# JURISDICTION CASE LAW BASICS
## How Jurisdiction Relates to Tribal Utility Regulation

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## OUTLINE



### 1. Introduction.

Utility regulation is filled with jurisdictional issues. Effective environmental regulation requires the ability to govern comprehensively in Indian Country, without regard to land ownership or tribal enrollment. The authority of a tribe over its members is clear, but tribal

jurisdiction over nonmembers is often contested. Because the extent of governmental jurisdiction is controversial everywhere, it is not surprising that the civil jurisdiction of tribal governments is a controversial and evolving topic. This paper will principally examine inherent and congressionally authorized exercises of tribal authority in the environmental regulatory field. The lessons learned through the environmental and taxation context are equally applicable to tribal utility regulation.

## 2. Jumping to the *Montana* Exceptions: The Narrowing of Inherent Sovereignty As a Basis for Tribal Regulation of Nonmembers.

In *Montana v. United States*,[1] the Supreme Court established the benchmark for determining tribal authority over nonmembers.[2] This inquiry requires that three alternative bases of tribal authority be examined: (1) "express congressional delegation," (2) "taxation, licensing, or other means [regulating] the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements," or (3) "conduct of non-Indians on fee lands within [the] 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."[3]

Tribal civil jurisdiction over nonmembers has been strongly linked to the concept of inherent tribal sovereignty as articulated in *Montana v. United States*.[4] In particular, two of the exceptions to *Montana's* general rule, the consensual relationship exception and the threatening conduct exception, have come to be known as *Montana* Exceptions 1 and 2. It is important to recognize that reliance on these exceptions oversimplifies both the *Montana* decision itself and current federal common law on tribal civil jurisdiction over nonmembers.

Tribal inherent authority over reservation land use by nonmembers came before the Supreme Court directly in 1989. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*[5] upheld a tribal zoning ordinance over some reservation fee lands, but not others.

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1 450 U.S. 544 (1981).

2 *E.g.*, *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) (characterizing *Montana* as the "pathmarking case" on the subject of tribes' regulatory jurisdiction over nonmembers). *Strate* is important for declaring that the cases cited by the *Montana* Court as illustrating the two *Montana* exceptions must be seen as showing how narrow the exceptions truly are.

3 *Id.* at 564-66.

4 450 U.S. 544 (1981).

5 492 U.S. 408 (1989).

Most of the fee land on the Yakama Reservation, including Wilkinson's property, is found in three towns. The rest, including Brendale's land, is scattered throughout the Reservation in a checkerboard pattern.[6] The district court held that the Tribe had exclusive jurisdiction over the property of Brendale, a nonmember, but lacked authority over the Wilkinson property under *Montana* Exception 2. The Ninth Circuit upheld tribal zoning authority throughout the Reservation, reasoning that denying the Tribe local governmental police power to zone fee land would destroy its capacity to engage in comprehensive planning.

In a fractured decision, split 4-2-3, the United States Supreme Court upheld tribal jurisdiction to zone areas where the amount of nonmember owned land was small enough that the Tribe retained the power to define the area's essential Indian character.[7] The Court rejected tribal authority to zone the Wilkinson property, which was located in an area of the Reservation that contained a large proportion of fee land owned by nonmembers. The conflicting opinions of the Court make it difficult to determine whether tribal authority over the land and person of nonmembers is an application of *Montana* Exception 2, Exception 1, or a special category of its own.

The plurality opinion of Justices White, Rehnquist, Scalia and Kennedy disposed of the Yakama Nation's critique of language in *Montana*, which rejected Crow tribal regulation of hunting and fishing on fee lands owned by non-Indians in the absence of an express congressional delegation. The Yakama Nation contended that insistence on a congressional delegation to assert jurisdiction conflicted with *Colville*.[8] The Court distinguished *Colville* noting that the tribal tax upheld there involved transactions on trust land and significantly involved tribal members. *Montana* cited *Colville* as an example of the sort of "consensual relationship" that might support tribal authority over nonmembers on fee lands.[9]

The Supreme Court's recent decisions applying the *Montana* Exceptions have increased the difficulty tribes will have supporting regulation of nonmembers on an inherent sovereignty basis.

*Atkinson Trading Co., Inc. v. Shirley*[10] rejected the Navajo Nation's claim that inherent sovereignty supported imposition of a hotel occupancy tax upon nonmembers on non-Indian fee

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6 *Id.* at 414.

7 *Id.* at 432-33.

8 *Id.* at 426-27 (discussing *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980)).

9 *Id.* at 427 (citing *Montana*, 450 U.S. at 565-66).

10 532 U.S. 645 (2001).

land within its reservation. The Tenth Circuit had upheld the tribal tax, finding that because a consensual relationship existed between the Navajo Nation and guests, the Nation had inherent jurisdiction to tax. On petitions for rehearing, the court of appeals split evenly so rehearing was denied. The Supreme Court analyzed the first and second *Montana* exceptions and held them inapplicable. The Court rejected broad language in *Merrion v. Jicarilla Apache Tribe*[11] and earlier cases and found the analysis of *Brendale* to be inapplicable because the effects of the trading post did not endanger the Navajo Nation's political integrity.

The Supreme Court's opinion made no comment on the standards for reviewing tribal court decisions but rejected the Tenth Circuit's finding of consensual relationships between the Navajo Nation and the hotel guests or the trading post. The *Atkinson Trading Post* opinion thus eliminated the argument that providing the benefits of a civilized society to nonmember businesses and individuals within Indian Country might support tribal inherent civil regulatory authority over nonmembers at least on fee land. As Justice White had noted in *Brendale*, the Court stressed that *Atkinson Trading Post* involved no claim of statutorily conferred power.[12] The Court noted that neither the Indian Trader's Statute[13] nor the regulations adopted under that statute, authorized the hotel occupancy tax at issue.[14]

The Court in *Atkinson Trading* refused to extend the zoning decision of *Brendale* into broad tribal authority over nonmembers whenever the acreage of non-Indian fee land is minuscule in relation to surrounding tribal land. The Court explained that the judgment in *Brendale* turned on both the formerly closed nature of the area in question and the fact that development there would place the entire area in jeopardy. However, the Court reemphasized that the outcome of *Brendale* was correct, citing *Duro v. Reina*, 495 U.S. 676, 688, for the proposition that zoning "is vital to the maintenance of tribal integrity and self-determination." Slip op. at 13, n.14.

