TREATMENT OF TRIBES LIKE STATES FOR ENVIRONMENTAL LAWS

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OUTLINE

THE FEDERALIST FRAMEWORK OF ENVIRONMENTAL LAW

Federal environmental law is carried out within a framework of federalism, which is grounded in the Constitution. The federal government has certain powers that are set out in the Constitution, and the Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As such, the states can be said to have inherent sovereignty, while the federal government's powers must be based on specific constitutional provisions. Within the enumerated federal powers, the Supremacy Clause provides that the states are subject to federal law, including treaties.[1]

The historical roots of this doctrine – states with inherent powers and a federal government with enumerated powers – reach into the convention in which the original states came together to form the federal government. As Justice Stevens has noted, however, "most of the States were never actually independent sovereigns, and those that were enjoyed that independent status for only a few years." [2] In contrast, he said, "The inherent sovereignty of the Indian tribes has a historical basis that merits special attention. They governed territory on this continent long before Columbus arrived."[3] Nevertheless, states that enter the Union after the original thirteen are considered to "assume sovereignty on an 'equal footing' with the established States."[4]

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[1] Article VI, Clause 2.
[2] United States v. Lara, 541 U.S. 193, 210-11 (2004) (Stevens, J., concurring).
[3] *Id*. at 210.
[4] Montana v. United States, 450 U.S. 544, 551 (1981) (*citing* Pollard's Lessee v. Hagan, 3 How. 212, 222-223, 229).

The sovereign powers of the states include the "police" power, which is a general source of authority for state laws to protect the public health, safety, and welfare, including laws to protect the environment. Federal environmental laws are, for the most part, based on the Commerce Clause, which provides Congress with power to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes."[5]

Prior to 1970, while forerunners of some of the modern environmental laws had been on the books for some time, those laws were not regulatory. Rather, the federal regulatory framework began to take shape in the early 1970s, as Congress recognized that a national scope was necessary, since many environmental issues cross state boundaries. When Congress enacted that generation of environmental laws, it did so in ways that recognized and made use of the powers of the states. In the federalist framework, states have prominent roles, some of which are based on inherent sovereignty and in some of which states carry out delegated federal authority. As the third kind of sovereign in our federal system, and as cultures that are deeply rooted in the environment, there must also be prominent roles for tribes.[6]

EARLY EPA POLICY FOR INDIAN COUNTRY

The first wave of environmental regulatory statutes, enacted in the 1970s, included the Clean Air Act (CAA) in 1970,[7] Clean Water Act (CWA) in 1972,[8] Safe Drinking Water Act (SDWA) in 1974,[9] and Resource Conservation and Recovery Act (RCRA) in 1976.[10] These enactments occurred during the early years of self-determination of federal Indian policy and the waning years of the termination era. Although conceptually tribes have always had inherent sovereignty, it is not surprising that the people writing the laws in the early 1970s did not consider where tribes fit. The namesake statute of the self-determination era, the Indian Self-Determination and Education Assistance Act,[11] was not enacted until 1975.

The 1970 CAA and 1972 CWA imposed certain obligations on the states. In implementing those laws, the Environmental Protection Agency (EPA) interpreted them as not granting authority to states to enforce their state programs in Indian country. In implementing the CWA, EPA had to decide how to

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[5] Article I, Section 8, Clause 3.
[6] *See* William H. Rodgers, Jr., *Tribal Government Roles in Environmental Federalism*, 21:3 NAT. RES. & ENVT. 3 (Winter 2007). For an account of one tribe's experience in administering several EPA programs, *see* Jill Elise Grant, *The Navajo Nation EPA's Experience with "Treatment as a State" and Primacy*, 21:3 NAT. RES. & ENVT. 9 (Winter 2007).
[7] The Clean Air Act (CAA) was originally enacted in 1955, Pub. L. No. 84-145, 69 Stat. 322, and has been amended many times since, including extensive amendments in 1990. Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended at 42 U.S.C. §§7401 to 7671q).
[8] The Clean Water Act, also known as the Federal Water Pollution Control Act, was originally enacted in 1948. Act of June 30, 1948, c. 758. Comprehensive amendments in 1972 extensively reworked the statute. Pub. L. No. 92-500, 86 Stat. 896 (codified as amended at 33 U.S.C. §1251 to 1387).
[9] The Safe Drinking Water Act, originally enacted in 1944 as the Public Health Service Act, is codified as amended at 42 U.S.C. §§300f to 300j-26. The title "Safe Drinking Water Act" was enacted in 1974. Pub. L. No. 93-523, §1, 88 Stat. 1660.
[10] The Clean Water Act, also known as the Federal Water Pollution Control Act, was originally enacted in 1948. Act of June 30, 1948, c. 758. Comprehensive amendments in 1972 extensively reworked the statute. Pub. L. No. 92-500, 86 Stat. 896 (codified as amended at 33 U.S.C. §1251 to 1387).
[11] Pub. L. No. 93-638 (codified as amended at 25 U.S.C. § 450).

