did not restore the Tribe's exclusive use of these lands. *Id.* at 422–23.

> European settlement of the New World, Indian tribes were self-governing sovereign political communities and they still retain some elements of quasi-sovereign authority after ceding their lands to the United States and announcing their dependence on the Federal Government. Thus, an Indian tribe generally retains sovereignty by way of tribal self-government and control over other aspects of its internal affairs.[170]

The *Brendale* plurality then applied the *Montana* exception that "[a] tribe may also retain inherent power to exercise civil authority . . . when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[171] The tribe's "protectable interest" in what occurs on non-Indian fee land would require a showing that adverse impact on the tribe is "demonstrably serious" and imperils "the political integrity, the economic security, or the health and welfare of the tribe."[172] This standard, the plurality suggested, "will sufficiently protect Indian tribes while at the same time avoiding undue interference with state sovereignty and providing the certainty needed by property owners."[173]

Justice Stevens, writing for the Court to uphold tribal zoning regulation in the "closed area" of the reservation,[174] explained that tribes may have "concurrent jurisdiction" with other governmental authorities and "overlapping land-use regulations are not inherently suspect" in Indian law jurisprudence.[175] Non-Indian fee ownership "does not deprive the Tribe of the right to ensure that this area maintains its unadulterated character," particularly when "the zoning rule at issue is neutrally applied, is necessary to protect the welfare of the Tribe, and does not interfere with any significant state or county interest."[176]

170. *Id.* (citations omitted) (internal quotation marks omitted).

171. *Id.* at 428 (quoting Montana v. United States, 450 U.S. 544, 566 (1981)).

172. *Id.* at 430–31.

173. *Id.* at 431.

174. Justice Stevens was joined by Justice O'Connor in concurring with the opinion regarding the Wilkinson property and in rendering the plurality opinion that the Tribe had zoning authority over the Brendale property, located in the part of the reservation that had been until recently "closed" to the public. *Id.* at 433–48 (plurality opinion for No. 87-1622).

175. *Id.* at 440 n.3.

176. *Id.* at 444.

Justice Blackmun[177] articulated a broader view of tribal sovereignty, explaining, "*Montana* must be read to recognize the inherent authority of tribes to exercise civil jurisdiction over non-Indian activities on tribal reservations where those activities, as they do in the case of land use, implicate a significant tribal interest."[178] Justice Blackmun noted that "the Court only once prior to *Montana* (and never thereafter) has found an additional sovereign power to have been relinquished upon incorporation."[179] He explained that *Montana* "stands for no more than that tribes may not assert their civil jurisdiction over nonmembers on fee lands absent a showing that, in *Montana*'s words, 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.'"[180]

Despite its singular facts and split decision, the import of the *Brendale* case is that the *Montana* holding denying tribal jurisdiction over non-Indians on the reservation should have limited application. The *Montana* exceptions, recognizing tribal inherent sovereignty when the tribe has a protectable interest in its integrity, security, health or welfare, become central to the analysis of tribal civil jurisdiction, including tribal authority under the Clean Water Act.

B. Tribal Regulatory Authority over Reservation Water Quality

Divergent views with respect to tribal authority over zoning, thankfully, have not permeated lower court case law with respect to tribal regulation of water. Shortly after *Montana* was decided, the Ninth Circuit upheld the Tribes' reservation of waters for the protection of fisheries in *Colville Confederated Tribes v. Walton*.[181]

177. Justice Blackmun, joined by Justices Brennan and Marshall, concurred that the tribes had the authority to zone the Brendale property in the "closed area" of the reservation and dissented from the opinion that the tribes lacked similar authority over the Wilkinson tract in the "open area" of the reservation. *Id.* at 448–68 (Blackmun, J., concurring in part, dissenting in part).

178. *Id.* at 450.

179. *Id.* at 453.

180. *Id.* at 459. Since the *Montana* case was argued by the United States as a matter of title and trusteeship, apparently no record was made by the Tribe that the non-Indians whose fishing and hunting the Tribe sought to regulate were in any measure affecting an identifiable tribal interest. *See* Montana v. United States, 450 U.S. 544, 558 n.6 (1981).

181. 647 F.2d 42, 42 (9th Cir. 1981).

Although the non-Indian fee owner of allotted lands had private water rights as well, the court found an implied reservation of water and concluded that the Tribe could regulate use of water that interfered with tribal rights.[182] In its ruling, the court cited the *Montana* case for the proposition that tribes retained "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the health and welfare of the tribe. This includes conduct that involves the tribe's water rights."[183]

Courts have specifically found broad tribal jurisdiction under the CWA. In the leading case of *Montana v. EPA*,[184] the State of Montana "attack[ed the] EPA's decision to grant TAS status to the [Flathead] Tribes" to promulgate water quality standards applicable to "all sources of pollutant emissions within boundaries of the Reservation, regardless of whether the sources are located on land owned by members or non-members of the Tribe."[185] The Ninth Circuit affirmed summary judgment for the EPA and upheld the Tribe's TAS status.[186] The court noted that tribes applying for TAS with respect to all surface waters within a reservation are required by EPA regulations to demonstrate, consistent with the holding from *Montana v. United States*, "that the regulated activities affect the political integrity, the economic security, or the health or welfare of the tribe."[187] The circuit court cited its previous ruling in the *Colville* case that "'[a] tribe retains the inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the health and welfare of the tribe,'"[188] and affirmed the EPA's decision that "the activities of the non-members posed such serious and substantial threats to Tribal health and welfare that Tribal regulation was essential."[189]

182. *Id.* at 48–49.
183. *Id.* at 52 (citations omitted).
184. 137 F.3d 1135 (9th Cir. 1998).
185. *Id.* at 1138.
186. *Id.* at 1142.
187. *Id.* at 1139 (quoting Montana v. United States, 450 U.S. 544, 566 (1981)).
188. *Id.* at 1141 (quoting *Colville Confederated Tribes*, 647 F.2d at 52).
189. *Id.* The court further explained, citing *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), that its decision "is also fully consistent with the only other circuit opinion that has yet considered the issue of tribal authority to set water quality standards." *Montana v. EPA,* 137 F.3d at 1141.

In addition, courts have held that authority to regulate water pollution is delegated to tribes "when the federal government acquires land in trust for Indians."[190] The Seventh Circuit recently ruled in *Oneida Tribe of Indians v. Village of Hobart* that a local village could not regulate stormwater runoff on lands held by the United States in trust for the Oneida Tribe.[191] The court explained, "'Indian treaties, executive orders, and statutes preempt state laws that would otherwise apply by virtue of the states' residual jurisdiction over persons and property within their borders.'"[192] "[W]hen the federal government acquires land in trust for Indians, the consequence is to 'reestablish [tribal] sovereign authority' over that land."[193] As a result of this federal trust relationship, "States and their subdivisions are not authorized to regulate stormwater and other pollution on Indian lands, including Indian trust lands."[194] The court further explained that the CWA governs Indian lands, "[b]ut it is the Indian governments of those lands, in this case the government of the Oneida Tribe, rather than states, that can be delegated regulatory authority under the Act."[195]

The tribal court of appeals in *Hoover v. Colville Federated Tribes* similarly ruled that federal delegation of tribal authority to regulate water quality extends to non-Indian activities on non-Indian fee land within the reservation.[196] The Court explained, "Tribes have express delegated authority to regulate water quality within the Reservation."[197]

EPA regulations generally preclude states from administering water quality programs within reservations and define Indian country as including all land within the limits of an Indian reservation, notwithstanding land ownership.[198] Since at least 2010,

190. Oneida Tribe of Indians v. Vill. of Hobart, 732 F.3d 837, 839 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2661 (2014).

191. *See id.* at 841.

192. *Id.* at 839 (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 29, § 2.01[2]).

193. *Id.* (quoting City of Sherrill v. Oneida Indian Nation, 554 U.S. 197, 221 (2005)).

194. *Id.* at 840.

195. *Id.* (citing 33 U.S.C. § 1377(e)(2) (2012); 40 C.F.R. § 122.31(b) (2014)).

196. Hoover v. Colville Confederated Tribes, 6 CCAR 16, 3 CTCR 44 (Colville App. 2002).

197. *Id.* at 29.

198. *See In re* Circle T Feedlot, Inc., 14 E.A.D. 653, 667–671 (EAB 2010); 40 C.F.R. § 123.1(h).

the EPA has recognized prevailing legal authority that "tribal water quality standards and [section] 401 certification authority extend to non-Indian fee land within a reservation."[199]

The EPA has recently proposed that CWA section 518 be interpreted "as a delegation by Congress of authority to eligible tribes to administer Clean Water Act regulatory programs over their reservations, regardless of land ownership."[200] This reinterpretation would remove the current requirement that tribes applying for TAS status "need to demonstrate their inherent regulatory authority,"[201] or "where the tribe's reservation includes nonmember-owned fee lands, the [requirement to] demonstrate that nonmember activities on nonmember-owned fee lands could have a substantial, direct effect on the tribe's health or welfare."[202] The EPA states that this "potential reinterpretation is supported by: the plain language of section 518; a similar approach applied in implementing the Clean Air Act TAS provisions; and relevant judicial cases and [the] EPA's experience since 1991."[203] The EPA believes that the reinterpretation could significantly reduce the time and effort for tribes to apply for and receive treatment as a state status.[204]

Although section 518 should be understood as an express federal delegation of CWA authority to tribes requiring no additional proof of authority, tribal regulation of water quality has also been recognized as inherent to tribal sovereignty. Case law requiring application of more stringent tribal water quality standards to control pollution originating off the reservation recognizes the power inherent in that sovereignty.

199. EPA 2010 SECTION 401 HANDBOOK, *supra* note 55, at 7 (citing Montana v. EPA, 137 F.3d 1135, 1141 (9th Cir 1998)).

200. Letter from Elizabeth Southerland, Dir., Office of Sci. and Tech., EPA, to Intergovernmental Assoc. Colleagues (June 18, 2004), *available at* http://water.epa.gov/scitech/swguidance/standards/wqslibrary/upload/TAS-letter-to-state-assocs-6-18-14_final.pdf.

201. *Id.*

202. EPA OFFICE OF SCI. & TECH., POTENTIAL REINTERPRETATION OF A CLEAN WATER ACT PROVISION REGARDING TRIBAL ELIGIBILITY TO ADMINISTER REGULATORY PROGRAMS 1 (2014).

203. *Id.*

204. *Id.* The EPA anticipates that this interpretive rule is not likely to become effective before fall 2015. *Id.* at 2.

