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EPA's New Tribal Strategy

by David F. Coursen

Editors' Summary: In 1984, EPA became the first federal agency to adopt an Indian policy. Congress subsequently affirmed the policy by authorizing the Agency to treat Indian tribes as states under the SDWA, the CWA, and the CAA. EPA's adoption of a common-law inherent authority test to determine jurisdiction under the statutes spawned a treat-as-states (TAS) process that requires a detailed review of factual information about each tribe. In this Article, David Coursen examines the complexity of EPA's jurisdictional analysis and evaluates whether EPA's new TAS strategy will ultimately be successful in addressing delays in these decisions.

Environmental statutes administered by the U.S. Environmental Protection Agency (EPA) often employ a joint state and federal partnership in environmental management, frequently with states taking the lead. This framework is not compatible with Indian territory,[1] where Indian tribes, rather than states, generally have primary jurisdiction.[2] EPA's environmental statutes generally did not address environmental protection on Indian lands or define a role for tribes before 1984, when EPA became the first federal agency to formally adopt an Indian policy.[3] The policy identified "[t]ribal Governments as sovereign entities with primary authority and responsibility for the reservation populace," and directed the Agency to "encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands," and to work directly with tribal governments on a government-to-government basis.[4]

Congress effectively ratified that approach when it addressed a tribal role by authorizing EPA to treat Indian tribes as states (sometimes referred to as TAS) under amendments to three federal environmental statutes. Under amendments to the Safe Drinking Water Act (SDWA),[5] Congress authorized EPA to treat tribes as states and "delegate to such tribes primary enforcement responsibility for public water systems [(PWS)] and for underground injection control [(UIC)]" and to allow the provision of "grant and contract assistance" to such tribes. An amendment to the Clean Water Act (CWA)[6] authorized EPA to treat tribes as states to the degree necessary to carry out the purposes of the Act for certain identified purposes: (1) grants; (2) water quality standards (WQS); (3) clean lakes; (4) nonpoint source management; (5) water quality certification; (6) the national pollutant discharge elimination system (NPDES); and (7) regulating the discharge of dredged or fill material into waters of the United States.[7] Finally, the Clean Air Act (CAA)[8] was amended in 1990 to authorize EPA to treat tribes as states for regulatory programs, to issue regulations specifying under which CAA provisions such treatment is appropriate, and to

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1. 18 U.S.C. §1151(a) (defining Indian country to include "all land within the limits of any Indian reservation," all "dependent Indian communities," and "all Indian allotments, the Indian titles to which have not been extinguished").
2. *See* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 527 n.1 (1998) ("Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States.").
3. U.S. EPA, EPA Policy for the Administration of Environmental Programs on Indian Reservations (1984), *available at* http://www.epa.gov/tribalportal/pdf/indian-policy-84.pdf.
4. *Id.*
5. Pub. L. No. 99-339, §302, 100 Stat. 665 (1986) (amending 42 U.S.C. §300j-11(a), ELR Stat. SDWA §1451.
6. Water Quality Act of 1987, Pub. L. No 100-4, §506, 101 Stat. 76-78 (1987) (inserting 33 U.S.C. §1377, ELR Stat. FWPCA §518.).
7. EPA has not treated the CWA TAS list as exhaustive, and also treats tribes as states for purposes of administering a sewage sludge management program under CWA §405. *See* 54 Fed. Reg. 18782 (May 2, 1989), 33 U.S.C. §1377(e). The CWA directs EPA "in consultation with Indian tribes, [to] promulgate final regulations which specify how Indian tribes shall be treated as States." 33 U.S.C. §1377(e).
8. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618, *id.* §7601(d)(1)-(3). In cases where treating tribes identically to states "is inappropriate or administratively infeasible," EPA may issue regulations specifying how it "will directly administer such provisions so as to achieve the appropriate purpose." *Id.* §7601(d)(4). In addition to this TAS provision, the CAA also provides for tribal implementation plans (TIPs) applicable to all areas within the tribe's reservation. *Id.* §7410(o). CAA's provision that land within a reservation's exterior boundaries may be redesignated for purposes of preventing significant deterioration of air quality, "only by the appropriate Indian governing body" pre-dates the TAS amendments and lacks any TAS provision. *Id.* §7474.

draft procedures for addressing tribal air management implementation plans.

These three statutes[9] require that to be eligible for such treatment, a tribe must meet the following statutory requirements: (1) federal recognition[10]; (2) a governing body carrying out substantial duties and powers[11]; (3) tribal regulatory jurisdiction over the area[12]; and (4) capability to carry out the proposed activities.[13] Yet no statute requires that a tribe possess criminal authority over nonmembers. In fact, the SDWA expressly recognizes that a "tribe shall not be required to exercise criminal enforcement jurisdiction for purposes of complying with" the statutory requirement for a program no less protective than a state program.[14] Other TAS statutes do not expressly state that tribes are not required to possess criminal enforcement jurisdiction, but EPA regulations provide that to the extent a tribe is precluded from asserting such criminal enforcement authority the federal government will assert such jurisdiction, pursuant to a memorandum of agreement.[15] This is important for enforcement, because tribes lack criminal enforcement authority over non-members,[16] and can impose only limited penalties on members.[17]

I. The TAS Process

For tribes to obtain TAS approval under the SDWA, the CWA, or the CAA, they must follow EPA regulations establishing application procedures. A tribe's application to EPA must meet the TAS eligibility requirements of demonstrating federal recognition,[18] a functioning government,[19] jurisdiction,[20] and capability.[21] EPA then notifies "appropriate

9. A fourth statute, the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405, was amended in 1986 to provide that the governing body of a federally recognized tribe, *id.* §9601(36), receive substantially the same treatment as a state regarding notification of releases, consultation on remedial actions, access, to information, and roles and responsibilities under cleanup regulations. *Id.* §9626. Other 1986 CERCLA Amendments addressed the tribal role by authorizing EPA cooperative agreements with tribes, *id.* §9604(d), exempting tribes from state requirements to pay a share of response costs and giving certain assurances, *id.* §9604(c)(3), authorizing tribes to recover cleanup costs, *id.* §9607(a), and establishing a tribal role as trustee for natural resources, *id.* §9607(f) and §9611(b)(1). EPA has not issued CERCLA tribal regulations, but authorizes tribes to do many things states can do in two generally applicable regulations. *See generally* 40 C.F.R. pt. 35, subpt. O (2007) (e.g., 40 C.F.R. §§35.6050-70; 35.6100-20; 35.6145-55; 35.6200-05; 35.6240-55) (addressing cooperative agreements between EPA and tribes); 40 C.F.R. pt. 300 (National Oil and Hazardous Substances Pollution Contingency Plan) (e.g., 40 C.F.R. §§300.515(c), (d), (e), (h), 300.525 (tribal participation in cleanup decisions); 40 C.F.R. §§300.400(g); 300.515, 300.525 (reservation cleanups should attain or waive legally applicable, or relevant and appropriate requirements of tribal law (ARARs))); 42 U.S.C. §9621(d).

