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Comment

THE TRUST DOCTRINE AND THE CLEAN WATER ACT: THE ENVIRONMENTAL PROTECTION AGENCY'S DUTY TO ENFORCE TRIBAL WATER QUALITY STANDARDS AGAINST UPSTREAM POLLUTERS

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In 1987, Congress amended the Clean Water Act (CWA) [FN1] to allow for qualifying Indian tribes to be treated as states for the purposes of certain CWA provisions. Tribes with substantial governing bodies that meet a variety of regulatory requirements may attain "treatment-as-state" (TAS) status. Among other things, this status empowers tribes to set water quality standards for navigable waters that flow through their reservations. Tribal water quality standards may differ from those of the surrounding jurisdictions that have water quality standard-setting authority. These surrounding jurisdictions may include the state in which the tribe's reservation is located, a different state, and/or another tribe with TAS status.

The CWA does not explicitly grant tribes with TAS status the authority to set tribal water quality standards that are more stringent than the CWA's minimum standards. By extension, the ability of tribes to preserve their water quality by enforcing their water quality standards against upstream polluters is also left unresolved ***678** by the CWA. [FN2] The Environmental Protection Agency (EPA) is charged with the implementation and enforcement of the CWA. Through a strained interpretation of the statute, the EPA has construed the TAS provision as allowing both for tribal water quality standards more stringent than the federal minimums, and for enforcement of those standards against upstream polluters. The only court to consider the issue to date is the Tenth Circuit in City of Albuquerque v. Browner, [FN3] which rejected the EPA's statutory construction while holding on grounds of inherent Indian sovereignty that Indian tribes indeed possess the authority to set and enforce stringent standards. [FN4]

In construing the role of Indian tribes under the CWA, both the Albuquerque court and the EPA have failed to consider a foundational principle of Federal Indian law: the trust doctrine. The trust doctrine imposes the highest standard of fiduciary duty on executive agencies to act in the best interests of Indian tribes. As applied in the context of EPA discretionary power under the CWA, the trust doctrine provides a powerful tool to Indian tribes to protect tribal water resources by setting extremely stringent water quality standards. The trust doctrine further enables tribes to invoke EPA power to enforce those standards against any upstream pollutant discharger.

Proper recognition of the EPA's obligations under the trust doctrine is critical to the appropriate treatment of tribal water quality management, both under and in addition to the provisions of the CWA. Failure to recognize the trust doctrine's impact on the EPA and on the operation of the CWA potentially deprives Indian tribes of the ability to protect their water resources adequately. Additionally, ignoring the trust doctrine's full effect weakens the role of Indian tribes in determining the nature of water quality on their reservations. This Comment addresses the need for and the effect of the trust doctrine's application to the CWA's provisions related to the treatment of Indian tribes as states.

Part I of this Comment generally describes the CWA and specifically discusses provisions governing water quality standards, ***679** the pollution discharge permitting scheme, and tribal treatment as states. Because the history of Federal Indian law is necessary to an understanding of the trust doctrine and tribal power under the CWA, Part II discusses fundamental principles of Federal Indian law, inherent Indian sovereignty, the concept of reserved Indian rights, and tribal regulatory power. Part III introduces the trust doctrine and specifically addresses the EPA's interpretation of its role in Indian-agency relations under the doctrine. Part IV addresses the limited case law that deals with tribal regulatory power to set and enforce water quality standards under the CWA. Finally, Part V calls for the application of the trust doctrine to the EPA in the specific context of the CWA, and describes the effect of the

trust doctrine on tribal power to control reservation water quality. A brief conclusion completes this Comment.

I

The Clean Water Act

A. The Clean Water Act Permitting Scheme

The CWA constitutes a comprehensive federal regulatory scheme that addresses the need to preserve and protect water quality. The CWA's stated purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." [FN5] While enumerating national water quality goals and policies, [FN6] the CWA explicitly describes an active and primary state role in water quality management. [FN7] Specifically, Congress is "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." [FN8] Nevertheless, when the standards of one state affect another state's water quality, state water quality standards become part of the federal law of water pollution control. [FN9]

The CWA contemplates two measures of water quality. The first measure is effluent limitation guidelines. The CWA requires ***680** the EPA to promulgate effluent limitation guidelines. [FN10] The guidelines are technology-based [FN11] and must be uniformly "applied to all point sources of discharge of pollutants." [FN12] Thus, effluent limitation guidelines are federal standards applied in all states. The second measure of water quality is a water quality standard. Water quality standards define "the water quality goals of a water body . . . by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses." [FN13] States set water quality standards subject to EPA approval as consistent with the requirements of the CWA. [FN14]

Water quality standards consist of three elements. First, water quality standards must delineate designated waterway uses that are consistent with the CWA's goals and policies. [FN15] Designated uses must reflect consideration of the value of public water supplies, fish and other wildlife, and recreational, agricultural, industrial and other uses. [FN16] Second, water quality standards must express "[w]ater quality criteria sufficient to protect the designated uses."[FN17] Unlike the technology-based effluent limitation guidelines, water quality standards criteria may be expressed either in numeric or narrative form, so long as the criteria specify the amount of pollutants that may be present. [FN18] However, the criteria must be based on "sound scientific rationale." [FN19] Third, water quality standards must contain an antidegradation policy. [FN20]

The primary means of enforcing effluent limitations and water quality standards is the National Pollutant Discharge Elimination ***681** System (NPDES). [FN21] Generally, the CWA prohibits the discharge of any pollutant into a navigable body of water unless the point source has obtained an NPDES permit. [FN22] Section 1342 of the CWA sets forth the NPDES permitting system and describes two distinct but related programs: state permitting programs, which must meet EPA approval by satisfying federal requirements, and a federal EPA permitting program. [FN23] Absent an approved state permitting procedure, the EPA is the default NPDES permitting authority. [FN24]

Section 1342(b) authorizes states to establish NPDES permitting programs "for discharges into navigable waters within [their] jurisdiction[s]" and delineates program requirements. [FN25] Essentially, the states must completely describe the program, indicate their compliance with the CWA's standards, and show that state law provides adequate enforcement authority. [FN26] The state permitting program's procedural requirements include a provision for the protection of affected downstream states. The permitting state must notify affected states of permit applications and must provide the opportunity for a public hearing. [FN27] Although affected downstream states lack veto power over the permit application, they may make recommendations to the permitting state and the EPA. [FN28] If the permitting state rejects the downstream states' recommendations, the EPA may nonetheless block the permit's issuance if the permit allows discharges that are outside ***682** the CWA's guidelines and requirements. [FN29]

Federal permit issuance programs are substantially identical to state permitting systems. An EPA permit program, and the permits issued via the EPA's program, "shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder." [FN30] However, the EPA has construed the CWA

as requiring EPA-issued NPDES permits to comply with § 1341(a), [FN31] which applies to a wide class of federal permits, including those for construction or operation of facilities that results in a discharge into navigable waters. [FN32] Under § 1341, states in which the discharge is located possess veto power over permit applications that do not ensure compliance with the affected states' water quality standards. [FN33] Affected ***683** downstream states, however, can only object to the permit, and must then rely on EPA protection of their water quality standards via conditioning the permit on compliance. Thus, under both state permitting programs and EPA-issued permits, enforcement of downstream water quality standards against upstream point-source dischargers relies on the EPA's willingness to condition the permit. As discussed in Part V below, however, the EPA's trust obligation toward Indian tribes provides increased protection in the permitting process, thereby allowing for enforcement of downstream water quality standards against upstream polluters. [FN34]

B. Enforcement of State Standards More Stringent Than Required by the CWA

The CWA not only provides a mechanism through which downstream states may contest NPDES permit applications to ensure compliance with minimum federal requirements, but it also indirectly provides for upstream enforcement of more stringent water quality standards. Section 1370 of the CWA expressly provides that states may adopt and enforce any pollutant discharge standard, provided such standards satisfy the minimum requirements set forth by the Act. [FN35] The EPA may not disapprove ***684** state standards solely on the grounds that the standards exceed minimum federal requirements. [FN36] However, downstream states lack direct authority to enforce their more stringent standards against polluters in an upstream state. Section 1370 has been construed to contemplate only intrastate, not interstate, application of standards more stringent than those federally mandated. [FN37] Specifically, the Supreme Court has held that an affected state may not apply its nuisance laws, such as its more stringent water quality standards, against an out-of-state point source. [FN38]

However, the Supreme Court has established that the EPA possesses the authority to enforce against upstream states the more stringent water quality standards of affected downstream states. In Arkansas v. Oklahoma, [FN39] the City of Fayatteville, Arkansas, sought an NPDES permit for a sewage treatment plant located thirty-nine miles upstream from the Arkansas-Oklahoma border. The plant was to discharge its pollutants into a stream that eventually flows into the Illinois River, which flows from Arkansas into Oklahoma. Oklahoma challenged EPA issuance of the permit, [FN40] asserting that the discharge violated Oklahoma water quality standards by allowing degradation of Illinois River water quality. The EPA agreed that the CWA required Arkansas to comply with Oklahoma water quality standards, but argued that the plant's discharge would have no measurable impact on water quality in Oklahoma.

Although the Arkansas Court declined to decide whether the CWA requires the EPA to apply the water quality standards of ***685** downstream states to upstream point sources in another state, it stated that "the statute clearly does not limit the EPA's authority to mandate such compliance." [FN41] The Court noted that the EPA's regulations provide "that an NPDES permit shall not be issued '[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States,' " [FN42] a restriction that applies to both EPA-issued and state-issued permits. [FN43] Recognizing achievement of state water quality standards as a central CWA objective, the Court found the EPA's regulations to be a reasonable exercise of agency discretion. [FN44] Furthermore, the Court found that the previously recognized limits on the enforcement power of downstream states in no way constrained the EPA's authority to mandate compliance with downstream water quality standards. [FN45] Finally, the Court ascribed a federal character to state water quality standards insofar as the standards affect permit issuance in another state, entitling EPA interpretation of those standards to substantial deference. [FN46]

Thus, state power to enforce water quality standards against out-of- state polluters under the CWA is limited. The EPA, however, in the context of both EPA-issued and state-issued water quality permits has the power to condition NPDES permits on compliance with more stringent downstream water quality standards. As described in Part V, this agency discretion combined with the EPA's obligations under the trust doctrine constitute a mandate to enforce tribal water standards against upstream point sources.

