Enacting and Enforcing Tribal Law to Protect and Restore Natural Resources
Part 1: Tribal Law and How it Works

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KEY QUESTIONS

1. What are the sources of Tribal legal authority?

2. What are the policy reasons for Tribes to develop and enforce their own regulatory programs?

3. Why should Tribes develop their own water quality standards (WQS) and cleanup laws?

4. What are the legal risks and challenges when Tribes exercise their inherent sovereign power to protect the Reservation Environment?
Why should a Tribe, Band or Alaska Native Village Enact Its Own Cleanup Standards?

- Assertion of the Tribe, Village or Band’s inherent sovereign powers
- Demonstrates a Tribe, Village or Band’s governmental process, self-confidence and authority
- Enables a Tribe, Village or Band to apply its own values to determine how clean is “clean” (and for what purpose)
Civil Regulatory Authority: The Three Sovereigns

- Federal Government
- States
- Indian Tribes/Bands/Native Villages
Sources of Tribal Civil Regulatory Authority

- As property owners
- Powers conferred by Congress through statute or treaty, or Executive Order
- Retained inherent sovereignty

Atkinson Trading Co. v. Shirley, 121 S. Ct. 1825 (May 29, 2001)
Decisions that Helped Shape the Table


*Chevron v. NRDC* – Agency Discretion, 467 U.S. 837 (1984)


Tribes Do Not Generally Have Retained Inherent Sovereignty Over Non-Members Except:

1. To regulate the activities of nonmembers who have entered into *consensual relationships* through commercial dealing, contracts, leases or other arrangements; and

2. To exercise civil authority over conduct of nonmembers on the Reservation that directly effects the Tribe’s *health, welfare, political integrity, or economic security*.

Applying the Montana Test

For Tribal environmental programs, we first look at the second *Montana* exception – exercising tribal authority over nonmembers to protect the health and welfare of the Reservation Population and the quality of the Reservation Environment.
CWA defines “reservation” to include all land within the limits of an Indian reservation, notwithstanding the issuance of any patent. (33 U.S.C. § 1377(h)(1))

Tribal WQS may be more stringent than either state or federal WQS (33 U.S.C. § 1377)

Off-reservation, upstream discharge point sources must comply with Tribal WQS

*City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996), cert. denied, 118 S. Ct. 410 (1997)*
Tribal Water Quality Management Program

- Defines Tribal agency powers and duties
- Determines Tribal WQS for all surface waters within the Reservation
- Requires use of Tribal administrative procedures and exhaustion of the Tribal administrative process
- Provide for judicial review in Tribal Court (on the record/arbitrary and capricious standard)
Regulatory Framework

Federal Clean Water Act (CWA)

EPA

State Program Approval

Challenge

Tribal Program Approval

WQS

Consistent with Treaty (Ex. Ord.) Protected Tribal Interests?

Federal Promulgation of WQS

Enforcement

Enforcement

WQS
State challenges to EPA’s Decision to Approve Tribal TAS Applications


Montana brought this action seeking a determination that EPA’s action to treat the Sioux and Assiniboine Tribes [Tribes] in the same manner as a state under section 518(e) of the Clean Water Act, 33 U.S.C. § 1377(e) was unlawful.

Montana asserts that the EPA’s decision is unlawful because the Administrative Record [AR] contains no evidence “which demonstrates an actual—as opposed to presumed—causal link between nonmember activity on fee land and the water quality problems identified in Tribes’ nonpoint source report.”
According to the EPA, the Tribes showed that the potential impacts of activities on fee lands to the Tribes are serious and substantial. Upon review of the EPA’s decision regarding the seriousness of substantialness of the potential impacts, the Court finds no indication that the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

No genuine issue of material fact exists regarding whether the EPA’s decision was unlawful, and the EPA is therefore entitled to judgment as a matter of law.
State of Wisconsin v. EPA, U.S. Court of Appeals for the Seventh Circuit, 266 F.3d 741 (September 21, 2001)

Question Presented: Whether the Environmental Protection Agency (EPA), acting through authority delegated to it by statute, was empowered to treat a particular tribe as a “state” for purposes of certain water quality rules. Like the district court, we conclude that the EPA acted properly in doing so, and we thus affirm the district court’s judgment rejecting the challenge Wisconsin has brought to the EPA’s action.

In August 1994, the Band applied for TAS status under the Act. Wisconsin opposed the application, arguing that it was sovereign over all of the navigable waters in the state, including those on the reservation, and that its sovereignty precluded any tribal regulation.
State of Wisconsin v. EPA, (cont.)

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

We conclude that the EPA’s grant of TAS status to the Band is not arbitrary, unreasonable, or contrary to law and we therefore AFFIRM the district court’s judgment.
What the Future May Hold

The court left the door open for the next case by case determination – apparently expecting further challenges to Tribal TAS status. By stating that:

“We note once again in closing that the EPA’s decision in each case seeking TAS status is fact-specific. In this case, both parties conceded that the waters within the Band’s reservation are very important to the Band’s economic and physical existence. Additionally, the reservation here is unusual in that there are no parcels of fee land within the reservation owned by non-members of the tribe. We have no occasion to say whether, on a different set of facts, the EPA might extend the notion of a tribe’s “inherent authority” to affect off-reservation activities so far as to go beyond the standards of the statute or the regulations. If it ever arises, that will be another case, for another day.”
All Roads Lead to the Exercise of Tribal Sovereignty

Whether the Tribe is acting as a property owner, asserting its civil regulatory authority, enforcing Tribal tort law, or seeking TAS approval, to implement Tribal WQS, the process is driven by the need to protect and preserve Tribal natural resources, foods and lifeways.
Good intentions are not enforceable.

The Federal Government trust obligation is inconsistently implemented and unreliable.

States will continue to protect their own interests even if the environment suffers in the process.

It is Tribal law, policy and legal action, when necessary, that will enable Tribal governments to protect the health of their Reservation Populations and to preserve the quality of their Reservation Environments for today and the future generations to follow.
THANK YOU FOR ATTENDING!

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