In the lead case of *City of Albuquerque v. Browner*,[205] the City of Albuquerque filed a claim against the EPA, challenging the EPA's approval of Isleta Pueblo's status for TAS under the CWA and the subsequent imposition of the Tribe's more stringent water quality standards for the city's waste treatment facility.[206] The Tenth Circuit affirmed summary judgment for the EPA.[207]

The court affirmed the EPA's interpretation of the CWA to allow tribes to set standards that are more stringent than required by federal law, ruling that the practice by which tribes "may establish water quality standards that are more stringent than those imposed by the federal government . . . is permissible because it is in accord with powers inherent in Indian tribal sovereignty."[208] The court also held that the EPA's enforcement of these more stringent tribal standards against upstream polluters was consistent with the ruling in *Arkansas v. Oklahoma*.[209] The court explicitly affirmed that tribal regulation could have effects outside reservation boundaries as the EPA exercised its own authority in issuing NPDES permits including "the authority to require upstream NPDES dischargers, such as Albuquerque, to comply with downstream tribal standards."[210]

Although in *City of Albuquerque v. Browner* the EPA exercised permitting authority under the CWA so tribes were "not applying or enforcing their water quality standards beyond reservation boundaries,"[211] the court's footnote to its decision suggests that, under *Montana v. United States*, tribes could have broader authority: "Indian tribes could have inherent jurisdiction over non-Indian conduct or non-Indian resources if there is 'some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'"[212]

It is important to recognize that similar conflicts could arise between upstream state standards and more stringent downstream tribal standards in situations where the EPA is not the NPDES

205. 97 F.3d 415 (10th Cir. 1996).
206. *Id.* at 418–19.
207. *Id.* at 429.
208. *Id.* at 423.
209. *Id.* at 422 (citing Arkansas v. Oklahoma, 503 U.S. 91, 106 (1992)).
210. *Id.* at 424.
211. *Id.*
212. *Id.* at 424 n.14 (quoting Montana v. United States, 450 U.S. 544, 566 (1981)).

permitting authority. In such cases, the EPA would have the authority to object to the upstream NPDES permit and, if necessary, to override the state and assume permitting authority.[213] Where the two jurisdictions in conflict over NPDES requirements were both states, the EPA has vetoed a state permit and assumed authority to issue a permit for an upstream discharge that, among other concerns, did not meet the downstream state's water quality standards.[214]

The Seventh Circuit, in *Wisconsin v. EPA*,[215] took one step further to establish a conceptual framework for tribal regulation of water quality beyond the confines of the reservation. In Wisconsin, the Sokaogon Chippewa Community—also known as the Mole Lake Band of Lake Superior Chippewa Indians—sought to regulate the water quality of "lakes and streams adjacent to or surrounded by the reservation."[216] The EPA granted the Band TAS status and Wisconsin sued, both to protect state sovereignty and to prevent tribal regulations from impacting "the state's planned construction of a huge zinc-copper sulfide mine on the Wolf River, upstream from Rice Lake."[217] The court of appeals affirmed summary judgment for the EPA, thus upholding the Band's regulatory authority.[218]

The court found that Wisconsin had waived any argument that "Rice Lake was not 'within the borders' of the reservation" and that the state's "ownership of the waterbeds did not preclude federally approved regulation of the quality of the [lake] water" by the Band.[219] The court also addressed on its merits Wisconsin's challenge to tribal water quality regulation of off-reservation activity, explicitly affirming the "classic extraterritorial effect" of

213. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,887 (Dec. 12, 1991) (codified as amended at 40 C.F.R. pt. 131 (2014)) ("In such cases, as was asserted in the proposal, [the] EPA believes that the Agency has the authority to object to the upstream NPDES permit and, if necessary, to assume permitting authority.").

214. *See* Champion Int'l Corp. v. EPA, 850 F.2d 182, 187 (4th Cir. 1988). The EPA vetoed an NPDES permit for North Carolina to which Tennessee and the EPA objected, eventually exercising jurisdiction. *Id.*

215. 266 F.3d 741 (7th Cir. 2001).

216. *Id.* at 744–45.

217. *Id.* at 745.

218. *Id.* at 743, 750.

219. *Id.* at 746–47.

tribal TAS under the CWA, which "takes this case beyond the scope of *Montana*"[220]:

> Once a tribe is given TAS status, it has the power to require upstream off-reservation dischargers, conducting activities that may be economically valuable to the state (e.g., zinc and copper mining), to make sure that their activities do not result in contamination of the downstream on-reservation waters (assuming for the sake of argument that the reservation standards are more stringent than those the state is imposing on the upstream entity). Such compliance may impose higher compliance costs on the upstream company, or in the extreme case it might have the effect of prohibiting the discharge or the activities altogether.[221]

The court in *Wisconsin v. EPA* recognized that conflicts between jurisdictions are "inevitable" because "activities located outside the regulating entity (here, the reservation), and the resulting discharges to which those activities can lead, can and often will have 'serious and substantial' effects on the health and welfare of the downstream state or reservation."[222] However, the court explained, the EPA can "mediate conflicting interests when a tribe's standards differ from those of a state."[223] The court noted,

> There is no case that expressly rejects an application of *Montana* to off-reservation activities that have significant effects within the reservation. . . . It was reasonable for the EPA to determine that, since the Supreme Court has held that a tribe has inherent authority over activities having a serious effect on the health of the tribe, this authority is not defeated even if it exerts some regulatory force on off-reservation activities.[224]

220. *Id.* at 748 (citation omitted).

221. *Id.*

222. *Id.* at 749.

223. *Id.* In its decision, the court cited 33 U.S.C. § 1341(a) (2012), which concerns the section 401 certification process, and suggested that the "EPA may then ask the tribe to issue a temporary variance from its standards . . . or may ask the state to provide additional water pollution controls." *Id.* EPA regulations provide a dispute resolution mechanism to address the situation where "disputes between States and Indian Tribes arise as a result of differing water quality standards on common bodies of water." 40 C.F.R. § 131.7 (2014).

224. *Wisconsin v. EPA*, 266 F.3d at 749.

The court discussed the EPA's role in evaluating conflicts between more stringent tribal standards and state permits for upstream discharge and development, finding that,

> [b]ecause the Band has demonstrated that its water resources are essential to its survival, it was reasonable for the EPA, in line with the purposes of the Clean Water Act and the principles of *Montana,* to allow the tribe to regulate water quality on the reservation, even though that power entails some authority over off-reservation activities."[225]

Any interpretation of the statutes to deny that power to tribes "would treat tribes as second-class citizens," a result inconsistent with both EPA decisions and congressional authority for treatment of tribes as states.[226]

This precedent pertaining to CWA section 518 treatment as a state has established a framework that recognizes inherent tribal sovereignty over reservation waters due to the serious and substantial effects of water quality on the health and welfare of a tribe. An evolving jurisprudence, supported by EPA guidance and decisions, supports tribal "inherent authority over activities having a serious effect on the health [and welfare] of the tribe; this authority is not defeated even if it exerts some regulatory force on off-reservation activities."[227]

V. PROTECTION OF OFF-RESERVATION TRIBAL RIGHTS

The CWA unambiguously grants tribes authority to protect water quality on the reservation. Before discussing how various sections of the Act might be interpreted or amended to protect water resources beyond reservation boundaries under the CWA where tribal rights are reserved under treaties, precedent addressing both tribal rights and federal obligations to tribes off the reservation must be reviewed. Case law supports tribal co-management of resources both within and outside the reservation in order to exercise fishing and hunting and gathering rights. Precedent also constrains state authority outside the reservation to indirectly interfere with tribal reservation water resources and tribal rights outside reservation boundaries.

225. *Id.* at 750.
226. *Id.*
227. *Id.* at 749.

Cases litigated both by the United States and by tribes have protected tribal reserved rights to fish in waters outside the reservation.[228] As explained below, conflicts between tribal rights and state government authority in the regulation of off-reservation usufructuary rights have been adjudicated to preserve dual management of resources. In a series of Supreme Court cases, the Puyallup Tribe obtained a declaratory judgment to protect its fishing rights in the Tribe's "usual and accustomed grounds and stations" off as well as on the reservation.[229] The Court rejected State of Washington's ban on fishing nets since it was not a "reasonable and necessary conservation measure"[230] and because a ban could deny the Tribe their fair apportionment of fishing runs.[231] However, tribal authority to take unlimited steelhead running through its reservation was also constrained.[232]

In the case of *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, the Supreme Court ruled that treaty language securing to the Yakima Tribe a "right of taking fish . . . in common with all citizens of the Territory"[233] represented not only

228. *See, e.g.*, Tulee v. Washington, 315 U.S. 681, 684 (1942) (reversing a state criminal conviction and upholding tribal off-reservation usufructuary rights that conflicted with state law pertaining to salmon fishing). Cases enforcing treaty rights tend to be prosecuted by tribes as well as by the United States on tribes' behalf. *See, e.g.*, United States v. Washington, 157 F.3d 630 (9th Cir. 1998). The case was litigated by numerous Indian tribes (the Tulalip, Puyallup, Squaxin Island, Makah, Muckleshoot, Upper Skagit, Nooksack, Nisqually, Lummi, Skokomish, Port Gamble S'Klallam, Lower Elwha S'Klallam, Jamestown S'Klallam, Suquamish, Swinomish, Hoh, Stillaguamish, Sauk Suiattle, and Quileute) as well as by the United States on the tribes' behalf. *See id.*

229. *See* Puyallup Tribe v. Dep't of Game of Wash. (*Puyallup III*), 433 U.S. 165, 173–77 (1977) (rejecting Tribe's claim to an unlimited take of steelhead running through its reservation); Dep't of Game of Wash. v. Puyallup Tribe (*Puyallup II*), 414 U.S. 44, 48–49 (1973) (holding that the state could not impose a total ban on the net fishing favored by Indians, since such regulation was not a "reasonable and necessary conservation measure" and would deny the Indians their fair share of the fishing runs); Puyallup Tribe v. Dep't of Game of Wash. (*Puyallup I*), 391 U.S. 392, 398 (1968) (upholding state authority to impose nondiscriminatory regulations on Treaty fishermen only if necessary to conserve fish).

230. *Puyallup I*, 391 U.S. at 401.

231. *Puyallup II*, 414 U.S. at 48 ("If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing.").

232. *Puyallup III*, 433 U.S. at 173–77.

233. 443 U.S. 658, 674 (1979) (quoting Treaty of Medicine Creek, art. 3, Dec.

an "'equal opportunity' for individual Indians . . . to try to catch fish, but instead secure[d] to the Indian tribes a right to harvest a share of each run of anadromous fish [such as salmon and steelhead] that passes through tribal fishing areas."[234] In reaching this conclusion, the Court emphasized that a right that meant no more than an "equal opportunity" for the Yakima "would hardly have been sufficient to compensate them for the millions of acres they ceded to the Territory"[235] and that "the Indians' 'equal *opportunity*' to take advantage of a scarce resource is likely in practice to mean that the Indians' 'right of taking fish' will net them virtually no catch at all."[236]

The most developed example of off-reservation co-management of natural resources may be found in *Minnesota v. Mille Lacs Band of Chippewa Indians* (*Mille Lacs III*).[237] In this case, the Supreme Court held that the Chippewa retain usufructuary rights in ceded territories guaranteed to them under treaties and found, "Indian treaty rights can coexist with state management of natural resources."[238] The Court explained, "States have important interests in regulating wildlife and natural resources within their borders, [but] this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty-making."[239] In *Mille Lacs III*, treaty authority resulted in tribal co-management of resources. A plan for tribal co-management of hunting, fishing, and gathering was developed by the bands and the state, with remaining resource issues decided by the district court and affirmed by the court of appeals.[240] That co-management plan applied to the "Minnesota

26, 1854, 10 Stat. 1133).

234. *Id.* at 659. The Court affirmed the State's conclusion, reflected in regulations challenged by the fishing industry, that the tribe was "entitled to a 45% to 50% share of the harvestable fish." *Id.* at 685–87.

235. *Id.* at 677.

236. *Id.* at 676 n.22.

237. 526 U.S. 172 (1999).

238. *Id.* at 204.