   The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6901-6992k, ELR STAT. RCRA §§1001-11011, does not expressly provide authorizing treatment of tribes as states and refers to Indian tribes only once when it defines "municipality" to include Indian tribal governments. *Id.* §6903(13). EPA had attempted to treat a tribe as a state for purposes of RCRA's Subtitle D solid waste program. *Id.* §6947. However, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit reasoned that RCRA established that tribes served solely a role as a municipality:

   > We think it is significant that when Congress wants to treat Indian tribes as states, it does so in clear and precise language. . . . But because Indian tribes are explicitly defined as municipalities, and because only states may submit solid waste management plans for EPA approval, the agency's position that it may approve plans submitted by Indian tribes is inconsistent with the statute's plain language.

   Backcountry Against Dumps v. EPA, 100 F.3d 147, 150-51, 27 ELR 20471 (D.C. Cir. 1996).

10. *See* 33 U.S.C. §1377(h)(2) (defining tribe as federally recognized entity); 42 U.S.C. §300f(14); *id.* §300j-11(b)(1)(A) (same); *id.* §7602(r) (same).

11. *See* 33 U.S.C. §1377(e)(1); 42 U.S.C. §300j-11(b)(1)(A); *id.* §7601(d)(2)(A).

12. *See* 33 U.S.C. §1377(e)(2) (defining TAS border for managing water resources as borders of a reservation); 42 U.S.C. §300j-11(b)(1)(B) (defining TAS functions' border as area of tribal government's jurisdiction); *id.* §7601(d)(2)(B) (bounding TAS border as within a reservation or other areas within tribe's jurisdiction). *But see infra* Part III.A.1-2 (discussing how EPA construes the CAA as a delegation of federal authority to grant tribes TAS authority over all air resources within its reservation and authorizes the tribe to obtain approval for off-reservation areas for which it can show jurisdiction).

13. *See* 33 U.S.C. §1377(e)(3); 42 U.S.C. §300j-11(b)(1)(C); *id.* §7601(d)(2)(C).

14. 42 U.S.C. §300j-11(b)(2).

15. *See, e.g.*, 40 C.F.R. §49.8 (CAA); *see also id.* §123.34 (NPDES); *id.* §233.41(f) (CWA §404); *id.* §501.25 (sewage sludge).

16. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

17. *See* 25 U.S.C. §1302(7) (limiting criminal penalties imposed by tribes to one year of imprisonment, or $5,000 fine, or both).

18. *E.g.*, 40 C.F.R. §123.32(a) SDWA, CWA, and CAA regulations require submission of a "statement that the tribe is recognized by the Secretary of the Interior"); *see also* 40 C.F.R. §123.32(a) (NPDES); *id.* §131.8(b)(1) (WQS); *id.* §233.61(a) (CWA §404); *id.* §501.22(a) (sewage sludge); *id.* §142.76(a) (PWS); *id.* §145.56(a) (UIC); *id.* §49.7(a)(1) (CAA).

19. A tribe must provide "[a] descriptive statement demonstrating that the tribal governing body [CAA: applicant] is currently carrying out substantial governmental duties and powers over a defined area." 40 C.F.R. §123.32(b) (NPDES); *id.* §131.8(b)(2) (WQS); *id.* §233.61(b) (CWA §404); *id.* §501.23(b); *id.* §142.76(b) (PWS); *id.* §145.56(b) (UIC); *id.* §49.7(a)(2) (CAA). This statement must describe the form of the tribal government and the types of governmental functions it performs, and it must identify the source of its authority to perform each function. *Id.*

20. Under SDWA, CWA, and CAA regulations, a tribe submits various documents regarding the area over which it claims authority, including: a map or legal description of the area; a statement by a tribal legal official describing the basis, nature, and subject matter of the tribe's jurisdictional authority; a copy of all documents supporting the jurisdictional assertions, e.g., tribal constitutions, codes, bylaws, charters, etc., and a description of the locations of the systems or sources the tribe proposes to regulate. *See id.* §123.32(3) (NPDES); *id.* §131.8(b)(3) (WQS); *id.* §233.61(c) (CWA §404); *id.* §501.23(3) (sewage sludge); *id.* §142.76(c) (PWS); *id.* §145.56(c) (UIC); *id.* §49.7(a)(3) (CAA). The focus of the TAS jurisdictional inquiry under the CAA is the reservation's boundaries, because the CAA delegates authority to the tribe over all reservation air resources, without the need for the tribe to show inherent authority over those resources.

21. SDWA, CWA, and CAA regulations require tribes to submit a narrative statement describing tribal capability to administer an effective program. 40 C.F.R. §123.32(d) (NPDES); *id.* §131.8(b)(4) (WQS); *id.* §233.61(d) (CWA §404); *id.* §501.23(d) (sewage sludge); *id.* §142.76(d) (PWS); *id.* §145.56(d) (UIC), *id.* §49.7(a)(4) (CAA). Each regulation lists materials to include in the supporting narrative statement:

   > (1) a description of the tribe's previous management experience, including but not limited to its administration of programs authorized under certain specified statutes; (2) a list of tribally administered environmental or public health programs, and copies of related tribal laws, policies, and regulations; (3) a description of tribal procurement and accounting systems; (4) a description of the entity or entities that exercise the tribe's executive, legislative, and judicial functions; (5) a description of the existing or proposed tribal agency that will assume primary responsibility for the program, which addresses the relationships between owners and operators of regulated facilities and that agency; and (6) a description of the technical and administrative capabilities of the staff to administer the program, or a plan describing how the

governmental entities"—adjacent states, tribes, and federal land management agencies[22]—of the substance of the tribe's jurisdictional assertions and accepts comments from those entities regarding jurisdiction.[23] EPA resolves any competing or conflicting jurisdictional claims,[24] and if it cannot promptly do so, it may approve the application for areas not in dispute.[25]

A tribe that meets those requirements is approved for TAS status and becomes eligible to seek grants and program approvals available to states.[26] A tribe approved for TAS status under one program under any TAS statute must obtain separate TAS approval under each new program. But once it has shown federal recognition or a functioning government under one statute, it need not make the same showing again under another statute.[27] By contrast, capability for one program does not necessarily show capability for another program involving different functions; also, demonstrating sufficient jurisdiction for one program will not necessarily establish jurisdiction under another statute. When a tribe is treated in the same manner as a state, it must follow the same procedures and meet the same information requirements a state must meet to obtain EPA program approval.[28]