The Supreme Court's other major 2001 decision limiting tribal authority, *Nevada v. Hicks*,[15] has no bearing on utility regulation; nevertheless, we discuss it briefly here. *Nevada v. Hicks* involved tribal court jurisdiction over an action by a tribal member against state officials arising from tort and civil rights violations committed while the officials executed a search warrant on Indian-owned reservation land. The Ninth Circuit upheld jurisdiction because the events occurred on tribal property, but the Supreme Court reversed and filed five opinions. All

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11 455 U.S. 130 (1982).

12 121 S. Ct. at 1832 n.5.

13 25 U.S.C. § 261.

14 *Atkinson Trading Post*, 532 U.S. at, slip op. at 10, n.10.

15 533 U.S. 353 (2001).

justices agreed that the Ninth Circuit erred.

Justice Scalia's opinion for the Court noted that criminal jurisdiction illustrates that tribes do not necessarily have regulatory authority over nonmembers found on tribal land. In addition, *Brendale*, according to the Court, is the only case in which the Court has approved tribal authority over a non-consenting nonmember's fee property.16 Justice Souter, writing for himself, Justice Kennedy and Justice Thomas, stated that the Court was right, but they would reach the same result more directly by simply extending *Montana* and its exceptions to tribal lands. Thus, for those justices, the *Montana* main rule for nonmember fee land would become the main rule for all land.17 Justice Ginsberg filed a separate opinion to emphasize that the Court was only deciding the question of tribal court jurisdiction over state officers' enforcing state law. A careful reading of *Hicks* demonstrates that Justice Ginsberg is correct. *Hicks* turns upon the fact that states have criminal jurisdiction over Indians for crimes committed outside Indian Country.18

In summary, the Supreme Court's 2001 opinions do three things: first, they reaffirm *Brendale*. Second, they narrow practically to the vanishing point the other situations in which a tribe has *inherent* civil regulatory authority over nonmembers under the second *Montana* exception.19 Third, the opinions cast doubt on tribal inherent civil regulatory authority over state law enforcement officers investigating on Indian lands. The result of these two opinions is that in most cases for a tribe to use inherent powers to regulate nonmembers, even on trust land, the first or second *Montana* exceptions must apply, and the tribe must do more than just provide services to the nonmembers.

**a.** ***Recent Utility Tax Decisions.***

With respect to utility taxes, a few cases are worthy of mention. In *Big Horn v. Adams*,

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16 *Id.* at 2309-10.

17 *Id.* at 2318-24.

18 *See, e.g.*, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), *cf. Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969) (extradition of suspect would interfere with tribal self-government where tribal law prohibited extradition except to three neighboring states).

19 *But see Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, No. 01-35681 (9th Cir. March 17, 2003). The Ninth Circuit has allowed discovery to proceed to determine whether the Tribes can use the second *Montana* exception to support the Tribe's 4% utility tax on the railroad. The railroad hauls hazardous materials across the reservations within a congressionally granted right-of-way. This case could breathe life into the second *Montana* exception.

291 F.3d 944 (9th Cir. 2000), the Ninth Circuit considered two tribal taxes: (1) a tax on the sale of electric power and (2) an ad valorem tax on the property with the power lines. The Court upheld the Tribe's tax on the sale of electric power as an example of a consensual relationship under *Montana* exception 1. However, the Tribe's ad valorem tax was struck down. The ad valorem tax was imposed by the Crow Tribe on utility property located on power company rights-of-way on the Crow Reservation. The electric company sued officials of the Crow Tribe, seeking injunctive and declaratory relief against the tribal utility tax on the company's property on the right-of-way across tribal lands. The district court had determined that the right-of-way was equivalent to fee land owned by nonmembers. The Ninth Circuit determined that the ad valorem tax on the property exceeded the Tribe's inherent sovereignty because the tax was not imposed on the activity which formed the consensual relationship (the sale of power).

The *Big Horn* Court stated that *Strate and Wilson v. Marchington* had impliedly overruled *Burling N. Ry. Co. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992). In *Blackfeet*, a railroad sought to enjoin tribes from taxing the railroad's non-possessory interest in property within their reservations. The Ninth Circuit held that the tribes had the inherent sovereign authority to tax the rights-of-way granted to the railroad based upon the tribes' "continuing property interest" in the land. *Id* at 904. The grant of a limited possessory interest to the railroad did not extinguish the tribes' interest in the land, therefore the tribes retained the authority to tax nonmembers doing business on reservation land for the tribal benefits they enjoy. The Ninth Circuit decision in *Blackfeet* was premised on the Supreme Court's decision in *Merrion*. *Blackfeet* also arguably involved a consensual relationship with the tribes within the meaning of the first *Montana* exception. Accordingly, in *Big Horn*, the Ninth Circuit found that the Tribe lacked authority to impose an ad valorem tax on rights-of way deemed to be the equivalent of fee land owned by nonmembers.

Tribal utility taxes were also at issue in a recent Washington Utilities and Transportation Commission case, *Brannan v. Qwest Corporation*, (Feb. 2002). The Commission upheld Qwest's pass-through of the Lummi Nation's and Swinomish Tribe's utility taxes to nonmembers customers living within reservation boundaries. The Commission distinguished the tribal utility taxes from those in *Atkinson* on the basis of the Tribes' relationship with the utilities. Although the Administrative Board's decision is of limited precedential value, the decision highlights the importance of tribes to think outside of the box, and like here, work with utilities to impose tribal taxes on nonmembers.