239. *Id.* The United States and other Indian bands, including the Fond du Lac Band, and several Wisconsin bands—St. Croix Chippewa, Lac du Flambeau Band, Bad River Band, Lac Courte Oreilles Indians, Sokaogan Chippewa, and Red Cliff Band—entered the case as intervenors. *Id.* at 185–86; Mille Lacs Band of Chippewa Indians v. Minnesota (*Mille Lacs II*), 124 F.3d 904, 910 (8th Cir. 1997).

240. *Mille Lacs III*, 526 U.S. at 187. The plaintiffs, six intervenor bands, and the State stipulated to a Conservation Code and Management Plan, and the

portion of the territory ceded in the 1837 Treaty," not only to the reservations of the various bands joined in the proceeding.[241]

In addition to litigation directly affecting regulation and exercise of fishing rights, several cases have protected reserved tribal rights to fish in waters outside reservations. More than a hundred years ago, in *United States v. Winans*,[242] the Supreme Court, in order to secure tribal rights of "taking fish at all usual and accustomed places,"[243] rejected the practice of using state-sanctioned "fish wheels" that would catch large volumes of salmon.[244] The Court recognized that removal of fish with these devices rendered tribal fishing rights meaningless and remanded the case to the court below to devise some "adjustment and accommodation" to protect Indian fishing rights reserved by treaty.[245]

Although litigation is ongoing, a district court in the State of Washington recently held that tribal rights to take fish in all usual and accustomed places off the reservation "imposes a duty upon the State to refrain from building or operating culverts" that block passage of salmonid fish and markedly diminish populations available for tribal harvest.[246] The district court ruled in favor of the

district court resolved remaining issues in a final order in *Mille Lacs Band of Chippewa Indians v. Minnesota* (*Mille Lacs I*), 952 F. Supp. 1362, 1384 (D. Minn.) ("[T]he State may regulate Indian Treaty rights in the interests of conservation, if such regulation meets the appropriate standards and does not discriminate against the Indians. However, even if the State regulation meets the appropriate standards and is not discriminatory, the State is nonetheless barred from regulating the Indian treaty rights if the bands can effectively self-regulate and the tribal regulations are adequate to meet conservation needs."), *aff'd*, 124 F.3d 904 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999). The Eighth Circuit denied the State's arguments to make a further allocation of resources in *Mille Lacs II*, 124 F.3d at 904.

241. *Mille Lacs III*, 526 U.S. at 187.

242. 198 U.S. 371 (1905). In this case, the United States sought an injunction on behalf of the Yakima Tribe.

243. *Id.* at 384.

244. *Id.* at 382.

245. *Id.* at 384.

246. United States v. Washington, No. CV 70-9213, 2013 WL 1334391, at *1 (W.D. Wash. Mar. 29, 2013). Plaintiffs in this case include Suquamish Indian Tribe, Jamestown S'Klallam, Lower Elwha Band of Klallam, Port Gamble Clallam, Nisqually Indian Tribe, Nooksack Tribe, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit Tribe, Tulalip Tribe, Lummi Indian Nation, Quinault Indian Nation, Puyallup Tribe, Hoh Tribe, Confederated Bands and Tribes of the Yakama Indian Nation, Quileute Indian

tribes, granting injunctive relief to allow passage of salmon and remedy violations of treaty rights.[247]

In addition to the above line of cases where courts have protected tribal fishing rights off-reservation, a separate line of authority holds that the federal reservation of land, whether for an Indian reservation or another purpose, impliedly reserves sufficient water to support the purpose of that reservation. These cases support the concept that water resources, potentially quality as well as quantity, may be reserved by implication, if needed to support federal purposes in establishing an Indian reservation.

More than a century ago, in *Winters v. United States*,[248] the Supreme Court held that an express reservation of land on the Fort Belknap Indian Reservation impliedly reserved sufficient in-stream water flow to support tribal agriculture, preventing the construction of dams that would divert flow from the Milk River.[249] The Court noted that the reservation was created from a "very much larger tract" where the Indians had lived a nomadic life and that irrigation was necessary to support a pastoral life on the reservation.[250]

In *Arizona v. California*,[251] the Supreme Court held that in creating the Chemehuevi, Cocopah, Yuma, Colorado River, and Fort Mohave Indian Reservations, the United States reserved enough water from the Colorado River to irrigate the irrigable parts of the reserved lands, for future as well as present needs, and that such water rights are "present perfected rights" entitled to priority.[252] The Court remarked on the arid nature of the reservations, and that both the animals the tribes hunted and the

Tribe, Makah Nation, and Swinomish Tribal Community, and Muckleshoot Indian Tribe, as well as the United States. *Id.*

247. *Id.* at *22–25 (finding that "salmon stocks . . . [had] declined alarmingly," that culverts blocking the passage of fish were a significant cause of salmon habitat degradation, that "the Tribes have demonstrated . . . irreparable injury in that their Treaty-based right of taking fish has been impermissibly infringed," and that an equitable remedy was appropriate to remedy treaty violations). The tribes' motion for injunctive relief was granted, and its application was not stayed pending appeal. United States v. Washington, No. CV 9213, 2013 WL 1788515, at *1 (W.D. Wash. Apr. 26, 2013).

248. 207 U.S. 564 (1908).

249. *Id.* at 577.

250. *Id.* at 576.

251. 373 U.S. 546 (1963).

252. *Id.* at 599–601 (following *Winters*, 207 U.S. 564).

crops the tribes raised would depend on water rights for survival.[253] In addition, the Court held that the quantity of water reserved from the Colorado River for the tribes was an amount sufficient to satisfy "the future as well as the present needs" of the reservations for irrigation of all practicably irrigable acreage on the reservations, and not merely an amount sufficient to satisfy the Indians' "reasonably foreseeable needs."[254]

In *Cappaert v. United States*, the Supreme Court upheld an injunction preventing a rancher from pumping well water that would affect water levels in an underground pool at the Death Valley National Monument.[255] The pool was notable for the scientific value of the species of fish it contained.[256] The Court held that "when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation."[257] The Court explained, "The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams."[258]

The Court explained that federal implied reservation of water can apply to prevent diversion of either surface water or groundwater, "since the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation."[259] Citing the known "reciprocal hydraulic connection between groundwater and surface water," the Ninth Circuit similarly constrained Nevada's allocation of groundwater on the grounds that it adversely affected Pyramid Lake Paiute Tribe irrigation rights under a decree affecting the Truckee River.[260]

An emerging jurisprudence recognizes tribal rights to prevent degradation of water quantity affecting reserved rights in territories ceded to the United States. In *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, the Ninth Circuit upheld an order protecting the Yakima Tribe's fishing rights by ordering the release

253. *Id.* at 599.

254. *Id.* at 600–01.

255. 426 U.S. 128, 147 (1976).

256. *Id.*

257. *Id.* at 139.

258. *Id.* at 138. However, "[t]he implied-reservation-of-water-rights doctrine . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." *Id.* at 141.

259. *Id.* at 143.

260. United States v. Orr Water Ditch Co., 600 F.3d 1152, 1158–59 (9th Cir. 2010).

of water flow in the Yakima River, a "usual and accustomed" place for taking fish outside the boundaries of the reservation.[261] Similarly, in *United States v. Adair*, the circuit court upheld the rights of the Klamath Tribe to "water flowing through the reservation not only for the purpose of supporting Klamath agriculture, but also for the purpose of maintaining the Tribe's treaty right to hunt and fish on reservation lands."[262] The court further held that these tribal rights to water survived the termination of the reservation pursuant to an act of Congress.[263] The Confederated Tribes of the Umatilla Reservation obtained a district court injunction against the construction and operation of a dam in northeastern Oregon that would have inundated off-reservation fishing stations where tribes had reserved fishing rights guaranteed under an 1855 treaty by which the Tribe ceded the bulk of their lands to white settlers.[264]

Although most of the precedent controlling off-reservation activities to protect tribal rights pertains to water quantity rather than water quality, some case law also suggests that tribes have protectable interests in off-reservation water quality. [265] In *United States v. Gila Valley Irrigation District* (*Gila I*),[266] the courts interpreted a decades-old decree apportioning use of the Gila River. The district court found that the Apache Tribe had a right to six thousand acre-feet of natural flow from the Gila River—because otherwise return flows were inferior due to their higher salt content—and enjoined non-Indians from diverting the river flow.[267] The circuit court agreed that the Tribe had rights to undiverted, higher-quality river flow, but declined to affirm a remedy until defendants were allowed to present evidence on water quality.[268]

261. 763 F.2d 1032–1033, 1035 (9th Cir. 1985).

262. 723 F.2d 1394, 1410 (9th Cir. 1983).

263. *Id.* at 1412–14 ("[W]here, as here, a tribe shows its aboriginal use of water to support a hunting and fishing lifestyle, and then enters into a treaty with the United States that reserves this aboriginal water use, the water right thereby established retains a priority date of first or immemorial use.").

264. Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553, 554 (D. Or. 1977).

265. *See* Jessica Owley, *Tribal Sovereignty Over Water Quality,* 20 J. LAND USE & ENVTL. L. 61, 81 (2004).

266. 804 F. Supp. 1 (D. Ariz. 1992), *aff'd in part, vacated in part,* 31 F.3d 1428 (9th Cir. 1994).

267. *Id.* at 7.

268. *See* United States v. Gila Valley Irrigation Dist. (*Gila II*), 31 F.3d 1428,

After litigating water quality issues, the district court "conclude[d] that the effect[s] of the [diversion and] water quality degradation on the Apache Tribe's efforts to revitalize their agriculture . . . warrant[ed] some form of injunctive relief."[269]

Paradoxically, the strongest statement of tribal interest in off-reservation pollution control was in *Oklahoma v. Tyson Foods*, a case involving contamination of the Illinois River Watershed by the poultry company.[270] The district court dismissed the lawsuit on the grounds that the Cherokee Nation was an indispensable party whose joinder could not be compelled due to its sovereignty.[271] To support its holding that the Cherokee Nation was indispensable to litigation, the district court quoted the Cherokee Environmental Quality Code, which made it "unlawful for any person to cause pollution of any air, water, land or resources of the Nation, *or to place or cause to be places* [sic] *any wastes or pollutants in a location where they are likely to cause pollution of any air, water, land or resources of the Nation.*"[272] The court held that the interests claimed by the Cherokee in vindicating rights for pollution to the Illinois River watershed were "neither fabricated nor frivolous," but were "real and substantial," thus requiring joinder.[273]

Although the scope of tribal authority over water quantity and quality is still evolving, commentators have described the increased tribal role in allocating and assuming regulatory authority over waters as a "quiet revolution."[274]

1436, 1443 (9th Cir. 1994).

269. United States v. Gila Valley Irrigation Dist. (*Gila III*), 920 F. Supp. 1444, 1454 (D. Ariz. 1996).

270. 258 F.R.D. 472 (N.D. Okla. 2009).

271. *Id.* at 481–83.

272. *Id.* at 477 (emphasis added) (quoting 63 CHEROKEE NATION CODE § 1004(A)). The court also quoted the Cherokee Nation Code to define waters of the Cherokee nation to include all waters "*which are contained within, flow through, or border upon the Cherokee Nation or any portion thereof.*" *Id.* (emphasis added) (quoting 63 CHEROKEE NATION CODE § 201).

273. *Id.* at 478–479. However, the court determined that joinder was not feasible because of the Cherokee Nation's sovereign status. *Id* at 481. Since joinder was not feasible, the federal and common-law claims were dismissed. *Id.* at 484.