EPA has issued a series of individual TAS regulations for specific CWA[29] and SDWA[30] programs and a single Tribal Air Rule (TAR) for TAS regulations under CAA programs.[31] The TAR specifies that tribes are eligible to be treated as states for most purposes, but are not subject to the same cost-share requirements and statutory deadlines states must meet,[32] and can seek approval for partial elements of CAA programs, provided the "elements are reasonably severable" from the remaining program.[33] The TAR also provides that when a tribe does not submit a tribal implementation plan (TIP) for its reservation, EPA may promulgate "without unreasonable delay such federal implementation plan [(FIP)] provisions as are necessary or appropriate to protect air quality."[34] Before EPA issued the TAR regulations, the U.S. Court of Appeals for the Ninth Circuit had ruled that EPA had limited authority to issue a FIP for a reservation.[35] But EPA has recently used its authority to promulgate FIPs under CAA §§301(a) and 301(d)(4) for Indian reservations in Idaho, Oregon, and Washington.[36] Still more recently, EPA has used the TAR as the basis for using a FIP to implement the redesignation of a reservation's air quality from Class II to Class I status under the prevention of significant deterioration of air quality program pursuant to CAA §164(c).[37]

II. Evaluating and Improving the Process

EPA issued its first TAS regulations in 1988. In 1994, it issued a regulation to revise and simplify the TAS process, with steps such as reducing duplicative information requirements and abolishing a requirement to consult with the U.S. Department of the Interior before resolving a competing or conflicting jurisdictional claim.[38] In 1998, EPA further revised the process with the "goal of significantly improving the defensibility of EPA's decisions without placing undue burdens on the decision-making process for tribal applications."[39] One significant change was to prepare proposed

tribe will acquire the needed capability and how it will fund that acquisition.

40 C.F.R. §123.32(d) (NPDES); *id.* §131.6(b)(4) (WQS); *id.* §233.61(d) (CWA §404), §501.23(d) (sewage sludge); *id.* §142.76(d) (PWS); *id.* §145.56(d) (UIC); *id.* §49.7(a)(4) (CAA).

22. 56 Fed. Reg. 64876, 64884 (Dec. 12, 1991) (WQS Preamble stating that "EPA defines the phrase 'governmental entities' as States, Tribes, and other Federal entities located contiguous to the reservation of the Tribe which is applying for treatment as a State.").
23. 53 Fed. Reg. 37396, 37400 (Sept. 26, 1988); 54 Fed. Reg. 14355 (Apr. 11, 1989); 40 C.F.R. §§131.8(c)(2) and 233.62(c) (1992).
24. *E.g.*, 40 C.F.R. §49.9(e) (CAA); *see also id.* §131.8(c)(4) (CWA WQS).
25. *E.g.*, 40 C.F.R. §49.9(e) (CAA); *see also* 53 Fed. Reg. at 37402 (requiring that if the SDWA "Administrator concludes that the Tribe has not adequately demonstrated its jurisdiction with respect to an area in dispute, then Tribal primacy will be restricted accordingly"); 54 Fed. Reg. 39098, 39102 (Sept. 22, 1989) (similar language in WQS proposal).
26. Note, however, that tribal groups not receiving TAS approval also appear to be eligible for some EPA-administered grant programs that are available to recipients other than states—or tribes treated as states. *See* 42 U.S.C. §300j-1(b)(3); 33 U.S.C. §1254; 42 U.S.C. §§7403(b)(3), 7405, & 7602(b)(5); 42 U.S.C. §9660(b)(3); 42 U.S.C. §6981; *see also* Indian Environmental General Assistance Program Act of 1992, 42 U.S.C. §4368b (authorizing grants, unavailable to the states, to federally recognized Indian tribal governments to build environmental capacity without any TAS requirement).
27. *See* 40 C.F.R. §131.8(b)(6); *id.* §233.61(f); *id.* §142.76(f), *id.* §145.56(f); 59 Fed. Reg. 64339, 64339-40 (Dec. 14, 1994) ("As a general rule, the 'recognition' and 'governmental' requirements are essentially the same" under the CWA and the CAA and "the fact that a tribe has met the recognition or governmental functions requirement" under one statute "will establish that it meets those requirements" for the other.); *see also* 59 Fed. Reg. 43956, 43962 (Aug. 25, 1994) (adopting same reasons for requiring "recognition" and "government" to CAA proposal).
28. *See, e.g.*, 40 C.F.R. §142.10(b)(6), 142.11 (PWS); *id.* §145.21-25, 145.31 (UIC); 54 Fed. Reg. at 39103-04 (WQS proposal discussing ways in which tribes are subject to the same requirements as states); 53 Fed. Reg. at 37403 (SDWA Preamble: "Tribes must meet the *same* requirements as states" to assume primacy.) (emphasis in original).
29. 40 C.F.R. §131.8 (WQS); 40 C.F.R. §233.60-62 (CWA §404); 40 C.F.R. §501.2225 (sewage sludge); 40 C.F.R. §123.31-34 (NPDES); *see also* 59 Fed. Reg. at 64339 (amending TAS regulations to simplify the TAS process); 40 C.F.R. §131.7 (implementing 33 U.S.C. §1377(e) requiring EPA to "provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water").
30. 53 Fed. Reg. at 37414 (codified at 40 C.F.R. pt. 124 (UIC) and pts. 141-46 (PWS)).
31. 40 C.F.R. §§49.6-9, 40, 81.
32. *Id.* §35.205 (specifying lower cost share for tribes than states receiving CAA grants under 42 U.S.C. §7405); *id.* §49.4 (listing provisions of the CAA for which tribes are not treated identically to states); *id.* §49.5 (tribes can make a request to EPA "clearly explaining why it is inappropriate to treat tribes in the same manner as states with respect to" a particular CAA provision).
33. *Id.* §49.7(c) (providing for approval for any program meeting regulatory requirements, even those meeting only partially meeting CAA elements if they are severable from and consistent with applicable requirements).
34. *Id.* §49.11(a).
35. Arizona v. EPA, 151 F.3d 1205, 1212, 28 ELR 21515 (9th Cir. 1998).
36. 70 Fed. Reg. 18074 (Apr. 8, 2005) (codified at 40 C.F.R. pts. 9 and 49).
37. 73 Fed. Reg. 23086 (Apr. 29, 2008).
38. 59 Fed. Reg. at 64340 (modifying 40 C.F.R. §131.8(c)(4)).
39. Memorandum from Jonathan Cannon, General Counsel, U.S. EPA & Robert Perciasepe, Assistant Administrator, U.S. EPA, to EPA Administrators, Adoption of the Recommendations From the EPA Workgroup on Tribal Eligibility Determinations 3 (Mar. 19, 1998) (on file with author).

