TO CLEAR THE MUDDY WATERS: TRIBAL REGULATORY AUTHORITY UNDER SECTION 518 OF THE CLEAN WATER ACT

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Under section 518 of the Clean Water Act (CWA), qualified tribes may assume regulatory authority over various CWA programs. Despite the demonstrated benefits to tribal interests, many tribes have as yet to take on the full mantle of regulatory authority. This is due in part to the jurisdictional conflicts that arise when tribal regulation of reservation water resources affects nontribal members who own land or live within reservation boundaries. In an effort to mediate between these competing interests, the Environmental Protection Agency (EPA) has determined that prior to asserting regulatory authority over reservation waters, a tribe must demonstrate that such authority falls within the scope of its inherent sovereign power. This interpretation of the force and intended operation of section 518 was recently upheld by the Ninth Circuit in *Montana v. Environmental Protection Agency*. In so doing, the court resolved a decade-long controversy over the Confederated Kootenai and Salish Tribes' authority to set water quality standards within the Flathead Reservation in western Montana. However, in summarily deferring to EPA's legal interpretation, the court did little to resolve the jurisdictional conflicts that have historically undermined tribal authority. This Chapter assesses both the Ninth Circuit's approach to the doctrine of inherent sovereignty as it relates to water quality regulation and the court's failure to recognize section 518 as a direct delegation of tribal regulatory authority. Ms. Cutler concludes that the Ninth Circuit avoided an invaluable opportunity to substantiate the legal basis of tribal authority over environmental programs on reservation lands. Continued tribal advancement in the area of environmental regulation will thus depend not on law, but rather on the extent to which EPA continues to advance an Indian policy favoring tribal regulatory authority and self-determination.

I. INTRODUCTION

May 1998. It is spring and the children have come to the river; one thousand fourth-, fifth-, and sixth-grade reservation school students have thrown down their books to gather on the banks of the Flathead River in western Montana to see, smell, touch, and celebrate. They are children of the Flathead Indian Reservation and this is their river, their water, their heritage. It is also now their responsibility.

The children went to the river to learn the importance of waterways to the Salish, Kootenai, and Pend d'Orielle Tribes and to learn about the natural environment of the Flathead Indian Reservation.[1] These lessons are, in one sense, about erosion and sedimentation, forest ecology, and low-impact camping. In another sense, they are the first steps towards stewardship of the river and other water resources within the Flathead Reservation. In 1995, the United States Environmental protection Agency (EPA) granted the Confederated Salish and Kootenai Tribes "treatment as a state" (TAS) status under the Clean Water Act (CWA),[2] authorizing the tribe to set water quality standards for all navigable waterways within the reservation.[3] The United States Court of Appeals for the Ninth Circuit recently upheld that grant of authority in a landmark case in the field of tribal civil jurisdiction and environmental regulation.[4] As a result, these children will inherit something their parents never had and their ancestors never thought necessary: the right to regulate the water.

These children will also inherit a long tradition of jurisdictional battles over rights to use, pollute, and regulate reservation waterways, as well as a political quagmire of competing local, state, and federal interests. The Flathead Reservation displays an extreme example of a common feature of reservation geography: members of the Tribe own only about fifty percent of the land within the

Reservation boundaries.[5] A variety of nontribal interests own the remaining portion, including municipal and county entities and the State of Montana.[6]

A significant portion of the Reservation's water quality problems, especially on Flathead Lake, comes from municipal and state-owned facilities.[7] As a result, these nontribal entities have an interest in water quality regulation that extends beyond the loss of their right to regulate water quality on the reservation. The Ninth Circuit's decision effectively subjects everyone on the Reservation to all water quality standards that the Tribe may promulgate. Unsurprisingly, nontribal interests vehemently opposed the grant of water quality authority to the Confederated Kootenai and Salish Tribes. However, the anecdotal evidence suggests that tribal regulatory authority, at least on the Flathead Indian Reservation, will reap rewards in terms of water quality that may make it worth the struggle.[8]

Since 1987 tribes have been able to apply to EPA for recognition and regulatory authority under the CWA. In that year, Congress added section 518 to the CWA, allowing EPA to treat qualified tribes as states for purposes of the Act (TAS status).[9] Recognition of TAS status is program-specific; a tribe may apply for TAS status for purposes of setting water quality standards independent of its status vis-à-vis other CWA programs, such as the National Pollutant Discharge Elimination System (NPDES) permitting program.[10] While program participation, measured in number of TAS approvals, has grown since 1987, tribes have to some extent been reticent to take on the full mantle of regulatory authority. Instead, they have chosen to apply for a variety of monetary grants, formerly available only to states, rather than seeking full regulatory jurisdiction.[11]

Some of the most significant hurdles standing in the way of full tribal authority in this area are the jurisdictional conflicts that arise when tribal regulation of reservation water resources affects nontribal members who own land or live within reservation boundaries.[12] This conflict lies at the heart of the Flathead controversy and the Ninth Circuit's resolution of that controversy in *Montana v. Environmental Protection Agency* (*Montana v. EPA*).[13] While the court resolved the Flathead conflict in favor of tribal sovereignty, the decision in no way represents a blank check for tribal jurisdiction under the CWA.

This Chapter assesses the extent to which *Montana v. EPA* resolves or abdicates the jurisdictional questions posed by nontribal ownership of reservation lands under the CWA. Part II reviews the provisions of the CWA as they relate to tribal authority under section 518. Part III presents a brief discussion of tribal sovereignty and civil jurisdiction. Part IV analyzes the most recent confluence of those two streams of law through an examination of *Montana v. EPA*. This discussion assesses both the Ninth Circuit's approach to the doctrine of inherent sovereignty as it relates to water quality regulation and the court's failure to recognize section 518 as a direct delegation of tribal regulatory authority. Part V concludes that while this case removes a significant barrier to the assertion of tribal authority under the CWA, in avoiding review of the plain language of section 518 the court missed an invaluable opportunity to substantiate the legal basis of tribal regulatory jurisdiction. Continued tribal advancement in the area of environmental regulation will thus depend not on law, but rather on the extent to which EPA continues to advance an Indian policy favoring tribal self-determination and full regulatory authority.

II. THE CLEAN WATER ACT

A. The Regulatory Program

The Clean Water Act (CWA)[14] requires states to set water quality standards for waters under their jurisdiction.[15] These standards must include designated water uses,[16] criteria designed to protect those designated uses,[17] and an antidegradationpolicy.[18] Once established, water quality standards serve two primary functions within the regulatory scheme established by the CWA. First, they are included, along with effluent limitations,[19] in the conditions that must be met by entities discharging pollutants under the National Pollution Discharge Elimination System (NPDES).[20] This program regulates the discharge of pollutants from any point source, which the act defines as any "discernible, confined and discrete conveyance"[21] into the navigable waters of the United States.[22]

Second, water quality standards play a major role in state certification under section 401 of the Act.[23] Under this section, any federally licensed activity that may result in a discharge into navigable waters must receive certification from the relevant state, certifying that the activity or discharge will comply with that state's water quality standards.[24] Thus, all NPDES permits that EPA issues must first receive certification from the appropriate state.[25]