274. Edmund J. Goodman, *Indian Tribal Sovereignty and Water Resources: Watersheds, Ecosystems and Tribal Co-Management*, 20 J. LAND RESOURCES & ENVTL L. 185, 207 (2000); *see also* Michael C. Blumm, *Unconventional Waters: The Quiet Revolution in Federal and Tribal Minimum Streamflows*, 19 ECOLOGY L.Q. 445, 468–79 (1992) (discussing the reserved rights doctrine and its impact on tribal water claims).

VI. FEDERAL FIDUCIARY OBLIGATIONS TO MANAGE TRIBAL RESOURCES

Federal agencies accept that the federal government has a fiduciary obligation to protect resources held in trust for tribes.[275] In addition, "[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government."[276] On closer examination of the legal precedent, as discussed briefly below, an enforceable federal duty is likely to require a specific basis in treaties, statutes, or regulations that discuss federal responsibilities to tribes.

In the 1942 case of *Seminole Nation v. United States*, the Supreme Court found an enforceable fiduciary obligation to tribes.[277] This case challenged the propriety of disbursements by the United States government to Seminole officials by agents aware of corruption.[278] Where the treaty provided for payment to destitute members of the tribe, the Court "recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people."[279] This trust obligation required that the federal government's "conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."[280]

275. *See, e.g.*, *Frequently Asked Questions*, BUREAU INDIAN AFF., http://www.bia.gov/FAQs (last visited Nov. 22, 2014) ("The federal Indian trust responsibility is also a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources . . . . In several cases discussing the trust responsibility, the Supreme Court has used language suggesting that it entails legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of the relationship between the United States and the federally recognized tribes.").

276. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 29, § 5.04.

277. 316 U.S. 286, 288–89 (1942). Jurisdiction in the U.S. Court of Federal Claims was specifically provided by statute. *Id.*

278. *Id.* at 304.

279. *Id.* at 296.

280. *Id.* at 297. The Court did not find a breach of the government's fiduciary obligation, but remanded this question to the court of claims for further findings. *Id.* at 300. No reported case documents these findings or resolution.

The lead cases of *United States v. Mitchell*, decided by the Supreme Court first in 1980 (*Mitchell I*)[281] and then in 1983 (*Mitchell II*),[282] frame the question of what is required to impose an obligation for payment of money damages on the federal government under the Tucker Act.[283] Although the issue of waiver of sovereign immunity is not pertinent to Clean Water Act jurisdiction, this line of cases explains the statutory and common law framework that may support a federal trust obligation to tribes.[284]

Both *Mitchell* cases involved the identical fact situation, where individual allottees on the Quinault Reservation and the Quinault Tribe sued the government for "mismanagement of timber resources"[285] on lands which the General Allotment Act had stated were to be held by the United States "in trust for the sole use and benefit of the Indian."[286] Claims included the failure "to obtain fair market value for timber sold," failure to "manage timber on a sustained-yield basis," and failure to "develop a proper system of roads and easements for timber operations."[287]

281. United States v. Mitchell (*Mitchell I*), 445 U.S. 535 (1980).

282. United States v. Mitchell (*Mitchell II*), 463 U.S. 206 (1983).

283. Much of the precedent on federal government trust obligations has been litigated under the Indian Tucker Act, enacted in 1949, which waived federal sovereign immunity over claims for monetary damages brought by Indians and vested jurisdiction in the U.S. Court of Federal Claims. The Indian Tucker Act, 28 U.S.C. § 1505 (2012), applies to claims "accruing after August 13, 1946," and includes claims "arising under the Constitution, laws or treaties of the United States, or Executive orders of the President." The Tucker Act of 1887, 28 U.S.C. §§ 1346, 1491, had previously waived sovereign immunity for various monetary claims against the federal government.

284. Cases apply *Mitchell I* and *II* to evaluate whether a federal trust relationship supports various claims for relief other than damages claims. *See, e.g.*, Yankton Sioux Tribe v. U.S. Dep't of Health & Hum. Servs., 533 F.3d 634, 644 (8th Cir. 2008); Marceau v. Blackfeet Housing Auth., 540 F.3d 916, 922–28, 935–40 (9th Cir. 2007); Inter Tribal Council v. Babbitt, 51 F.3d 199, 203 (9th Cir. 1995); Black Hills Inst. of Geol. Rese. v. S. Dak. Sch. of Mines & Tech., 12 F.3d 737, 743 (8th Cir. 1993); Red Lake Band of Chippewa Indians v. Barlow, 834 F.2d 1393, 1398–1400 (8th Cir. 1987); Assiniboine & Sioux Tribes of the Ft. Peck Indian Reservation v. Bd. of Oil & Gas Cons. of Mont., 592 F.2d 782, 794 (9th Cir. 1986); Saginaw Chippewa Indian Tribe of Mich. v. Granholm, No. 05-10296-BC, 2008 WL 4808823, at *40 (E.D. Mich. Oct. 22, 2008).

285. *Mitchell I*, 445 U.S. at 537.

286. *Id.* at 541 (quoting General Allotment (Dawes) Act § 5, 24 Stat. 389 (codified as amended at 25 U.S.C. § 348)).

287. *Id.* at 537.

The Court in *Mitchell I* held that the Tucker Act itself created no substantive rights and that the "limited trust relationship" created by the General Allotment Act "does not impose any duty upon the Government to manage timber resources" since "the allottee, and not the United States, was to manage the land."[288] The case was remanded to the court of claims to determine if other statutes created a basis for liability.[289]

In *Mitchell II*, the Supreme Court affirmed the court of claims' decision that the United States was accountable for money damages for mismanagement of forest resources on allotted lands of the Quinault Reservation.[290] The Court found that timber management statutes and regulations, under which the Department of the Interior "exercise[d] 'comprehensive' control over the harvesting of Indian timber,"[291] gave the "Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians."[292] These statutes and regulations, "[i]n contrast to the bare trust created by the General Allotment Act," were found to "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities."[293] In *Mitchell II*, the Court noted that its "construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people"[294] and that a fiduciary relationship can exist '"even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund or a trust or fiduciary connection.'"[295]

United States v. White Mountain Apache Tribe applied the *Mitchell* tests to hold the federal government liable for failure to maintain and preserve the former Fort Apache Military Reservation, which a federal statute required be held in trust for the tribe.[296] Applying "elementary trust law," the Court confirmed "the commonsense

288. *Id.* at 540, 542–43.

289. *See Mitchell II*, 463 U.S. at 211.

290. *Id.* at 228.

291. *Id.* at 209 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980)).

292. *Id.* at 224.

293. *Id.*

294. *Id.* at 225.

295. *Id.* (quoting Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (1980)).

296. United States v. White Mountain Apache Tribe, 537 U.S. 465, 471 (2003).

assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch."[297]

Courts have scrutinized underlying statutes to deny a substantive basis for federal government liability. In the *United States v. Navajo Nation* cases, where the tribe claimed that the government was liable in damages for negotiating a lower rate for coal leases than the tribe had requested, the Supreme Court twice overturned awards by the Federal Circuit Court.[298] The Supreme Court interpreted various leasing statutes and determined that they failed to create a fiduciary duty.[299]

In addition to potential statutory bases for federal fiduciary responsibility, courts widely accept the "undisputed existence of a general trust relationship between the United States and the Indian people."[300] However, the degree to which this common-law trust relationship may create enforceable obligations is disputed. The Supreme Court ruled in *United States v. Jicarilla Apache Nation* that "[t]he trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law."[301] This case involved a narrow issue of whether the Jicarilla should benefit from the fiduciary exception to the attorney-client privilege, thus requiring the United States to disclose documents.[302]

297. *Id.* at 475.

298. United States v. Navajo Nation (*Navajo II*), 556 U.S. 287, 302 (2009); United States v. Navajo Nation (*Navajo I*), 537 U.S. 488, 514 (2003).

299. *Navajo II*, 556 U.S. at 293, 294, 300.

300. United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2324 (2011) (quoting *Mitchell II*, 463 U.S. 206, 225 (1983)); *see* Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942).

301. *Jicarilla*, 131 S. Ct. at 2318.

302. *Id.* at 2326. The Court's discussion was focused on specific attorney-client issues:

> Applying these factors, we conclude that the United States does not obtain legal advice as a "mere representative" of the Tribe; nor is the Tribe the "real client" for whom that advice is intended. . . .
>
> . . . .
>
> . . . [Because its] sovereign interest in the administration of Indian trusts [is] distinct from the private interests . . . . the Government seeks legal advice in a "personal" rather than a fiduciary capacity.
>
> Moreover, the Government has too many competing legal concerns to allow a case-by-case inquiry into the purpose of each communication.

Id. at 2326–28 (internal citations omitted).

In cases seeking declaratory or injunctive relief,[303] the common law trust relationship between the United States and Indian tribes has rarely been held to establish enforceable obligations.[304] In a case brought under the Administrative Procedures Act, the Ninth Circuit found no duty to protect tribal water rights from the expansion of cyanide heap-leach gold mines upriver from the Gros Ventre Tribe's reservation absent statutory or treaty language creating specific obligations.[305] Where uranium processing and dumpsites were located in part on Navajo Nation reservation land, the D.C. Circuit found that the tribe had colorable claims under environmental laws pertaining to hazardous wastes,[306] but that the statute creating the Navajo reservation itself was a "bare trust" under *Mitchell I* that created no specific fiduciary duties.[307] Various cases pertaining to natural resources affirm the government's fiduciary obligation in principle, but find that this obligation is met by compliance with general regulations, thus giving no practical effect to the trust obligation.[308]

303. Cases for declaratory or injunctive relief against the United States may be brought under the Administrative Procedures Act (APA), 5 U.S.C. §§ 500–504 (2012). Waiver of sovereign immunity for such suits is provided in 5 U.S.C. § 702.

304. *See, e.g.*, Cobell v. Norton, 240 F.3d 1081, 1094–95, 1098 (D.C. Cir. 2001) (holding that, in a class action brought under the APA alleging widespread mismanagement of actual Individual Indian Money trust accounts, plaintiffs could rely on common law trust principles to secure relief).

305. Gros Ventre Tribe v. United States, 469 F.3d 801, 803, 812–13 (9th Cir. 2006) (finding that "none of the treaties cited by the Tribes impose a specific duty" on the government "to manage off-Reservation [water] resources for the benefit of the Tribes"); *see Indian Tribal Approvals*, *supra* note 129 (stating that, as of 2014, the Gros Ventre Tribe had not qualified for TAS under the CWA).

306. El Paso Natural Gas Co. v. Navajo Nation, 750 F.3d 863, 896–97 (D.C. Cir. 2014); *see* 42 U.S.C § 6901(b)(3).

307. *El Paso Natural Gas Co.*, 750 F.3d at 896–97 (noting that the statute creating the reservation "provide[d] that designated lands 'shall be held in trust by the United States exclusively for the Navajo Tribe and as a part of the Navajo Reservation,'" but no language pertaining to specific tribal rights or federal duties was referenced (quoting 25 U.S.C. § 640d-9(a) (2006))).