findings of fact regarding tribal jurisdiction over non-Indian fee lands and circulate them to the governmental entities that are notified of the jurisdictional assertions in a tribe's initial application[40]; this effectively gives those entities two opportunities to comment on tribal jurisdiction. While this has made the process more time-consuming, EPA has achieved its goal of maximizing defensibility, and its decisions under TAS statutes have been upheld by several reviewing courts.[41]

The Government Accountability Office (GAO) reviewed the TAS process and issued a report in 2005 summarizing its results.[42] The report noted that EPA had received 61 requests for TAS applications to manage environmental programs from 57 tribal entities[43] and had approved 32 of these requests,[44] but the report revealed delays and a lack of transparency in EPA's process for reviewing and approving applications:

> EPA followed its processes in most respects for approving tribal requests for TAS status and program authorization for the 20 cases we reviewed, but we found some lengthy delays in these processes. . . . EPA has not established overall time frames for reviewing requests . . . . Furthermore, the lack of transparency of EPA's review process may hinder a tribe's understanding of the status of its request and what actions, if any, may be needed. . . . Delays in the approval process may hinder a tribe's efforts to control its environmental resources.[45]

Moreover, officials from "five tribes in one western state" said "that they have not submitted TAS requests because the process has become so lengthy."[46] The report did not suggest changing TAS regulations, but recommended "a written strategy with estimated time frames for reviewing and approving tribal requests for TAS for program authorization."[47]

EPA responded to the GAO report by issuing a strategy memorandum.[48] The memorandum does not change the TAS regulatory framework, but challenges the Agency to "facilitate the timely review of TAS applications to administer EPA regulatory programs . . . and to improve ongoing communication with tribal applicants."[49] The strategy memorandum calls for EPA to work with tribes concerning TAS applications by opening communication and establishing common expectations, providing additional tools and assistance, improving internal TAS review procedures, and improving public understanding of TAS regulations.[50] Because it does not amend EPA TAS regulations, it does not alter the TAS substantive mandates of thorough documentation and careful review. Furthermore, it does not alter the primary responsibility EPA Regions play in processing and approving TAS applications,[51] but the Regions are no longer expected to prepare memoranda determining whether each application raises issues of "national significance," triggering EPA Headquarters review.[52] Instead, for several years TAS reviews have been conducted by teams including headquarters and regional staff; as significant issues arise, they are promptly and fully considered by the team, without a formal national significance determination. The strategy formalizes this new, more collegial process, which has led to an increasing rate of TAS decisions.[53]

An important part of the strategy is nine attachments explaining the substance and process for TAS review: two attachments identify and discuss procedural steps for processing applications[54]; three recite the TAS requirements for specific programs and suggest ways to meet them[55]; three summarize the TAS process and answer frequently asked questions[56]; the remaining attachment provides examples of factual information used in the case-specific jurisdictional analysis discussed below.[57] The strategy memorandum is an outgrowth of nearly 20 years of experience in implementing and working to improve TAS regulations. It recognizes that TAS development is an ongoing process requiring "continuous EPA review of progress under this Strategy."[58]

III. The Jurisdictional Conundrum

The strategy memorandum institutionalizes procedural improvements but does not change the substantive requirements for TAS review. More efficient, coherent, and transparent procedures for implementing TAS regulations should address many sources of the delays discussed in the GAO

40. *Id.* at 6.

41. *E.g.*, Wisconsin v. EPA, 266 F.3d 741, 32 ELR 20177 (7th Cir. 2001); Montana v. EPA, 137 F.3d 1135, 28 ELR 21033 (9th Cir. 1998); Albuquerque v. Browner, 97 F.3d 415, 27 ELR 20283 (10th Cir. 1996).

42. U.S. GAO, Indian Tribes: EPA Should Reduce the Review Time for Tribal Requests to Manage Environmental Programs (2005) (GAO-06-95), *available at* http://www.gao.gov/new.items/d0695.pdf [hereinafter GAO Report].

43. *Id.* at 3.

44. *Id.* at 9 (listing 30 approvals under the CWA and 1 each under the SDWA and the CAA).

45. *Id.* at 5.

46. *Id.* at 20.

47. *Id.* at 5.

48. Memorandum from Marcus Peacock, Deputy Administrator, U.S. EPA, to EPA Administrators, Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs (Jan. 23, 2008), *available at* http://www.epa.gov/tribalportal/pdf/strategy-for-reviewing-applications-for-tas-01-23-08.pdf.

49. *Id.* at 2.

50. *Id.*

51. *Id.* at 5.

52. *Id.* (citing Cannon Memorandum, *supra* note 39, at 4).

53. *Id.*

54. *Id.* at 9-11 (attach. A: Procedural Steps for Processing Tribal Applications for TAS Eligibility for the Clean Water Act Water Quality Standards and Certification Programs); *id.* at 29-30 (attach. F: Procedural Steps for Processing Tribal Applications for TAS Eligibility for Regulatory Programs Under the Clean Air Act).

55. *Id.* at 13-16 (attach. B: Regulatory Requirements for TAS Eligibility under the Clean Water Act Water Quality Standards and Certification Programs and Examples of Supporting Documentation); *id.* at 31-35 (attach. G: Regulatory Requirements for TAS Eligibility under the Clean Air Act and Examples of Supporting Documentation); *id.* at 37-40 (attach. H: Regulatory Requirements for TAS Eligibility under the Safe Drinking Water Act Public Water System Supervision Program and Examples of Supporting Documentation).

56. *Id.* at 21 (attach. D: Overview of a Tribe's TAS Eligibility for the CWA Water Quality Standards Program); *id.* at 23-27 (attach. E: Frequently Asked Questions: TAS Eligibility Process for the Clean Water Act Water Quality Standards and Certification Programs); *id.* at 41-43 (attach. I: Frequently Asked Questions: TAS Eligibility Process for the Safe Drinking Water Act Public Water System Supervision Program).

57. *Id.* at 17-20 (attach. C: Examples of Information to Show Tribal Authority Over Nonmember Activities Under *Montana v. United States*: Impacts of Nonmember Activities on Tribal Political Integrity, Economic Security, or Health or Welfare).

58. *Id.* at 7.

report. But the GAO report identifies one source of delays beyond the scope of the strategy: "[EPA] officials cited evolving Indian case law and complexities associated with some jurisdictional issues as significant contributing factors to added review time."[59] Indeed, one outside observer has argued that EPA's basic approach to addressing the TAS jurisdictional requirements under the CWA, and, by extension, the SDWA, is too complex and burdensome for tribes.[60]

Tribal jurisdiction is politically controversial, legally multifaceted, and defined in case law whose continually evolving principles are rife with ambiguity.[61] EPA TAS regulations adopt two different approaches to implementing TAS jurisdictional requirements: (1) the CWA and the SDWA require that tribes demonstrate their own retained inherent jurisdiction to perform regulatory functions under the two statutes; and (2) the CAA approves tribes to exercise delegated federal authority over Indian reservations' air resources.