***686** C. CWA's Provision for Treatment of Indian Tribes as States

In 1987, Congress amended the CWA to allow for the treatment of qualifying Indian tribes as states with regard to certain aspects of the Act. [FN47] Generally, "the treatment of Indian Tribes as States means that Tribes are to be primarily responsible for the protection of reservation water resources." [FN48] To qualify for "treatment-as-state" (TAS) status, tribes must meet statutory and regulatory requirements. Section 1377(e) lists the criteria for TAS status:

The Administrator is authorized to treat an Indian tribe as a State . . . if --

(1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

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

(3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations. [FN49]

"Indian tribe" is defined as "any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation." [FN50] Federal Indian reservation refers to "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." ***687**[FN51] Although reservations are generally thought to have readily defined borders, the Supreme Court has indicated the term reservation should be broadly construed to include all Indian country. [FN52] The EPA recommends examining the use of Indian land, not whether it is labeled a reservation, and "considers trust lands formally set apart for the use of Indians to be 'within a reservation' for purposes section [sic] 518(e)(2) [§ 1377(e)(2)], even if they have not been formally designated as 'reservations.' " [FN53] Finally, while the inclusion of patent fee land in the definition of reservation is telling, whether § 1377(e) constitutes an explicit delegation of regulatory authority over non-Indians is not clearly resolved by the statutory language. [FN54]

Attainment of TAS status, however, does not result in treatment as states under all provisions of the CWA. TAS status applies only to certain enumerated CWA sections. Most importantly, qualifying tribes may set water quality standards pursuant to § 1313 of the CWA. [FN55] Additionally, tribes may apply to assume NPDES permitting authority. Thus, a qualifying tribe may both set water quality standards and take over the NPDES permitting program, or may administer water quality standards ***688** independent of NPDES permitting authority. [FN56] Whether the tribe assumes NPDES permit administration may affect the nature of tribal authority in relation to both upstream and downstream jurisdictions. [FN57] However, as discussed in detail in Part V, the EPA's trust obligation to Indian tribes renders any distinction based on permitting authority irrelevant and supports upstream enforcement of tribal water quality standards.

Finally, § 1377 directs the EPA to provide a dispute resolution mechanism to address conflicts between states and Indian tribes resulting from tribal promulgation of water quality standards. [FN58] The mechanism is to address "unreasonable consequences" resulting from "differing water quality standards" between states and tribes, and must provide for consideration of factors such as "the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards." [FN59] Pursuant to this statutory mandate, the EPA has created a dispute resolution mechanism consisting of mediation, nonbinding arbitration, or, if one or more parties refuses to participate, the appointment of an individual or panel to make appropriate recommendations. [FN60] Only a state or tribe may request EPA involvement in a dispute; other affected third parties, such as the NPDES permit applicant, may not invoke the dispute resolution process. [FN61]

Despite the CWA's detailed provision for the treatment of Indian tribes as states, two critical issues remain unanswered. Discussed in Parts IV and V below, these issues are whether tribes with TAS status may set water quality standards more stringent than those required by the CWA and whether those stringent standards may be enforced against upstream polluters. However, the uniqueness of Federal Indian law warrants an examination of its fundamental principles before addressing the EPA and judicial approaches to the resolution of these issues.

***689** II

Overview of Federal Indian Law

A. Foundations of Federal Indian Law: The Marshall Trilogy

Chief Justice John Marshall laid the foundation of Federal Indian law in three landmark cases in the first half of the nineteenth century. The first case, Johnson v. McIntosh, [FN62] did not involve any Indian parties, yet defined the nature of Indian land rights in terms which persist today. In Johnson, Indian tribes had sold land to individual land speculators prior to the Revolutionary War. After the war, the tribes ceded these same lands to the United States in the Treaty of Greenville. The government then sold the land to private parties, including the defendant William McIntosh. The plaintiff, a descendant of a pre-Revolutionary War purchaser, challenged the validity of McIntosh's title, arguing that both the English and French had treated tribes as sovereigns with the power to sell land to individuals. [FN63]

Marshall held that the pre-Revolutionary War sale transferred only an Indian "right of occupancy," not full fee simple, embracing an Old World Discovery Doctrine based on principles of Christian conquest. [FN64] Under the Discovery Doctrine, Christian discovery of lands "unknown to all Christian people" [FN65] gave "title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." [FN66] At the end of the Revolutionary War, Great Britain ceded its rights under the Discovery Doctrine, [FN67] giving the United States the "exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest." [FN68] The Indian right of occupancy, when combined with the discoverer's right, merges into full fee simple. However, a grant from a tribe to an individual transfers only the Indian right of occupancy. [FN69] This conception of Indian property rights laid a foundation of partial Indian sovereignty deeply couched in concepts of fundamental Christian superiority.

***690** The second case in the Marshall trilogy introduced the concept of a trust relationship between Indian tribes and the federal government. In Cherokee Nation v. Georgia, [FN70] the Cherokee Nation sought to restrain Georgia from enforcing state laws directed toward the eradication of Cherokee political society and the seizure of Cherokee land for state use. The Cherokee Nation filed suit directly in the Supreme Court under original jurisdiction granted by the Constitution over controversies between states and foreign nations. [FN71] Without addressing the merits, the Supreme Court dismissed the case for lack of jurisdiction, holding that Indian tribes are not foreign nations within the meaning of the Constitution. Instead, the Court found tribes to be "domestic dependent nations," whose relationship with the United States "resembles that of a ward to his guardian." [FN72] This assertion was based in part on the Discovery Doctrine embraced in Johnson. The Court noted that the tribe held a right to occupy the land only until the United States extinguished that right. [FN73] Thus, while not addressing the merits of the case, the Court nonetheless further weakened Indian sovereignty and defined the nature of federal-Indian relations.

In the third and final case of the Marshall trilogy, Worcester v. Georgia, [FN74] the Supreme Court addressed the merits of the controversy avoided in Cherokee Nation, ultimately affirming inherent tribal sovereignty at the expense of state power. Like Johnson, Worcester involved as parties only non- Indians, but had tremendous repercussions for Indian tribes. In Worcester, church missionaries violated Georgia laws prohibiting non-Indians from residing in Cherokee territory without a state license. The state laws, however, were not aimed at preserving Cherokee independence by limiting white intrusion. Rather, the Georgia act was an assertion of jurisdiction over the Cherokee Nation. [FN75] Ultimately, the Court held that Georgia had no such jurisdiction; thus, its law was void, and the missionaries' convictions were overturned. [FN76]

***691** Whether the Worcester Court's holding was grounded in principles of Indian sovereignty, federalism, or both, remains unclear. Marshall acknowledged that "Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights . . . from time immemorial," and were capable of making treaties with the United States. [FN77] Explicitly rejecting the idea that the Cherokee nation had surrendered its sovereignty and independence by associating with and seeking protection from a stronger power, the Court recognized the tribe as "a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force." [FN78] However, the Court completed its denial of Georgia's jurisdictional authority with the assertion

that "[t]he whole intercourse between the United States and [the Cherokee] nation, is . . . vested in the government of the United States." [FN79] This language implies that the federal government may possess the power to legislate in the very manner the Supreme Court denied Georgia, notwithstanding the Court's affirmation of tribal sovereignty. Nevertheless, Worcester significantly refined the conception of Indian tribes as under the protection of the United States government while still recognizing and preserving the principle of tribes as sovereign nations. [FN80]

B. Tribal Sovereignty Refined: Subsequent Supreme Court Jurisprudence

Since the Marshall trilogy, the Supreme Court has refined both its judicial approach to Indian sovereignty and the nature of federal-tribal relations. In United States v. Kagama, [FN81] the most significant case following the trilogy, the Court expanded the scope of federal power over tribes it had alluded to in Worcester. Upholding ***692** congressional power to enact the Major Crimes Act, which extended federal criminal jurisdiction over tribe members, the Court held that Congress possesses the power to legislate for the protection and benefit of the tribes. [FN82] Without relying on the Commerce Clause or any other constitutional provision, the Court deemed this power to be derived from the very nature of the federal-tribal relationship. [FN83] The tribes were decreed "wards of the nation . . . dependent on the United States . . . for their daily food . . . [and] for their political rights." [FN84] Though acknowledging the federal government's role in the tribes' weakened state, the Court determined that "[f]rom [the tribes'] very weakness and helplessness . . . there arises the duty of protection, and with it the power." [FN85] This plenary power doctrine frames the trust responsibility within a construct of federal power to determine the extent of its obligation to the tribes. Indeed, the Court has asserted that Congress has the power to determine the nature of its "guardianship" of the tribes, including the power to determine when to terminate the guardianship. [FN86] However, the concept of plenary power can and must be separated from the concepts of tribal sovereignty and the trust obligation. [FN87]

Notwithstanding the assertion of paramount congressional power over tribes, the Supreme Court nonetheless has recognized the existence and preconstitutional origins of inherent Indian sovereignty. Even while embracing federal legislative ***693** plenary power in Kagama, the Court deemed tribes to be "semi-independent" sovereigns that possess power to regulate their internal and social relations. [FN88] Because tribal sovereignty, though often guaranteed by treaty, does not originate from any federal or constitutional grant of authority, the power of local self-government vested in Indian tribes predates the Constitution and the federal government. [FN89] Indeed, Indian tribes are separate sovereigns. While Congress arguably possesses the power to divest tribes of their sovereignty, "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." [FN90] Tribes therefore retain their inherent sovereignty to the extent that the federal government has not extinguished tribal power. Included among those powers that have not been so divested is the power of self-government. [FN91] Additionally, this sovereignty includes jurisdiction at least over tribe members within the tribes' territory. [FN92] Indian sovereignty, then, contemplates the existence of a separate and autonomous governmental authority. [FN93]

C. Reserved Rights

The concept of reserved rights springs from foundational principles of inherent sovereignty. Reserved rights refer to sovereignty, power, or rights retained by tribes during their dealings ***694** with the federal government. Treaties between Indian tribes and the federal government did not consist of a grant of rights or power from the government to the tribes. Rather, treaties were "not a grant of rights to the Indians, but a grant of rights from them [and] a reservation of those not granted." [FN94] Grounded in principles of inherent sovereignty, this reserved rights doctrine not only recognizes inherent tribal sovereignty in matters of self-government, but also adds a geographic component to their sovereignty. [FN95] Reserved rights attach to reservations in the form of an easement. [FN96] Importantly, reservations are not necessarily conceived to be fixed geographic areas. Instead, reservations refer to the complete package of reserved rights, ranging from identified parcels of land to the right to access "usual and accustomed places" to take fish "in common with citizens of the Territory." [FN97] While treaties certainly embodied the cession of some rights, inherent tribal sovereignty was retained to the extent it was not surrendered, and this sovereignty may extend in the form of property rights beyond the borders of designated reservations.