implement the permit program for "point" sources of water pollution under CWA section 402. The statute directs EPA to administer this permit program but authorizes states to apply to EPA to take it over. In interpreting the statute, EPA relied on the principle of federal Indian law that state laws generally do not apply to Indians within Indian country, and, since the statute did not expressly delegate such authority to the states, EPA determined that Congress had not intended to so. So, EPA decided that it would have to implement the point source program in Indian country directly, and not delegate it to the states.[12]

In another early development, the 1970 version of the CAA included some provisions authorizing EPA to establish a program to prevent air pollution in areas that were already in compliance with the National Ambient Air Quality Standards (NAAQS). When EPA implemented this authority through rulemaking, creating the "prevention of significant deterioration" (PSD) program, it wrote the rules so that the governor of a state with a clean air area could "redesignate" the area either somewhat more or somewhat less polluted (but still in compliance with the National Ambient Air Quality Standards). In its rulemaking, EPA similarly provided that a tribe's governing body could redesignate its reservation.[13] The Northern Cheyenne Tribe did so, and, upon receiving EPA approval, became the first jurisdiction to redesignate to class I. Congress revised the PSD program in the 1977 CAA amendments,[14] in a manner generally consistent with the program EPA had established through rulemaking. EPA's decision was subsequently upheld in federal court.[15] This was the first instance of EPA and Congress treating tribes like states, although without actually calling it that.

In 1980, at the end of the Carter Administration, EPA adopted a policy statement on the implementation of its programs on Indian lands.[16] Then in 1984, during the Reagan Administration, EPA adopted an expanded version of its Indian policy.[17] Both these policy statements proclaimed the intent to work with tribes as the primary governmental parties in making environmental policy decisions for their reservations. The 1984 policy expressed support for tribes assuming regulatory and program management responsibilities, and pledged EPA support for removing existing legal impediments to EPA working directly with tribal governments. As such, the 1984 policy statement set the stage for tribal amendments to the regulatory statutes.

THE "TREATMENT AS A STATE" (TAS) AMENDMENTS

In 1986, Congress began to enact amendments to federal environmental statutes authorizing EPA to treat Indian tribes like states.[18] The following statutes have been amended (in the years indicated) to include provisions relating to tribes that use some variation of the term "treatment as a State":

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[12] EPA, National Pollutant Discharge Elimination System, 38 Fed. Reg. 13,528, 13,530 (May 22, 1973) (codified at 40 C.F.R. § 125.2(b)); *see generally* JAMES M. GRIJALVA, CLOSING THE CIRCLE: ENVIRONMENTAL JUSTICE IN INDIAN COUNTRY 17 (2008).
[13] EPA, Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. 42,510, 42,515 (Dec. 5, 1974) (codified at 40 C.F.R. § 52.21(c)(3)(i)).
[14] Pub. L. No. 95-95, title I, § 127(a), 91 Stat. 731 (codified at 42 U.S.C. §§ 7470-7479).
[15] Nance v. EPA, 645 F.2d 701 (9th Cir. 1981), *cert. denied sub nom*. Crow Tribe v. EPA, 454 U.S. 1081.
[16] EPA POLICY FOR PROGRAM IMPLEMENTATION ON INDIAN LANDS (Dec. 19, 1980).
[17] EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (Nov. 8, 1984). *See generally* GRIJALVA, *supra* note 12, at 23-34.
[18] *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW Ch. 10 (2012 ed.); GRIJALVA, *supra* note 12.

- Safe Drinking Water Act, 1986[19]
- Comprehensive Environmental Response Compensation and Liability Act, 1986[20]
- Clean Water Act, 1987[21]
- Clean Air Act, 1990[22]

As an alternative to the term "treatment as a State" or acronym "TAS," EPA sometimes expresses this concept as "treatment in a manner similar to a State." In a rulemaking document on tribal eligibility for grant program, EPA explained this choice of terminology, saying:

> EPA recognizes that Tribes are sovereign nations with a unique legal status and a relationship to the federal government that is significantly different than that of States. EPA believes that Congress did not intend to alter this relationship when it authorized treatment of Tribes "as States;" rather, the purpose was to reflect an intent that, insofar as possible, Tribes should assume a role in implementing the environmental statutes in Indian country comparable to the role States play outside of Indian country.[23]

Three of the four statutes listed above – SDWA, CWA, and CAA – authorize EPA and the states to administer regulatory programs that prescribe legally enforceable requirements. To administer regulatory programs like the states do, a tribe must have governmental authority over the regulated public, either as an aspect of inherent tribal sovereignty or as delegated federal power. These statutes also authorize a number of grant programs for states. Tribes can qualify for treatment like states for purposes of such grant programs, and for such programs they generally are not required to demonstrate governmental authority over the regulated public. CERCLA can be considered a remedial rather than a regulatory statute, in that it is not designed to establish enforceable standards for conduct but, rather, to facilitate remediation of sites that became contaminated before the hazards of certain chemicals or industrial practices were known. TAS for each of these different kinds of purposes is discussed below.