A. Inherent Authority

Retained inherent authority derives from the full and independent sovereignty Indian tribes originally possessed. They lost many aspects of sovereignty when they were incorporated into the United States[62] but retained sufficient inherent authority "to protect tribal self-government or to control internal relations."[63] Retained inherent sovereign power includes broad authority over tribal members[64] and primary authority over Indian country, including reservations.[65] Tribes also retain broad authority over non-member activities on reservation lands owned by the tribe or held in trust for the tribe by the United States[66] and "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations even on non-Indian fee lands."[67] Tribes have faced federal policies that vacillate between absorbing Indians into the broader social order and promoting tribal self-determination and non-Indians have been allowed to own significant portions of some reservation areas.[68] Regardless, the overarching principle of inherent authority is 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 tribes, and so cannot survive without express congressional delegation."[69]

1. Inherent Authority on Non-Member Lands

EPA issued its first TAS regulations under the SDWA without articulating any specific test for demonstrating tribal authority, implicitly viewing the question as governed by common-law principles of Indian law.[70] EPA directly described and adopted the common-law test for retained inherent authority in its regulations for implementing TAS regulations under the CWA.

When EPA was developing its CWA rule, the complexities of inherent tribal authority had achieved an apotheosis in what was then the U.S. Supreme Court's most recent decision on the subject, *Brendale v. Confederated Tribes & Bands of the Yakima Nation*.[71] The Justices issued three opinions—none of them for the Court. The Court issued only a judgment, finding a tribe had inherent authority to zone non-Indian fee lands in a reservation area inhabited mostly by tribal members, but lacked such authority in an area with a substantial non-Indian population. EPA analyzed *Brendale* carefully, but found little practical guidance beyond an instruction to follow the rule announced previously in *Montana v. United States*,[72] subsequently identified as "the 'pathmarking case' concerning [tribal] civil regulatory authority over nonmembers."[73] *Montana* recognized that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,"[74] with two exceptions:

59. GAO Report, *supra* note 42, at 18.

60. Ann. E. Tweedy, *Using Plenary Power as a Sword: Tribal Civil Regulatory Jurisdiction Under the Clean Water Act After* United States v. Lara, 35 ENVTL. L. 471, 478 (2005).

61. Plains Commerce Bank v. Long Family Land & Cattle Co., 491 F.3d 878 (8th Cir. 2007), *cert. granted*, 128 S. Ct. 829 (2008) (presenting issues concerning the scope of one of the tests for tribal jurisdiction under Montana v. United States, 450 U.S. 544 (1981)).

62. *See Montana*, 450 U.S. at 563-64 (discussing United States v. Wheeler, 435 U.S. 313 (1978)).

63. *Id.* at 564.

64. *Wheeler*, 435 U.S. at 322 ("right of internal self-government includes the right to prescribe laws applicable to tribal members . . .").

65. 18 U.S.C. §1151 (Indian country "means . . . all land within the limits of any Indian reservation under the jurisdiction of the United States Government").

66. *See* Strate v. A-1 Contractors, 520 U.S. 438, 454 (1997) (agreeing with settled principle of Indian law that "tribes retain considerable control over nonmember conduct on tribal land").

67. *Wheeler*, 435 U.S. at 564-65.

68. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §1.06 (2005 ed.):

> Indian policy from the end of the American Civil War through the Second World War . . . shifted from the end of treaty-making and land allotment and cultural assimilation to reorganization and restoration [of tribal governments] reinvigorating traditional culture, and then sharply turned to tribal termination and individual tribal member relocation.

See generally id. §1.04-07 (further detailing fluctuation of federal policies from cultural absorption and making tribal land available to nonmembers between 1871 and 1928, reinvigorating tribal governments from 1928-1942, terminating tribal status from 1943-1961, and promoting Indian self-determination as the current policy).

69. *Wheeler*, 435 U.S. at 564. *But cf. infra* Part III.B (explaining "delegated authority" as Congress' plenary power to expand and contract the scope of tribal authority including the ability to delegate federal power to a tribe); United States v. Lara, 541 U.S. 193, 200-07 (2004).

70. 53 Fed. Reg. at 37399-400 (EPA recognizing "that there is substantial support for the general proposition that a tribal government has [SDWA] jurisdiction . . . within the exterior boundaries of a reservation."). EPA declined, however, to adopt "a rebuttable presumption concerning tribal governmental jurisdiction on reservation lands," and required that the tribe "adequately show it possesses the requisite jurisdiction" to regulate activities covered by the SDWA. *Id.* EPA did not discuss how a tribe might make that showing under the SDWA regulations, but did later explain its common-law test under the CWA. 56 Fed. Reg. at 64877-80 (applying regulations virtually identical to the SDWA TAS regulations). *Compare* 40 C.F.R. §142.72-78 (SDWA PWS) *with* 40 C.F.R. §123.31-33 (CWA NPDES). The more robust discussion in the CWA regulations was likely due to the emphasis on complexities of inherent authority in Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989).

71. 492 U.S. 408 (1989).

72. 450 U.S. 544 (1981).

73. Strate v. A-1 Contractors, 520 U.S 438, 445 (1997), *quoted in* Nevada v. Hicks, 533 U.S. 353, 358 (2001).

74. *Montana*, 450 U.S. at 565.

> [1] 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. [2] 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.[75]

The second *Montana* exception—focusing on threats to tribal political integrity, economic security, health, or welfare—is the lynchpin of EPA's test for analyzing inherent authority. EPA expressed some uncertainty about how significant or direct the effect must be to support jurisdiction under this test, before adopting "an interim operating rule, requir[ing] that the potential impacts of regulated activities on the tribe are serious and substantial."[76] EPA considers a broad range of information regarding the tribe: its culture; its use of and dependence upon reservation waters; the reservation's characteristics, resources, and watersheds; "nonmember activities that actually occur on the reservation or that could occur, consistent with the reservation's characteristics"[77]; and the potential consequences such activities could have on tribal political integrity, economic security, and health or welfare.[78]

This case-by-case analysis, requiring a comprehensive and detailed factual inquiry, does not presume tribal authority in the absence of factual evidence[79] and does not preclude a state from demonstrating authority.[80] Indeed, EPA regulations recognize that a tribe's application may not make the showing required to demonstrate jurisdiction on some parts of a reservation,[81] and authorize a TAS approval limited to those parts for which the tribe has established jurisdiction.[82] Two appellate courts have upheld EPA TAS decisions using the jurisdictional approach set forth in the CWA TAS regulations.[83]

EPA uses an identical common-law test under both statutes, although the statutes differ in their jurisdictional language. The SDWA authorizes TAS applications "within the area of the Tribal Government's jurisdiction,"[84] while the CWA addresses areas "within the borders of an Indian reservation."[85] The fact that EPA uses an identical test under both statutes underscores that the test is based on common-law principles of federal Indian law,[86] rather than on the language of federal statutes that EPA administers. The use of such a common-law test has three practical consequences.