Specifically, Indian tribes possess significant water rights. Tribes possess a property interest in reserved water

rights. Relying on this reserved rights concept, the Supreme Court in Winters v. United States specifically held that Indian tribes have an implied reserved water right to sufficient water to render their land habitable. [FN98] Under the Winters Doctrine, this property right in water vested in the tribes no later than the time of the formation of the reservation, and could date from time immemorial. [FN99] Considered together, the reserved rights and Winters Doctrines supply Indian tribes with off-reservation property interests specifically pertaining to water. As discussed below, these water rights (viewed in light of inherent tribal sovereignty, the federal government's trust obligation to the tribes, and the CWA) ***695** strongly support the enforcement of tribal water quality standards against upstream jurisdictions.

D. Tribal Regulatory Power Over Non-Indians

Despite notions of inherent tribal sovereignty, tribal jurisdiction over non- Indians is subject to considerable limitations. Tribes possess civil and criminal jurisdiction over their members. [FN100] By contrast, Indian tribes have no criminal jurisdiction over non-Indians, whether on Indian land or not. [FN101] Likewise, tribes appear to lack regulatory authority over non-Indians on non-Indian land outside the reservation. [FN102] In the context of jurisdiction over non-Indians within reservation boundaries, however, tribal regulatory authority depends on a variety of factors, including ownership of the land, the nature of the relationship between the non-Indian and the tribe, and the nature of the non-Indians' activities.

Although Indian tribes generally lack regulatory authority over non-Indians within the reservation, the Supreme Court in Montana v. United States [FN103] enunciated broad exceptions to this rule. The Court based the general denial of regulatory authority on the belief that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." [FN104] However, tribes retain inherent sovereign power to exercise some jurisdiction over non-Indians within reservation boundaries, ***696** even on non-Indian owned lands. [FN105] Specifically,

> [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. 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. [FN106]

Given the breadth of these exceptions, an argument can nearly always be made in favor of tribal jurisdiction over all land within reservation boundaries, particularly under the health and welfare exception.

Subsequent cases dealing with tribal jurisdiction over non-Indians on fee land within the reservation, however, have complicated the issue. In Brendale v. Confederated Tribes & Bands of Yakima, [FN107] a fractured court variously applied or declined to apply the Montana rule and exceptions. The Brendale Court faced a complicated factual scenario involving a challenge to tribal zoning authority over fee owned land within "open" and "closed" portions of the reservation. [FN108] The Court held in three separate opinions that the tribes had regulatory authority only over the "closed" portion of the reservation. [FN109] Two opinions applied the Montana test with opposite results, and the third neglected to apply the Montana test at all. [FN110] Although the lack of a majority opinion nullifies the precedential value of Brendale, the opinions obfuscated the issue of tribal regulatory authority over non-Indians ***697** on fee land and called into question the viability of the Montana test.

However, the Supreme Court, while still producing differing results in its application, affirmed the validity of the Montana test in Strate v. A-1 Contractors. [FN111] In Strate, decided eight years after Brendale, the Court once again applied the Montana test. Although it found against the existence of tribal regulatory authority, the Strate Court declared Montana to be "the pathmarking case concerning tribal civil authority over nonmembers." [FN112] Thus, any assertion of tribal jurisdiction over non-Indians on fee land within the reservation must meet one of the Montana test exceptions.

The Federal Responsibility Toward Indian Tribes: The Trust Doctrine

A. Origins and Overview

Generally, the trust doctrine is the mechanism by which federal obligations to Indian tribes are judicially enforced. [FN113] The trust doctrine requires that the United States and its agents protect Indians' native separatism by acting in the best interests of the Indian tribes. [FN114] This trust responsibility toward Indian nations blankets all branches of the federal government, though its application varies with each branch. Congress is held only to a rationality standard: its actions must only "be tied rationally to the fulfillment of Congress's unique obligation toward the Indians." [FN115] Additionally, given Congress's plenary power over Indian affairs, [FN116] it may terminate its trust responsibility at any time it deems such termination to be in the interests of Indian tribes. [FN117] Executive agencies, by contrast, must fulfill their trust obligations under the highest standard of fiduciary care. [FN118] Finally, the judiciary, while rarely expressly imposing a trust obligation upon itself, utilizes treaty interpretation canons of ***698** construction which supposedly favor the tribes. The canons of construction are: "ambiguous expressions must be resolved in favor of the Indian parties concerned; Indian treaties must be interpreted as the Indians themselves would have understood them; and Indian treaties must be liberally construed in favor of the Indians." [FN119]

Although the precise origins of the trust doctrine are difficult to ascertain, the doctrine is rooted primarily in Indian treaties and judicial interpretations of the relationship between the federal government and Indian tribes. [FN120] With the cession by treaty of vast tracts of Indian land, the United States accepted a commensurate obligation to protect the separatism of the tribes. Generally, treaties with Indian tribes contain express language referring to the federal government's protection of the treating tribe. [FN121] In addition, treaties with Indian tribes often contain provisions providing for the exclusion of non-Indians from reservation land. [FN122] Such provisions strongly imply a duty by the United States to protect the tribes' land and interest in separatism. [FN123]

The trust doctrine has been more fully developed via judicial interpretation to consist of a fiduciary obligation to act in the best interests of the tribes. The Supreme Court in 1831 asserted ***699** that the "relation [of the tribes] to the United States resembles that of a ward to his guardian." [FN124] Over a century later, the Court recognized that "[i]n carrying out its treaty obligations . . . the Government . . . has charged itself with moral obligations of the highest responsibility and trust . . . [and] should therefore be judged by the most exacting fiduciary standards." [FN125] The judiciary has also recognized a trust obligation arising from specific congressional acts. [FN126]

The trust doctrine is of heightened significance in the context of administrative agencies. Administrative agencies must follow their statutory mandates. However, where the statutory mandate allows for agency discretion, the agency may not simply make a "judgment call." [FN127] Rather, agencies must apply the highest standard of fiduciary care with respect to exercises of discretion affecting tribal interests. [FN128] Absent express provision to the contrary, "Congress intends specific adherence to the trust responsibility by executive officials." [FN129] Indeed, failure "to demonstrate an adequate recognition of . . . [an executive agency's] fiduciary duty to the Tribe" constitutes an abuse of discretion in violation of the Administrative Procedure Act. [FN130] Furthermore, administrative agencies' trust responsibility consists of both procedural and substantive mandates. [FN131] Although agencies must consider tribal interests in their decision- making processes, mere consideration of these interests does not satisfy the trust obligation. [FN132] To fulfill their trust obligation under the highest fiduciary care standard, agencies must not merely consider but also act in ***700** the best interests of Indian tribes. [FN133] Thus, the trust doctrine in the administrative agency context overlays the agency's statutory mandate and requires agencies to act in the best interests of Indian tribes where such action is not contrary to the mandate.

B. Trust Property: Water as a Protected Beneficiary Interest

Indians possess a variety of protected beneficial interests under the trust doctrine. The most significant category of trust property is the Indian land base. [FN134] Indian land is held in trust by the United States for the benefit of the tribes. In addition, some land that was allotted to individual Indians under the Dawes Act continues to be held in trust for those individuals' descendants pursuant to the Indian Reorganization Act. [FN135] This beneficiary interest in land extends to water rights. [FN136] Thus, the federal government has a duty to act in the best interest to protect land and water as trust assets in which Indians possess a beneficial interest.

Furthermore, at least one court has embraced the view that the fiduciary duty of the United States government to protect Indian trust assets should extend to the protection of Indian land base and water from environmental degradation. [FN137] In United States v. Washington, [FN138] the federal district court held, in the context of off-reservation fishing rights, that Indian tribes are entitled to protection of the environment from man-made despoliation. Given the existence of implied water rights under the Winters Doctrine, on-reservation water surely merits similar protection ***701** from environmental degradation. This fiduciary duty to protect water quality supplements statutory mandates and supports upstream enforcement of tribally determined water standards as a means to protect trust property.

C. The EPA's Indian Policy

The EPA has explicitly acknowledged the federal duty to respect tribal self- government and protect tribal interests, and it is in this context that the CWA's treatment of tribes as states must be analyzed. Throughout the history of federal-Indian relations, federal policy has variously undermined, subjugated, supported, and paternalistically embraced Indian sovereignty and the trust. Some past policies, such as allotment and termination, [FN139] were based on assimilationist principles and severely weakened Indian sovereignty and self-government. Other policy approaches ostensibly supported Indian self-government, but in reality imposed a majority society governmental paradigm. [FN140] Today, federal-Indian relations are in an epoch dubbed "self-determination."

The self-determination era refers to the establishment of government-to- government relations and federal deference to tribal determination of the extent to which the tribe desires and is able to control and operate federal programs. [FN141] The era began during the Nixon administration, when the President repudiated termination and advocated tribal self-determination. Subsequent administrations embraced this approach, including President Reagan, who published his Indian Policy in 1983. [FN142] Reagan's policy emphasized two themes: "(1) that the Federal Government will pursue the principle of Indian 'self-government' and ***702** (2) that it will work directly with Tribal Governments on a 'government-to-government' basis." [FN143]

In response to President Reagan's clear executive mandate, the EPA produced a set of guidelines for the administration of agency programs on Indian reservations. The guidelines consist of nine key principles that affirm tribal sovereignty, tribal self-government, and agency obligations under the trust doctrine. The nine principles are:

1. The Agency stands to work directly with Indian tribal governments on a one-to-one basis (the "government-to-government" relationship), rather than as subdivisions of other governments. . . .