TREATMENT LIKE STATES FOR REGULATORY PROGRAMS

Each of the three regulatory statutes – SDWA, CWA, and CAA – includes a list of three requirements that a tribe must meet to qualify for TAS. The first and third requirements are virtually

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[19] Codified as amended at 42 U.S.C. §§300f to 300j-26. Provisions authorizing treatment of tribes as states were enacted in Pub. L. No. 99-339, §302(a), 100 Stat. 665, as section 1451 of the SDWA (codified at 42 U.S.C. §300j-11).

[20] The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) was enacted in 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§9601 to 9675, 11001 to 11050). Provisions authorizing EPA to treat tribes like states were enacted in Pub. L. No. 99-499, §207(e), 100 Stat. 1706, as CERCLA §126 (codified at 42 U.S.C. §9626). In addition, the amended statute also includes provisions authorizing tribes, like states, to act as trustees for damages to natural resources. 42 U.S.C. §9607(f).

[21] Codified as amended at 33 U.S.C. §1251 to 1387. Provisions authorizing EPA to treat tribes like states were enacted in Pub. L. No. 100-4, Title V, §506, 101 Stat. 76, as CWA §518 (codified as amended at 33 U.S.C. §1377).

[22] Codified as amended at 42 U.S.C. §§7401 to 7671q. Provisions authorizing EPA to treat tribes like states were enacted in the 1990 Amendments, Pub. L. No. 101-549, §§107(d), 108(i), amending CAA §301 by adding a new subsection (d) (codified at 42 U.S.C. §7601(d)) (tribal authority and TAS), and CAA §110, adding a new subsection (o) (codified at 33 U.S.C. §7410(o) (regarding tribal implementation plans). In addition, amendments enacted in 1977 authorize tribes to redesignate areas within their reservation for purposes of prevention of significant deterioration of air quality. Pub. L. No. 95-190, §14(a)(42), (43), 91 Stat. 1402 (codified at 42 U.S.C. §7474(c)).

[23] EPA, Environmental Program Grants for Tribes; Final Rule, 66 Fed. Reg. 3782 (Jan. 16, 2001).

identical in all three statutes, but the wording of the second requirement is a bit different in each. As stated in the SDWA, TAS is authorized only if:

> (A) the Indian Tribe is recognized by the Secretary of the Interior and has a governing body carrying out substantial governmental duties and powers;
> (B) the functions to be exercised by the Indian Tribe are within the area of the Tribal Government's jurisdiction; and
> (C) the Indian Tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this subchapter and of all applicable regulations.[24]

In the CWA, the first item is stated somewhat differently than in the SDWA, though not substantively differently, in that the requirement for federal recognition is stated elsewhere, in a different subsection of the section that was added in 1987 to authorize TAS.[25] The second item is stated as follows:

> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation.[26]

In the CAA, the requirement for federal recognition is stated elsewhere, in the definitions section of the statute.[27] The second item is stated as follows:

> (B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction.

EPA has taken a fundamentally different approach in implementing TAS for the CAA than it took for the CWA, and the difference in wording of the second requirement was a major factor cited by EPA in explaining its interpretation of congressional intent. This is discussed below under the heading "Inherent Sovereignty or Delegated Federal Authority?"

Safe Drinking Water Act

The SDWA authorizes EPA to administer two regulatory programs, the public water systems (PWS) program and underground injection control (UIC) program. The TAS amendments to the SDWA authorize EPA to delegate primary enforcement authority (sometimes called "primacy"). EPA published final rules implementing this authority in 1988.[28] In the absence of tribes assuming primacy, EPA policy is to retain enforcement authority.

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[24] 42 U.S.C. § 300j-11.
[25] 33 U.S.C. § 1377(h). In the main definitions section of the statute, Indian tribes are included in the definition of "municipality." 33 U.S.C. § 1362(4).
[26] 33 U.S.C. § 1377(e).
[27] 42 U.S.C. § 7602(r).
[28] EPA, Safe Drinking Water Act – National Drinking Water Regulations, Underground Injection Control Regulations; Indian Lands; Final Rule, 53 Fed. Reg. 37396 (Sept. 26, 1988) (codified in various sections of 40 C.F.R. pts. 35, 124, 141, 142, 143, 144, 145, and 146).