Section 401 serves another function as well. States other than the certifying state whose water quality may be affected by the federally permitted activity or discharge have an opportunity through section 401 to object to the issuance of the permit or license. If such activity will violate the water quality standards of a downstream state, the permit or license must be conditioned to ensure compliance with the downstream state's water quality standards.[26] If there are no conditions that the permitting agency can attach to the permit or license that will adequately protect downstream water quality standards, the issuing agency cannot issue the license or permit.[27]

B. Treating Tribes as States

In 1987, Congress amended the CWA to allow qualified tribes to receive some of the regulatory authority otherwise delegated to the states.[28] Section 518(e) of the CWA grants EPA the authority to treat qualified tribes as states for a variety of purposes, including establishing water quality standards and issuing NPDES permits.[29] In order for a tribe to be "treated as a state" under this section, the tribe must meet four requirements. The tribe must (1) be federally recognized, (2) have a governing body carrying out substantial duties and powers, (3) have adequate jurisdiction over the water resources for which it seeks program approval, and (4) have the capability to carry out the functions for which the tribe seeks authorization.[30]

EPA reviews tribal application for CWA program approval on a case-by-case basis; this is due in part to EPA's judgment that while a tribe may qualify for TAS status under one program, the tribe may not be able to qualify under other CWAprograms.[31] Thus, TAS status is program specific. For example, a tribe that has been approved for TAS status for purposes of setting water quality standards within its jurisdiction does not automatically gain authority to issue NPDES permits.[32]

III. THE LIMITS OF TRIBAL CIVIL JURISDICTION: INHERENT SOVEREIGNTY

A. A Unique Kind of Sovereignty

The administration of federal environmental statutes on tribal lands is complicated by the unique status of Indian tribes as independent but dependent sovereign entities.[33] Tribes generally retain regulatory jurisdiction over matters of tribal self-government and internal relations. Tribes may regulate matters that fall outside this limited scope only under express delegation from Congress.[34]

This delicate balance is in part a relic of the troubled history of tribal relations in the United States. As early Supreme Court decisions recognized, the discovery and settlement of the "New World" in the late eighteenth and early nineteenth centuries resulted in the conquest of lands previously occupied by Indian nations and the subjection of those lands to exclusive federal power.[35] Indian tribes retained aboriginal title to land in their possession, but this gave the tribes only the right to occupy the land and the federal government could extinguish those rights at any time.[36] The conquest and subsequent treaty relationship established between the federal government and the various tribes established a system wherein tribes were recognized as "domestic dependent nations."[37]

Subsequent federal Indian jurisprudence established that despite their status as dependents of the federal government, tribes retained inherent sovereignty over their internal affairs and the right to self-government.[38] However, the extent to which tribes may exercise this sovereignty over nonmembers is limited to situations where such authority is not "inconsistent with their [dependent] status."[39]

B. The Civil Regulatory Context

The exercise of Indian sovereignty in the context of environmental regulation is further complicated by the prevalence of non-Indian land ownership within reservation boundaries.[40] For the most part, this "checkerboard" distribution of ownership throughout reservation land is a result of federal Indian policy in the late nineteenth and early twentieth centuries. During this period, Congress pursued a policy of allotment and assimilation aimed at substituting individual private ownership for the system of communal tribal ownership.[41] The most significant symbol of the allotment era is the General Allotment Act of 1887,[42] which authorized allotments in the amount of 80 or 160 acres to individual Indians or heads of Indian households, respectively. The federal government held title to the allotted land in trust for the individual Indian for a period of twenty-five years; after that time a patent would issue, granting the Indian fee simple title to the land.[43] The Act also provided that tribal land not disposed of through the allotment process would be opened for homesteading by non-Indians.[44]

Although the Indian Reorganization Act of 1934 effectively repealed the allotment policy,[45] Indian landholdings fell sixty percent during the period of 1887 to 1924, from 138 million acres to 48 million acres.[46] The result is a checkerboard pattern of varied interests

within reservation boundaries, with significant fee simple non-Indian holdings alongside tribal trust lands and lands held in fee by tribal members.[47]

The doctrine of inherent sovereign authority addresses a number of the jurisdictional questions that this checkerboard generates. One issue is whether a tribe has authority to regulate the activities of non-Indians on non-Indian land within the reservation.[48] In *Montana v. United States* (*Montana v. U.S.*),[49] decided in 1981, the Supreme Court clarified the extent to which the doctrine of inherent sovereign authority may be asserted within a civil regulatory context. In that case, the Crow Tribe sought to prohibit all hunting and fishing by nonmembers on land owned in fee by nonmembers within the reservation.[50] The Court first determined that the relevant Crow treaties and the federal trespass statute did not give the Tribe jurisdiction over land owned by non-Indians.[51] In doing so, the Court affirmed that the initial step in analyzing Indian regulatory jurisdiction is to determine whether Congress has granted the tribe the asserted authority by means of treaty or federal statute.[52] Under this analysis, an appeal to inherent sovereignty as a basis for a tribe's civil regulatory jurisdiction is unnecessary if Congress has directly delegated that authority to the tribe.[53]

After finding no direct delegation of the asserted regulatory authority by treaty or statute, the Court next assessed whether the doctrine of inherent sovereignty could support such an assertion.[54] The Court held that, in general, inherent tribal sovereign power did not extend to regulation of activities of nonmembers on land owned by nonmembers.[55] However, the Court carved out two exceptions to this "general proposition."[56] First, the Court recognized that tribes retain inherent sovereign power to regulate the activities of nonmembers who enter into consensual relationships with the tribe or its members.[57] Here the Court cited cases generally upholding the authority of a tribe to utilize devices such as taxation or licensing to regulate commercial transactions, contracts, leases, and other arrangements between tribal members and non-Indians.[58] Second, the Court recognized that tribes may exercise civil authority over the conduct of non-Indians on fee lands within the reservation "when that conduct threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe."[59] Here, the Court cited cases resolving jurisdictional conflicts in favor of tribal interests within the context of adoption, tribal tax revenues, and water rights.[60] Finding no indication that the facts of the case before it met either one of these exceptions, the Court rejected the Crow Tribe's assertion of civil regulatory jurisdiction over non-Indian hunting and fishing on fee lands within the reservation.[61]

C. Further Complications

While the *Montana v. U.S.* doctrine has been described as "the golden rule of federal Indian law" in this area,[62] many commentators decreed the death of *Montana v. U.S.*'s second exception in the Supreme Court's subsequent decision in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*.[63] In a completely fractured 4-2-3 decision, the Court grappled with the issue of civil regulatory jurisdiction over nonmembers in the context of a conflict over zoning authority on the Yakama Indian Reservation.[64] While the Court presented no clear plurality opinion, the result was that while the Tribe could exercise zoning authority over non-Indian's land in those portions of the Reservation generally closed to the public, the Tribe did not have zoning authority over fee lands within the "open" area of the Reservation.[65]

None of the three opinions agreed on a common approach for applying *Montana v. U.S.*'s second exception.[66] In fact, neither of the two opinions representing the opinion of the Court rely on *Montana v. U.S.* as the basis for their holding.[67] Nevertheless, the outcome of this merry-go-round decision is arguably consistent with *Montana v. U.S.*[68] The Tribe could exercise exclusive zoning authority over "closed areas" of the Reservation where there was minimal non-Indian ownership of land because here nonmember activities would "undoubtedly negatively affect the general health and welfare" of the Tribe.[69] However, the Tribe could not exercise zoning authority over areas of the reservation characterized as predominantly nonmember fee ownership where the county's exercise of zoning authority "would have no direct effect on the Tribe and would not threaten the Tribe's political integrity, economic security, or health and welfare."[70]

Despite doubt after *Brendale* as to the continued vitality of the *Montana v. U.S.* exceptions, the Supreme Court decisively returned to *Montana v. U.S.* in its 1997 decision in *Strate v. A-1 Contractors*.[71] In *Strate*, the Court held that the tribal courts did not have jurisdiction over the personal injury claims of a nonmember injured by another nonmember in a car crash that occurred on a state highway running through the reservation.[72] Although the facts of this case have little or no direct bearing on tribes' civil regulatory jurisdiction, the import of the case lies in Justice Ginsburg's heavy reliance on *Montana v. U.S.*'s description of the bounds of inherent sovereignty and her analysis of the scope of the health and welfare exception.