308. *See, e.g.*, Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy, 898 F.2d 1410, 1421 (9th Cir. 1990) ("[B]ecause the Navy was not jeopardizing . . . cui-ui [fish], its failure to develop an environmental impact statement . . . did not breach its fiduciary obligations to the Tribe."); Pit River Tribe v. Bureau of Land Mgmt., 306 F. Supp. 2d 929, 950–51 (E.D. Cal. 2004) ("The federal government does owe a high fiduciary duty to a tribe when its actions involve tribal property or treaty rights, [but] this responsibility is discharged by . . . compliance with general regulations."), *rev'd on other grounds, sub nom.* Pit River Tribe v. U.S. Forest Service,

Some scholars and judges believe that common law trust obligations to protect tribal lands and resources should constrain federal administrative discretion.[309] In a U.S. Court of Federal Claims case, creation of a reservation was held to create a federal duty to prudently represent the tribes' interests in litigation regarding off-reservation water rights.[310] A district court found that a regulation issued by the Secretary of the Interior was a breach of trust to the Pyramid Lake Paiute Tribe and, thus, arbitrary and capricious.[311]

On the other hand, where the Army Corps of Engineers asserted its obligations to protect Lummi Indian tribal fishing rights under treaty, denial of a rivers-and-harbors permit was warranted on the basis of general fiduciary obligations "to ensure that Indian treaty rights [were] given full effect."[312] The Corps was held to have the authority to take into account tribal fishing rights in denying the permit, although Corps regulations made no mention of Indian treaty rights.[313]

In the next section of this article, specific recommendations are made to facilitate exercise of tribal rights under section 401 of the CWA. Although common law fiduciary obligations of the U.S. government to tribes provide important context, particular attention is paid to the language of applicable statutes, regulations, treaties, and management documents to evaluate federal duties

469 F.3d 768 (9th Cir. 2006).

309. *See, e.g.*, Edwardsen v. Morton, 369 F. Supp. 1359, 1376 (D.D.C. 1973) (holding that the United States has a common law duty to protect aboriginal Indian tribal land from trespass); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 29, § 5.05[3][c]. Other courts have relied on both statutes and common law principles to find an enforceable duty. *See, e.g.*, Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1563 (10th Cir. 1984), *reh'g granted*, 782 F.2d 855, 858 (10th Cir. 1986) (en banc) (adopting the prior dissenting opinion of J. Seymour and supporting a "fiduciary duty" of the Secretary of the Interior constraining administrative discretion to manage the Tribe's oil and gas reserves).

310. Fort Mojave Indian Tribe v. United States, 23 Cl. Ct. 417, 425–26 (1991). This claim was based on the fact that the United States, in representing the Fort Mojave and Colorado River Indian Tribe in *Arizona v. California*, had failed to include all land for which irrigation was needed, thus reducing tribal water claims in the Colorado River. *See* Arizona v. California, 376 U.S. 340, 344–345 (1963).

311. Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 256–257 (D.D.C. 1973).

312. Nw. Sea Farms v. U.S. Army Corps of Eng'rs, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996).

313. *Id.*

and to develop implementation strategies that protect tribal water resources and reserved rights.

VII. RECOMMENDATIONS: TRIBAL USE OF CLEAN WATER ACT SECTION 401 TO PROTECT RESOURCES AND RESERVED RIGHTS

A. Tribal Exercise of Section 401(a)(1) Certification Authority

On the first and most basic level, the EPA should facilitate tribal exercise of section 401(a)(1) certification authority when discharge originates within a reservation. The EPA's section 401 qualification regulation supports this goal. Although the EPA still requires additional qualification procedures for a tribe to exercise authority under the impaired waters program or to issue discharge permits for discharge originating on the reservation, the EPA has provided a one-step TAS qualification process for the purposes of water quality standards and section 401 certification.[314]

The EPA's proposed amendments to simplify the process whereby tribes may assert regulatory authority over all reservation waters[315] are likely to remove an additional procedural barrier to the exercise of section 401 authority by facilitating TAS for water quality standards programs. The EPA's proposal to simplify the extension of tribal CWA authority to all reservation waters is strongly supported by legal precedent affirming broad tribal authority to regulate water quality.[316] Simplification of the TAS qualification process will also affirm inherent tribal sovereignty to prevent substantial and direct effects "on the political integrity, the economic security, or the health [and] welfare of the tribe"[317] that may result from pollution or degradation of water quality.

314. *See* 40 C.F.R. § 124.51(c) (2014); EPA 2010 SECTION 401 HANDBOOK, *supra* note 55, at 6; *supra* Part III.

315. See *supra* note 21 and accompanying text.

316. *See* 40 C.F.R. § 123.1(h); *see also* Montana v. EPA, 137 F.3d 1135, 1141 (9th Cir. 1998) (holding that tribes have inherent authority to regulate actions of nonmembers on their land whenever those actions threaten the health and safety of the tribe); Colville Confederated Tribes v. Walton, 647 F.2d 42, 48–49 (9th Cir. 1981) (holding that where tribes have a reserved water right, the tribe should be the determiner of its use, even if subsequent developments have rendered that use unnecessary); *supra* Part IV.A–B.

317. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 428 (1989) (plurality opinion for Nos. 87-1699 and 87-1711); *see* Montana v. United States, 450 U.S. 544, 566 (1981); Oneida Tribe of Indians of Wis. v. Vill. of Hobart, 732 F.3d 837, 840 (7th Cir. 2013), *cert. denied*, 134 S. Ct.

To facilitate the exercise of section 401(a)(1) authority, the EPA should provide simple written guidance to inform tribes that have secured TAS for a water quality standards program of the following:

(1) Tribal qualification for TAS to set water quality standards, without any further procedure, allows the tribe to exercise all authorities under CWA section 401, including denial of certification or requiring conditions for certification of federal permits for discharge that originates on the reservation.

(2) Tribal certification authority under section 401(a)(1) applies to any federal permits that may result in discharge that originates on the reservation, including EPA NPDES pollution discharge permits (CWA section 402), Corps dredge and fill permits (CWA section 404), FERC energy facilities permits, and general permits.

(3) Tribal nondegradation[318] and narrative water quality standards,[319] as well as numeric standards, may be enforced under section 401(a)(1).

(4) Tribal authority to certify or deny certification under CWA section 401(a)(1) can include conditions to protect water quality beyond those needed to prevent violations of water quality standards. The authority for a certifying tribe to provide "other limitations" pursuant to section 410(d) may be used to protect designated uses and tribal reserved rights that depend on water quality.

The EPA should also designate a tribal liaison who is knowledgeable about the CWA, section 401 certification, and tribal TAS to support effective implementation of tribal certification rights.[320]

2661 (2014); Wisconsin v. EPA, 266 F.3d 741, 749 (7th Cir. 2001); *Montana v. EPA*, 137 F.3d at 1141; City of Albuquerque v. Browner, 97 F.3d 415, 424 n.14 (10th Cir. 1996); *Colville Confederated Tribes*, 647 F.2d at 52; *supra* Part IV.A–B.

318. Nondegradation or antidegradation standards proscribe deterioration of water quality. *See Antidegradation Policy*, EPA WATER QUALITY STANDARDS, http://water.epa.gov/scitech/swguidance/standards/adeg.cfm (last visited Nov. 30, 2014).

319. *See supra* note 101 and accompanying text.

320. Specific expertise on section 401 of the CWA and TAS implementation could be provided through the EPA American Indian Environmental Office (AIEO). *See American Indian Environmental Office*, EPA, http://www.epa.gov/tribalportal/aieo/index.htm (last visited Dec. 27, 2014).

B. Tribal Exercise of Section 401(a)(2) Rights to Object to Federal Permits

Many threats to tribal water quality do not originate on the reservation. The few tribes qualified for TAS have begun to exercise section 401(a)(1) certification rights where federal permits affect discharge originating on their reservation lands.[321] However, no tribe has yet exercised authority under section 401(a)(2) in order to object to federal permits and engage the EPA in evaluation and recommendations to protect tribal water quality from discharge originating off-reservation. There is also no EPA guidance interpreting or facilitating tribal exercise of rights under section 401(a)(2) of the CWA. The trust obligation owed to tribes by the federal government includes both procedural and substantive components.[322] The section 401(a)(2) process for downstream tribes affected by pollution is particularly well-suited to give real world efficacy to concepts of government-to-government interaction.

The EPA has critical responsibilities pursuant to section 401(a)(2). Upon its receipt of a proposed federal permit and certification, the EPA must notify a tribe when discharge subject to the permit may affect the quality of the tribe's waters.[323] Then, should the tribe object to the permit, the EPA has a duty to evaluate and make recommendations reflecting the tribe's objections to the federal licensing or permitting agency at a public hearing.[324]

The EPA's obligations to represent tribes under CWA section 401(a)(2) extend beyond those to a downstream state under the statute. As an agent of the federal government, the EPA owes a trust obligation to Indian tribes,[325] for which there is no analogous fiduciary obligation to the states. The United States has long

321. *See supra* Part III.

322. *See, e.g.*, Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 ENVTL. L. 279, 298 (2000) ("Tribes held both a procedural right—a right to consultation and participation in decision making—as well as the substantive right to prevent harm to their off-reservation resources."). *See generally* Haskew, *supra* note 4 (analyzing the benefits and pitfalls of consultation policies).

323. 33 U.S.C. § 1341(a)(2) (2012).

324. *Id.*

325. *See, e.g.*, *Mitchell II*, 463 U.S. 206, 225 (1983) (noting that there is an "undisputed . . . trust relationship between the United States and the Indian people"); *supra* Part VI.

assumed the duty to represent tribes to ensure that tribal water resources secured by treaties and statutes are protected.[326] Where the United States has undertaken to represent tribes to protect tribal water rights, the government has a duty to adequately and prudently represent tribal interests.[327]

Executive Order 13175 directs the EPA "to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights."[328] In addition, the EPA has specific duties under its own 2014 National Program Manager Guidance to act "in a manner consistent with the one-to-one, government-to-government relationship with federally recognized Indian tribes" and to work together with tribal governments to "implement effective environmental programs on tribal lands that are protective of human health and the environment."[329] The EPA Indian Policy also "expressly recognizes the right of tribes to self-determination and acknowledges the federal government's trust responsibility to tribes."[330]

The EPA should provide explicit policy guidance setting forth the EPA's responsibilities under CWA section 401(a)(2) in keeping with the Agency's federal trust obligations to tribes. This guidance should explain that the EPA will provide written notice to a tribe in every instance when a discharge may affect the quality of tribal reservation waters, without determining at this stage of the process

326. *See generally* Winters v. United States, 207 U.S. 564 (1908); United States v. Winans, 198 U.S. 371 (1905); Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001); Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998); City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996). The federal duty of representation is reflected in 25 U.S.C. § 175, which states: "In all States and Territories where there are reservations . . . the United States attorney shall represent them in all suits at law and in equity."

327. *See* Fort Mojave Indian Tribe v. United States, 23 Cl. Ct. 417 (1991). The court held the Tribe's allegation that the federal government "breached that trust by failing adequately to represent plaintiffs' interests" in the *Arizona I* litigation "properly state a claim for breach of trust addressable in this court," *id.* at 425, and that the government's "obligation to perform 'all acts necessary' to preserve the trust res would necessarily include prudently representing plaintiffs' interests in litigation in which ownership to those water rights is placed in issue," *id.* at 426.

328. Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

329. EPA OFFICE OF INT'L & TRIBAL AFFAIRS, FY 2014 NATIONAL PROGRAM MANAGER GUIDANCE 3 (2014).

330. *Id.* at 4.

whether that discharge is significant.[331] The guidance should clarify that the EPA will provide official notice of a tribal opportunity to object to a federal permit within thirty days of any of the following: section 401(a)(1) certification by the state where the discharge originates; denial of section 401(a)(1) certification by the state where the discharge originates; or waiver of section 401(a)(1) certification by the state where the discharge originates. The official notice by the EPA to a tribe under section 401(a)(2) should include the permit application, any documents pertaining to certification by the state where the discharge originates, any comments on the permit prepared by the EPA, and any other documents relied upon by the EPA to determine that the discharge may affect the quality of tribal waters. The EPA's guidance should also state that tribes have sixty days from the date of the official notice by the EPA under section 401(a)(2) within which to object to federal permits, irrespective of whether tribes may have had prior actual notice of any matters pertaining to the federal permit.

This new EPA guidance for section 401(a)(2) should explain the statutory requirement[332] that tribal objections to a federal permit must be in writing and must be copied to the federal licensing or permitting agency as well. The guidance should then clarify that any written objection made by a tribe to a federal license or permit will entitle that tribe to a public hearing, unless, prior to such hearing, the licensing or permitting agency has agreed in writing to all conditions requested by the tribe in making its objections. EPA guidance should state that federal regulations establishing the requirements for public hearings shall apply.[333]

Next, the EPA guidance should set forth the role of the EPA in evaluating and making recommendations to the permitting agency on the objections raised by the tribe. The guidance should explicitly recognize the importance of water quality to tribal health,

331. Even in *Arkansas v. Oklahoma*, where the EPA eventually determined that discharge would have no "detectable effect" on the downstream state, Oklahoma was given the opportunity to participate in evaluation of the effects of the discharge. *See* 503 U.S. 91, 113 (1992).

332. 33 U.S.C. § 1341(a)(2) (2012).

333. For example, in review of any Army Corps of Engineers permit, 33 C.F.R. § 327 (2014) would apply. *See, e.g.*, 33 C.F.R. § 327.8 (presentation of witnesses, record of proceedings on transcripts, and post-hearing offer of written comments); *id.* § 327.9 (written decision on the record by the presiding officer); *id.* § 327.11 (providing for public notice).

welfare, economic security, and political integrity, and should acknowledge the expertise of tribal governments in regulating threats to water resources. To support tribal self-determination and recognize tribal government expertise, the EPA's evaluation and recommendations to the federal permitting agency should give substantial weight to the tribe's objections and to any evidence provided by the tribe to support its objection.

In order to ensure effective record development as well as recognition of tribal sovereignty to regulate tribal waters, EPA guidance should clarify that the hearing before the permitting agency and the presentation of "additional evidence" as provided in section 401(a)(2) may include presentation of evidence, arguments of counsel, and statements of witnesses by the objecting tribe as well as by the EPA (in addition to the initial written objection and evaluation and recommendations of the EPA). Guidance should state that the EPA shall consult with the tribe in the process of developing the EPA's recommendations and provide such support as may be requested by the tribe to ensure that tribal objections, conditions, and evidence are developed in the record.

Moreover, EPA guidance should explain that tribal section 401(a)(2) rights to object to federal permits and analysis of compliance with the water quality standards of an affected tribe necessarily includes evaluation and determination of whether all tribal water quality standards will be met—including narrative and nondegradation standards as well as numeric standards. EPA guidance should state that, in making its evaluation and recommendations, the Agency will require compliance with downstream tribal narrative and nondegradation water quality standards and, where appropriate, the EPA will assign numeric limits to these standards in consultation with the tribe.[334] The EPA should further affirm that, in its evaluations and recommendations

334. *See* discussion *supra* Part II.B. In *Upper Blackstone Water Pollution Abatement District v. EPA* and in administrative proceedings related to the Attleboro Wastewater Treatment Plant, the EPA translated Rhode Island's eutrophication narrative standard into numeric effluent limits for discharge from Massachusetts sewage treatment plants. *See* Upper Blackstone Water Pollution Abatement District v. EPA, 690 F.3d 9, 18–19 (1st Cir. 2012), *cert denied*, 133 S. Ct. 2382 (2013); *In re* City of Attleboro, MA Wastewater Treatment Plant, 14 E.A.D. 398 (EAB 2009). In administrative proceedings related to the Brayton Point power plant in Massachusetts, the EPA required a closed-cycle cooling system to comply with Rhode Island's general narrative criteria to protect aquatic life. *See In re* Dominion Energy Brayton Point, L.L.C., 12 E.A.D. 490, 496 (EAB 2006).

under section 401(a)(2), scientific uncertainty shall not be grounds to disregard evidence that the activities proposed to be permitted or licensed would violate tribal water quality standards.[335]

Finally, EPA guidance should state that the EPA shall recommend to the federal permitting or licensing agency all conditions needed for compliance with tribal water quality standards and shall advise the federal agency that the permit may not be issued unless those conditions are included.[336] EPA guidance should state that if imposition of conditions cannot ensure compliance, the EPA will advise in writing that the agency may not issue a license or permit pursuant to section 401(a)(2).

In addition to providing clear policy guidance allowing affected tribes to exercise authority under section 401(a)(2), the EPA should facilitate compliance with tribal water quality standards when states have the delegated authority to issue NPDES permits. Whenever the EPA reviews a state NPDES permit where discharge may affect the quality of tribal waters, the EPA should inform the state of the EPA's obligation to ensure compliance with the water quality standards of downstream affected tribes.[337] Where appropriate, the EPA should help resolve any disputes resulting from differing state and tribal water quality standards, including differing nondegradation or narrative water quality requirements.[338]

Under CWA section 401(a)(2), the EPA has an obligation and an opportunity to facilitate protection of tribal waters from adverse effects of discharge that originates off-reservation. As mining, oil and gas drilling, pipelines, and other extraction and infrastructure activities are proposed upstream of tribal reservations, effective exercise of tribal authority to object to federal permits under section 401(a)(2) may be critical to protect tribal water quality, integrity, economic security, health, and welfare.

335. *See Upper Blackstone Water Pollution Abatement District*, 690 F.3d at 23–24.

336. 33 U.S.C. § 1341(a)(2); *see* EPA 2010 SECTION 401 HANDBOOK, *supra* note 55, at 10 (showing that similar policy language is provided in the EPA 2010 SECTION 401 HANDBOOK with respect to section 401(a)(1) certification and is reflected in the court's holding in *Lake Carriers Ass'n v. EPA*, 652 F.3d 1 (D. C. Cir. 2011)); discussion *supra* Part II.A.

337. *See, e.g.*, City of Albuquerque v. Browner, 97 F.3d 415, 424 (10th Cir. 1996).

338. *See* Wisconsin v. EPA, 266 F.3d 741, 746–48 (7th Cir. 2001); discussion *supra* notes 219–30 and accompanying text. The dispute resolution mechanism for such conflicts is provided in 40 C.F.R. § 131.7 (2014).

C. Tribal Exercise of Clean Water Act Authority When Discharge Affects or Originates from Ceded Territories Where Tribes Have Reserved Rights

Tribal interests in protecting water quality in ceded territories raise new issues under section 401 of the Clean Water Act. It has been recognized that "[t]he ability of tribes to control pollution and protect water quality is vital to [their] survival": "clean water is vital to tribes, not only on cultural, medicinal, and ceremonial bases, but it is also an important element of sovereignty."[339] Although section 401 of the CWA provides important authority for tribes to control pollution and protect water quality, the structure of its provisions was originally designed to give authority to states. Unlike tribes, the states of the Union have no reserved rights outside their boundaries. Situations where discharge originates off-reservation and affects water resources in ceded territories where tribes have reserved rights require additional consideration of the scope and implementation of section 401.

In many of the areas where new extraction activities and infrastructure are proposed, tribes have reserved rights that are dependent on the quality of water resources. In the Lake Superior Basin area, for example, all of the land on the United States side of the Basin constitutes ceded territories where bands of the Lake Superior Chippewa have reserved rights to hunt, fish, and gather.[340] Exercise of section 401 certification by states where these ceded territories are located may or may not protect tribal reserved rights. States may value economic benefits claimed by industry over their own water quality, let alone the usufructuary rights of tribes. States also lack the specific fiduciary duty to protect tribal ceded territories or rights reserved in treaties with the United States.

Montana v. United States and subsequent cases have affirmed that tribal inherent sovereign authority is based on a

339. Marren Sanders, *Clean Water in Indian Country: The Risks (and Rewards) of Being Treated in the Same Manner as a State*, 36 WM. MITCHELL L. REV. 533, 556 (2010) (citing *Browner*, 97 F.3d at 418).

340. *See Map of Territory Ceded to the United States by the Lake Superior Chippewa in Minnesota in 1854 and 1837, in Wisconsin in 1837 and 1842 and in Michigan in 1836*, GREAT LAKES INDIAN FISH & WILDLIFE COMMISSION, http://www.glifwc.org/map.html (last visited Nov. 11, 2014); *see also* GREAT LAKES INDIAN FISH & WILDLIFE COMM'N, GUIDE TO THE SOUTHERN BOUNDARY OF THE WISCONSIN PORTION OF THE 1837 AND 1842 CEDED TERRITORIES 4 (2008) (addressing the treaties' effect on hunting, fishing, and gathering rights).

demonstration that the conduct sought to be regulated would have a serious and direct effect on "the political integrity, the economic security, or the health or welfare of the tribe."[341] Although cases applying this reasoning have extended tribal authority either to lands within the reservation owned by non-Indians[342] or to regulation of water pollution outside reservation boundaries that affects reservation waters,[343] as the court explained in *Wisconsin v. EPA*, there is no case that expressly limits tribal jurisdiction under *Montana* to reservation boundaries.[344]

Cases since *United States v. Winans* have held that tribal protectable interests extend to off-reservation reserved rights.[345] Although the legal basis of this shared authority is the power of the federal government to enter into treaties, recent cases protecting rights to hunt, fish, and gather off the reservation demonstrate that tribes may prosecute and protect their rights in court, in partnership with the United States.[346] As a result of treaty-reserved rights, states may be required to share management of off-reservation resources with Indian tribes.[347]

Precedent has also recognized an implied reservation of rights to water, whether for an Indian tribe or for a national monument, in an amount sufficient to accomplish the federal purpose of the reservation.[348] Although earlier cases protected water only for on-

341. Montana v. United States, 450 U.S. 544, 566 (1981).

342. *See Montana*, 450 U.S. at 557, 566; *supra* Part IV.A.

343. *See Browner*, 97 F.3d at 423–24; *supra* Part IV.B.

344. *See* Wisconsin v. EPA, 266 F.3d 741, 749 (7th Cir. 2001); *supra* Part IV.B.

345. *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 667–68 (1979); United States v. Winans, 198 U.S. 371 (1905); Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032, 1035 (9th Cir. 1985); United States v. Adair, 723 F.2d 1394, 1410–11 (9th Cir. 1983); Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553, 554 (D. Or. 1977); *supra* Part V.

346. *See Mille Lacs III*, 526 U.S. 172, 208 (1999) (holding in favor of Chippewa usufructuary rights); *Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 684–85 (holding in favor of Indians' fishing rights); United States v. Washington, 157 F.3d 630, 643 (9th Cir. 1998) (affirming in part the district court's holding on tribal rights established by treaties); *supra* Part V.

347. *See Mille Lacs III*, 526 U.S. at 204; *supra* Part V; *see also Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 687–89; *Puyallup I*, 391 U.S. 392, 398–99 (1968).