First, EPA receives limited judicial deference when it applies common law principles of federal Indian law, rather than interpreting federal statutes it is charged with administering. The Ninth Circuit has explained the reasons for giving limited deference to TAS jurisdictional determinations under the common-law test:

> The scope of inherent tribal authority is a question of law for which EPA is entitled to no deference. . . . EPA's delineation of [its] scope . . . has nothing to do with its own expertise or with any need to fill interstitial gaps in the statute committed to its discretion.[87]

Second, the common-law test EPA has developed requires a comprehensive factual analysis of actual and potential non-member activities on the reservation. EPA has stated that its analysis is informed and supplemented by generalized findings about the importance of protecting reservation water quality,[88] based on EPA's view that congressional enactment of the CWA to regulate water quality reflects a belief that the regulated activities are important, and the TAS provisions reflect the view that tribes are the appro-

75. *Id.* at 565-66 (internal citations omitted). Note 15, which immediately follows the quotation, provides that "[a]s a corollary, this Court has held that Indian tribes retain rights to river waters necessary to make their reservations livable. *Arizona v. California*, 373 U.S. 546, 599 [(1963)]." *Id.* at 565 n.15. EPA did not reproduce the footnote language in its WQS, 56 Fed. Reg. at 64876, 65877, but the first appellate court to review EPA's jurisdictional test, without citing *Montana* note 15, pointed out "the threat" to a tribe "inherent in impairment of the quality of the principal water source." Montana v. EPA, 137 F.3d 1135, 1141, 28 ELR 21033 (9th Cir. 1998).

76. 56 Fed. Reg. at 64878. EPA adopted that standard "solely as a matter of prudence in light of judicial uncertainty" as the precise formulation courts should employ. *Id.* The Court subsequently stated that to support tribal authority, non-member activity must do more than affect tribal land, it must "endanger the [tribe's] political integrity; in other words, its impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe." Atkinson Trading Co. v. Shirley, 532 U.S. 645, 657 (2001) (internal quotation omitted). Most recently, the Court has described the test as applying where conduct "menaces" the tribe: the conduct must "do more than injure the tribe, it must imperil the subsistence of the tribal community" or "be necessary to avert catastrophic consequences." Plains Commerce Bank v. Long Family Land & Cattle Co., No. 07-411, 544 U.S.__ (June 25, 2008), slip op. at 22-23 (internal quotations omitted).

77. Peacock Memorandum, *supra* note 48, at 17-20 (attach. C: Examples of Information to Show Tribal Authority Over Nonmember Activities Under *Montana v. United States*: Impacts of Nonmember Activities on Tribal Political Integrity, Economic Security, or Health or Welfare).

78. *Id.*

79. However, once a tribe meets an "initial burden" of showing that it uses reservation waters whose impairment "would have a serious and substantial effect on the health and welfare of the Tribe," EPA will "presume that there has been an adequate showing of tribal jurisdiction on fee lands, unless an . . . adjacent Tribe or State [ ] demonstrates a lack of jurisdiction on the part of the Tribe." 56 Fed. Reg. at 64879.

80. *See* 56 Fed. Reg. at 64878 (rejecting suggestions to adopt "a rebuttable presumption of tribal authority over all water within a reservation that would operate even in the absence of any factual evidence."); *see also* 40 C.F.R. §123.23(b) (requirement that state seeking an NPDES program approval under the CWA that would cover Indian lands must submit statement analyzing legal basis for state's authority); *Id.* §145.24(b) (when state submission for approval of the SDWA UIC program "seeks authority over activities on Indian lands, the [state submission] shall contain an appropriate analysis of the State's authority").

81. *See* SAFETEA-LU, Pub. L. No. 109-59, §10211, 119 Stat. 1144, 1937 (2005) ("Notwithstanding any other provision of law, [EPA] may treat an Indian tribe in the State of Oklahoma under a law administered by [EPA] only if" the tribe meets TAS requirements and the tribe and state agencies enter into a cooperative agreement to jointly plan and administer the program.).

82. *See* 53 Fed. Reg. at 37402 (SDWA); 54 Fed. Reg. at 14355 (CWA grants); 54 Fed. Reg. at 39102 (WQS); 58 Fed. Reg. 8172, 8176 (Feb. 11, 1993) (CWA §404).

83. Montana v. EPA, 941 F. Supp. 945, 951, 27 ELR 20421 (D. Mont. 1996), *aff'd*, 137 F.3d 1135, 28 ELR 21033 (9th Cir. 1998); *see also* Wisconsin v. EPA, 266 F.3d 741, 32 ELR 20177 (7th Cir. 2001).

84. 42 U.S.C. §300j-11(b)(1)(B).

85. 33 U.S.C. §1377(e)(2).

86. 56 Fed. Reg. at 64880 (EPA "recognize[s] inherent Tribal civil regulatory authority to the full extent permitted under Federal Indian law, in light of *Montana, Brendale*, and other applicable case law.").

87. *Montana*, 137 F.3d at 1140.

88. *See id.* at 1141 (recognizing "the threat" to "the health and welfare of a tribe . . . inherent in impairment of the quality of the principal water source").

priate nonfederal entity to carry out CWA functions on reservations.[89] "Because EPA's generalized findings will be incorporated into the analysis of tribal authority, the factual showing [to establish jurisdiction] is limited."[90] Once a tribe meets the initial burden of asserting that it uses reservation waters which are subject to protection under the CWA and whose impairment would have a serious and substantial effect on the tribe,

> EPA will, in light of the facts presented by the tribe and the generalized statutory and factual findings regarding the importance of reservation water quality . . . presume that there has been an adequate showing of tribal jurisdiction of fee lands, unless an appropriate governmental entity . . . demonstrates a lack of jurisdiction on the part of the Tribe.[91]

Although this test appears relatively simple, straightforward, and favorable to tribes, in practice EPA's case-by-case analysis entails a robust inquiry into the facts on each reservation.[92] The test has been criticized as burdensome:

> Despite EPA's purported presumption in favor of tribal jurisdiction, its policy has resulted in both substantial uncertainty and burdens for tribes by requiring tribes to show inherent sovereignty to attain TAS. EPA determines whether a tribe is qualified for TAS status on a case-by-case basis, and it requires a tribe to submit a fairly lengthy application in order to receive such status. In its application, the tribe . . . must submit a statement by legal counsel showing why the tribe should be allowed to regulate water quality under *Montana* and its progeny, which is a difficult task, given the increasing narrowness of the *Montana* exceptions . . . .[93]

Further, as already explained, the time needed to consider and resolve complex jurisdictional issues can cause "[d]elays in the approval process" that "may discourage tribes from even submitting requests for TAS status."[94]

Finally, a third consequence of a test recognizing inherent authority as measured by "the relevant principles of Federal Indian law,"[95] rather than statutory language, is that case law evolves over time. When it does, the regulatory test, including the information necessary to support a showing of inherent authority, may also change. Thus, a tribal application that was sufficient to support a TAS decision when submitted could become incomplete, without changes in either the tribe, rule, or statute, solely because of case law developments suggesting a need for more or different information.