Justice Ginsburg analyzed the four cases cited by the Court as authority for *Montana v. U.S.*'s health and welfare exception.[73] She characterized these cases as raising the question of "whether a state's . . . exercise of authority would trench unduly on tribal self-government."[74] Furthermore, Justice Ginsburg argued that the exception should be read in context of the sentence preceding that of the exception itself: "Read in isolation, the *Montana* rule's second exception can be misperceived. Key to its proper application, however, is the court's preface: '. . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations.'"[75] Justice Ginsburg's reliance on the preface to the exception allows her to argue that regulatory authority over the state highway accident does not interfere with tribal self-government, thus rendering the second exception inapplicable to the *Strate* facts.[76]

Justice Ginsburg's opinion thus offers mixed blessings for tribes seeking to assert civil regulatory jurisdiction over nonmember's activities. While it revitalizes the status of the *Montana v. U.S.* rule and its exceptions, it also can be read as further narrowing the scope of the health or welfare exception.[77]

IV. *MONTANA v. EPA*

In 1995, the Environmental Protection Agency (EPA) granted the Confederated Salish and Kootenai Tribes of the Flathead Reservation "treatment as state" (TAS) status under the Clean Water Act, authorizing the Tribes to set water quality standards for all navigable waterways within the Reservation.[78] The State of Montana and others owning land in fee within the Reservation challenged this grant of authority.[79] Montana argued that TAS status allowed the Tribes to set water quality standards (WQS) that would apply to all discharges within the

Reservation, including those originating on land owned in fee by nonmembers of the Tribes.[80] Montana claimed that this was an improper extension of the Tribes' authority.[81]

The Ninth Circuit upheld the grant of TAS status to the Tribes, holding that EPA properly applied the doctrine of inherent tribal authority in extending to the Tribes regulatory authority over nonmembers on fee land within the Reservation.[82] In so doing, the Ninth Circuit first deferred to EPA's judgment that inherent authority was the proper standard under which to evaluate TAS status.[83] The Court then affirmatively applied the second exception to the *Montana v. U.S.* doctrine by identifying water quality regulation as an area that could affect the tribe's health and welfare, justifying tribal jurisdiction over nonmember conduct.[84]

This resolution, although a win for the Flathead Reservation Tribes, poses serious problems for future tribal efforts to assert regulatory authority. First, the court's legal interpretation of the requisite showing to justify an assertion of inherent authority potentially narrows the scope of *Montana v. U.S.*'s second exception beyond that which either EPA policy or Supreme Court precedent requires.[85] Second, and more importantly, the court's cursory and deferential assumption that TAS status requires a showing of inherent authority runs contrary to established federal Indian law and policy and potentially undermines future tribal efforts to assert full regulatory authority over reservation environments.[86]

A. The Scope of Inherent Authority

1. EPA's TAS Regulations

EPA regulations governing the grant of TAS status adopt the standard of inherent tribal authority as the criterion for assessing tribal jurisdiction and authority to promulgate water quality standards.[87] The regulations state that a tribe shall include in its application "a descriptive statement of the . . . Tribe's authority to regulate water quality,"[88] which should include a statement from the tribe's legal counsel of the "basis for the tribe's assertion of authority" and an "identification of the surface waters" over which the tribe seeks jurisdiction.[89]

The Preamble to the final regulation provides further guidance as to what EPA will consider as a sufficient showing of "authority to regulate water quality."[90] In order to meet its burden under the regulations, a tribe must show that (1) the tribe uses waters located within the reservation, (2) those waters are subject to protection under the CWA, and (3) impairment of those waters would have a serious and substantial effect on the health and welfare of the tribe.[91] Echoing the language of *Montana v. U.S.* and *Brendale*, EPA requires that the activities the tribe seeks to regulate have a "serious and substantial" effect on the health and welfare of the tribe.[92]

2. The Ninth Circuit's Approach: Of Dicta and Distinctions

In *Montana v. EPA*,[93] the Ninth Circuit upheld these regulations as validly reflecting the Supreme Court's delineation of the scope of inherent tribal authority.[94] The court cited three reasons for its determination that EPA had properly found the authority to promulgate water quality standards as falling within the scope of the Salish and Kootenai Tribes' inherent sovereign authority. First, the court noted that in requiring the impacts on tribal health and welfare to rise to a level of "serious and substantial," EPA properly accounted for the Supreme

Court's comments on inherent authority in *Brendale*.[95] The State of Montana argued that *Brendale* in fact has repudiated the *Montana v. U.S.* standard of inherent authority. However, the Ninth Circuit rejected that argument, noting instead that *Montana v. U.S.* was recently "reaffirmed" by the Supreme Court in *Strate v. A-1 Contractors*.[96]

Second, the Ninth Circuit noted that EPA's finding of serious and substantial threats to tribal health and welfare is supported by Ninth Circuit precedent holding that threats to water rights may invoke inherent authority.[97] Finally, the court noted that its decision was "fully consistent" with the Tenth Circuit's recent decision in *City of Albuquerque v. Browner*.[98] In that case, the Tenth Circuit recognized the authority of the Isleta Pueblo to establish water quality standards more stringent than federal standards, finding such authority to be "in accord with powers inherent in Indian tribal sovereignty."[99]

The Ninth Circuit thus interpreted the line of cases establishing the scope of inherent authority as including both the Supreme Court's initial application of that standard to civil regulatory matters in *Montana v. U.S.*, and that Court's subsequent commentary in *Brendale* and *Strate*.[100] Moreover, the Ninth Circuit implicitly characterized the latter two cases as modifying the *Montana v. U.S.* rule. Specifically, it affirmed EPA's reading of *Brendale* as requiring that the threat to tribalinterests must be "serious and substantial" in order to meet the "direct effect" exception to the *Montana v. U.S.* rule.[101] And, although not crucial to its holding,[102] the Ninth Circuit in dicta indicated that *Strate* creates an additional requirement that must be met in order for the second *Montana v. U.S.* exception to apply, namely that the tribe demonstrate "a nexus between the regulated activity and tribal self governance."[103]

As such, the Ninth Circuit appears to have interpreted *Strate* as applicable in not only a civil adjudicatory but also a civil regulatory context.[104] In so doing, the court appears to have turned the *Montana v. U.S.* exception into a multi-step evaluation. Although it is too soon to tell what practical effect this test will have, it could potentially narrow the scope of inherent authority beyond that intended either by EPA or the *Montana v. U.S.* Court.