348. *See* Cappaert v. United States, 426 U.S. 128, 147 (1976); Arizona v. California, 373 U.S. 546, 600–01 (1963); Winters v. United States, 207 U.S. 564, 577 (1908); *supra* notes 255–64 and accompanying text.

reservation irrigation,[349] more recent precedent controls water quantity in order to secure off-reservation fishing rights as well.[350] Tribes may have protectable interests in off-reservation water quantity and quality[351] to the extent needed to accomplish the federal purpose of treaties reserving usufructuary rights.

Although federal fiduciary obligations to tribes have been honored more frequently in dictum than in practice, federal responsibilities to protect tribal resources have been established by treaties, statutes, and regulations.[352] Federal agencies are also likely to have broad regulatory discretion to exercise fiduciary obligations to protect tribal rights and resources.[353]

For the CWA to be most effective in protecting tribal water resources, the reach of section 401 must be interpreted to assist tribes in protecting their reserved rights in ceded territories. Canons of interpretation permit the EPA to exercise broad discretion where Congress has not specifically restricted the Agency's authority to protect tribal rights and resources.

Under *Chevron v. Natural Resources Defense Council*,[354] the EPA's interpretation of environmental statutes is entitled to substantial deference, particularly since "the regulatory scheme is technical and complex" and "the decision involves reconciling conflicting policies."[355] If Congress has "directly spoken to the precise question at issue," no further inquiry is required by the court.[356] However, if

349. *See Arizona*, 373 U.S. at 600–01; *Winters*, 207 U.S. at 577; *supra* Part V.

350. *See Kittitas Reclamation Dist.*, 763 F.2d at 1033; *Adair*, 723 F.2d at 1418; *Alexander*, 440 F. Supp. at 556; *supra* Part V.

351. *See supra* Part V. The precedent establishing tribal interests in *off*-reservation water quality is less developed. *See* Oklahoma v. Tyson Foods, 619 F.3d 1223 (10th Cir. 2010) (determining tribe was an indispensable party for claims related to water pollution); *Gila III*, 920 F. Supp. 1444, 1454 (D. Ariz. 1996) (determining effects of water diversion on water quality affected tribal fishing and required injunctive relief).

352. *See* United States v. White Mountain Apache Tribe, 537 U.S. 465, 474–75 (2003); *Mitchell II*, 463 U.S. 206, 228 (1983); Cobell v. Norton, 240 F.3d 1081, 1106 (D.C. Cir. 2001); Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855, 857 (10th Cir. 1986); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 256–57 (D.C. Cir. 1972); *supra* Part VI.

353. *See* Nw. Sea Farms, Inc. v. U.S. Army Corps of Eng'rs, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996); *supra* Part VI.

354. 467 U.S. 837 (1984).

355. *Id.* at 865.

356. *Id.* at 842.

> Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[357]

In *Decker v. Northwest Environmental Defense Center*, the United States Supreme Court recently upheld the EPA's interpretation of CWA statutes and rules pertaining to NPDES permit requirement for logging road runoff.[358] The Court found the statutory language ambiguous[359] and upheld the EPA's reading of its own rules as a "permissible one."[360] The Court explained:

> It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail. When an agency interprets its own regulation, the Court, as a general rule, defers to it "unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'"[361]

The Supreme Court has specifically given deference to the EPA's interpretation of the CWA and even to the EPA's interpretation of section 401 of the Act. In *PUD No. 1 of Jefferson County v. Washington Department of Ecology*,[362] the Court held, "[The] EPA's conclusion that *activities*—not merely discharges—must comply with state water quality standards is a reasonable interpretation of [section] 401, and is entitled to deference."[363] In *Arkansas v. Oklahoma*, the Court concluded that the EPA's requirement that a facility in one state must comply with the water quality standards of a downstream state was "a reasonable exercise

357. *Id.* at 843.

358. 133 S. Ct. 1326, 1327 (2013).

359. *Id.* at 1334.

360. *Id.* at 1337.

361. *Id.* (quoting Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 880 (2011) (citation omitted)).

362. 511 U.S. 700 (1994).

363. *Id.* at 712; *see also* S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370, 377–78 (2006) (explaining that even though "expressions of agency understanding do not command deference from this Court . . . the administrative usage of 'discharge' in this way confirms our understanding of the everyday sense of the term").

of the Agency's substantial statutory discretion."[364] The Court further held that the court of appeals, in reviewing agency action under section 401(a)(2), "should have afforded the EPA's interpretation of the governing law an appropriate level of deference."[365] The EPA's interpretations of other pollution control statutes and rules have been upheld in numerous court decisions.[366]

1. Interpretation of Clean Water Act Section 401 to Protect Tribal Reserved Rights

Where a discharge originates on the reservation and a tribe has direct CWA section 401(a)(1) certification authority over that discharge, it is well established that section 401(d) certification authority includes the power to set other limitations pertaining to the effects of the activity as a whole on water quality.[367] As suggested previously,[368] when a discharge originates on the reservation, the EPA should advise tribes that conditions on that discharge may include protection of reserved rights that depend on water quality.

In the case where a tribe has the right to object to a permit under section 401(a)(2), the permissible breadth of tribal objections has not yet been interpreted by the EPA or by the courts. Section 401(a)(2) directs that, once a state or tribe has determined that "discharge will affect the quality of its waters so as to violate any water quality requirements in such State" or tribe and requests a

364. 503 U.S. 91, 107 (1992).

365. *Id.* at 112 (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984)).

366. *See* Nat'l Ass'n of Clean Water Agencies v. EPA, 734 F.3d 1115, 1125–28 (D.C. Cir. 2013) (upholding the interpretation of a statute allowing the EPA to set sewage sludge incineration emissions); Am. Iron & Steel Inst. v. EPA, 115 F.3d 979, 988–89 (D.C. Cir. 1997) (upholding EPA interpretation of the Great Lakes statute to provide for establishment of uniform basin-wide water pollution standards); Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1326–27 (D.C. Cir. 1995) (upholding EPA interpretation of requirements for solvent disposal); Rollins Envtl. Servs. (NJ), Inc. v. EPA, 937 F.2d 649, 652 (D.C. Cir. 1991) (upholding EPA interpretation of decontamination regulation even though "[the] EPA's interpretation would not exactly leap out at even the most astute reader"). *But see* Friends of the Earth, Inc. v. EPA, 446 F.3d 140, 144 (D.C. Cir. 2006) (holding that the CWA's unambiguous requirement for setting maximum "daily" loads foreclosed interpretation to only set seasonal or annual loads for pollutants).

367. *See S.D. Warren*, 547 U.S. at 374; *Jefferson Cnty.*, 511 U.S. at 712; *supra* Part II.A.

368. *See supra* Part VII.A.

public hearing, the licensing or permitting agency must hold the requested hearing.[369] At that hearing, the EPA shall submit its evaluation "with respect to *any* such objection" made by the downstream state or tribe.[370] In addition, section 401(d) allows that "other appropriate requirement[s]" may be included in federal permits under section 401, and does not explicitly preclude these other appropriate requirements from applying to the downstream state provisions of this section.[371]

The EPA should interpret section 401(a)(2) to allow tribal objections to impacts of discharge on off-reservation reserved rights once a discharge that affects water quality within the reservation has triggered a tribal objection under this section. This interpretation would be consistent with the EPA's fiduciary responsibilities to tribes under executive order and Agency policies[372] and would serve the purpose of section 401(a)(2) in protecting states or tribes affected by discharge originating upstream. Congress has not spoken directly to preclude this interpretation.

In this situation, section 401(a)(2) tribal objections to impacts of discharge on off-reservation reserved rights would be derivative and mediated by EPA evaluation and recommendations. EPA guidance should provide that where the threshold for treatment as an affected state under 401(a)(2) has already been satisfied, tribes may propose "conditions and limitations on the activity as a whole,"[373] including those that affect off-reservation water quality necessary to support rights reserved under treaty. In its evaluation, recommendations, and presentation at any hearing or proceeding, the EPA should include tribal concerns and conditions related to protection of water quality to maintain off-reservation reserved

369. 33 U.S.C. § 1341(a)(2) (2012).

370. *Id.* (emphasis added).

371. *Id.* § 1341(d). The text applies to "[a]ny certification provided under this section," and is not explicitly limited to section 401(a)(1). *Id.* Since previous paragraphs of section 401, including sections 401(a)(3), 401(a)(4), and 401(a)(5), explicitly limit their application to a certification obtained pursuant to paragraph (a)(1) of this section, the absence of this limitation in section 401(d) could be interpreted to allow other limitations to be raised under section 401(a)(2).

372. *See supra* Part VII.B.

373. *See* PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology, 511 U.S. 700, 712 (1994); *see also* S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370, 374 (2006); *supra* Part II.A.

rights as well as tribal objections related to the violation of water quality standards in reservation waters.

In addition, CWA section 401(a)(2) statutory requirements that the EPA provide an evaluation and recommendations under specified conditions[374] would not preclude the EPA from exercising its discretion to also evaluate tribal objections to federal permits when discharge would adversely affect off-reservation reserved rights. Common law fiduciary obligations to tribes,[375] as well as explicit trust obligations under executive order[376] and EPA policy and guidance,[377] would support the EPA's authority to interpret this section to protect tribal treaty rights from water quality impacts of federal permits.

In the exercise of discretionary authority, the author recommends that the EPA consult with tribes to develop an interpretive rule that would allow tribal objection to federal permits when discharge may affect the quality of waters within ceded territories, where waters are needed to support the tribe's reserved rights to hunt, fish and gather under treaties with the United States. The EPA would request a hearing on behalf of a tribe objecting to a federal permit on the grounds that the permitted activity threatens or has some direct and serious effect[378] on tribal reserved rights that depend on water quality. The EPA would assume the same responsibility to evaluate and make recommendations on tribal objections and conditions provided in section 401(a)(2) when a discharge affects reservation waters.[379]

The potential rule proposed above interpreting section 401(a)(2) would require tribes to rely on the EPA's federal agency in order to protect water quality and their reserved rights in ceded territories that depend on water quality. The EPA would mediate protection of tribal reserved rights to fulfill the purposes of federal

374. 33 U.S.C. § 1341(a)(2).

375. *See* Nw. Sea Farms, Inc. v. U.S. Army Corps of Eng'rs, 931 F. Supp. 1515, 1519–20 (W.D. Wash. 1996) (describing the Supreme Court's recognition of fiduciary duties to tribes and holding the Corps could take into account tribal rights not mentioned in regulations).

376. *See supra* Part VI.

377. *Id.*

378. *See* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 428 (1989) (plurality opinion for Nos. 87-1699 and 87-1711); Montana v. United States, 450 U.S. 544, 566 (1981); *supra* notes 165–80 and accompanying text.

379. 33 U.S.C. § 1341(a)(2).

treaties and in the exercise of the EPA's fiduciary commitments to tribes.

2. *Expanding Tribal Treatment as a State to Protect Waters in Ceded Territories*

Protection of tribal reserved rights that depend on water resources could be best served by allowing tribal co-management of water resources within ceded territories, particularly where the land is under the control of the federal government. Substantive tribal civil jurisdiction to protect water quality, rather than merely the potential for tribal consultation, would increase the likelihood that treaty rights to hunt, fish and gather would be protected in the face of proposals for pipelines, mineral extraction and other industrial development on federal lands in ceded territories.