The attenuation of inherent tribal sovereignty in federal jurisprudence since 1978 is a subject of other papers.[20] The confused and increasingly narrow application for inherent tribal

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[20] Important recent appellate decisions include *Boxx v. Long Warrior*, 265 F.3d 771 (9th Cir. 2001) (tribal member injured in accident on reservation right-of-way granted to National Park Service could not sue nonmember in tribal courts); *McDonald v. Means*, 300 F.3d 1037 (9th Cir. 2002) (tribal member injured when car struck non-member's horse on BIA road within the reservation could maintain action in tribal court); *MacArthur v. San Juan County*, 309 F.3d 1216, No. 01-4001 (10th Cir. October 7, 2002) (tribal court lacked jurisdiction to hear employees'

sovereignty makes it important to consider available statutes authorizing or delegating powers to Indian tribes. The predictable resistance to tribal regulatory authority warrants basing that authority on federal statutory authorizations or delegation, rather than inherent authority supported by the two *Montana* exceptions.

### 3. Reexamining the First Part of the *Montana* Test: Congressional Authorization of Tribes to Exercise Certain Authorities.

When attempting to establish tribal authority over nonmembers, the tendency has been to focus on the *Montana* exceptions. However, as our following review of cases illustrates, the Court has repeatedly recognized and acknowledged congressional authorization or delegation as an alternate basis for tribal authority over nonmembers.

#### a. *Mazurie and the § 1161 (Liquor Ordinance) Authorization.*

The leading case on "delegation" to tribes of authority over non-Indians is *United States v. Mazurie*.[21] The Mazuries operated a bar on fee land within the Wind River Reservation in Wyoming. They were denied a tribal liquor license by the tribe under its option to regulate the introduction of liquor into Indian Country. The United States prosecuted them and obtained a conviction for violating 18 U.S.C. § 1154. The *Mazurie* opinion focuses on the phrase in § 1154 exempting "fee-patented lands in non-Indian communities" within Indian reservations from the Indian liquor laws.

For our purposes, the important statute is 18 U.S.C. § 1161. This provision is a 1953 congressional local-option act that authorizes tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian Country (so long as state law is not violated). Section 1161 exempts from federal prosecution acts "in conformity . . . with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian Country, certified by the Secretary of the Interior, and published in the federal register." Note that this statute does not directly delegate authority to any tribe nor expressly approve any particular tribe's ordinance. However, it makes clear that tribal liquor ordinances, duly adopted, certified by the Secretary of the Interior, and published in the Federal Register will have legal effect for federal criminal law purposes.

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claims against County Health Clinic contracting with Indian Health Service on reservation fee land); *Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation,* 323 F.3d 767, No. 01-35681 (9th Cir. March 17, 2003) (tribe showed basis for believing that railroad's right-of-way threatened harm to tribal lands that might justify taxation; Tribe was entitled to discovery on jurisdictional facts).

[21] 419 U.S. 544 (1975).

In Part IV of its opinion the Court held that Congress has the power to delegate its authority to tribes.[22] Although the Court noted cases limiting the authority of Congress to delegate its legislative power, discussed below, it upheld the delegation in § 1161 as follows:

> [W]hen Congress delegated its authority to control the introduction of alcoholic beverages into Indian Country, it did so to *entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life*. Clearly the distribution and use of intoxicants is just such a matter. We need not decide whether this independent authority is itself sufficient for the tribes to impose Ordinance No. 26. It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority "to regulate Commerce . . . with the Indian tribes." *Cf. United States v. Curtiss-Wright Export Corp.*, [299 U.S. 304 (1936)].
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> The fact that the Mazuries could not become members of the tribe, and therefore could not participate in the tribal government, does not alter our conclusion.[23]

*Mazurie* is a landmark case. It upholds the authority of Congress to authorize tribes to exercise jurisdiction over non-Indians when those matters "affect the internal and social relations of tribal life."[24] It imposes no requirement that a tribe possess inherent sovereignty over a subject in order to support congressional delegation; to the contrary, as the interpretation of the *Montana* exceptions have shown, the tests for inherent sovereignty are much narrower than Congress' ability to authorize tribal authority.[25]

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22 The court of appeals in *Mazurie* expressed doubt that Congress has power to regulate businesses on non-Indian fee land. Part III of the Supreme Court's opinion dismissed that doubt on the basis of the Indian Commerce Clause and the string of cases involving sale of alcoholic beverages to tribal Indians whether on or off a reservation. *Mazurie*, 419 U.S. at 554.

23 *Id.* at 557 (emphasis added).

24 In *City of Timber Lake v. Cheyenne River Sioux*, 10 F.3d 554 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2741 (1994), the court relied on § 1161, as construed in *Rice v. Rehner*, 463 U.S. 713 (1983), as authority for tribal regulation of liquor throughout the reservation with no exemption for non-Indian communities. Thus, while the reference to non-Indian communities at issue in *Mazurie* would affect federal criminal prosecutions, it would not limit the tribal civil jurisdiction over nonmembers authorized by § 1161.

25 Where tribal authority is based on a federal statute or a treaty, the issue arises whether the tribe is exercising delegated federal authority or "re-authorized" tribal authority. The language of the Supreme Court's previous opinions is equivocal. *Compare Montana*, 450 U.S.