However, in deciding *Montana v. EPA*, the Ninth Circuit did not subsequently apply the "nexus" requirement it derived from *Strate*.[105] Rather, the court noted that *Strate* was decided after the district court decision[106] and distinguished the facts of *Strate* from those in *Montana v. EPA*.[107] The Ninth Circuit did rely on the *Strate* decision that *Montana v. U.S.* survived the chaos of *Brendale*, commenting that "the EPA decision appears to adumbrate the Supreme Court's holding in *Strate*."[108] The Ninth Circuit thus indicates that despite the potential narrowing of *Montana v. U.S.*'s second exception by *Brendale* and *Strate*, EPA correctly relied on the *Montana v. U.S.* approach when evaluating the Tribes' TAS application.

The court's *Strate* citation could be read as extending *Strate* to civil regulatory contexts and concurrently transforming *Montana v. U.S.*'s second exception to a multi-step evaluation requiring an initial showing of nexus between the regulated activity and tribal self-governance. However, because the court declined to apply *Strate*'s "nexus" test, a more accurate reading of the opinion is that the Ninth Circuit reaffirmed the viability of *Montana v.*

U.S.'s health and welfare exception without changing the substantive test for when that exception applies.

3. Implication: The Resurrection of the Health and Welfare Rule

The basis of the Ninth Circuit's holding remains the standard set forth in *Montana v. U.S.* and *Brendale*: a showing of serious and substantial effect on tribal health or welfare justifies tribal regulatory authority for purposes of establishing reservation-wide water quality standards.[109] Thus, although the Ninth Circuit's citation to *Strate* indicates that that case applies to civil regulatory jurisdiction issues, *Strate* itself does not provide strict authority for such a position. A more accurate reading of both *Strate* and the Ninth Circuit's reasoning here limits the import of *Strate* to its particular factual context, namely civil judicial—as opposed to civil regulatory—jurisdiction over nonmember activities on federal highways. Such a reading would return the inherent authority analysis to the *Montana v. U.S.* rule and its two exceptions, as opposed to the multi-step analysis suggested in dicta by the Ninth Circuit.

Why does any of this matter? Even if courts faced with claims of tribal regulatory jurisdiction choose to limit the holding of *Strate* to its particular adjudicatory context, *Strate* remains a strong affirmation of the *Montana v. U.S.* rule. Justice Ginsburg very forcefully noted: "While *Montana* immediately involved regulatory authority, the court broadly addressed the concept of 'inherent sovereignty' . . . [and] delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise forms of civil jurisdiction over non-Indians."[110] Subsequent courts could very well follow the substance of the Ninth Circuit's reasoning in *Montana v. EPA* by recognizing that *Strate* adds little substance to the application of the *Montana v. U.S.* rule in the context of regulatory jurisdictional conflicts.

However, if the language of the Ninth Circuit's opinion in *Montana v. EPA* is to affirm the applicability of *Strate* to civil regulatory jurisdiction conflicts, tribes must now meet an additional burden. Specifically, tribes must show a "nexus" between the regulated activity and tribal self-governance.[111] Presumably, EPA would also be required to incorporate this standard into its requirements for approving tribal applications for program authorization under section 518.

While this may provide another hurdle in the path of tribal assertion of environmental regulatory authority, it is equally important to note that the Ninth Circuit could have adopted an interpretation of *Strate* that all but eliminated the second *Montana v. U.S.* exception. Justice Ginsburg's insistence on reading the second exception with the context of its preface[112] gives rise to the possibility of two interpretations. The first is that adopted by the Ninth Circuit in *Montana v. EPA*. This analysis adds a requirement that the asserted civil authority over nonmembers is necessary to protect tribal self-government.[113] Alternatively, *Strate* could be read as eliminating from *Montana v. U.S.*'s second exception the language regarding health and welfare. This interpretation would rely on Justice Ginsburg's assertion that the touchstone of the second exception is the degree to which the denial of tribal authority would "trench unduly on tribal self-government."[114] Under this reading, analysis under the second exception would focus almost exclusively on the political integrity prong, relegating to the dust heap of discarded dicta the promise that conduct that threatens or effects the health or welfare of the tribe may fall under tribal jurisdiction.[115]

B. EPA's Rejection of the Delegation Argument

The problems created by the Ninth Circuit's muddled treatment of *Strate* pale in comparison to those presented by its eagerness to defer to EPA's choice of inherent authority as the standard for assessing TAS status. That cursory deference is problematic in two respects. First, it is not clear that the decision to adopt inherent authority is the type of statutory construction appropriately analyzed under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[116] Second, even when analyzed under *Chevron*, a thorough *Chevron* analysis leads to the conclusion that section 518 represents a direct delegation of Clean Water Act regulatory authority to qualified tribes. By failing to address either of these issues, the Ninth Circuit abdicated responsible judicial review while evading an invaluable opportunity to firmly substantiate the legal basis of tribal regulatory jurisdiction under the CWA.

1. The Ninth Circuit's *Chevron* Mistake

In choosing inherent authority as the criterion for TAS status, EPA determined that section 518 of the CWA did not constitute a direct congressional delegation to tribes of regulatory authority over nonmembers.[117] Under *Montana v. U.S.*, tribes need to invoke inherent authority as a basis for their regulatory authority only if Congress has not previously delegated such authority to tribes by treaty or statute.[118] This rule derives from Congress's plenary authority in Indian matters under the Indian Commerce Clause and congressional treaty powers.[119] The Supreme Court has consistently recognized that *Montana v. U.S.*'s general proscription against tribal civil jurisdiction over non-Indians applies only in the absence of express delegation of such authority to the tribe.[120]

In the Preamble to its final regulations governing TAS application procedures, EPA responded to comments regarding whether or not Congress intended section 518 to be a delegation of tribal regulatory authority over nonmembers.[121] EPA determined that the legislative history of section 518 was not clear on this question and thus interpreted section 518 as recognizing tribal regulatory authority over nonmembers to the extent allowed by tribal inherent authority.[122] In other words, EPA took the position that in section 518 Congress had not directly delegated CWA regulatory authority to tribes. The Ninth Circuit summarily agreed with EPA that the agency's resolution of this issue was entitled to deference under *Chevron*.[123] Without analysis, the court simply concluded that this choice "may well be viewed in a deferential light because the statute's language and legislative history were not entirely clear" as to the proper standard for evaluating TAS applications.[124]

However, *Chevron* deference is typically reserved for resolution of matters for which substantial agency expertise renders the court comparatively disadvantaged in assessing the merits of the issue.[125] The interpretation of whether a particular statute constitutes a grant of tribal authority is a question of federal Indian law.[126] As such, this determination is not dependent on EPA's environmental expertise, nor on any need to fill a gap in a statute.[127] While such a determination involves interpreting language of a statute largely delegated to EPA's administration, the standards under which congressional grants of jurisdictional authority to tribes are assessed implicate fundamental principles of Indian law.[128] The federal judiciary thus enjoys a relative advantage over the EPA in resolving such questions.[129] EPA is no

better equipped to apply principles of Indian law to the issue of delegation than it is to discern the scope of inherent authority. Having correctly recognized the necessity for de novo review of the scope of inherent authority, the Ninth Circuit should have subjected EPA's rejection of direct delegation in section 518 to similar scrutiny.