2. The Agency will recognize tribal governments as the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with agency standards and regulations. . . .

3. The Agency will take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands. . . .

4. The Agency will take appropriate steps to remove existing legal and procedural impediments to working directly and effectively with tribal governments on reservation programs. . . .

5.The Agency, in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments. . . .

6. The Agency will encourage cooperation between tribal, state and local governments to resolve environmental problems of mutual concern. . . .

7. The Agency will work with other federal agencies which have related responsibilities on Indian Reservations to enlist their interest and support in cooperative efforts to help tribes assume environmental program responsibilities for reservations. . . .

8. The Agency will strive to assure compliance with environmental statutes and regulations on Indian reservations.

. . .

9. The Agency will incorporate these Indian policy goals into its planning and management activities, including its budget, operating guidance, legislative initiatives, management accountability system and ongoing policy and regulation development processes. . . . [FN144]

The policy clearly distinguishes tribal governmental jurisdiction from that of state and federal government, and encourages federal and state efforts to increase tribal involvement in and control ***703** over administration of environmental programs on reservations. [FN145] Significantly, the EPA policy explicitly recognizes its trust obligation. [FN146] However, the policy statement directs the EPA only to "consider" Indian interest, indicating recognition merely of a procedural, rather than substantive, trust obligation. As discussed in Part V, the trust doctrine requires the EPA actively to pursue Indian tribes' best interests.

IV

Case Law Addressing Enforcement Under the CWA of Tribal Water Quality Standards Against Upstream Polluters

Two thorny issues that have arisen in the context of TAS designation of Indian tribes, and that are the focus of this Comment, are whether tribes with TAS status may set water quality standards more stringent than those required under the CWA, and the extent to which those standards must be enforced against upstream point source dischargers either within the same state or in another state. Section 1377(e), the TAS provision, does not reference § 1370, which allows states to adopt and enforce water quality standards more stringent than required by the CWA, as one of the provisions under which tribes are entitled to TAS. Even if tribes with TAS status may adopt more stringent water quality standards, the CWA does not clearly resolve the complicated jurisdictional issue of enforcement against other states.

To date, two courts have addressed the ability of Indian tribes with TAS status under the CWA to enforce tribal water quality standards against non- Indians upstream. The first, City of Albuquerque v. Browner, [FN147] affirmed tribal sovereignty and allowed for the application of tribal water quality standards against the City of Albuquerque, located upstream from the tribe with TAS authority to set water quality standards. The second, Montana v. EPA, [FN148] approved of Albuquerque and allowed for extension of tribal water quality standards over non-Indian fee lands on the reservation.

***704** A. City of Albuquerque v. Browner

The Rio Grande River flows through the Isleta Pueblo reservation in New Mexico before turning east to form the Texas-Mexico border. Granted TAS status under the CWA, the Isleta Pueblo Tribe set Rio Grande water quality standards more stringent than those of New Mexico. The City of Albuquerque possessed an NPDES permit, issued prior to the promulgation of Isleta Pueblo water quality standards, for discharges in the Rio Grande from its waste water treatment plant. The approval of Isleta Pueblo standards required the EPA to revise the City of Albuquerque's permit to provide for compliance with tribal standards. Before EPA completion of this revision, the City of Albuquerque challenged EPA approval of the Isleta Pueblo water quality standards. The district court granted summary judgment in favor of the EPA, [FN149] and the City of Albuquerque appealed. While the case was on appeal, the parties, participating in the CWA dispute resolution process, reached an agreement on the terms of the City of Albuquerque's permit. [FN150]

The Albuquerque court faced a number of issues. [FN151] Most importantly, the City of Albuquerque challenged the EPA's interpretation of the CWA to afford the Isleta Pueblo tribe authority to adopt water quality standards more stringent than required by statute and the application of those more stringent standards ***705** against an upstream NPDES permit holder. [FN152] In response, the Albuquerque court first asserted that § 1377(e), the TAS provision, is ambiguous because not all provisions of the CWA are incorporated by that section. [FN153] Specifically at issue was the fact that the TAS provision does not incorporate § 1370, which allows for states to set standards more stringent than the federal minimum. In approving the Isleta Pueblo water quality standards, the EPA

relied on § 1370 as authorizing the tribe to set standards more stringent than those federally mandated. [FN154] The court, however, explicitly rejected the argument that § 1370 was somehow incorporated by § 1377(e). Instead, the Albuquerque court relied on principles of inherent tribal sovereignty to allow tribal water quality standards more stringent than those required by the CWA. Specifically, the court recognized that "Indian tribes have residual sovereign powers that already guarantee the powers enumerated in § 1370, absent an express statutory elimination of those powers." [FN155] The court concluded that the construction of the CWA to allow for tribes who qualify for TAS status to set stringent water quality standards was consistent with principles of inherent Indian tribal sovereignty. [FN156]

The Albuquerque court also upheld the enforcement of the tribal standards against the City of Albuquerque as an upstream polluter. However, the court avoided discussion of tribal sovereignty with regard to enforcement power. Responding to the argument of the City of Albuquerque that § 1377 does not expressly permit tribes to enforce water quality standards outside reservation boundaries, the court advised reading the CWA as a "comprehensive regulatory scheme" and admonished against construing provisions selectively and in isolation. [FN157] Reading the CWA as a whole, the court found that the EPA, not the tribe, was exercising its statutory authority in issuing NPDES permits in compliance with downstream water quality standards. [FN158]

Under Albuquerque, Indian tribes who qualify for TAS do not ***706** have the authority to enforce tribal water quality standards against upstream point source dischargers. Instead, tribes must rely on the EPA's authority and obligations under the CWA to issue permits only in compliance with tribal water quality standards. As discussed below, however, the Albuquerque approach does not guarantee enforcement of tribal standards against upstream polluters. Enforcement of the EPA's trust obligation is necessary to ensure the application of tribal water quality standards to all upstream dischargers.

B. Montana v. EPA

The second case to deal with Indian TAS issues, Montana v. EPA, [FN159] addressed the enforcement of tribal water quality standards against upstream non-Indian polluters within the borders of the tribe's reservation. The Flathead reservation contains Flathead Lake, a source of water for many different uses, including agriculture, industry, and domestic use. The reservation "reflects a pattern of mixed ownership and control between tribal and non-tribal entities," which include NPDES permit holders, such as the state, county, and several municipalities. [FN160] The EPA granted the Confederated Salish and Kootenai Tribes (the Tribes) TAS status over all land within the reservation, including non-Indian land, based on the agency's determination that the Tribes possess "inherent authority over non-members on fee lands." [FN161] Montana then launched a facial challenge to the regulations adopted pursuant to § 1377(e) that allow for application of tribal water quality standards to fee lands on the reservation. [FN162] The district court granted summary judgment in favor of the EPA and the Tribes. [FN163]

The EPA took the position that Indian tribes with TAS status possess regulatory authority over non-Indians within the reservation under the second Montana exception, which governs non-Indian activities affecting tribal health and welfare. The EPA has construed the CWA generally as "a legislative determination that ***707** activities which affect surface water and critical habitat quality may have serious and substantial impacts." [FN164] Given this, upon a general showing of facts that reservation waters are used by the tribe or tribal members and that the waters and critical habitat are subject to CWA protection, the EPA will "presume that there has been an adequate showing of tribal jurisdiction of fee lands." [FN165] An adjacent state may rebut the presumption by demonstrating a lack of tribal jurisdiction. [FN166]

The Montana court held that the EPA's regulations reflect an "appropriate delineation and application of inherent Tribal regulatory authority over non-consenting non-members." [FN167] Applying the second Montana exception, the court found that the activities of point source dischargers on non-Indian land posed a serious threat to the health and welfare of the Tribes. [FN168] The court explicitly recognized that "'conduct that involves the tribe's water rights" ' falls within those activities encompassed by the second Montana exception. [FN169] Therefore, the Tribes possess regulatory authority over non-Indian polluters notwithstanding the fact that non-Indian fee lands are involved. Finally, the court noted the consistency of its holding with that of Albuquerque. [FN170]

V

CWA Treatment as States Status in Light of the Trust Doctrine

Neither courts nor the EPA have adequately considered the impact of the trust doctrine on the treatment of Indian tribes under the CWA. By obligating the EPA to exercise in favor of Indian tribes its discretionary power to approve water quality standards, application of the trust doctrine supports the authority ***708** of tribes with TAS status to set standards more stringent than required by the CWA. Likewise, the EPA's fiduciary duty under the trust doctrine to act in Indian tribes' best interests requires the EPA to condition all upstream NPDES permits on compliance with tribal water quality standards. Finally, the EPA should utilize its discretionary power to promulgate and enforce stringent water quality standards for reservation waters even where the applicable tribe may not qualify for TAS status but is otherwise governed by an established tribal government.

A. EPA Approval of Tribal Water Quality Standards More Stringent Than Required by the CWA

Although the EPA explicitly recognizes its trust obligation, the agency misconstrues the manner of its application. The EPA Indian Policy states that "[t]he Agency, in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments." [FN171] This policy statement envisions only a procedural aspect to the trust obligation with no substance. The EPA is charged with approving state- and tribe-promulgated water quality standards. In the context of approving water quality standards, the EPA may satisfy the trust obligation as recognized by the policy statement by merely "considering" tribal interests. In other words, the EPA may act contrary to tribal interests by simply acknowledging tribal interests are affected by its actions. This construction of the trust responsibility ignores any substantive obligation to act in the tribes' best interests, and is contrary to the highest standard of fiduciary care imposed upon executive agencies. The EPA must reformulate its policy statement to conform to an understanding of its trust obligation as a substantive as well as procedural mandate. [FN172]

As a substantive mandate to act in the best interests of the tribes, the trust obligation, together with principles of inherent Indian sovereignty, supports tribal authority to set water quality standards more stringent than those mandated by federal law. As discussed above, § 1370 provides states with the authority "to adopt or enforce . . . any standard or limitation respecting discharges of pollutants." [FN173] This section is not among the sections ***709** under which qualifying tribes may receive treatment as states. However, the EPA has construed this as a "savings clause" rather than a delegation of power to states. According to the EPA, § 1370 merely recognizes existing state authority to set water quality standards and indicates that such authority is not preempted by the CWA except to the extent the CWA requires certain minimum standards. [FN174] Relying on legislative history and statutory construction, [FN175] the EPA interprets tribes with TAS status likewise to possess the authority under § 1370 to set any water quality standard that meets or exceeds federal minimum standards.