Were tribes granted authority to protect water quality on ceded territories held in trust by the United States, whether through statutory interpretation or amendment of CWA provisions providing for treatment as states, exercise of water quality functions would require demonstration both of federal trust responsibility and of tribal inherent sovereign interests. First, the tribe would need to show that the water resources that the tribe seeks to co-manage are, in fact, held by the federal government.[380] The tribe would then demonstrate that its members retain reserved rights under treaties with the federal government to hunt, fish, or gather on this federal land.[381] Next, the tribe would show that treaties, statutes, regulations, or other federal authorities establish fiduciary responsibilities to protect tribal reserved rights on the federal land at issue. Where ceded territories are on national forest lands, statutes and regulations pertaining to national forests specifically affirm trust obligations to recognized Indian tribes.[382] Forest

380. *See* 33 U.S.C. § 1377(e)(2).

381. Treaty rights may be disputed in some jurisdictions. With respect to Lake Superior Chippewa Indians, the United States Supreme Court determined in *Mille Lacs III*, 526 U.S. 172, 202, 207 (1999), that the Chippewa retain their rights under the 1837 and 1855 treaties, and that these rights have not been relinquished or abrogated.

382. *See, e.g.*, 36 C.F.R. § 219.4(a)(2) (2014) ("The Department recognizes the Federal Government has certain trust responsibilities and a unique legal relationship with federally recognized Indian tribes. The responsible official shall honor the government-to-government relationship between federally recognized Indian tribes and the Federal Government."); *id.* § 219.4(b)(2) ("[P]lan

management plans adopted pursuant to these regulations may contain more specific management requirements establishing trust responsibilities. The Superior Forest Plan, for example, cites treaties preserving the rights of Ojibwe bands to hunt, fish, and gather and states that the Superior National Forest is responsible to maintain and facilitate the exercise of these rights on lands subject to those treaties.[383]

Finally, in order to establish tribal inherent sovereign authority to protect water quality on federal trust lands, the tribe would need to show that the water quality function sought is needed to prevent a "direct effect on the political integrity, the economic security, or the health or welfare of the tribe"[384] that would otherwise result from water pollution. Treaty language reserving rights, tribal resource management documents, and government or tribal reports could demonstrate the importance of reserved rights to tribal political integrity, economic security, health, and welfare. For example, the 1854 Treaty with the Chippewa connects the cession of territory and formation of reservations with tribal rights to hunt and fish in the territories ceded by the Treaty.[385] Tribes within the 1854 ceded territory have adopted a conservation code,[386] and a

development or revision . . . shall include consideration of . . . [t]he objectives of federally recognized Indian Tribes . . . ."); *id.* § 219.10(5) (stating that the forest plan must provide multiple uses and consider habitat conditions "for hunting, fishing, trapping, gathering, observing, subsistence, and other activities . . . in collaboration with federally recognized Tribes . . . and other Federal agencies"); *see also* Nez Perce Tribe v. U.S. Forest Serv., No. 3:13-CV-348-BLW, 2013 WL 5212317, at *5–6 (D. Idaho Sept. 12, 2013) (holding that the Forest Service had a specific duty under the National Forest Management Act and the Forest Plans to consult with a tribe regarding the use of the National Forest System roads held by the tribe under treaty (citing 16 U.S.C. § 1604(a)(i))).

383. U.S. FOREST SERV. E. REGION, LAND AND RESOURCE MANAGEMENT PLAN, SUPERIOR NATIONAL FOREST 1-4, 2-37 (2004). The Plan states, "The Superior National Forest has a role in maintaining these rights because it is an office of the federal government responsible for natural resource management on land subject to these treaties," and "Superior National Forest facilitates the exercise of the right to hunt, fish and gather as retained by Ojibwe whose homelands were subject to treaty in 1854 and 1866." *Id.*

384. Montana v. United States, 450 U.S. 544, 566 (1981); *see supra* notes 165–80 and accompanying text.

385. Treaty with the Chippewa, U.S.-Chippewa, art. 11, Sept. 30, 1854, 10 Stat. 1109 ("[T]he Chippewas of Lake Superior . . . [a]nd such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.").

386. *See* 1854 TREATY AUTH., CEDED TERRITORY CONSERVATION CODE

recent Corps report supports the relationship between subsistence hunting and fishing and the tribes' cultural identity.[387] These factors could support tribal co-management of water resources.

The EPA may have discretion to interpret the language of CWA section 518(e)(2) so that tribal TAS status and water quality functions can protect waters held in trust by the United States for Indians. Section 518(e)(2) states that the EPA is authorized to treat an Indian tribe as a state under the CWA if

> the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation.[388]

The simplest interpretation of this paragraph might apply the term "otherwise"[389] to all of its clauses, limiting the authority of the EPA to treat tribes as states to the area within the borders of the reservation.[390] However, the phrasing of this paragraph could also be read disjunctively, so that the EPA would have authority to treat an Indian tribe as a state for functions pertaining to the

(2012), *available at* http://www.1854treatyauthority.org/cms/files/Code%201854%20Conservation%20Code%202012.pdf; *see also Organizational Overview—Purpose*, 1854 TREATY AUTHORITY, http://www.1854treatyauthority.org/about/history.htm (last visited Dec. 3, 2014).

387. U.S. ARMY CORPS OF ENG'RS, TREATY RIGHTS AND SUBSISTENCE FISHING IN THE U.S. WATERS OF THE GREAT LAKES, UPPER MISSISSIPPI RIVER, AND OHIO RIVER BASINS 2, 68 (2012).

388. *Id.*; 33 U.S.C. § 1377(e)(2) (2012).

389. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1598 (Philip Babcock Gove et al. eds., 1986) (stating that "otherwise" may mean "in a different way or manner," "in different circumstances," "under other conditions," or "in other respects").

390. The general rule is that "[t]he presence of a comma separating a modifying clause in a statute from the clause immediately preceding it is an indication that the modifying clause was intended to modify all the preceding clauses and not only the last antecedent one." 73 AM. JUR. 2D *Statutes* § 130 (2012). *But see, e.g.*, United States v. Transocean Deepwater Drilling, Inc., 767 F.3d 485, 495 (5th Cir. 2014) ("'[A] purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning.' . . . We will 'disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute.'" (quoting U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 454, 462 (1993)).

management and protection of water resources "held by the United States in trust for Indians" even if such resources were not within the borders of the reservation.[391] Statutory construction is a "holistic endeavor,"[392] and this construction could give meaning to all clauses of the statute.[393] If section 518(e)(2) were found to be ambiguous on this issue, the EPA's interpretation of CWA section 518(e)(2) would be entitled to substantial deference even the Agency's reading was a new interpretation[394] and not the only possible one.[395] The author would suggest that the EPA, in consultation with tribes, should consider both potential interpretation and potential amendment of the CWA to explicitly encourage tribal co-management of resources on federal land in ceded territories where treaty rights to hunt, fish, and gather depend on protection of water quality.

VIII. CONCLUSION

Although CWA section 401 may adequately protect states from federal disregard of a state's water quality interests when federal permits are issued, independent tribal authority is needed to protect both reservation water quality and the off-reservation reserved rights of tribes. To the extent that discharge from mineral extraction, oil and gas drilling and infrastructure, or industrial pollution originates on the reservation, section 401(a)(1), as currently understood, could provide tribes with direct authority to

391. 33 U.S.C. § 1377(e)(2).

392. *U.S. Nat'l Bank of Or.*, 508 U.S. at 454–55 ("Statutory construction 'is a holistic endeavor,' and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." (citation omitted)).

393. Demko v. United States, 44 Fed. Cl. 83, 88 (1999) (concluding that statutory language "should be read in a manner that gives meaning to all parts. . . . [R]ules of grammar and syntax are not necessarily dispositive"). If TAS functions of the tribe were limited to land within reservation borders, the prior clauses of 33 U.S.C. § 1377(e)(2) would be rendered meaningless, since it would have been sufficient to state "the functions to be exercised by the Indian tribe pertain to the management and protection of all water resources which are . . . within the borders of an Indian reservation." *Id.*

394. Neither a "break with prior interpretations of the Act," nor the fact that the Agency has "changed its interpretation," reduce the deference accorded to the EPA in interpreting an environmental statute. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 862–63 (1984).

395. *See Chevron*, 467 U.S. at 843; *supra* notes 358–71 and accompanying text.

veto or condition federal permits and protect tribal waters.[396] However, fewer than ten percent of federally recognized tribes have been qualified by the EPA to exercise this authority.[397] To support tribal exercise of this fundamental CWA certification function, the EPA should simplify the process by which tribes qualify for TAS under section 518(e) of the CWA and facilitate removal of any other barriers to tribal exercise of section 401(a)(1) authority.

Although some tribes qualified for TAS have begun to exercise their section 401(a)(1) certification rights when discharge originates on the reservation, tribes have not yet begun to utilize section 401(a)(2) authority to object to federal permits and engage the EPA in evaluation and recommendations to protect water quality downstream of sites where discharge originates. It is clear that, under the CWA, its implementing regulations, and case law, activities subject to either state NPDES permits or to federal permits must comply with the water quality standards of an affected or downstream tribe.[398] Clear EPA guidance that respects this law, congressional delegation of authority to tribes under the CWA, and recognition of inherent tribal sovereignty is needed to awaken the potential of section 401(a)(2) to protect tribal water quality.

The EPA should move quickly to develop guidance facilitating tribal exercise of authority under section 401(a)(2). In that guidance, the EPA should respect tribal expertise and rights to self-determination, give deference to tribal government assessments, and exercise fiduciary obligations to protect tribal waters. The EPA should ensure that both numeric and narrative standards of the tribes are upheld, and evaluate and make recommendations that protect water resources needed to support tribal reserved rights—even when those waters are outside the boundaries of the reservation.

In addition, it must be recognized that in many parts of the United States, tribal reservations constitute only a small portion of the acreage that has long sustained tribal integrity, economic security, health, and welfare.[399] Tribes that have ceded huge tracts of land to the U.S. government may be quite vulnerable to

396. *See supra* Part II.A.

397. *See supra* notes 129–30 and accompanying text.

398. For a full explication of the effects of the CWA's regulations and relevant case law on downstream tribes, see *supra* Part II.B.

399. *See supra* notes 152–53 and accompanying text.

downstream pollution that affects off-reservation water resources needed to support reserved rights to hunt, fish, and gather, as well as affecting reservation waters.

Courts have held that tribal reserved rights outside the reservation boundaries may not be rendered meaningless either by technologies used by non-Indians to capture the fish or as a result of water controls that impair treaty rights.[400] Where treaties have secured to tribes the right of taking fish, precedent confirms that tribes are entitled to a "fair share" of that reserved resource.[401] Yet, in many areas of the United States—including the Lake Superior Basin—federal permits have the potential to allocate tribal reserved rights to mining, drilling and pipeline companies and other industries. These permits do not disrupt tribal fishing, hunting, and gathering rights for just one season, but for hundreds of thousands of years.

Substantive requirements of treaties, statutes, and regulations, including those contained in CWA sections 401 and 518, have the potential to prevent pollution of water resources, breach of federal trust obligations to tribes, and an unfair degradation of tribal reserved rights. To realize this potential, the EPA should begin the process, in consultation with tribes, to determine how tribal authority under the CWA could best protect tribal reserved rights as well as reservation waters. In the long run, greater recognition of tribal rights, United States' trust responsibilities, and tribal inherent sovereignty to protect water quality would allow for consultation and co-management of resources between tribes and the federal government and between tribes and states.

400. *See supra* Part V.
401. *See supra* note 229 and accompanying text.