2. A Proper *Chevron* Analysis and a Contrary Result

Without discussion, the Ninth Circuit agreed with EPA's determination that the statutory language and legislative history of section 518 are unclear as to the standard under which TAS status should be determined.[130] The court then apparently concluded that "step one" of *Chevron* had been met.[131] Citing *Chevron*, the court deferred to EPA's choice of inherent tribal authority "as the standard intended by Congress."[132] However, the court did not itself analyze either the language or history of section 518, nor did the court assess the reasonableness of the agency's interpretation, as a full *Chevron* analysis requires.[133]

Such analysis may well have led the Ninth Circuit to conclude that the language of section 518 and its legislative history are not ambiguous and that the section does in fact constitute a direct delegation of CWA regulatory authority to qualified tribes. So viewed, section 518 should preempt the need to assess each applicant tribe's situation in light of *Montana v. U.S.*'s second exception.[134] This result would substantiate the legal basis for tribal assertion of regulatory jurisdiction under the CWA, decrease the administrative burden of a case-by-case assessment of tribal authority, and avert the potential pitfalls of the uncertain inherent authority analysis.

As EPA has admitted, the argument that section 518 provides direct authorization of tribal regulatory authority finds support in both the legislative history of the CWA and in dicta from the Supreme Court.[135] Specifically, in the Congressional Record, a House committee staff memorandum states that "Indian tribes have the right to regulate lands and other natural resources within the reservation, including non-Indian owned fee lands or resources."[136] Similarly, commentary on the floor of the Senate arguably evinces a legislative intent to grant tribal regulatory jurisdiction over all reservation waters regardless of ownership.[137] Finally, Justice White, writing for the court in *Brendale*, observed that section 518(e) represents an example of express delegation of regulatory power.[138]

Appeal to legislative history and prior judicial interpretation is unnecessary, however, given the plain meaning of section 518 and the corresponding definition section.[139] Section 518(e) lists three conditions that a tribe must satisfy in order for EPA to treat a tribe "as a State" for CWA purposes:[140]

> (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
>
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and

> (3) the Indian tribe is reasonably expected to be capable . . . of carrying out the functions to be exercised . . . .[141]

The plain meaning of the last clause of subsection (2) indicates that tribes may seek regulatory jurisdiction over water resources that are physically located within the borders of an Indian reservation, regardless of ownership.[142] Accordingly, EPA has interpreted this clause as not only modifying the previous three types of water resources but also as establishing a fourth category over which tribes may seek regulatory jurisdiction.[143]

This interpretation relies in part on the definition of "reservation" included in section 518(h): "'Federal Indian reservation' means 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."[144] Thus, the CWA definition explicitly includes nontrust lands issued under patent and rights-of-way within the definition of "reservation." As such, the plain meaning of section 518 is that tribes may seek regulatory jurisdiction for CWA purposes over water resources located on or running through land that is within the borders of a reservation, regardless of the ownership status of the land adjacent to or under that water.[145]

As written, therefore, section 518 clearly contemplates that tribal regulatory authority under the CWA exceeds that available to tribes under *Montana v. U.S.*'s inherent authority standard. *Strate* demonstrates that the inherent authority of tribes to regulate nonmember conduct does not generally extend to federal or state right-of-ways running across reservation land.[146] By analogy, navigable-in-fact waterways, the beds of which are owned by states under the equal footing doctrine, should be exempt from tribal assertions of regulatory authority. This result, however, would conflict with the stated congressional intent of section 518 that tribes should have the "primary authority to set water quality standards" within Indian reservations.[147] Thus, tribal authority under section 518 extends over areas traditionally not included within the scope of inherent authority, because all land and water resources within reservation boundaries, regardless of ownership or right-of-way status, fall within the scope of the authority granted through the Act's definition of "reservation."

The regulatory interplay between water quality standards and other CWA programs indicates that the most logical interpretation of section 518 is to view it as a direct delegation of regulatory authority over reservation water resources. As noted by the district court in *Montana v. EPA*:

> This interpretation of sections 518(e) and (h)(1) comports with common-sense, for it seems highly unlikely that Congress contemplated granting to tribes the authority to set water quality standards for only those segments of streams traversing or appurtenant to Indian lands, while at the same time state water quality standards would remain in effect on the reservation for those same streams where the stream segments traverse or bound non-Indian land.[148]

Such a result is clearly incongruous with both the comprehensive approach of the CWA[149] and EPA's stated preference for avoiding "checkerboard" jurisdiction.[150]

Thus, a complete *Chevron* analysis of section 518 indicates that the statute is not ambiguous, neither on its face nor when viewed in light of the legislative history, and that therefore deference to EPA's contrary interpretation of the meaning of section 518 is not warranted. Rather, the plain meaning of the statute, when read in the context of the definitions provided by Congress, indicates a clear congressional intent to delegate regulatory jurisdiction under the CWA to qualified tribes. The Ninth Circuit's opinion in *Montana v. EPA* reaches the same result as a matter of fact, insofar as it recognizes tribal regulatory jurisdiction under the CWA. However, in misapplying *Chevron*, the result of the Ninth Circuit's decision as a matter of law is to undermine the status of section 518 as a direct delegation of tribal authority.

V. CONCLUSION

From the perspective of tribes seeking regulatory authority under CWA section 518, the Ninth Circuit in *Montana v. EPA* strengthened the health and welfare prong of *Montana v. U.S.*'s direct effect test. The court avoided an interpretation of *Strate v. A-1 Contractors* that would obliterate the second *Montana v. U.S.* exception altogether. Instead, it characterized *Strate* as creating a "nexus" requirement that must be met "in order for the second *Montana v. U.S.* exception to apply."[151] While the court did not offer analysis explaining what kind of a relationship between the regulated activity and tribal self-governance would suffice to meet this nexus test, it clearly indicated that threats to water resources met this standard.[152] This pronouncement, coupled with EPA's generalized findings that "activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare,"[153] should suffice to ensure that subsequent tribal applications under section 518 meet little or no serious challenge regarding whether *Montana v. U.S.*'s direct effects test will apply to the jurisdictional question presented by such application.

This result clears the significant barrier to the assertion of uniform tribal authority under the CWA. By affirming EPA's regulations under section 518, the Ninth Circuit implicitly affirmed and advanced EPA's policy of promoting reservation-wide environmental standards and eventual tribal administration of reservation-based environmental resources.[154]

The Ninth Circuit's deferential approach, however, effectively rejected an opportunity to establish more securely the legal basis for tribal assertion of regulatory jurisdiction under the CWA. The Ninth Circuit accepted without analysis EPA's determination that section 518 does not directly grant tribes regulatory authority under the CWA. Coupled with the continued trend of Supreme Court Indian jurisprudence towards limiting the scope of tribal inherent sovereignty,[155] this leaves the prospects for advancing tribal environmental regulatory authority largely in the hands of EPA. Should EPA choose to replace its current Indian policies with an approach less favorable to the assertion of tribal authority, tribes may have little recourse under the law for sustaining their claims to self-determination within the context of environmental resource management. The assertion of tribal environmental regulatory authority has thus far succeeded only with the strong backing of EPA. Should tribes lose this invaluable partner in their struggle for equal footing under the environmental regulatory statute, their prospects for securing full authority over their water, land and future sustainability as independent nations may drown in the muddy waters of a jurisdictional quagmire.