The purpose of the PWS program is to protect the safety of sources of drinking water provided by public water systems. EPA has established national standards for such systems.[29] Public water systems operated by tribes are subject to these standards.[30] The UIC program primarily deals with disposing of fluids associated with the extraction process of oil and natural gas.[31] More information can be found on EPA's UIC Program on Tribal Lands website.

Clean Water Act

The CWA created a number of interrelated regulatory programs. Under section 301, EPA has established effluent limitations for many kinds of sources of water pollution. Under section 303, the states have adopted water quality standards (WQS) for bodies of surface waters, intended to ensure that each water body will support its designated use. Section 402 authorizes EPA to issue permits for "point" sources, and such permits include conditions to enforce compliance with any applicable effluent limitations and with WQS. This permit program, which is called the "National Pollutant Discharge Elimination System" or NPDES, can be delegated to states. Section 401 provides each state in which a point source discharges pollutants (or a discharge occurs as a result of another federal permit) must be given the opportunity to certify whether or not the discharge complies with its WQS. Section 303(d) requires states to identify segments of surface water bodies that do not meet WQS and establish Total Maximum Daily Loads (TMDLs) designed to bring such segments into compliance. If a state does not do so, or submits a TMDL that EPA does not approve, EPA is supposed to step in and develop the TMDL. Section 404 authorizes the U.S. Army Corps of Engineers to issue permits to discharge dredged or fill material into surface waters, including wetlands, another program that can be delegated to states.

The TAS provisions of the CWA are set out in section 518,[32] which includes a list of sections for which EPA is authorized to treat tribes like states. The list includes sections 303 (WQS), 401 (certification of compliance with WQS), 402 (point source permits), and 404 (dredge and fill permits). EPA has implemented this authority through a number of rule-making documents.[33]

The most engagement by tribes in CWA programs has been in adopting WQS. EPA's Regulatory Requirement for TAS Eligibility Under the CWA WQS and Certification Programs and Examples of Supporting Documentation can be found on EPA's website. A tribe that has TAS status for WQS also has TAS status for section 401 certification.[34] For tribes without TAS status, EPA generally implements CWA program directly. In the absence of tribal WQS, EPA may draw on state WQS in issuing NPDES permits.[35]

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[29] 40 C.F.R. pts. 141, 143.
[30] 40 C.F.R. §§ 141.2, 141.3, 142.3.
[31] 40 C.F.R. pts. 145, 146, 147.
[32] 33 U.S.C. § 1377.
[33] *E.g.*, 56 Fed. Reg. 64339 (Dec. 12, 1991) (water quality standards); EPA, Treatment of Tribes as States for Purposes of Sections 308, 309, 401, 402, and 405 of the Clean Water Act: Final Rule, 58 Fed. Reg. 67966 (Dec. 22, 1993)(codified in various sections of 40 C.F.R. pts. 122-124, and 501); EPA, Clean Water Act; Section 404 Tribal Regulations; Final rule, 58 Fed. Reg. 81172 (Feb. 11, 1993).
[34] 40 C.F.R. §§ 124.51(c), 131.4(c).
[35] 58 Fed. Reg. 67974 (Dec. 22, 1993).

Clean Air Act

Like the CWA, the CAA authorizes a complex web of regulatory programs, but unlike the CWA, which calls for the states to adopt WQS, the CAA authorizes EPA to adopt a set of national standards for a six kinds of pollutants: sulfur dioxide, total suspended particulates (particulate matter or "PM"), carbon monoxide, ground level ozone, nitric oxide and nitrogen dioxide (together known as "NOx"), and lead.[36] These national standards are the National Ambient Air Quality Standards (NAAQS). To achieve or maintain compliance with the NAAQS, states are required to develop state implementation plans (SIPs), which must be submitted to EPA for approval.[37] In addition, the CAA authorizes a number of permit programs, which, for the most part, are not discussed in this paper.

Rather than listing all of the sections that EPA authorizes to treat tribes like states, the CAA statutory language authorize EPA to treat tribes like states pursuant to regulations in which EPA specifies those provisions "for which it is appropriate to treat Indian tribes like states."[38] Carrying out this mandate, in 1998, EPA published a final rule, which it refers to as the "Tribal Authority Rule."[39] Tribes can become authorized for TAS for most purposes. For tribes without TAS status, EPA generally implements CAA programs directly, and EPA has issued a number of rules taking the direct implementation approach.[40] Information about EPA's Regulatory Requirement for TAS Eligibility under the CAA and Examples of Supporting Documentation can be found on EPA's website.

Inherent Sovereignty or Delegated Federal Authority?