**b.** ***Montana and the Possibility of § 1165 Delegation.***

*Montana v. United States*[26] construed both the Crow treaties and 18 U.S.C. § 1165 as possible sources for the Crow Tribe's power to regulate non-Indian hunting and fishing on non-Indian lands within the Crow Reservation. The Ninth Circuit had held that the federal trespass statute, 18 U.S.C. § 1165, "augmented" the Tribe's regulatory power over non-Indian land.[27]

Reversing the Ninth Circuit's "augmentation" holding and rejecting the tribe's contention that it had inherent sovereign authority over non-Indian hunting and fishing, the *Montana* Court indicated that Congress could have authorized that authority by amending § 1165:

> If Congress had wished to extend tribal jurisdiction to lands owned by non-Indians, it could easily have done so by incorporating in § 1165 the definition of "Indian Country" in 18 U.S.C. § 1151 . . . . Indeed, a Subcommittee of the House Committee on the Judiciary proposed that this be done. But the Department of the Interior recommended against doing so. . . .[28]

Note that the *Montana* Court's example of 18 U.S.C. § 1165 demonstrates the difference between the showing required to satisfy the two *Montana* exceptions for inherent sovereignty and the "certain degree of independent authority over matters that affect the internal and social relations of tribal life," which *Mazurie* indicates will support a congressional delegation of jurisdiction to a tribe.[29]

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at 562 (Congress could extend tribal jurisdiction to non-Indian land) *with Mazurie*, 419 U.S. at 554 (Congress delegated its authority to control alcohol in Indian Country). In the context of double-jeopardy and 25 U.S.C. § 1301(2) (the *Duro* amendment), the Ninth Circuit has held that Congress has the power to reaffirm former tribal criminal jurisdiction over nonmember Indians. *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001). Where the statutory language permits, construing federal statutes as affirming inherent tribal authority as opposed to delegating federal authority properly acknowledges tribal sovereign status as well as avoids issues concerning technical delegations. However, the Tenth Circuit has held to the contrary, *United States v. Lara*, 324 F.3d 635, No. 01-3695 (8th Cir. March 24, 2003)

[26] 450 U.S. 544 (1981).

[27] *United States v. Montana*, 604 F.2d 1162, 1167 (9th Cir. 1979).

[28] *Montana*, 450 U.S. at 562.

[29] *Mazurie*, 419 U.S. at 557.

### c. *Brendale, Montana v. EPA and the Clean Water Act (§ 518) Delegation.*

*Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,[30] which was decided as an inherent authority case, is generally noted for its discussion of *Montana* Exceptions 1 and 2. However, *Brendale* is also important for its acknowledgment of situations in which Congress has delegated authority to tribes. Justice White, who wrote the plurality opinion, commented that *Brendale* involved "no contention . . . that Congress has expressly delegated to the Yakima Nation the power to zone fee lands of nonmembers of the Tribe."[31] Using the signal "*cf*.", Justice White cited four examples of express statutory delegation. The first citation is to the definition of Indian Country, 18 U.S.C. § 1151, and the second, to the authorization of tribal liquor ordinances that were at issue in *United States v. Mazurie*.[32] The third and fourth citations are particularly important as they refer to § 518 of the Clean Water Act.

Justice White cited two parts of the Clean Water Act in *Brendale* as examples of congressional authorization to tribes. The first subsection cited, 33 U.S.C. § 1377(e), sets up a process by which tribes can exercise a series of important powers under the Clean Water Act if they satisfy the EPA Administrator that they meet certain conditions. The second subsection, 33 U.S.C. § 1377(h)(1), defines "Federal Indian reservation" in exactly the way Indian Country is defined by 18 U.S.C. § 1151, *i.e.*, all reservation land, notwithstanding patents and rights of way.

The Clean Water Act, as amended in 1987 to add § 518, authorizes the EPA Administrator to treat an Indian tribe as a State if the tribe has a governing body carrying out substantial governmental duties and powers, proposes to manage water resources within an Indian reservation, and is found by the Administrator to be capable of carrying out water resource functions in a manner consistent with the Clean Water Act and its regulations. Under § 518, tribes may exercise the same authority as states for several purposes, including setting water quality standards and issuing certification of compliance with standards, water discharge permits, and wetlands permits. Section 518 does not expressly grant any power or approve any particular tribe's ordinance. Instead it sets up a process under which the EPA Administrator can approve tribal enactments that, upon approval, become enforceable against members and nonmembers alike.

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30 492 U.S. 408 (1989) (upholding, by deeply divided Court, tribal exclusive zoning power in a portion of the reservation dominated by tribal ownership, and rejecting inherent tribal power to zone lands in another part of the reservation that was largely fee land and populated by non-Indians).

31 *Id.* at 428.

32 18 U.S.C. § 1161.

Unfortunately, the EPA has taken a narrow view of § 518 in regulations, essentially limiting its applicability to situations in which the tribal government can show it possesses inherent sovereign authority under *Montana* Exceptions 1 and 2.[33] The difficulty posed by the regulations, however, is mitigated by their presumption that adverse effects on reservation water quality are sufficiently serious to meet the "health and welfare" requirement of the second *Montana* exception.

In *Montana v. U.S. EPA*,[34] the EPA's decision to grant "treatment as a State" (TAS) status to the Confederated Salish and Kootenai Tribes was upheld. The State of Montana used EPA's requirement that a tribe show its inherent authority as an opening to redetermine the scope of inherent authority. However, the Ninth Circuit upheld the regulation, noting that EPA had taken a cautious view of *Montana* Exception 2 and finding that the regulation reflected "appropriate delineation and application of inherent Tribal regulatory authority over non-consenting nonmembers."[35] The district court would have found § 518 by itself to be an ample delegation of federal authority.[36]

In *Wisconsin v. U.S. EPA and Sokaogon Chippewa Community*,[37] the EPA's decision to grant TAS status to the Sokaogon Chippewa Community was also upheld. Wisconsin challenged the TAS status of the Community, also known as the Mole Lake Band of Lake Superior Chippewa Indian, on several grounds, including the contention that Rice Lake is not within the borders of the Reservation because the boundaries run only to the Lake's high water mark. The court of appeals found this argument to have been waived because it had not been presented to EPA. In a related contention, Wisconsin argued that the Tribe lacked authority over water resources because the State has ownership of the underlying lake beds. However, the court found that even if the State owned the submerged lands Congress' powers to regulate commerce and powers over Indian affairs would support federal regulation of waters within the Reservation and the delegation of that authority. Finally, Wisconsin argued that the Tribe lacked inherent

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33 *See* Final Rule, 58 Fed. Reg. 67,966 to 67,970-71 (Dec. 22, 1993).