As discussed in Part IV, however, the Tenth Circuit in City of Albuquerque v. Browner rejected this interpretation of the CWA. The Albuquerque court held, without analysis, that tribes with TAS status possess inherent sovereignty that empowers them to set water quality standards more stringent than those required by the federal government. [FN176] Although this holding reflects an appropriate understanding of the nature of inherent tribal sovereignty, the EPA does not possess the authority to construe the scope of tribal sovereignty. [FN177]

A sounder position for the EPA's determination that tribes with TAS status may set stringent water quality standards rests in the trust doctrine. Absent an interpretation that tribes qualify as states for purposes of § 1370, the CWA is silent regarding whether tribes may set water quality standards more stringent than those set by the federal government. Hence, the nature of the water quality standards a tribe may set constitutes a pocket of ***710** agency discretion, [FN178] triggering the EPA's fiduciary duty to act in the best interests of the tribes. Acting in the best interests of the tribes in the context of water quality standards certainly encompasses providing the tribe and its members with the highest degree of water quality protection available. Additionally, the EPA has a trust duty to protect tribes' beneficial interest in water resources on the reservation, which duty supports EPA approval of stringent tribal standards. Finally, self-government must be both supported pursuant to the EPA Indian Policy and recognized as a protected beneficiary interest under the trust doctrine. The EPA therefore has a fiduciary obligation to defer to tribal government decisions regarding what water quality standards best serve tribal interests. Because

approval of water quality standards represents an area of agency discretion, the EPA has a duty under its trust obligation to approve tribe-promulgated water quality standards that are more stringent than federal minimum standards. Reliance on the trust doctrine for this approval removes the issue from the cloud of uncertainty created by the EPA's reliance on a dubious statutory construction and significantly augments inherent Indian sovereignty as a basis for approval of stringent tribal standards.

TheEPA also can rely on the trust doctrine to counter assertions that there must be an upper limit to the stringency of tribal water quality standards. Under the Administrative Procedures Act (APA), agency action must not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [FN179] One commentator argues that although the EPA may not have the power to disapprove a water quality standard based on stringency alone, the agency must nonetheless act reasonably or risk classification of its actions as unlawfully arbitrary and capricious. [FN180] Although the CWA allows standard-setting entities to force technological development through stringent water quality standards, [FN181] whether the EPA reasonably can approve standards more stringent than natural background water quality has been a contentious issue. One proposed solution is the imposition of a ***711** standard requiring the EPA to review the reasonableness of tribal water quality standards. [FN182] The guiding criteria of reasonableness would be those listed in § 1377(e) with regard to dispute resolution: [FN183] consideration of "the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards." [FN184]

In light of the EPA's trust obligation, however, no artificially constructed reasonableness standard is necessary to justify EPA approval of stringent tribal water quality standards, even those which exceed natural background water quality. The arbitrary and capricious review standard under the APA is very deferential, resulting in a finding adverse to the agency only "if the agency . . . has entirely failed to consider an important aspect of the problem." [FN185] Because it is subject to the highest standard of fiduciary duty with regard to approval of tribal standards, the EPA must approve tribal water quality standards that meet the CWA's statutory requirements regardless of the stringency of the standards. Fulfillment of this fiduciary duty prevents the agency's action in providing such approval from being characterized as arbitrary and capricious. On the contrary, neglecting to act in accordance with its trust obligation would be an EPA violation of the APA because it would constitute a failure to consider a vital aspect of the issue being addressed.

B. EPA Enforcement of Tribal Water Quality Standards Against Upstream Point Source Dischargers

The trust doctrine provides a statutory overlay that greatly strengthens the CWA's basic framework in support of enforcement of tribal water quality standards against upstream point source dischargers. When the EPA is the NPDES permitting authority, the state or tribe where the point source discharger is located must issue a certification that the discharge will comply with that jurisdiction's water quality standards and effluent limitations. [FN186] After the EPA receives the certification, if the discharge may affect other states or tribes, all such potentially ***712** affected states and tribes must be notified. [FN187] Affected states and tribes may then object to the proposed permit, and the EPA must make a recommendation with respect to the objections. [FN188] When the EPA is the agency issuing the permit (as opposed to some other federal agency, such as the Federal Energy Regulatory Commission, involved in issuing permits for activities that affect water quality), EPA recommendations naturally will be adopted in the permit. Regardless, the inclusion in the NPDES permit of an EPA recommendation that the permit be conditioned on adherence to downstream tribal water quality standards depends on EPA willingness to recommend such compliance. Similarly, when the state is the permitting authority, compliance with downstream tribal water quality standards requires both tribal objection to issuance of the permit absent such protection and EPA willingness to block permit issuance. [FN189] Thus, enforcement of tribal water quality standards against upstream point source dischargers is at the discretion of the EPA.

Given that whether stringent tribal water quality standards will be enforced against upstream polluters is an area of EPA discretion, the trust doctrine requires that the EPA apply tribal standards to all upstream permits. As discussed above, the EPA must accept tribal water quality standards, regardless of stringency. Because the EPA has a fiduciary duty to act in the best interests of the tribes, the EPA must act pursuant to tribal objections and recommendations regarding upstream permits. Any exercise of discretion contrary to tribal interests, any "judgment call" in favor of permit issuance to an upstream point source over tribal objections, whether on its face permissible

under the CWA, would constitute a breach of the agency's trust obligation resulting in EPA liability for any resulting damage to tribal water quality. The EPA's fiduciary duty under the trust doctrine requires the EPA to condition all upstream permits on compliance with tribal water quality standards. [FN190]

The trust doctrine also plays a role in the dispute resolution ***713** procedure set out in § 1377(e) to address discord likely to arise from uniform upstream enforcement of tribal water quality standards. The EPA has specifically considered its role in the dispute resolution process in light of its Indian Policy and trust obligation and rejected the suggestion that the agency must give special consideration to tribal interests. The "EPA believes that its role in dispute resolution is to work with all parties to the dispute in an effort to reach an agreement that resolves the dispute. The Agency shall not have a predisposition to support any party's position in disputes over water quality standards." [FN191] While neutrality in the dispute resolution process is desirable, impartial EPA participation in tribal-state disputes conflicts with the agency's trust obligation.

Additionally, the dispute resolution default procedure is unworkable as a neutral mechanism given the EPA's trust obligation. Under CWA regulations, the default dispute resolution procedure if one or both parties refuse to participate in mediation or arbitration is simply the EPA reviewing the situation considering all available information and making a non-binding recommendation for resolution of the dispute. [FN192] In weighing tribal and state interests in a dispute regarding enforcement of tribal water quality standards, the EPA must favor tribal interests. Considering the EPA's fiduciary duty under the trust doctrine, the dispute resolution process must be reconsidered to provide a neutral process for achieving the avoidance of "unreasonable consequences" arising from enforcement of stringent tribal standards as required by the CWA. [FN193] This revised dispute process must remove the EPA from any decision-making or mediator role so that the agency may properly advocate tribal interests.

C. The Trust Doctrine as a Means to Broaden Tribal Power to Determine and Enforce Water Quality Standards

The trust doctrine also provides support for broadening the scope of tribal ability to set water quality standards by allowing the EPA to exercise its discretion in favor of tribes that do not yet qualify for TAS status. Until a tribe attains TAS status, the EPA assumes that state water quality standards apply to reservation ***714** waters. [FN194] Acknowledging "that, as a legal matter, there may be some question as to whether State standards apply to reservation waters," the EPA asserts that because no general federal water quality standards exist, application of state standards is necessary to avoid a "regulatory void." [FN195] However, the CWA authorizes the EPA to set water quality standards on reservations where tribes lack TAS status. [FN196] Nevertheless, while the EPA will consider federal promulgation of water quality standards on Indian reservations where a particular need exists, it views EPA water quality standard promulgation as a last resort. [FN197] In fact, the EPA baldly maintains, without analysis, that "EPA Indian Policy dictates that Federal promulgation should only be pursued as a final course of action." [FN198]

The EPA misinterprets its obligations under the trust doctrine and its own Indian Policy. The Indian Policy calls for recognition of tribal governments as the primary parties for setting environmental standards. [FN199] In light of this policy and the self-determination era's general goal of government-to-government relations, the EPA should defer not to state standards, but to tribal recommendations regarding appropriate water quality standards for reservation waters regardless of whether the tribal government has met the specific administrative requirements for qualification for TAS status. Certainly, the EPA should continue to require that the tribe have "a governing body carrying out substantial governmental duties." [FN200] However, where a tribal government fails to qualify for TAS status due, for example, to lack of administrative capability or resources, or even inability to define adequately geographic boundaries of tribal jurisdiction, the EPA should nonetheless adopt the tribe's water quality standards. Use of agency discretion to promulgate for reservation waters federal standards that are based on tribal government recommendations supports rather than violates the EPA Indian Policy ***715** that requires recognition of tribal government as the primary party for setting water quality standards.