2. Inherent Authority on Trust Lands

One illustration of how evolving case law may create uncertainty is in the area of tribal authority over tribal lands. EPA's CWA regulations expressly consider authority over non-member activities on non-member fee land but do not discuss authority over non-member activities on tribal land. That focus on land ownership reflects the specific holding in *Montana*—that tribes lack authority over fishing by "non-Indians on fee lands."[96]

Moreover, two of the most recent Supreme Court inherent authority decisions, *Atkinson Trading Co. v. Shirley*[97] and *Strate v. A-1 Contractors*,[98] have relied solely on land ownership to determine jurisdiction, finding that a tribe lacked authority over nonmember activities *because* the activities were taking place on nonmember fee land. And the Court's most recent decision, held that a tribe lacks authority to regulate the sale of non-Indian fee land.[99]

But there is also language in *Montana* discussing tribal authority over "the activities of nonmembers of the tribe."[100] Later, when the Court considered a tort claim against state officials under color of state law investigating on tribal land an off-reservation violation of state law, it applied *Montana*, and held in *Nevada v. Hicks*[101] that the claim should be heard in state, not tribal, court. The Court found a limited tribal interest in state-law enforcement officials' activities on tribal land when weighed against the state's interest in pursuing off-reservation violations of its laws.[102]

The question regarding whether *Hicks* requires that EPA extend to trust lands the case-specific factual analysis of nonmember activities it developed to analyze fee land is interesting, but academic. Common-law principles governing tribal inherent authority, whether under *Montana*'s exceptions or any other formulation, establish that tribes have inherent authority sufficient to protect their own lands' environment. First, because such lands are tribal property, as well as the tribe's homeland and often its most important asset, the authority to protect such lands is "necessary to protect tribal self-government."[103] Second, protection of tribal property is necessary to a tribe's political integrity, economic security, health, and welfare under the second *Montana* exception. Third, the Court's most recent Indian law decision has expressly recognized that tribes retain sovereign authority necessary for "managing tribal lands."[104] Finally, a tribe's traditional and undisputed power to exclude persons from entering tribal land,"[105] enables it to

89. 56 Fed. Reg. at 64878; 58 Fed. Reg. at 8174.

90. *Montana*, 137 F.3d at 1139 (citing 56 Fed. Reg. at 64879).

91. 56 Fed. Reg. at 64879.

92. *See* Peacock Memorandum, *supra* note 48, at 17-20 (attach. C).

93. Tweedy, *supra* note 60, at 478-479; *see* GAO Report, *supra* note 42, at 18 (several tribal officials "questioned the value of spending time and resources for such a lengthy process").

94. GAO Report, *supra* note 42, at 12.

95. 56 Fed. Reg. at 64880.

96. *Montana*, 450 U.S. at 565-66 (recognizing authority "even on nonmember fee lands," "tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands"; no showing that "non-Indian hunting and fishing on fee lands imperil the subsistence of welfare of the Tribe"; noting history of state "regulation of hunting and fishing on fee lands within the reservation").

97. 532 U.S. 645, 657 (2001) (failing to recognize how the "operation of a hotel on non-Indian fee land 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe'") (quoting *Montana*, 450 U.S. at 566).

98. 520 U.S. 438, 454 (1997) (holding that the state, rather than the tribe, had authority to adjudicate a tort claim on a highway right of-way the state had acquired from the tribe, making the land "equivalent, for nonmember governance purposes, to alienated, non-Indian land").

99. Plains Commerce Bank v. Long Family Land & Cattle Co., No. 07-411, 544 U.S.__ (June 25, 2008), slip op. at 13.

100. *Montana*, 450 U.S. at 565.

101. 533 U.S. 353 (2001).

102. *Id.* at 370.

103. *Montana*, 450 U.S. at 564 ("[T]ribes retain their inherent authority . . . to protect tribal self-government.").

104. Plains Commerce Bank v. Long Family Land & Cattle Co., No. 07-411, 544 U.S.__ (June 25, 2008), slip op. at 16.

105. *Id*. at 17.

"regulate the conduct of persons over whom it could assert a landowner's right to occupy and exclude."[106]

Nevertheless, *Hicks* illustrates how the focus of the common-law test has changed from the status of the land where an activity is taking place to the identity of the person undertaking the action. That shift is problematic for EPA, whose statutes describe jurisdiction in terms of the location and ownership of land: the SDWA authorizes TAS approval for the "the area of the Tribal Government's jurisdiction"[107]; the CWA authorizes TAS approval for "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."[108] Nothing in either statute suggests that a tribe's authority over a specific area of land could vary depending on the identity of the person being regulated. Indeed, as noted above, EPA has recognized that tribes in fact have no criminal jurisdiction over non-members, and has not treated that jurisdictional limitation as precluding tribes from obtaining TAS approval.

B. Delegated Authority

A second potential source of tribal authority comes from Congress, whose plenary power over tribal affairs allows it to delegate federal authority to tribes.[109] Such delegation provides a federal statutory source of tribal authority neither dependent upon nor limited by the scope of a tribe's inherent authority.[110] Two federal courts have suggested in dicta that EPA could properly interpret the CWA as such a delegation.[111]

1. CAA Regulations: Delegation

EPA construes the CAA as a delegation of federal authority over reservation air resources. The CAA authorizes TAS approval for "air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction,"[112] and applies TIPs "to all areas . . . located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent."[113] EPA analyzed the tribal provisions of the CAA and determined in the TAR,[114] that the CAA is "a statutory grant of jurisdictional authority to tribes [that] establishes a territorial view of tribal jurisdiction and authorizes a tribal role for all air resources within the exterior boundaries of Indian reservations without distinguishing among various categories of on-reservation land."[115] Thus, TAS approval applies to "all areas within the exterior boundaries of the tribe's reservation," regardless of land ownership.[116] The D.C. Circuit upheld EPA's interpretation of the CAA as a delegation.[117]