34 137 F.3d 1135, 1138 (9th Cir. 1998).

35 *Id*. at 1141.

36 941 F. Supp. 945 (D. Mont. 1996). *See generally* A. Skibine, The Chevron Doctrine in Federal Indian Law and the Agencies' Duty to Interpret Legislation in Favor of Indians: Did the EPA Reconcile the Two in Interpreting the "Tribes As States" Section of the Clean Water Act?, 11 St. Thomas L. Rev. 15 (1998); R. Cross, When Brendale Met Chevron: The Role of Federal Courts in the Construction of An Indian Environmental Law, 1 Great Plains Nat. Resources J. 1 (1996).

37 266 F.3d 741 (7th Cir. 2001).

authority over off-Reservation activities, activities that would be affected by the strict water quality standards EPA approved. The court found that a tribe with TAS status has congressional power to require upstream off-Reservation dischargers to make sure their activities do not result in contamination of the downstream on-Reservation waters. The Clean Water Act provides a procedure for resolving disputes over differing water quality standards that may be set by states and tribes.

The *Wisconsin* court also expressly noted that water quality regulation is a core governmental function critical to self-government and does not involve the issues presented in *Nevada v. Hicks* where state officials are investigating off-Reservation crimes.

### d. *Arizona Public Service Co. and the Delegation in the 1990 Amendments to the Clean Air Act.*

The major case on delegated authority with respect to air shed protection is *Arizona Public Service Co. v. Environmental Protection Agency*.[38] This case concerns a challenge to the EPA's 1998 regulations that address the power of tribes to regulate air quality under the 1990 amendments to the Clean Air Act.[39]

The Clean Air Act amendments refer to tribal jurisdiction in several places. Tribal Implementation Plans may become applicable to all areas "located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation."[40] However, tribes may be treated as states "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction."[41] The court of appeals held that Congress delegated authority to tribes to regulate all lands within reservations. Judge Ginsberg dissented, contending that Congress delegated authority only with respect to Tribal Implementation Plans because in the other provision, § 7601(d)(1)(B), Congress failed to "include the formulaic 'notwithstanding' proviso-the gold standard for such delegations."[42]

### e. *A Contrast: The Conclusion of No RCRA Delegation in Backcountry Against*

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38 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied*, 121 S. Ct. 1600 (2001).

39 *See* Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254 (1998) (to be codified at 40 C.F.R. pts. 9, 35, 49, 50, and 81).

40 42 U.S.C. § 7410(o).

41 42 U.S.C. § 7601(d)(1)(B).

42 *Arizona Public Service Co.*, 211 F.3d at 1303.

***Dumps.***

Despite the delegations of authority in the amendments to the Clean Water Act and the Clean Air Act, Congress has not always delegated environmental authority to tribes. The Resource Conservation and Recovery Act (RCRA) illustrates the uneven way in which Congress has approved the role of tribes in environmental enforcement within Indian Country. RCRA has a definition of "State."[43] However, tribes are listed in the RCRA's definition of "municipality."[44] As "municipalities" Indian tribes are eligible for federal funding to develop solid waste management and resource recovery programs and are also subject to citizen suits to enforce the revised criteria.[45]

While no court has adopted the "gold standard" espoused by Judge Ginsberg to uphold delegations of authority to tribes, they may be reluctant to broadly construe statutes in favor of such delegations. Such is the case in *Backcountry Against Dumps v. EPA*.[46] In *Backcountry*, the Campo Band of Mission Indians sought EPA approval of its solid waste program under 42 U.S.C. § 6945(c), and though the provision applies only to states, EPA approved the tribal program. The court of appeals reversed, stating "[t]his is not what the statute says."[47] The only difference between the Campo Band and states with approved solid waste facility plans was that the tribe's landfill would have to comply with the Part 258 design standards in addition to the operating standards of the regulations. The court also noted that the tribe could seek EPA approval for a site-specific regulation that would satisfy both RCRA and the tribe's desire for flexibility in design and monitoring.

### f. *Testing the Middle Ground: How Specifically Must Congress Authorize Tribal Enforcement?*

As we have discussed, the courts have acknowledged the delegations in § 1161, the Clean Water Act § 518, and the Clean Air Act, on one side, and rejected a delegation in RCRA on the other. The majority in *Arizona Public Service Co.* concluded that congressional delegations do not require any particular formula, but Judge Ginsberg's "gold standard" dissent remains influential.

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43 42 U.S.C. § 6903(31).

44 42 U.S.C. § 6903(13).

45 *See* 42 U.S.C. § 6948, 6972; *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989).

46 100 F.3d 147 (D.C. Cir. 1996).

47 100 F.3d at 150.

The question discussed in *Arizona Public Service Co.*-how specific must Congress be to authorize the exercise of tribal jurisdiction over nonmembers-was examined again, this time by the Ninth Circuit, in *Bugenig v. Hoopa Valley Tribe*.[48] The lower courts in *Bugenig* upheld a tribal ordinance barring logging in a buffer zone within the boundaries of the Hoopa Valley Reservation in California. This ordinance is a form of zoning for cultural resource protection, as the buffer zone was enacted to protect the sacred, spiritual, and visual integrity of traditional tribal dance sites and the trail connecting them.