Furthermore, EPA Indian Policy and the trust doctrine obligate the EPA to consider and act in the best interests of Indian tribes. The EPA has a fiduciary duty to preserve and support self-government when the statutory framework within which the EPA operates allows for agency discretion. The EPA has at its discretion the authority to determine the stringency of water quality standards on Indian reservations. "[W]ater quality management serves the

purpose of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government." [FN201] Because, as indicated above, self-government is a protected trust interest, the trust doctrine supports giving a measure of water quality management to tribes regardless of their qualification for TAS status. Where a tribal government determines that stringent water quality standards are in the best interests of its constituents, the EPA must defer to this governmental determination. Tribes with substantial tribal governments should be able to determine the appropriate water quality standards for navigable reservation waters and rely on the EPA to promulgate and enforce those standards. [FN202]

Similarly, the EPA's fiduciary duty encompasses an obligation to preserve the reservation environment, including water as a specific trust asset. This trust obligation mandates the creation and enforcement of stringent water quality standards for reservation waters regardless of whether a tribal government has recommended the standards or even whether the tribe has an established government. In such a case, the EPA must determine what water quality standard best protects the tribe's interests and condition all upstream NPDES permits on compliance with those standards. Furthermore, tribes have reserved rights in the water resources on the reservation under the Winters Doctrine. The EPA as fiduciary to the tribes also must protect these reserved rights. Just as upstream users of reservation waters cannot divert water such that tribal welfare is affected, neither can upstream point source dischargers pollute those waters to the tribe's detriment, ***716** regardless of whether the tribe possesses TAS status under the CWA.

Conclusion

In today's era of Indian self-determination, recognition of tribal governmental authority is increasingly common. However, despite considerable retained sovereignty, Indian tribes are nonetheless constrained by jurisdictional and other limitations on their regulatory power. Under current case law, Congress is the ultimate authority regarding the nature of Indian sovereignty and authority. Although Congress has provided for the treatment of qualifying Indian tribes as states under certain provisions of the CWA, this explicit statutory authorization constitutes an incomplete empowerment of Indian tribes. Given this, issues regarding the nature of tribal power under the CWA have been left to the executive and judiciary branches to resolve.

Because of the failure to account for the effect of the trust doctrine, the responses of the EPA and judiciary to questions regarding tribal authority to set and enforce water quality standards under the CWA have been incomplete. Admittedly, both the EPA and the courts have supported Indian authority to protect reservation water resources via the enforcement of strict water quality standards. Nevertheless, the extent of tribal influence over water quality protection has been lessened by the failure of the EPA and the courts to consider adequately the role of the EPA's obligations under the trust doctrine.

This Comment calls for the application of principles of the trust doctrine to the EPA in the context of the CWA's treatment of Indian tribes. Under the trust doctrine, the EPA has a fiduciary obligation to act in the best interest of tribes and to exercise any agency discretion in favor of tribal interests. Thus, the trust doctrine constitutes a critical means for maximizing tribal empowerment and must be applied whenever discretionary agency action affects tribal interests. Because the CWA allows for substantial EPA discretion in the context of water quality standards, the trust doctrine must be applied to ensure a maximum tribal role in the protection of tribal water quality.

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[FN1]. 33 U.S.C. § § 1251-1387 (1994 & Supp. III 1997).

[FN2]. If the CWA only allows tribes to set standards equal to the federal minimum standards, enforcement of those standards against upstream polluters would be an irrelevant issue. Upstream polluters would be required to comply with federal minimum standards regardless of whether a downstream tribe possessed TAS status.

[FN3]. 97 F.3d 415 (10th Cir. 1996).

[FN4]. See id. at 423-24.

[FN5]. 33 U.S.C. § 1251(a) (1994).

[FN6]. See 33 U.S.C. § 1251(a)(1)-(7) (1994).

[FN7]. See 33 U.S.C. § 1251(b) (1994).

[FN8]. Id.

[FN9]. Arkansas v. Oklahoma, 503 U.S. 91, 110 (1992).

[FN10]. 33 U.S.C. § 1314(b) (1994).

[FN11]. See generally 33 U.S.C. § 1314 (1994). The guidelines must set "criteria for water quality accurately reflecting the latest scientific knowledge." 33 U.S.C. § 1314(a)(1) (1994).

[FN12]. 33 U.S.C. § 1311(e) (1994). Point sources are discernible, known conveyances from which pollutants are discharged. 33 U.S.C. § 1362(14) (1994). Agricultural stormwater discharges and "return flows from irrigated agriculture" are not point sources. Id.

[FN13]. 40 C.F.R. § 131.2 (2000).

[FN14]. See 33 U.S.C. § 1313 (1994). The EPA sets water quality standards for states which fail to submit appropriate standards. 33 U.S.C. § 1313(b)(1), (i)(2) (1994).

[FN15]. 40 C.F.R. § 131.6(a) (2000).

[FN16]. 40 C.F.R. § 131.10(a) (2000).

[FN17]. 40 C.F.R. § 131.6(c) (2000).

[FN18]. 40 C.F.R. § 131.3(b) (2000).

[FN19]. 40 C.F.R. § 131.11(a)(1) (2000).

[FN20]. 40 C.F.R. § 131.6(d) (2000). Antidegradation policies generally are designed to protect existing water quality and uses, even where the existing water quality exceeds the water quality standards. 40 C.F.R § 131.12 (2000).

[FN21]. Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992); 33 U.S.C. § 1342(a) (1994).

[FN22]. See Arkansas, 503 U.S. at 102; 33 U.S.C. § 1311 (1994).

[FN23]. See 33 U.S.C. § 1342 (1994).

[FN24]. 33 U.S.C. § 1342(a) (1994).

[FN25]. 33 U.S.C. § 1342(b) (1994).

[FN26]. Id.

[FN27]. 33 U.S.C. § 1342(b)(3) (1994). Section 1342(b)(3) requires state permit programs "[t]o insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application." Id.

[FN28]. 33 U.S.C. § 1342(b)(5) (1994). Section 1342(b)(5) requires state permit programs
[t]o insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.
Id.

[FN29]. 33 U.S.C. § 1342(d)(2) (1994). Section 1342(d)(2) provides:
No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.
Id.

[FN30]. 33 U.S.C. § 1342(a)(3) (1994).

[FN31]. Arkansas v. Oklahoma, 503 U.S. 91, 103 (1992).

[FN32]. 33 U.S.C. § 1341(a)(1) (1994).

[FN33]. 33 U.S.C. § 1341(a) (1994). Section 1341(a)(2) provides:

Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, 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.

33 U.S.C. § 1341(a)(2) (1994). The CWA further provides that "[n]o license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be." 33 U.S.C. § 1341(a)(1) (1994).

[FN34]. At least one commentator has argued that whether a permit is state- or EPA-issued is a key issue with regard to tribal ability to enforce water quality standards against upstream polluters. See Robin Kundis Craig, Borders and Discharges: Regulation of Tribal Activities under the Clean Water Act in States with NPDES Program Authority, 16 UCLA J. Envtl. L. & Pol'y 1, 13-16 (1997). Craig attempts to distinguish existing case law governing the ability of downstream states and tribes to enforce their water quality standards against upstream polluters based on the fact that the NPDES permits were EPA- rather than state-issued. Id. Craig asserts that in the case of state permit program application, "the downstream... tribe's real influence on the permitting state or tribe depends largely on the EPA's willingness to object to the permit involved." Id. at 15. Craig fails to consider the impact of the EPA's trust obligation on the agency's decision-making process, discussed in detail in Part V.

[FN35]. 33 U.S.C. § 1370 (1994). Section 1370 provides:

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) 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.

Id.

[FN36]. James M. Grijalva, Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters, 71 N.D. L. Rev. 433, 458 (1995).

[FN37]. Mark A. Bilut, Note, Albuquerque v. Browner, Native American Tribal Authority Under the Clean Water Act: Raging Like a River Out of Control, 45 Syracuse L. Rev. 887, 917 (1994).

[FN38]. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 493-94 (1987).

[FN39]. 503 U.S. 91 (1992).

[FN40]. Because Arkansas did not have an EPA-approved state permitting program, the EPA was the appropriate permit issuing authority under § 1342(a)(1) of the CWA.

[FN41]. Arkansas v. Oklahoma, 503 U.S. 91, 104-05 (1992).

[FN42]. Id. at 105 (quoting 40 C.F.R. § 122.4(d) (1991)). The EPA's regulations further require that "[i]n designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters." 40 C.F.R. § 131.10(b) (2000).

[FN43]. Arkansas, 503 U.S. at 105 n.10; 40 C.F.R. § 123.25 (2000).

[FN44]. Arkansas, 503 U.S. at 105-06.

[FN45]. Id. at 106.

[FN46]. Id. at 110; see also Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984) (establishing two-part test for evaluating statutory construction by administrative agencies and stating that "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute").

[FN47]. See 33 U.S.C. § 1377 (1994).

[FN48]. Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,879 (Dec. 12, 1991) [hereinafter EPA Final Rule] (codified at 40 C.F.R. pt. 131 (2000)).

[FN49]. 33 U.S.C. § 1377(e) (1994); see also 40 C.F.R. § 130.6(d) (2000); 40 C.F.R. § 131.8 (2000). In the application for TAS status, tribes must

> make a relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members, (and thus that the Tribe or tribal members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters and critical habitat are subject to protection under the Clean Water Act.

EPA Final Rule, 56 Fed. Reg. at 64,879.

[FN50]. 33 U.S.C. § 1377(h)(2) (1994).

[FN51]. 33 U.S.C. § 1377(h)(1) (1994). Indian land on reservations falls within four categories. The vast majority of land is held by the federal government in trust for the tribes. The government holds additional land in trust for individual Indians. Non-Indians own some reservation land in fee simple. Finally, Indians own a small fraction of reservation land in fee simple. See infra note 135 and accompanying text.

[FN52]. See Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 125-26 (1993); Narragansett Indian Tribe of R.I. v. Narragansett Elect. Co., 878 F. Supp. 349, 355 (D.R.I. 1995), aff'd in part, rev'd in part, 89 F.3d 908 (1st Cir.

1996).

[FN53]. EPA Final Rule, 56 Fed. Reg. at 64,881.

[FN54]. Id. at 64,882.

[FN55]. 33 U.S.C. § 1377(e) (1994). Other enumerated sections are § 1254 (research, investigations, training and information), § 1256 (grants for pollution control programs), § 1315 (state reports on water quality), § 1318 (reporting requirements), § 1319 (enforcement of standards), § 1324 (clean lake programs), § 1329 (non-point source management programs), and § 1344 (issuance of permits for dredged or fill material). See Jane Marx et al., Tribal Jurisdiction over Reservation Water Quality and Quantity, 43 S.D. L. Rev. 315, 329 (1998); William C. Galloway, Note & Comment, Tribal Water Quality Standards Under the Clean Water Act: Protecting Traditional Cultural Uses, 70 Wash. L. Rev. 177, 188 (1995). Additionally, § 1377 provides tribes with TAS status with regard to allocation of water use rights within its jurisdiction, gives the EPA rather than states jurisdiction over sewage treatment works on reservations, provides for the reservation of funds for grants for waste treatment management plan development to serve Indian tribes, and allows tribes to enter into cooperative joint planning and administration agreements with states where the tribe is located. 33 U.S.C. § 1377(a)- (d) (1994); see also Craig, supra note 34, at 9-10.