This significantly simplifies the TAS jurisdictional showing under the CAA: "For applications covering areas within the exterior boundaries of the applicant's reservation the [jurisdictional] statement must identify with clarity and precision the exterior boundaries of the reservation . . . ."[118] The tribe can then implement the CAA for all resources within the reservation, without presenting information of either the quality or quantity needed under the common-law test. By contrast, the requirements for TAS approval outside the reservation (and thus beyond the area encompassed by the delegation) are identical to those under the Water Acts, requiring a legal statement "that describes the basis for the tribe's assertion of authority."[119]

2. Plenary Power

More recently, the Supreme Court has emphasized the extraordinary breadth of congressional plenary power to expand or limit tribal jurisdiction, by either delegating federal authority to tribes[120] or altering the scope of tribal inherent authority.[121] After the Court held that tribes lacked criminal

106. *Hicks*, 533 U.S at 377 (internal citations and quotations omitted). *Hicks* did not implicate a landowner's power to exclude because it involved an intrusion authorized by a search warrant, a circumstance where no landowner can exclude a state official. The Court implicitly recognized this when it cited a state's "right to enter a reservation (including Indian-fee lands) for enforcement purposes." *Id.* at 363.

107. 42 U.S.C. §300j-11(b)(1)(B); *see also* §42 U.S.C. 300f(14) (defining tribe as entity exercising "powers over any area").

108. 33 U.S.C. §1377(e)(2). A reservation consists of all land within its borders. *Id.; see also* §1377(h)(1) (defining reservation to include "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").

109. United States. v. Mazurie, 419 U.S. 444, 557 (1975); *see* United States v. Lara, 541 U.S. 193, 197-98 (2004) (distinguishing federal statute that expands inherent tribal authority from one that delegates federal authority to a tribe); *see also* Brendale v. Confederated Tribes & Bands of the Yakima Nation, 492 U.S. 408, 428 (1989) (plurality identifying 33 U.S.C. §1377(e) and (h)(1) as the CWA's delegation of authority to tribes).

110. *Id.*; *see also* 63 Fed. Reg. 7254, 7257 (Feb. 12, 1998) (contending that where a statute explicitly delegates "federal authority to tribes, it is not necessary . . . to determine whether tribes have inherent authority" over the matters covered by the delegation).

111. *See* Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280-82, 30 ELR 20565 (D.C. Cir. 2000) (construing the CAA as a delegation and addressing EPA's interpretation of the CWA as a delegation by referencing Montana v. EPA, 941 F. Supp. 945, 951, 27 ELR 20421 (D. Mont. 1996)); *see also id.* at 1301-03. (Ginsburg, J. dissenting) (concluding that the CAA's language was *not* a delegation while suggesting that the CWA *is* a delegation based on the CWA's inclusion of a definition of reservation including the proviso "'notwithstanding the issuance of any patent and including rights-of-way running through the reservation'").

112. 42 U.S.C. §7601(d)(2)(B), *discussed at* 63 Fed. Reg. at 7255.

113. *Id.* §7410(o), *discussed at* 63 Fed. Reg. at 7255; *see also id.* §7474(c) (providing "[l]ands within the exterior boundaries of reservations . . . may be redesignated [with regard to the prevention of significant deterioration of air quality] only by the appropriate Indian governing body"). The CAA's language suggests an intent to treat reservations as unitary geographic entities, with tribes as the relevant nonfederal regulatory authorities.

114. 63 Fed. Reg. at 7255-59 (final rule).

115. *Id.* at 7254.

116. 40 C.F.R. §49.9(g).

117. Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1292, 30 ELR 20565 (D.C. Cir. 2000) ("EPA correctly interpreted [42 U.S.C.] §7601(d) to expressly delegate jurisdiction to otherwise eligible tribes over all land within the exterior boundaries of reservations, including fee land.").

118. 40 C.F.R. §49.7(a)(3).

119. *Id.* §49.7(a)(3)(ii).

120. United States v. Lara, 541 U.S. 193, 207 (2004) (referencing Duro v. Reina, 495 U.S. 676, 686 (1990); South Dakota v. Bourland, 608 U.S. 679, 695 n.15, 23 ELR 20972 (1993); Montana v. EPA, 450 U.S. 544, 564 (1981); United States. v. Mazurie, 419 U.S. 444, 556-57 (1975).

121. *Id.*

authority over non-member Indians,[122] Congress altered the holding by amending a statutory definition of tribal "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[123] Thus, a non-member Indian prosecuted by the tribe could not show that a subsequent federal prosecution violated the Double Jeopardy Clause because the first prosecution was under inherent tribal authority, as expanded by the federal legislation, rather than under delegated federal authority. The statute "relaxes the restrictions, recognized in *Duro* that the political branches had imposed on the tribes' exercise of inherent prosecutorial power," something "the Constitution authorizes Congress to do."[124] In other words, Congress' plenary power enables it to expand tribal inherent authority, as well as to delegate federal authority.

The breadth of congressional plenary power makes it a double-edged sword that can contract, as well as expand tribal authority.[125] Both the statutory expansion of tribal power recognized in *United States v. Lara*[126] and the statutory reduction in Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Uses (SAFETEA-LU) underscore how profoundly congressional exercises of plenary power can affect tribal power.

The TAS provisions of the CAA, the CWA, and the SDWA are all exercises of congressional plenary power regarding tribal authority. EPA's CAA regulations construe the exercise of plenary power in the CAA TAS provisions as delegating federal authority for reservations to tribes with TAS status. But EPA's CWA and SDWA regulations conclude that neither "statute expands or limits the scope of Tribal authority beyond that inherent in the Tribe,"[127] which means that neither statute exercised Congress' plenary power to alter tribal authority.

IV. Conclusion

EPA's adoption of a common-law inherent authority test to determine jurisdiction under the SDWA and the CWA inevitably spawned a TAS process that requires a detailed review of factual information about each tribe. The complexity of EPA's jurisdictional analysis, moreover, has been cited as a cause of the delays the GAO report described. The strategy's success in addressing delays in TAS decisions may ultimately depend on how effectively process improvements can promote prompt and accurate TAS determinations under a common-law inherent authority test that is complex and fact-intensive.

122. *Duro*, 495 U.S. at 676.

123. U.S. Department of Defense Appropriations Act, Pub. L. No. 101-511, §8077, 104 Stat. 1856, 1892-93 (1990) (amending 25 U.S.C. §1301(2)).

124. *Lara*, 541 U.S. at 200.

125. *See* SAFETEA-LU, Pub. L. No. 109-59, §10211, 119 Stat. 1144, 1937 (2005) (limiting the authority of Indian tribes in Oklahoma to implement EPA statutes by (1) authorizing state authority over Indian country in Oklahoma and (2) precluding TAS approval for any tribe in Oklahoma absent an agreement with the state to jointly plan and administer the program).

126. 541 U.S. 193 (2004).

127. 56 Fed. Reg. at 64880.