[1] Flathead River Honoring Attracts 1,000 Curious Students, Char-Koosta News, May 29, 1998, at 1, available in 1998 WL 11408153.

[2] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1994 & Supp. III 1997).

[3] *Montana v. Environmental Protection Agency*, 946 F. Supp. 945, 947 (D. Mont. 1996), *aff'd* 137 F.3d 1135 (9th Cir.), *cert. denied* 119 S. Ct. 275 (1998).

[4] 137 F.3d at 1138.

[5] Raymond Cross, When *Brendale* Met *Chevron*: The Role of Federal Courts in the Construction of an Indian Environmental Law, 1 Greater N. Cent. Nat. Resources J. 1, 22 (1996).

[6] *Id.*; 137 F.3d at 1138.

[7] Ken Olsen & Dan Hansen, Cooperation Key to Latest Lake Decision; Montana, Tribes Still Dealing with Repercussions of 1982 ruling on Flathead Lake Ownership, Spokesman-Rev., Jul. 30, 1998, at A1.

[8] *Id.* At least in the Flathead Lake context, tribal entities may have more time, resources, and political motivation to invest in monitoring water quality issues than local county and state officials. *Id.*

[9] Water Quality Act of 1987, Pub. L. No. 100-4, § 506, 101 Stat. 76 (codified as amended at 33 U.S.C. § 1377(e) (1994)).

[10] *Id.*; *see* Judith Royster, *Oil and Water in the Indian Country*, 37 Nat. Resources J. 457, 467, 471 (1997).

[11] A 1994 survey found that of 77 tribes recognized under one or another program, 76 had received TAS under the pollution control grant program of section 106 of the CWA, while only five received TAS under section 303, the water quality standards program. Royster, *supra* note 10, at 467 & nn. 53-54. By August of 1996, the number of tribes granted TAS status for at least one of the CWA programs had grown to 103. By March 1998, this number had grown to 146 tribes. However, only 21 of those tribes has been delegated authority under section 303. *See* American Indian Environmental Office, United States Environmental Protection Agency, Treatment of Tribes in the Same Manner as States/Program Approval Matrix (last modified Mar. 1998) http://www.epa.gov/indian/matrix.htm.

[12] *See generally* Richard A Monette, *Treating Tribes as States Under Federal Statutes in the Environmental Arena: Where Laws of Nature and Natural Law Collide*, 21 Vt. L. Rev. 111 (1996); Daniel I.S.J. Rey-Bear, Comment, *The Flathead Water Quality Standards Dispute; Legal Bases for Tribal Regulatory Authority Over Non-Indian Reservation Lands*, 20 Am. Indian. L. Rev. 151 (1995-96). For a survey of tribal civil jurisdictional issues under the CWA, *see generally* Robin Kundis Craig, *Borders and*

Discharges: Regulation of Tribal Activities Under the Clean Water Act in States with NPDES Program Authority, 16 UCLA J. Envtl. L. & Pol'y 1 (1998).

[13] 137 F.3d 1135, 1140 (9th Cir.), *cert. denied* 119 S. Ct. 275 (1998).

[14] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1994 & Supp. III 1997).

[15] *Id.* § 1313 (1994).

[16] *Id.* § 1313(c)(2)(A). Somewhat circularly, EPA defines designated uses as "those uses specified in water quality standards for each water body or segment whether or not they are being attained." 40 C.F.R. § 131.3(f) (1998).

[17] 33 U.S.C. § 1313(c)(2)(A) (1994). Criteria must be based on a "sound scientific rationale," must protect the most sensitive designated use, and may be either numerical or narrative in form. 40 C.F.R. § 131.11 (1998).

[18] 33 U.S.C. § 1313(d) (1994). The antidegradation requirement is designed to protect both existing instream uses and maintain water quality levels in those water bodies where existing water quality exceeds the level necessary to support fish, wildlife, and recreation. 40 C.F.R. § 131.12 (1998).

[19] Effluent limitations are primarily technology-based standards that set numerical limits on the amount, rate, and concentration of individual pollutants that may be discharged from a point source under an NPDES permit. *See infra*note 20; 33 U.S.C. § 1362 (1994) (effluent limitation defined as "any restriction . . . on quantities, rates, concentrations of chemical, physical, biological, and other constituents which are discharged from point sources"); *id.* § 1311(b)(1)(A)(effluent limitations to be based on "best practicable control technology currently available"); *id.* § 1311(b)(2)(A) (effluent limitations for toxic pollutants to be based on "best available technology economically achievable").

[20] 33 U.S.C. § 1342(a) (1994). Section 402 of the CWA establishes the NPDES permit system that allows the Administrator of EPA to issue permits for discharges otherwise made illegal by the CWA. Such permits must contain conditions that assure compliance with various provisions of the Act, including those relating to effluent limitations in section 301. Water quality standards are not specifically referenced in section 402's list of conditioned requirements. However, as the Supreme Court has made clear, while section 301 is commonly referred to as requiring effluent limitations for point sources, it also mandates the promulgation of "any more stringent limitation . . . required to implement any applicable water quality standard established pursuant to this chapter." *Id.* § 1311(b)(1)(C); *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 713 (1994) (noting that the legislative history of the 1977 amendments indicates that "[s]ection 303 is always included by reference where section 301 is listed" (citation omitted)).

[21] 33 U.S.C. § 1362(14) (1994).

[22] *Id.* § 1342(a).

[23] *Id.* § 1441(a).

[24] *Id.* § 1341(a)(1). Section 401 certification is required from the state within whose jurisdiction the permitted activity or discharge will originate. *Id.*

[25] *Id.* § 1341. While most commentary on the conflicts between upstream and downstream water quality standards have focused on the effect of such standards on the NPDES permitting program, it is important to note that section 401 certification is required for any permit or license issued by any federal entity. *Id.* § 1342(a)(1); *see also Jefferson County*, 511 U.S. at 709 (certification under section 401 required for hydroelectric project licensed by the Federal Energy Regulatory Commission).

[26] 33 U.S.C. § 1341(a)(2) (1994).

[27] *Id.*; *see also Arkansas v. Oklahoma*, 503 U.S. 91, 104 (1992) (stating that EPA could require a sewage treatment plant's discharges to comply with downstream water quality standards); *Albuquerque v. Browner*, 97 F.3d 415, 423-24 (10th Cir. 1996) (upholding both EPA's approval of tribal water quality standards that were more stringent than those of the tribe's upstream neighbors and EPA's revision of an upstream NPDES permit to reflect the tribe's more stringent standards).

[28] Water Quality Act of 1987, Pub. L. No. 100-4, § 506, 101 Stat. 76 (codified as amended at 33 U.S.C. § 1377 (1994)).

[29] 33 U.S.C. § 1377(e) (1994). Specifically, tribes may be granted TAS status for the following CWA programs: grants for pollution research and pollution control programs, development of water quality standards and implementation plans, various recording and reporting requirements, enforcement, clean lakes, nonpoint source management programs, section 401 certification, NPDES permitting, and the section 404 wetlands program. *Id.*

[30] *Id.* § 1377(e), (h)(2); *see also* EPA, Office of Water, American Indian Environmental Office, "Treatment-as-a-State" Regulation (visited Dec. 13, 1998) <http://www.epa.gov/indian/treatst.htm>; Indian Tribes: Eligibility for Program Authorization, 59 Fed. Reg. 64,339, 64,339 (Dec. 14, 1994).