Having exhausted tribal court remedies,[49] Bugenig filed suit in federal district court seeking declaratory judgment that the tribe lacks regulatory jurisdiction over her land and that the tribal court lacks subject matter jurisdiction over it as well. The district court granted the tribe's motion to dismiss on the grounds that Congress expressly granted the tribe jurisdiction over all lands within the reservation's boundaries, including Bugenig's land, in the Hoopa-Yurok Settlement Act of 1988, which provides:

> The existing governing documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed.[50]

The "existing governing documents" expressly include the Hoopa Valley Tribe's Constitution,[51] which declares that the jurisdiction of the Hoopa Valley Tribe extends to all lands within the reservation boundaries and also gives the Hoopa Valley Tribal Council specific authority to:

> [R]egulat[e] the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting non-members of the Hoopa Valley Tribe shall be subject to the approval of the Commissioner of Indian Affairs or his authorized representative.[52]

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[48] No. C 98-3409 CW (N.D. Cal. Mar. 31, 1999), *appeal pending*, 9th Cir., No. 99-15654.

[49] *E.g.*, *Hoopa Valley Tribe v. Bugenig*, 25 Indian L. Rep. 6137 (Hoopa Valley Tr. Ct. July 11, 1996); *Bugenig v. Hoopa Valley Tribe*, 25 Indian L. Rep. 6139 ( Hoopa Valley S. Ct. April 23, 1998).

[50] 25 U.S.C. § 1300i-7.

[51] 25 U.S.C. § 1300i(b)(4).

[52] CONSTITUTION AND BYLAWS OF THE HOOPA VALLEY TRIBE, art. IX, § 1(*l*) (approved as amended June 18, 1996).

Thus, like the liquor statute and the § 518 procedure, the statute in *Bugenig* expressly authorizes a tribal ordinance applying to nonmembers, with the precaution that federal agency approval is also required. The § 1300i-7 delegation is unique, however, in that it relates only to exercises of civil authority by the Hoopa Valley Tribe.

Construction of the Hoopa-Yurok Settlement Act is a question of law, the district court found. It found no authority supporting Bugenig's contention that the phrase "ratified and confirmed" was ambiguous:

> The Court concludes that the plain meaning of "ratified and confirmed" is to give every clause in the document being ratified the full force and effect of a congressional statute. Nothing in the legislative history of the Act evinces a clearly expressed legislative intention to the contrary. . . . Accordingly, the Court holds that § 1300i-7 of the Act unambiguously grants each clause of the Tribal Constitution the full force and effect of a congressional statute.[53]

A three-judge panel of the Ninth Circuit Court of Appeals reversed and remanded the district court's decision on October 3, 2000.[54] Judge O'Scannlain wrote on behalf of himself and Judges Reavley and Gould, holding that because of a presumption against tribal jurisdiction over nonmembers on fee lands, any congressional delegation must be truly express. The influence of Judge Ginsberg's "gold standard" of delegation was clear, as the panel reasoned that if Congress uses the "notwithstanding the issuance of any fee patent" proviso, then an appropriate delegation of authority over fee land has been made. Any alternative formulation must represent, on its face, a "pellucid" delegation of the claimed authority, the panel held.

The three-judge panel opinion went on to address an issue not considered by the district court: whether the Hoopa Valley Tribe possessed inherent tribal authority to adopt and enforce the ordinance under the two *Montana* exceptions. The panel concluded that the second *Montana* exception must be narrowly construed and allows tribal jurisdiction over nonmembers only when necessary to protect self-government or control internal relations. In a footnote, the panel rejected the tribe's claim that *Brendale* supported tribal land use authority because the area at issue in *Bugenig* is dominated by tribal land ownership and the tribe maintains the right to determine the essential character of the area.

On February 28, 2001, the Ninth Circuit Court of Appeals granted en banc rehearing and prohibited further citation of the panel opinion within the Ninth Circuit pending the results of

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53 *Bugenig v. Hoopa Valley Tribe*, No. C 98-3409 CW, slip op. at 8 (N.D. Cal. Mar. 31, 1999); available at http://www.msaj.com/cases/bugenig.htm.

54 *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210 (9th Cir. 2000), *reh'g en banc granted*, 240 F.3d 1215 (9th Cir. 2001).

rehearing. On rehearing, the court affirmed the district court by a vote of 8-3.[55] The court concluded that under the circumstances Congress had expressly delegated authority for the ordinance. The statutory phrase "ratified and confirmed" has additional significance because it is the same phrase the Congress historically has used to give legal recognition to agreements with Indians.[56] In this instance, legislative history showed that the Hoopa-Yurok Settlement Act was a response to confusion over who had the right to make management decisions relating to lands and resources. Congress understood that absent statutory delegation of authority, the Hoopa Valley Tribe could not manage the Reservation, although the Tribe had been attempting to do so through its Law and Order Code and Comprehensive Plan. This case illustrates that Congress can delegate where the issue affects the internal and social relations of tribal life, as land use does.

### 4. Preserving Areas for Future Tribal Regulation: Direct Federal Regulation of Nonmembers Within Indian Country.

Environmental regulatory legislation adopted by Congress since about 1970 typically calls for preparation of implementation plans under state or other nonfederal law and submission of those plans to EPA for approval. Upon approval of a state implementation plan, direct federal enforcement generally ceases, subject to EPA's disapproval of a state plan, amendment, or particular permit.

Since the mid-1980s, TAS provisions have been added to several federal environmental laws under which tribes are treated as states or sovereigns. As noted above, a tribal implementation plan allows tribal enforcement and a reduced EPA role. As construed by EPA, during the period before recognition of the tribe as a State for purposes of implementation of that environmental regulatory program, this regulatory pattern makes EPA the environmental regulator on "Indian lands."