There is a basic difference between the way EPA interpreted the treatment like a state provisions of the Clean Water Act and how it interpreted the Clean Air Act. The issue is whether Congress intended for tribes that seek EPA authorization to administer regulatory programs under TAS provisions to be acting on the basis of their own inherent sovereignty or whether Congress intended TAS provisions to constitute a delegation of federal authority. Briefly, EPA has construed the TAS provisions of the CAA as a delegation of federal authority to tribes, but it did not reach the same conclusion in the context of either the CWA or SDWA.

The TAS provisions of the CWA were enacted before those of the CAA and, as such, were implemented through rulemaking sooner. In the final rules for TAS for the water quality standards (WQS) program, EPA considered whether Congress had intended the TAS provisions of the CWA to be a delegation of federal authority and determined that legislative history was not clear enough to support

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[36] 42 U.S.C. § 7409; 40 C.F.R. §§ 50.1 – 50.12.
[37] 42 U.S.C. § 7410.
[38] 42U.S.C § 7602(d).
[39] EPA, Indian Tribes: Air Quality Planning and Management; Final Rule, 63 Fed. Reg. 7254 (Feb. 12, 1998), making revisions in 40 C.F.R. pts. 9, 35, 50, and 81, and adding a new part 49.
[40] *See, e.g.*, EPA, Federal Operating Permits Program: Final rule, 64 Fed. Reg. 8247 (Feb. 19, 1999)(codified in various sections of 40 C.F.R. pt. 71); EPA, Review of New Sources and Major Modifications in Indian Country: Final rule, 76 Fed. Reg. 38748 (July 1, 2011) (codified at 40 C.F.R. §§ 49.151 – 49.161, 49.166 – 49.173, and amendments in 40 C.F.R. pt. 51, Appendix S); EPA, General Permits and Permits by Rule for the Federal Minor New Source Review Program in Indian Country for five Source Categories: Final rule, 80 Fed. Reg 25068 (May 1, 2015) (codified at 40 C.F.R. §§ 49.162 – 49.164).

such a conclusion.[41] So EPA implemented the CWA TAS provisions as requiring a showing by the tribe that it possesses sufficient inherent sovereignty to regulate all the surface waters covered by the tribe's application for TAS.[42]

Applying its understanding of Federal Indian law principles, EPA formulated an approach to applying the general proposition announced in *Montana v. United States*,[43] which holds that, subject to two exceptions, the inherent sovereignty of a tribe does not apply to nonmembers of the tribe. This is an application of a court-made legal principle called "implicit divestiture," which holds that tribes can be divested of certain aspects of their inherent sovereignty by implication, in the absence of any statutory or treaty language limiting tribal governmental powers.[44]

In the *Montana* case, the Tribe's authority was challenged only with respect to non-trust lands, and not with respect to trust lands. So EPA found that the need for a showing of sufficient inherent sovereignty really only applies to lands within reservation boundaries that are not in Indian trust or restricted status. What EPA requires is that a tribe to show that its assertion of authority over fee lands and other non-trust lands fits the second exception to the *Montana* general proposition, i.e., the exception that recognizes that a tribe may exercise inherent tribal sovereignty to protect the tribe's health and welfare. In the WQS final rule EPA said that, in the context of the CWA, Congress had made a finding that water pollution is dangerous to health and welfare.[45] Accordingly, EPA requires a tribe to make a "relatively simple" factual showing that there are waters within its reservation that are used by the tribe and its members and that such waters are subject to regulation under the CWA.[46] The tribe must also assert that the impairment of surface waters by the activities of nonmembers on fee lands would have a "serious and substantial effect on the health and welfare of the Tribe."[47] If a tribe meets this initial burden, EPA says that, taking into account its generalized statutory and factual findings, it will presume that the tribe has adequately demonstrated its jurisdiction over fee lands.[48] EPA's resolution of this issue has been upheld by the courts.[49]

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[41] 56 Fed. Reg. 64, 339, 64,880-81 (Dec. 12, 1991). EPA did not, in fact, determine that Congress did not intend CWA section 518 to be a delegation of federal authority to tribes, but, rather, EPA said "the question of whether section 518(e) is an explicit delegation of authority over non-Indians is not resolved." *Id*. at 64,881.

[42] 40 C.F.R. §131.8(b)(3).

[43] 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).

[44] *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.02[3][c] (2012 ed.); *see also* Dean B. Suagee, *The Supreme Court's "Whack-a-Mole" Game Theory in Federal Indian Law, a Theory that Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RES. J. 90 (2002).

[45] 56 Fed. Reg. 64,878.

[46] 56 Fed. Reg. 64,879.