[31] 59 Fed. Reg. at 64,340.

[32] *Id.*; *see also* Royser, *supra* note 10, at 467. However, tribes do have authority to issue section 401 certifications once they are authorized to set water quality standards. 40 C.F.R. §§ 124.51(c), 131.4(c) (1998).

[33] Craig, *supra* note 12, at 17.

[34] *Montana v. United States*, 450 U.S. 544, 564 (1981).

[35] Rey-Bear, *supra* note 12, at 154; *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 87 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

[36] Craig, *supra* note 12, at 17; *see also Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) at 604-05.

[37] *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 17.

[38] *See Montana v. United States*, 450 U.S. at 563-64 and cases cited therein.

[39] Rey-Bear, *supra* note 12, at 156-58 (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978)).

[40] Preamble to the Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64, 877 (Dec. 12, 1991) (codified in 40 C.F.R. pt. 131); Craig, *supra* note 12, at 20.

[41] *See* American Indian Lawyer Training Program, Indian Tribes as Sovereign Governments 89 (1988) [hereinafter AILTP]; American Indian Law Deskbook 18-22 (Joseph Mazurek ed., 2d ed. 1998).

[42] Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.).

[43] *Id.* § 5, 24 Stat. at 389-90.

[44] *Id.*

[45] *See* Act of June 18, 1934, Ch. 576, §§ 1-4, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-463 (1994)).

[46] American Indian Law Deskbook, *supra* note 41, at 21; AILTP, *supra* note 41, at 9.

[47] AILTP, *supra* note 41, at 9.

[48] *See supra* notes 38-39 and accompanying text.

[49] 450 U.S. 544 (1981).

[50] *Id.* at 547.

[51] *Id.* at 561.

[52] American Indian Law Deskbook, *supra* note 41, at 108.

[53] *See infra* notes 118-20 and accompanying text.

[54] 450 U.S. at 563.

[55] *Id.* at 564-65.

[56] *Id.* at 565.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 556.

[60] *Id.*

[61] *Id.*

[62] Visiting Professor Robert Miller, Address to the Federal Indian Law Class at Northwestern School of Law of Lewis & Clark College (Nov. 10, 1998).

[63] 492 U.S. 408 (1989); *see* Preamble to the Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,876, 64,877 (Dec. 12, 1991); *Montana v. Environmental Protection Agency* (*Montana v. EPA*), 137 F.3d 1136, 1140 (9th Cir.), *cert. denied*, 119 S. Ct. 275 (1998) (characterizing *Montana*'s legal argument).

[64] *Brendale*, 492 U.S. at 414 (White, J., writing for the Court).

[65] *Id.*; *id.* at 433 (Stevens, J., concurring and deciding). Justice Stevens's opinion was the deciding one because it added two votes to Justice White's four votes, holding that the tribe had lost the ability to regulate land use by nonmembers in open areas. Justice Stevens, however, agreed with the dissent that the Tribe retained the right to regulate closed areas of the reservation, making five votes for retained authority over some land owned by nonmembers. *Id.*

[66] *See id.* at 428-31 (White, J., writing for the Court) (arguing that the extent of a tribe's jurisdiction depends upon the circumstances); *id.* at 449-50 (Blackmun, J., concurring in part and dissenting in part) (arguing that "*Montana* must be read to recognize the inherent authority of tribes to exercise civil jurisdiction over non-Indian activities on tribal reservations where those activities, as they do in the case of land use, implicate a significant tribal interest").

[67] *See id.* at 414-33 (White, J., writing for the Court); *id.* at 433-48 (Stevens, J., concurring and deciding).

[68] 56 Fed. Reg. at 64,877 (citing Stevens, J. (*see infra* note 69 and accompanying text) and White, J. (*see infra* note 70 and accompanying text)).

[69] *Brendale*, 492 U.S. at 443 (Stevens, J., writing for the court) (quoting the district court opinion at 617 F. Supp. 735, 744 (E.D. Wash. 1985)).

[70] *Id.* at 432 (White, J., writing for the court) (quoting the district court opinion).

[71] 520 U.S. 438 (1997).

[72] *Id.* at 442.

[73] *Id.* at 457-59.

[74] *Id.* at 458.

[75] *Id.* at 459 (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)).

[76] *Id.*

[77] *See* discussion *infra* notes 108-14 and accompanying text.

[78] *Montana v. Environmental Protection Agency*, 941 F. Supp. 945, 947 (D. Mont. 1996), *aff'd*, 137 F.3d 1135 (9th Cir.), *cert. denied*, 119 S. Ct. 275 (1998).

[79] 137 F.3d at 1137.

[80] *Id.*

[81] *Id.* at 1140.

[82] *Id.* at 1141.

[83] *Id.* at 1140.

[84] *Id.* at 1141.

[85] *See* discussion infra Part IV.A.

[86] *See* discussion infra Part IV.B.

[87] Preamble to the Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64, 879 (Dec. 12, 1991).

[88] 40 C.F.R.§ 131.8(b)(3) (1998).

[89] *Id.*

[90] 56 Fed. Reg. at 64,879.

[91] *Id.*

[92] *Id.*

[93] 137 F.3d 1135 (9th Cir.), *cert. denied*, 119 S. Ct. 275 (1998).

[94] *Id.* at 1141. The court viewed EPA's determination of the scope of the Tribes' inherent authority as a question of law to which EPA was entitled no deference because it "has nothing to do with its own expertise or with any need to fill interstitial gaps in the statute." *Id.* at 1140. Here, the court apparently agreed with a portion of Montana's argument that EPA should be afforded no deference on questions of federal Indian law, as those issues are beyond the scope of the agency's demonstrated expertise in the environmental field. Cross, supra note 5, at 27 (citing the State of Montana's brief in support of summary judgment before

the district court, Brief for the State of Montana at 7-10, *Montana v. Environmental Protection Agency*, 941 F. Supp. 945 (D. Mont. 1996) (No. CV-95-56-M-CCL)). Accordingly, the Ninth Circuit subjected the agency's interpretation of inherent authority to de novo review.

[95] *Montana v. EPA*, 137 F.3d at 1141 (citing *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 431 (White, J.), 447 (Stevens, J.) (1989)).

[96] *Id.* (citing *Strate v. A-1 Contractors*, 520 U.S. 438 (1997)).

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

[98] *Id.* (citing *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996)).

[99] *Albuquerque*, 97 F.3d at 423.

[100] *Montana v. EPA*, 137 F.3d at 1140-41.

[101] *Id.*

[102] Arguably, *Strate* is entirely inapplicable to the doctrine of inherent sovereignty as applied in the context of civil regulatory, as opposed to civil adjudicative, jurisdiction over nonmembers. This distinction is clearly expressed in *Strate*, whose holding, strictly stated, is limited to the scope of a tribe's adjudicative jurisdiction over nonmembers. *See Strate*, 520 U.S. at 442.

[103] *Montana v. EPA*, 137 F.3d at 1140.