[FN56]. Craig, supra note 34, at 10-12; 40 C.F.R. § 123.31 (2000).

[FN57]. 40 C.F.R. § 131.8 (2000).

[FN58]. 33 U.S.C. § 1377(e) (1994).

[FN59]. Id.

[FN60]. 40 C.F.R. § 131.7 (2000).

[FN61]. 40 C.F.R. § 131.7(b)(6) (2000).

[FN62]. 21 U.S. (8 Wheat.) 543 (1823).

[FN63]. See David H. Getches et al., Federal Indian Law 63 (4th ed. 1998).

[FN64]. Johnson, 21 U.S. at 588-89.

[FN65]. Id. at 576.

[FN66]. Id. at 573.

[FN67]. Id. at 584.

[FN68]. Id. at 587.

[FN69]. Id. at 593.

[FN70]. 30 U.S. (5 Pet.) 1 (1831).

[FN71]. See U.S. Const. art. III, § 2.

[FN72]. Cherokee Nation, 30 U.S. at 17.

[FN73]. Id. However, the Court referenced only extinguishing the Indian right of occupancy via voluntary cessation to the government. Notably absent was the other means of extinguishing title mentioned in Johnson--conquest.

[FN74]. 31 U.S. (6 Pet.) 515 (1832).

[FN75]. Id. at 542.

[FN76]. Id. at 561-63.

[FN77]. Id. at 559. Marshall noted that the only aspect of this inherent sovereignty the tribes had surrendered was the power to engage in "intercourse with any other European potentate than the first discoverer." Id.

[FN78]. Id. at 561.

[FN79]. Id.

[FN80]. One commentator has denominated this the "sovereign trusteeship" model. Mary Christina Wood, Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited, 1994 Utah L. Rev. 1471, 1498-1505. Under this model, the federal government polices and protects the tribes' interest in native separatism, but does not possess unfettered federal dominion over the tribes. This trust paradigm, though undermined by subsequent Supreme Court jurisprudence, represents the most promising approach to federal-Indian relations. See id.

[FN81]. 118 U.S. 375 (1886).

[FN82]. Id. at 383-84.

[FN83]. Id.

[FN84]. Id.

[FN85]. Id. at 384. This reasoning seems a bit circular. The Court could be heard to say that exercise of federal power over the tribes, whether or not previously judicially or constitutionally sanctioned, gave rise to a federal protective obligation to the tribes. This obligation, in turn, gives rise to the very power which contributed to the tribes' dependent state and need for protection.

[FN86]. See United States v. Sandoval, 231 U.S. 28, 46 (1913).

[FN87]. See Wood, supra note 80, at 1504-05. Professor Wood notes that the trust responsibility predates Kagama and its doctrine of "unfettered federal dominion." Id. Under the plenary power doctrine, however, tribal sovereignty may exist only so long as Congress allows it to exist, "for Congress can unilaterally and whimsically destroy the ability of tribes to exercise self-governing powers." Robert A. Williams, Jr., Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live with the Plenary Power of Congress Over the Indian Nations, 30 Ariz. L. Rev. 439, 449 (1988). But see Robert Laurence, Learning to Live with the Plenary Power of Congress Over the Indian Nations: An Essay in Reaction to Professor Williams' Algebra, 30 Ariz. L. Rev. 413, 422-24 (1988) (arguing that plenary power should be counterbalanced by a proportional recognition of inherent tribal sovereignty).

[FN88]. Kagama, 118 U.S. at 381-82.

[FN89]. Talton v. Mayes, 163 U.S. 376, 384 (1896). The Talton Court held that Fifth Amendment due process constraints do not apply to tribal powers of local self-government because of the inherent nature of Indian sovereignty. Id. However, given the tribes' dependent status, general constitutional provisions apply to the tribes. Id.

[FN90]. United States v. Wheeler, 435 U.S. 313, 323 (1978); see also Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975) ("Indian tribes possess an inherent sovereignty except where it has been specifically taken away from them by treaty or act of Congress.").

[FN91]. Wheeler, 435 U.S. at 326. Those aspects of sovereignty that the tribes have lost include the ability to alienate land freely, the power to enter into direct commercial or governmental relations with foreign nations, and criminal jurisdiction over non-Indians. Id.

[FN92]. Talton, 163 U.S. at 380 (1896); see also United States v. Mazurie, 419 U.S. 544, 557 (1975) (noting that tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory").

[FN93]. Wheeler, 435 U.S. at 326. In Wheeler, the Supreme Court held that the Navajo Tribe was a sovereign separate from the federal government such that Fifth Amendment protections against double jeopardy were not violated when both the tribal and federal governments prosecuted a tribal member for the same criminal act. Id. at 329-30.

[FN94]. United States v. Winans, 198 U.S. 371, 381 (1905).

[FN95]. Indeed, the "tribal land base is the sine qua non of sovereignty." 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, 133. Professor Wood identifies four aspects of tribal sovereignty: tribal land base; economic vitality; self-government; and cultural vitality. Id. at 133-222.

[FN96]. Winans, 198 U.S. at 381, 384.

[FN97]. Id. at 381.

[FN98]. Winters v. United States, 207 U.S. 564, 576-78 (1908); see also Arizona v. California, 373 U.S. 546, 599-600 (1963).

[FN99]. Marx et al., supra note 55, at 319.

[FN100]. See, e.g., Montana v. United States, 450 U.S. 544, 564 (1981) (noting tribes retain regulatory power over internal tribal relations and jurisdiction over tribal criminal offenders); United States v. Wheeler, 435 U.S. 313, 323-24 (1978) (stating criminal jurisdiction remains vested in Navajo Tribe).

[FN101]. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

[FN102]. See generally Montana, 450 U.S. at 561-62 (discussing limitations on tribal regulatory jurisdiction to land owned by or held in trust for Indians or reserved for use by Indians).

[FN103]. 450 U.S. 544 (1981). Non-Indians came to own reservation land as a result of a congressional allotment policy. In 1887, Congress passed the General Allotment Act, or Dawes Act, under which Indian families or individual Indians were allotted parcels of reservation land, eventually to be owned in fee simple. Because the allotted land lacked the size and quality necessary to sustain its owners, most allotted land eventually fell into non-Indian fee simple ownership as a result of sale or state tax lien foreclosure. Additionally, the government often sold to non-Indians "surplus" land not needed for allotment. In the roughly fifty years the allotment policy was in effect, Indian land holdings dropped from 138,000,000 acres to 48,000,000 acres. See Getches et al., supra note 63, at 165-84.

[FN104]. Montana, 450 U.S. at 564.

[FN105]. Id. at 565.

[FN106]. Id. at 565-66 (citations omitted).

[FN107]. 492 U.S. 408 (1989).

[FN108]. The "open" area of the reservation consisted of a hodgepodge of fee simple land and land held in trust for the tribe or tribe members by the federal government. By contrast, the "closed" area was almost entirely trust land, and was closed to the general public except by permit. Id. at 408.

[FN109]. Justices White, Scalia, and Kennedy, along with Chief Justice Rehnquist, held that the Yakima Tribe lacked zoning jurisdiction over the "open" area. Id. at 432. However, the White plurality felt further factfinding was necessary to determine whether the Tribe had jurisdiction over fee land in the "closed" area under one of the Montana exceptions. Id. Justices Stevens and O'Connor concurred with the White plurality regarding zoning jurisdiction in the "open" area, id. at 447, but also issued the judgment of the Court that the Yakima Tribe possessed jurisdiction over the "closed" area, id. at 444. Finally, Justices Blackmun, Brennan, and Marshall ruled that the Yakima Tribe had jurisdiction over both areas. Id. at 465.

[FN110]. The opinions of Justices White and Blackmun applied Montana, while Justice Stevens's opinion discussed Montana only tangentially.

[FN111]. 520 U.S. 438 (1997).

[FN112]. Id. at 445.

[FN113]. Wood, supra note 80, at 1495 n.114.

[FN114]. Id. at 1497; Wood, supra note 95, at 114.

[FN115]. Morton v. Mancari, 417 U.S. 535, 555 (1974).

[FN116]. See, e.g., United States v. Kagama, 118 U.S. 375 (1886).

[FN117]. United States v. Sandoval, 231 U.S. 28, 46 (1913).

[FN118]. See, e.g., Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1972).

[FN119]. Getches et al., supra note 63, at 129-31 (quoting Charles F. Wilkinson & John M. Volkman, Judicial Review of Indian Treaty Abrogation: "As Long As Water Flows, or Grass Grows Upon the Earth"--How Long a Time is That?, 63 Cal. L. Rev. 601, 618-19 (1975) (footnotes omitted)).

[FN120]. Other sources of law providing "broad foundational principles courts may draw upon in developing the Indian trust doctrine" include "statements of congressional policy," "other judicial doctrines now well- established in Indian law," and "broad, organic principles of private trust law." Wood, supra note 95, at 123-25.

[FN121]. See, e.g., Treaty of Hopewell, Nov. 28, 1785, art. 3, 7 Stat. 18, 19 (acknowledging the Cherokee Nation to be under the exclusive protection of the United States). Analyzing this article of the Treaty of Hopewell and recognizing the retained sovereignty of the Cherokee Nation, Chief Justice Marshall noted that "[p]rotection does not imply the destruction of the protected." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 552 (1832).

[FN122]. See, e.g., Treaty of Point no Point, Jan. 26, 1855, art. 2, 12 Stat. 933 (asserting that no "white man [shall]

be permitted to reside upon the [reservation of several Northwest tribes] without permission of the said tribes"); Treaty of Hopewell, Nov. 28, 1785, art. 5, 7 Stat. 18, 19 (allowing the Cherokee Nation to punish non-Indians who settle or had settled on reservation land).