[47] 56 Fed. Reg. 64879. In using the phrase "serious and substantial," EPA has acknowledged that plurality opinion of the Court in Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 431, 109 S.Ct. 2994, 3008, 106 L.Ed.2d 343 (White., J, joined by three other Justices, announcing the decision of the Court in one of two consolidated cases and dissenting in the other), would require that, for a tribe to have a "protectable interest" under the second *Montana* exception, the effect of the activity that the tribe seeks to regulate must be "demonstrably serious." 56 Fed. Reg. 64878.

[48] 56 Fed. Reg. 64,879. A state (or an adjacent tribe) is allowed an opportunity to challenge the applicant tribe's assertion of jurisdiction. 40 C.F.R. §131.8(c)(3).

[49] Montana v. Environmental Protection Agency, 941 F. Supp. 945 (D. Mont. 1996), *affirmed*, 137 F.3d 1135 (9th Cir. 1998), *cert. denied*, 525 U.S. 921, 119 S.Ct. 275 (Mem.), 142 L.Ed.2d 227 (1998) (upholding EPA approval of Confederated Salish and Kootenai Tribes for treatment as a state for setting water quality standards for all waters within reservation boundaries in which nearly half of the land is not in Indian trust status).

In its rules implementing the TAS provisions of the Clean Air Act, EPA came to a different conclusion, interpreting these TAS provisions as constituting "a delegation of federal authority, to tribes approved by EPA to administer CAA programs in the same manner as states, over all air resources within the exterior boundaries of a reservation for such programs."[50] EPA's reasoning is based on the statutory language,[51] the structure of the statue, and the legislative history.[52] This interpretation renders the *Montana* general proposition inapplicable, and thus EPA does not require a tribe to make an affirmative showing of inherent sovereignty over pollution sources on fee lands within its reservation.[53] This interpretation has also been upheld in court.[54]

This difference between EPA's interpretation of TAS in the CWA and the CAA has important practical implications for the development of tribal regulatory programs. Basically, for any tribe with surface waters on or adjacent to non-trust lands within its reservation, if the tribe seeks to regulate water quality under the CWA, it should anticipate litigation in the event that EPA approves its application for TAS. Although EPA decisions approving tribal TAS applications have been upheld by the courts, each case turns on its specific facts, rendering the outcomes of future cases somewhat difficult to predict. A tribal program to regulate air quality under the CAA, however, should face a much lower risk of litigation because, given delegation of federal authority, the implicit divestiture argument is not applicable. In 2014, EPA announced an initiative to reconsider its interpretation of the TAS provisions of the CWA.[55]

TREATMENT LIKE STATES FOR GRANT PROGRAMS

The statutes authorizing treatment of tribes as states include a number of financial assistance programs. Tribes are also eligible for financial assistance from EPA under statutes that do not have TAS provisions, including many programs that are not regulatory in nature. In 2001, EPA published a final rule updating and revising its regulations governing grants to tribes and intertribal consortia for a wide range of programs.[56] For grants in support of regulatory programs for which EPA is authorized to treat tribes as states, the grant regulations generally require tribes to have made the showing that it qualifies

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[50] 63 Fed. Reg. 7254 (Feb. 12, 1998).
[51] CAA §110(o) provides that, when a tribal implementation plan has been approved by EPA, "the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." 42 U.S.C. §7410(o).
[52] 63 Fed. Reg. 7254-58. The legislative history includes a Senate Committee report stating that the Act "constitutes an express delegation of power to Indian tribes." S. Rep. No. 228, 101st Cong. 1st Sess. 79 (1989), *cited at* 63 Fed. Reg. 7254.
[53] 63 Fed. Reg. 7257 (discussing reasoning behind regulatory provision codified at 40 C.F.R. 49.7(a)(3)). EPA's interpretation of the CAA "as an explicit delegation of federal authority to eligible tribes [renders] it is not necessary for EPA to determine whether tribes have inherent authority over all sources of air pollution on their reservations." *Id*. EPA did express the belief, however, that "tribes generally will have inherent authority over air pollution sources on fee lands." *Id*. For any areas outside a tribe's reservation over which it asserts jurisdiction for a TAS application, EPA does require an affirmative showing of inherent sovereignty. 63 Fed. Reg. at 7258-59 (discussing regulatory provision codified at 40 C.F.R. §49.7(a)(3)).
[54] Arizona Public Service Co. v. Environmental Protection Agency, 211 F.3d 1280 (D.C. Cir 2000), *cert. denied sub nom* Michigan v. EPA, 532 U.S. 970, 121 S.Ct. 1600 (Mem.), 149 L.Ed.2d 467 (2001).
[55] A number of documents relating to this initiative, including a letter to Tribal Leaders dated April 18, 2014, are available on an EPA website: http://water.epa.gov/scitech/swguidance/standards/wqslibrary/tribal.cfm.
[56] EPA, Environmental Program Grants for Tribes; Final Rule 66 Fed. Reg. 3782 (Jan. 16, 2001).