#### a. *Does "Indian Lands" Mean Indian Country?*

EPA's role in protecting Indian Country from state regulation and carving out that geographic area for later tribal regulation is illustrated in *Washington Dept. of Ecology v. EPA*.[57] In *Washington Dept. of Ecology*, the State proposed a RCRA regulatory program for the entire geographic area of Washington State. EPA, however, refused to approve the State's program with respect to "Indian lands," which it defined to include both trust and fee lands within Indian

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55 266 F.3d 1201 (9th Cir. 2001).

56 *E.g.*, *Antoine v. Washington*, 420 U.S. 194 (1975).

57 752 F.2d 1465 (9th Cir. 1985).

Country. EPA's limited approval was upheld as within the authority of the agency.[58]

More recently, EPA by regulation has asserted authority to determine whether particular lands are within or outside Indian Country. The regulations have met with mixed results. In *H.R.I., Inc. v. EPA*, 198 F.3d 1224 (10th Cir. 2000), the court decided whether EPA had properly determined for purposes of the Safe Drinking Water Act that a parcel of land was Indian Country and whether EPA had correctly found that another parcel of land was "in dispute." The Tenth Circuit affirmed EPA's decisions but remanded to the Agency for a jurisdictional determination concerning the disputed land.

Somewhat similar regulations for Part 71 of the Clean Air Act were rejected in *Michigan v. EPA*, 268 F.3d 1075 (D.C. Cir. 2001). The Clean Air Act allows EPA to adopt a federal air quality implementation program in the absence of an approved state or tribal implementation program. In its 1999 regulations establishing Part 71 Federal Operating Permits Plan, EPA declared that it "will treat areas for which EPA believes the Indian Country status is 'in question' as Indian Country."[59]

Michigan did not contend that states should have jurisdiction over Indian Country lands. Nor did it dispute that EPA may undertake the initial jurisdictional line-drawing identifying Indian Country. However, the court struck down the regulations which it read as effectively giving EPA a blank check to expand its own jurisdiction by not deciding jurisdictional questions. The court determined that EPA was not construing the Clean Air Act for the benefit of tribes, but rather construing the statute for its own benefit.

As the following discussion illustrates, the question whether "Indian lands" is the same as Indian Country is sometimes unclear from the applicable statute and regulations.[60]

EPA's regulations, as amended following the addition of § 518 to the Clean Water Act,

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58 *See also Arizona v. EPA*, 151 F.3d 1205 (9th Cir. 1998), *as amended*, 170 F.3d 870 (9th Cir. 1999) (air quality regulation geographic scope).

59 40 C.F.R. § 71.4(b).

60 There is no single definition of Indian Country. However, the definition found in 18 U.S.C. § 1151, which includes all lands (including fee lands) within Indian reservations, dependent Indian communities, and Indian allotments to which Indians own title, is the broadest definition. The § 1151 definition is also found in § 518 of the Clean Water Act. *See* 33 U.S.C. § 1377(h)(l). The Supreme Court has stated that the statute's definition generally applies also to questions of federal civil jurisdiction and to tribal jurisdiction. *E.g., DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 478-79 (1976). A narrower definition applies for federal criminal purposes under the liquor statutes. 18 U.S.C. § 1154(c).

refer to permitting on "Indian lands." EPA has consistently interpreted the term "Indian lands" to be the same as "Indian Country," which is defined in 18 U.S.C. § 1151. EPA's equation of "Indian lands" with Indian Country is set forth in a number of circumstances. For example, regulations under the Safe Drinking Water Act define "Indian land" to be "Indian Country."[61] EPA's interpretation that the term "Indian lands" is the same as "Indian Country" was upheld in *State of Washington Dept. of Ecology v. EPA*,[62] a case that involves RCRA.

Similarly, under the Clean Water Act, the regulations recognize that in many cases states will "lack authority to regulate activities on Indian lands" and that "EPA will administer the program on Indian lands if a State (or Indian tribe) does not seek or have authority to regulate activities on Indian lands."[63]

EPA amended its Clean Water Act regulations to address Indian Country issues in 1993. In the Federal Register notice, EPA determined that it had never expressly authorized any State to operate an NPDES program on Indian lands even though some States have issued permits on reservations. The preamble clarified that "[w]hen [a] state-issued permit expires, EPA will reissue the permit on the Federal Indian Reservation unless the Indian tribe has been authorized to operate the NPDES program."[64] In the eight years since that regulation was issued, EPA has begun to carry out its threat, to the horror of some state environmental quality agencies who feel that their State is better equipped to operate a NPDES program than is an EPA regional office. The most controversial cases are those in which the tribe has not sought TAS authority, and so the ability of EPA to preempt the application of state laws governing the conduct of nontribal members within Indian Country cannot be shown to be necessary for the purpose protecting tribal self-government. We discuss a few of these cases below.

### b. *Do NPDES Permits on Fee Land Always Affect Indians?*

The National Pollution Discharge Elimination System (NPDES) permitting provisions of the Clean Water Act present one of the most controversial applications of EPA's authority to directly implement federal environmental laws within Indian Country prior to tribal TAS status. The controversy arises from NPDES permitting of non-Indian facilities located on fee lands within Indian Country in States where EPA has previously approved a state-wide NPDES permitting system. This controversy has led to litigation between EPA and several States.

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61 40 C.F.R. § 144.3.

62 752 F.2d 1465, 1567 n.1 (9th Cir. 1985).

63 40 C.F.R. § 123.1(h).

64 58 Fed. Reg. 67,968.

Controversy over direct federal implementation of the NPDES program in Indian Country is illustrated by *In Re: NPDES Permit for Waste Water Treatment Facility of Union Township, Michigan*.[65] In this appeal, EPA's appeals board held that Union Township, a governmental subdivision of the State of Michigan, was required to apply to EPA for a NPDES permit for discharges from the township's new waste water treatment plant (WWTP) into the Chippewa River, located within the Isabella Reservation of the Saginaw Chippewa Tribe of Michigan.