[FN123]. Although this federal duty of protection was originally premised on concepts of native separatism and sovereignty, it has been "reconceptualized by some lawmakers into a guardian-ward relationship attributable to a situation of extreme dependency." Wood, supra note 80, at 1503. Under either formulation, however, the obligation remains the same.

[FN124]. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

[FN125]. Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).

[FN126]. See Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975) (recognizing a trust relationship arising from the Indian Nonintercourse Act, which regulated non-Indian trade with and conduct toward Indian tribes).

[FN127]. Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1972).

[FN128]. Id. at 256-57.

[FN129]. Getches et al., supra note 63, at 344 (quoting Reid Peyton Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 Stan. L. Rev. 1213, 1247-48 (1975)).

[FN130]. Pyramid Lake, 354 F. Supp. at 257. The trust obligation in the context of administrative action is enforceable under the Administrative Procedure Act, as well as via equitable, declaratory, or mandamus relief, and under the Indian Claims Commission Act. Wood, supra note 80, at 1514-15.

[FN131]. Wood, supra note 95, at 225-33.

[FN132]. Id.

[FN133]. Id.

[FN134]. Id. at 133. Other protected beneficiary interests include economic vitality, self-government, and cultural vitality. See id. at 150- 223.

[FN135]. The Dawes Act, discussed supra note 103, provided for the allotment of reservation land to individual Indians and families. The federal government was to hold allotted land in trust for twenty-five years before passing fee simple title to the Indian allottee. In some cases, this trust period was extended. In 1934, Congress passed the Indian Reorganization Act, which ended allotment and provided that allotted land held in trust would remain so indefinitely. Getches et al., supra note 63, at 166, 192-96.

[FN136]. The United States Claims Court has recognized water rights as a trust property that the United States government, as trustee, has a duty to protect. Fort Mojave Indian Tribe v. United States, 23 Cl. Ct. 417, 426 (1991), aff'd, 64 F.3d 677 (Fed. Cir. 1995).

[FN137]. See Wood, supra note 95, at 140-41.

[FN138]. 506 F. Supp. 187, 203 (W.D. Wash. 1980), vacated in part by 759 F.2d 1353 (9th Cir. 1985) (remanding to the district court for further factfinding). Notably, the Washington case dealt with a specific treaty fishing clause.

[FN139]. Termination refers to a federal policy in effect from 1945 to 1961 under which Congress terminated federal recognition of certain Indian tribes with the goal of complete Indian integration into mainstream society. With termination of federal recognition, federal support of the terminated tribe ceased. See Getches et al., supra note 63, at 204-24.

[FN140]. The Indian Reorganization Act of 1934 provided a mechanism through which tribes could among other things adopt, subject to Department of Interior approval, constitutions and establish tribal councils. Invariably, these governments were modeled after the Federal Constitution, although tribal councils often lack separation of powers. Id. at 192-200.

[FN141]. Galloway, supra note 55, at 179.

[FN142]. Envtl. Prot. Agency, EPA Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984) [hereinafter EPA Indian Policy], available at http://www.epa.gov/superfund/tools/topics/relocation/policy.htm (last modified Mar. 28, 2001).

[FN143]. Id.

[FN144]. Id. (emphasis added).

[FN145]. Id.

[FN146]. Id.

[FN147]. 97 F.3d 415 (10th Cir. 1996).

[FN148]. 137 F.3d 1135 (9th Cir. 1998).

[FN149]. See City of Albuquerque v. Browner, 865 F. Supp. 733 (D.N.M. 1993), aff'd, 97 F.3d 415 (10th Cir. 1996).

[FN150]. Albuquerque, 97 F.3d at 419.

[FN151]. The City of Albuquerque raised seven issues on appeal:
(1) whether the district court's opinion and order should be vacated because the case is mooted by an agreement negotiated by the parties; (2) whether the EPA reasonably interpreted § 1377 of the Clean Water Act as providing the Isleta Pueblo's authority to adopt water quality standards that are more stringent than required by the statute, and whether the Isleta Pueblo standards can be applied by the EPA to upstream permit users; (3) whether the EPA complied with the Administrative Procedure Act's notice and comment requirements in approving the Isleta Pueblo's standards under the Clean Water Act; (4) whether the EPA's approval of the Isleta Pueblo's standards was supported by a rational basis; (5) whether the EPA's adoption of regulations providing for mediation or arbitration to resolve disputes over unreasonable consequences of a tribe's water quality standards is a reasonable interpretation of § 1377(e) of the Clean Water Act; (6) whether the EPA's approval of the Isleta Pueblo's ceremonial use designation offends the Establishment Clause of the First Amendment; and (7) whether the Isleta Pueblo's standards approved by the EPA are so vague as to deprive Albuquerque of due process.
Id. at 420.

[FN152]. Id.

[FN153]. Id. at 422.

[FN154]. Id. at 423.

[FN155]. Id.

[FN156]. Id.

[FN157]. Id. at 423-24.

[FN158]. Id. at 424. The court reasoned that § 1377 incorporates § 1342, which gives the EPA authority to require upstream NPDES permit holders to comply with downstream standards, and § 1342 incorporates § 1311, which provides the EPA authority to issue NPDES permits in compliance with downstream standards. Id. at 424 n.13.

[FN159]. 137 F.3d 1135 (9th Cir. 1998).

[FN160]. Id. at 1139.

[FN161]. Id. at 1140.

[FN162]. The specific regulation at issue was 40 C.F.R. § 131.8(a)(3), which states that water quality standards must pertain to management and protection of water resources that are within the borders of a reservation. See id.

[FN163]. See Montana v. EPA, 941 F. Supp. 945 (D. Mont. 1996), aff'd, 137 F.3d 1185 (9th Cir. 1998).

[FN164]. EPA Final Rule, 56 Fed. Reg. 64,876, 64,878 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131 (2000)).

[FN165]. Id. at 64,879. The EPA also noted the difficulty of "separat[ing] out the effects of water quality impairment on non-Indian fee land within a reservation with those on tribal portions" as a practical matter supporting one jurisdictional authority. Id. at 64,878.

[FN166]. Id. at 64,879.

[FN167]. Montana v. EPA, 137 F.3d 1135, 1141 (9th Cir. 1998).

[FN168]. Id.

[FN169]. Id. (quoting Colville Confederated Tribes v. Walton, 647 F.2d 42, 52 (9th Cir. 1981)).

[FN170]. "Our decision is also fully consistent with the only other circuit opinion that has yet considered the issue of tribal authority to set water quality standards." Id. at 1141.

[FN171]. EPA Indian Policy, supra note 142.

[FN172]. See Wood, supra note 95, at 225-33.

[FN173]. 33 U.S.C. § 1370 (1994).

[FN174]. EPA Final Rule, 56 Fed. Reg. 64,876, 64,886 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131 (2000)). "[Section 1370] is... a savings provision that indicates that existing State authority to regulate effluent discharges and/or set water quality standards is not preempted by the CWA, as long as the State standards/regulations are at least as stringent as required by the CWA." Id.

[FN175]. The EPA cites a statement by Senator Burdick, a member of the conference committee on the Water Quality Act of 1987, which indicates that the committee's intent was to grant Indian tribes "the same regulatory jurisdiction over water quality matters with regard to waters within Indian jurisdiction that States have been exercising over their water." Id. The agency further noted that if tribes could set water quality standards equivalent only to the federal minimum standards, the dispute resolution provision would be superfluous. Id.

[FN176]. City of Albuquerque v. Browner, 97 F.3d 415, 423 (10th Cir. 1996).

[FN177]. Montana v. EPA, 137 F.3d 1135, 1140 (9th Cir. 1998) (asserting that "the scope of inherent tribal authority is a question of law for which EPA is entitled to no deference").

[FN178]. See, e.g., Albuquerque, 97 F.3d at 426 (stating that "[w]hether the more stringent standard is attainable is a matter for the EPA to consider in its discretion"); Bilut, supra note 37, at 902 (noting that although states may set more stringent standards, the EPA may still have discretion in reviewing those standards).

[FN179]. 5 U.S.C. § 706(2)(A) (1994).

[FN180]. Bilut, supra note 37, at 902.

[FN181]. Albuquerque, 137 F.3d at 426.

[FN182]. Bilut, supra note 37, at 909.

[FN183]. Id. at 912.

[FN184]. 33 U.S.C. § 1377(e) (1994).

[FN185]. Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[FN186]. 33 U.S.C. § 1341(a)(1) (1994).

[FN187]. 33 U.S.C. § 1341(a)(2) (1994).

[FN188]. Id.

[FN189]. 33 U.S.C. § 1342(d)(2) (1994).

[FN190]. Although tribes conceivably could set water quality standards that are absurdly stringent and unattainable even with improved technology, this possibility does not detract from the EPA's trust doctrine responsibility to enforce tribal standards. Furthermore, a good faith standard could be imposed to constrain tribes from the unlikely imposition of unattainable standards.

[FN191]. EPA Final Rule, 56 Fed. Reg. 64,876, 64,887-88 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131 (2000)).

[FN192]. 40 C.F.R. § 131.7(f)(3) (2000).

[FN193]. 33 U.S.C. § 1377(e) (1994).

[FN194]. Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, 54 Fed. Reg. 39,098, 39,104 (proposed Sept. 22, 1989) (codified at 40 C.F.R. pt. 131 (2000)); see also EPA Final Rule, 56 Fed. Reg. at 64,890-91.

[FN195]. EPA Final Rule, 56 Fed. Reg. at 64,891.

[FN196]. Id.; see also 33 U.S.C. § 1313(c)(4) (1994).

[FN197]. EPA Final Rule, 56 Fed. Reg. at 64,891.

[FN198]. Id.

[FN199]. See EPA Indian Policy, supra note 142.

[FN200]. 40 C.F.R. § 131.8 (a)(2) (2000).

[FN201]. EPA Final Rule, 56 Fed. Reg. at 64,879.

[FN202]. Principles of inherent Indian sovereignty also support tribal promulgation of water quality standards for reservations. In light of extremely diminished off-reservation sovereign power, however, tribes can best rely on the trust doctrine to support upstream enforcement of those standards.

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