under the statutory requirements.[57] For several other kinds of grants, the regulations require a showing that the tribes qualifies for TAS, but the tribe is generally not required to show that it has sufficient inherent sovereignty to exercise regulatory jurisdiction. Rather, instead of a jurisdictional showing, the tribe must only show that it has "adequate authority to carry out the grant activities."[58]

TREATMENT LIKE STATES FOR REMEDIATION AND EMERGENCY PLANNING

In addition to the statutes discussed above, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[59] has been amended to authorize EPA to treat Indian tribes like states.[60] As distinct from the statutory requirements of SDWA, CWA, and CAA that require a tribe to show that it qualifies for treatment as a state to administer regulatory programs, the TAS provision in CERCLA, which was added in 1986,[61] tells EPA that a tribe "*shall be afforded* substantially the same treatment as a State" for a number of purposes. The list of purposes includes: notification of releases; consultation on remedial actions; access to information; health authorities; and roles and responsibilities under the national contingency plan and submittal of priorities for remedial action (but not for the right to put one site on the National Priorities List).[62]

CERCLA allows the federal government to assume the lead in taking response actions at a hazardous waste site or to transfer funds and management responsibility to States, their political subdivisions, or tribes with the requisite technical and management capabilities. To ensure cooperation during this process, the Act provides a process by which federal, state, tribal and local governments may enter into formal agreements.[63] While CERCLA is not a regulatory statute, the EPA regulations implementing this provision nevertheless do require tribes to make a showing of jurisdiction over the site at issue in order "to assume the same responsibility as a state in Superfund response actions."[64]

Indian tribes that meet these requirements may participate either as a lead or support agency for Superfund-financed response actions. EPA regulations allow tribes to enter into Superfund Memoranda of Agreement with EPA to establish the nature and extent to which EPA and the tribe will interact during response actions.[65] When taking the lead on fund-financed cleanups under section 104, tribes do not have

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[57] *E.g.*, Water Pollution Control (CWA section 106), 40 C.F.R. § 35.583; Nonpoint Source Management (CWA section 319(h)), 40 C.F.R. § 35.633; Public Water Systems (SDWA section 1443(a)), 40 C.F.R. § 35.676; Underground Water Source Protection (SDWA section 1443(b)), 40 C.F.R. § 35.676.
[58] E.g., Lead Based Paint Program Grants (Toxic substances Control Act (TSCA) section 404(g)), 40 C.F.R. § 35.693; Indoor Radon Grants (TSCA section 306), 40 C.F.R. § 35.703; Toxic Substance Compliance Monitoring (TSCA section 28), 40 C.F.R. § 35.713.
[59] 42 U.S.C. §§9601 – 9675.
[60] CERCLA §126, 42 U.S.C. §9626.
[61] Pub. L. No. 99-499, title II, §207(e), 100 Stat. 1706.
[62] 42 U.S.C. §9626(a).
[63] CERCLA §104; 42 U.S.C. §9604, implemented through rules codified at 40 C.F.R. Part 35, Subpart O.
[64] EPA, National Oil and Hazardous Substance Pollution Contingency Plan; Final Rule, 55 Fed. Reg. 8666, 8770 (March 8, 1990) (discussing reasoning for regulatory provisions codified at 40 C.F.R. §300.515(b)); A tribe must also be federally recognized and have a governing body "that is currently performing governmental functions to promote the health, safety and welfare of the affected population or to protect the environment within a defined geographic area." 40 C.F.R. § 300.515(b); *see also* 40 C.F.R. §300.105 (defining "State" to include Indian tribes with respect to certain provisions of CERCLA).
[65] 40 C.F.R. § 300.505(a).

to provide the same type of financial assurances as states.[66] Tribes may enter into Cooperative Agreements with EPA to receive funds for tribal-lead remediation and response actions, to defray any costs they incur in the role of support agency, and take enforcement actions against potentially responsible parties under the Act.[67] Tribes are also afforded the same opportunity as states to participate in EPA negotiations with potentially responsible parties for actions relating to lands under tribal jurisdiction, and if an agreement is reached with those parties, tribes may become signatories.[68]

Tribes are also authorized to act as trustees for natural resources damages.[69] This provision of CERCLA is intended to make the responsible parties bear the costs of damages to natural resources caused by the release of hazardous substances.