Under the Clean Water Act, a State may submit to EPA a proposed permit program governing sources discharging to the navigable waters within the State's borders and demonstrating that the State will apply and enforce the Clean Water Act's effluent limitations and other requirements in the permits at issue.[66] Once a State has received approval for its program, EPA ceases issuing permits to the regulated sources.

The State of Michigan obtained EPA approval of its NPDES permitting program in 1973, and EPA delegated additional approval in 1978. Neither Michigan's program nor EPA's approvals mentioned areas of Indian Country within Michigan. However, EPA's 1973 approval specifically required Michigan to regulate a nearby WWTP which is also on the Reservation.

In 1999, the Michigan Department of Environmental Quality gave public notice of a draft state permit for the WWTP facility. EPA objected because the WWTP is located within the exterior boundaries of the Isabella Reservation. EPA stated that Michigan may not implement its NPDES program on the reservation because Michigan did not explicitly seek, and EPA did not expressly grant, such authorization. On January 24, 2001, the Environmental Appeals Board of EPA upheld the decisions of EPA Region V. Thus, the township must obtain a federal NPDES permit for its proposed waste water discharge, notwithstanding the fact that the Saginaw Chippewa Tribe has not exercised the option of TAS status for NPDES permitting purposes within the boundaries of the Isabella Reservation. The township is also subject to the requirements of Michigan environmental law.

In *Michigan Department of Environmental Quality v. U.S. EPA*, 318 F.3d 705 (6th Cir. 2003), the appellate court upheld the Environmental Appeals Board. Rather than addressing the question of whether the State or EPA is the appropriate authority to issue a discharge permit on the Isabella Reservation, or questions about the Reservation's status itself, the Sixth Circuit relied on a procedural defect arising from the failure of the State to identify with sufficient clarity its objections to the actions of the EPA Administrator.

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65 NPDES Appeal Nos. 00-26 & 00-28 (EAB 2001).

66 *See* 33 U.S.C. § 1342(b); *Ames, Iowa v. Reilly*, 986 F.2d 253, 254 (8th Cir. 1993); *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1285 (5th Cir. 1977).

**c.** ***Avoiding Litigation: Regulatory Agreements.***

Who will prevail? States generally have very broad civil and criminal authority over nontribal members within Indian Country. As the Cohen treatise says:

> The scope of preemption of state laws in Indian country generally does not extend to matters having no direct effect on Indians, tribes, their property, or federal activities. In these situations, state courts have their normal jurisdiction over non-Indians and their property, both in criminal and civil cases.
>
> When transactions or events in Indian country involve both Indians and others, competing claims of state, federal, and tribal jurisdiction arise . . . . [C]ases against Indian defendants are generally preempted from state jurisdiction by federal protection of tribal self-government. The matter is more complex when the defendant is not an Indian.
>
> . . .
>
> Absent a governing federal statute, the Supreme Court has stated that in controversies where both Indians and non-Indians are involved "the State could protect its interest up to the point where tribal self-government would be affected."[67]

In support of these principles, the Cohen treatise cites many cases.[68]

However, tribes also have a strong argument for asserting authority. State environmental laws and regulations within Indian Country usually have a direct effect on Indians, tribes, their property, or federal activities. It is only under certain circumstances that a state may validly assert authority over the activities of nonmembers within Indian Country.[69] But whether such an effect exists is a factual question. Similarly, whether the tribe has adopted its own environmental regulations is a factual question. A conflict in state and tribal regulations may lead to a finding

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67 Felix S. Cohen's Handbook of Federal Indian Law 352-55 (Renard Strickland ed., 2d ed. Michie 1982) (footnotes omitted). *See also id.* at 264-66.

68 *E.g.*, *United States v. McBratney*, 104 U.S. 621 (1882); *Utah & N. Ry. v. Fisher*, 116 U.S. 28 (1885); *Thomas v. Gay*, 169 U.S. 264 (1898); *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930) (dictum); *Williams v. Lee*, 358 U.S. 217 (1959); and *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965).

69 *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 (1987); *New Mexico v. Mescallero Apache Tribe*, 462 U.S. 324, 331-32 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980).

of interference with tribal self-government.

It is perfectly appropriate for tribes to enter into agreements with States and provide for continuation of well-managed state regulatory programs in the absence of a tribal finding of an adverse effect on Indians, tribes, or their property. Where such an agreement has been made, the tribe may choose not to adopt its own regulatory program. Thus, implementation of the state program would not interfere with tribal self-government. In such cases, the state environmental agency and state courts arguably would have their normal jurisdiction over non-Indians and their property within such an area of Indian Country. An agreement to let the State apply its environmental regulations to non-Indians operating on fee land may also avoid a dispute between the tribe and the State over reservation boundaries; that is, over whether the lands are within Indian Country at all.[70] Whether EPA is flexible enough to recognize such agreements for NPDES permits remains to be seen.

## 5. Conclusion.

Congressional statutes that reflect an intention to ratify, confirm, reaffirm, or otherwise enable the exercise of tribal territorial jurisdiction, or other specific authorities, already exist. The Supreme Court has not suggested that the "express delegation" standard will be rigidly applied. Using congressional authorization as a basis for tribal exercises of authority may reverse or slow the erosion of the inherent tribal sovereignty doctrine in the federal courts.

In our view, in light of the narrowing of the *Montana* exceptions, the only reliable basis for environmental regulation on tribal lands is through congressional authorization or delegation. Through a judicious combination of clarifying its regulations or seeking amendments as necessary to broaden the TAS process in federal environmental laws, EPA can help tribes assure that adequate environmental enforcement occurs on tribal lands. The TAS procedures differ from one federal environmental statute to another. Clearer law is needed.

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70 *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), originated in a dispute over whose solid waste regulations applied. The case resulted in a holding that the lands were no longer part of the Yankton Sioux Reservation and therefore state regulations governed.