The TAS provision in CERCLA was added in the same act of Congress that enacted the Emergency Planning and Community Right-to-Know Act (EPCRA).[70] Although EPCRA does not include any provisions specifically mentioning Indian tribes, EPA has, through rulemaking, decided to treat tribes as states for purposes of EPCRA.[71]

In 2002, Congress enacted the Small Business Relief and Brownfields Revitalization Act[72] which, among its other provisions, added a new section 128 to CERCLA[73] authorizing a new EPA assistance program for states and tribes to establish programs to remediate "brownfields," a term used for sites that have some contamination but generally not so much as to be high priorities for federal enforcement. This program is an example of a statute that treats tribes like states but does not use the "treatment as a state" terminology. Rather, at numerous points it says "a State or an Indian tribe."

RCRA: AN EPA STATUTE WITHOUT TAS STATUTORY LANGUAGE

Not all regulatory statues administered by EPA include express authorization to treat tribes as states. The major EPA statute that is administered in the cooperative federalism framework that has not yet been amended to authorize TAS is the Resource Conservation and Recovery Act (RCRA).[74] The regulatory provisions of RCRA are mostly concerned with hazardous waste and municipal solid waste. The only reference to tribes in this statute is the inclusion of tribes in the definition of "municipality."[75] As "municipalities," tribes are eligible for grants to develop solid waste management and resource recovery programs.[76] They have also been ruled subject to citizen suits for alleged violations of RCRA.[77]

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[66] 40 C.F.R. § 300.510(a).
[67] 40 C.F.R. § 300.515(a); 40 C.F.R. Part 35, Subpart O.
[68] Environmental Protection Agency, Office of Solid Waste and Emergency Response, Indian Tribe Involvement in the Superfund Program, Pub. No. 9375.5-02/FS Fall 1989.
[69] CERCLA § 107. 42 U.S.C. § 9607.
[70] Pub. L. No. 99-499, title III, 100 Stat. 1729 (codified at 42 U.S.C. §§11001 – 11050).
[71] EPA, Community Right-to-Know Reporting Requirements; Final Rule, 55 Fed. Reg. 30632, 30641 (July 26, 1990) (discussing rationale for EPA decision to assigning the chief executive officer of an Indian tribe with responsibilities performed by state governors outside of Indian country, regulatory provisions codified at 40 C.F. R. parts 355, 370).
[72] Pub. L. No. 107-118.
[73] 42 U.S.C. § 9628.
[74] 42 U.S.C. §§ 6901 – 6992k.
[75] 42 U.S.C. § 6903(13).
[76] 42 U.S.C. §6948.

Although Congress has not amended RCRA to treat tribes like states, it has enacted legislation recognizing the extent of the problem associated with unregulated open dumps in Indian country.[78] Open dumps in Indian country may be subject to enforcement action by EPA, and in two reported cases, the citizen suit provision of RCRA[79] has been held to constitute a waiver of tribal sovereign immunity.[80]

In one case that arose in the context of the RCRA, EPA had decided to treat a tribe like a state for purposes of approving a tribal municipal solid waste landfill permit program despite the lack of TAS statutory language. The federal appeals court rejected EPA's reasoning and set aside the Agency's decision, but the court nevertheless expressed the view that the tribe possessed sufficient inherent sovereignty to establish a landfill permit program.[81] The court said that a tribal program would have to be in strict compliance with the EPA regulations governing municipal solid waste landfills, and noted that while a state program can be allowed a waiver by EPA of certain requirements, for a tribe to be allowed such a waiver, EPA would have to issue a site-specific regulation.

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[77] Blue Legs v. U.S. Bureau of Indian Affairs, 867 F.2d 1094, 1097 (8th Cir. 1989) (construing inclusion of tribes in definition of "municipality" as a waiver of tribal sovereign immunity, since municipalities are "persons" under the statute and citizen suites are authorized by 42 U.S.C. §6972 against any person alleged to violate the statute).
[78] Indian Lands Open Dump Clean-Up Act of 1994, Pub. L. No. 103-399 (codified at 25 U.S.C. §§3901 – 3908).
[79] RCRA §7002; 42 U.S.C. §6972.
[80] Blue Legs v. U.S. Bureau of Indian Affairs, 867 F.2d 1094, 1096-98 (8th Cir. 1989) (finding congressional waiver of tribal sovereign immunity for citizen suits under RCRA in inclusion of tribes in definition of "municipality" and inclusion of "municipality" in definition of person); Atlantic States Legal Foundation v. Salt River Pima-Maricopa Indian Community, 827 F.Supp. 608, 609-10 (D. Ariz. 1993) (same regarding citizen suit provision under RCRA; also reaching similar conclusion regarding citizen suit provision of Clean Water Act). *But see* Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126, 1132-33 (11th Cir. 1999) (questioning reasoning in *Blue Legs*).
[81] Backcountry Against Dumps v. EPA, 100 F.3d 147, 150-51 (D.C. Cir. 1996).