[104] *See* supra note 102.

[105] 137 F.3d at 1140.

[106] *Id.*

[107] *Id.* at 1141.

[108] *Id.*

[109] *Id.*

[110] *Strate*, 520 U.S. at 453 (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)).

[111] *Montana v. EPA*, 137 F.3d at 1140.

[112] *See* supra notes 75-76 and accompanying text.

[113] 137 F.3d at 1140.

[114] *Strate*, 520 U.S. at 458.

[115] *Montana v. United States*, 450 U.S. at 565.

[116] 467 U.S. 837 (1984). *Chevron* established the standard and scope of judicial review of an agency's interpretations of the statutes it administers. *Chevron* sets up a two-step analysis. In step one, a reviewing court determines if Congress has already expressed a clear intent regarding the issue in controversy. *Id.* at 842. In determining congressional intent, a court looks first to the plain meaning of the statutory language. *Id.* at 859. If the plain language does not clearly resolve the issue, legislative history may be consulted to determine congressional intent. *Id.* at 862. If a clear intent can be determined, "the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. However, if the statutory language and legislative history are "silent or ambiguous" the court may move on to step two, an analysis of whether the agency's interpretation is "based on a permissible construction of the statute." *Id.* at 843.

[117] Preamble to the Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,880 (Dec. 12, 1991).

[118] *Montana v. United States*, 450 U.S. at 563.

[119] American Indian Law Deskbook, supra note 41, at 106 ("Congress possesses largely unfettered authority to establish the range of state, federal and tribal authority in Indian country."); *id.* at 107-09 nn.4-24 (citing, among other authorities, the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973) (federal power in Indian matters is also derived from treaty power under U.S. Const. art. II, § 2, cl. 2).

[120] *See Strate v. A-1 Contractors*, 520 U.S. 438, 449 (1997) ("As the Court made plain in *Montana*, the general rule and exceptions there announced govern only in the absence of a delegation of tribal authority by treaty or statute."); *id.*at 446 ("*Montana* thus described a general rule that absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land.") (emphasis added); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 428 (1989) (White, J.) (Analyzing the inapplicability of *Montana v. U.S.*'s second exception only after noting that "[t]here is no contention here that Congress has expressly delegated to the [tribe] the power to zone fee lands of nonmembers"); *Montana v. United States*, 450 U.S. at 564 (finding that civil jurisdiction over nonmembers is "inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation") (emphasis added).

[121] 56 Fed. Reg. at 64,879.

[122] *Id.*

[123] *Montana v. EPA*, 137 F.3d at 1140 (citing *Chevron*, 467 U.S. at 843-44).

[124] *Id.*

[125] *See* Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2091 (1990) (arguing that *Chevron* is "inapplicable" when the agency is "at a clear comparative disadvantage to courts"); *id.* at 2096 (noting that "[d]eference is due when a matter within the agency's competence is at issue; courts should review agency decisions independently when it is not").

[126] Rey-Bear, supra note 12, at 179-84 (describing the development of the congressional delegation doctrine in the federal Indian law context).

[127] *Cf. Montana v. EPA*, 137 F.3d at 1140 (recognizing these same qualities as justifying review of EPA's delineation of the scope of inherent authority).

[128] *See* Cross, supra note 5, at 32-35.

[129] *Id.* at 57 & nn. 80-81.

[130] *Montana v. EPA*, 137 F.3d at 1140.

[131] *See* supra note 116.

[132] 137 F.3d at 1140.

[133] *See Chevron*, 467 U.S. at 842-43.

[134] *See* discussion supra part III.B.

[135] *See* Preamble to the Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,879-80 (Dec. 12, 1991).

[136] 133 Cong. Rec. H184-85 (daily ed. Jan. 8, 1987) (memorandum from Ducheneauz/Broken Rope to Morris K. Udall, Chairman, Committee on Interior and Insular Affairs); 133 Cong. Rec. S753-54 (daily ed. Jan. 14, 1987) (same); *see also* 56 Fed. Reg. at 64,879.

[137] 56 Fed. Reg. at 64,880. Here, EPA notes the statement of Senator Burdick that "[t]he intent of the conferees was to assure that Indian tribes would be able to exercise the same regulatory jurisdiction over water quality matters with regard to waters within Indian jurisdiction that States have been exercising over their water." *Id.* However, EPA declined to give this comment significant weight. Interpreting Senator Burdick's comments, EPA drew a fine distinction in terminology between the expression "waters within Indian jurisdiction" and "waters within the reservation," claiming that the Senator's comment does not evince an intent "that all waters with the reservation are in fact 'within Indian jurisdiction.'" *Id.* This distinction does not give proper consideration to the context of Senator Burdick's statement. Senator Burdick was, as EPA notes, responding to a question from Senator Inouye that characterized section 518 as conferring on tribes the same regulatory authority over reservation water that was enjoyed by states "for regulation of water outside Indian reservations." *Id.* Senator Inouye clearly understood section 518 as conferring jurisdiction over water within the borders of the reservation while leaving the states with jurisdiction over water located outside reservation

borders. When asked, Senator Burdick first affirmed this understanding as correct before proceeding with the statement cited above. Nevertheless, EPA characterized this exchange as indeterminative of congressional intent. EPA contends instead that had Congress "intended to make a change as important as an expansion of Indian authority to regulate nonmembers, it probably would have done so through statutory language and discussed the change in the committee reports." *Id.* Absent explicit language referencing tribal regulatory authority over nonmembers, EPA characterizes the legislative history of section 518 as "ambiguous and inconclusive" on the question of delegation. *Id.*

[138] *Id.* at 64,880 (citing *Brendale*, 492 U.S. at 428 (1989) (White, J.)).

[139] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 859-62 (1984) (turning to legislative history only after a thorough analysis of the statutory language determined that the language was not dispositive of congressional intent); *see also Sierra Club v. United States Forest Serv.*, 93 F.3d 610, 612 (9th Cir. 1996) ("Only if the language is ambiguous do we consider statutory history . . . .").

[140] 33 U.S.C. § 1377(e) (1994).

[141] *Id.*

[142] A contrary interpretation of this clause would render the word "otherwise" meaningless, as this word serves to distinguish the last clause from the preceding three. The distinguishing factor is that the prior three clauses describe various ways in which water resources can be owned that give a tribe or individual tribal members a predominant ownership interest in the resource. The word "otherwise" as used in subsection (e) thus serves to distinguish a fourth class of water resource that is not defined by the character or means of ownership, but rather by geographic location within the borders of a reservation.

[143] 56 Fed. Reg. at 64,881.

[144] 33 U.S.C. § 1377(h)(1) (1994). This language is identical to that used in the definition of "Indian country" in 18 U.S.C. § 1151 (1994) and has been interpreted by Supreme Court dicta to include land owned by non-Indians. *See* infra note 145.

[145] This interpretation of the definition of "federal Indian reservation" as including land owned in fee by nonmembers finds support in dicta from *Montana v. United States*. In assessing whether the Crow Tribe would regulate hunting and fishing on land owned in fee by nonmembers, the Court observed that "fee-patented lands" were expressly excluded from the scope of the federal trespass statute. Justice Stewart reasoned that had Congress intended to include fee lands within the scope of that statute, it could have done so by using the definition of "Indian country" included in 18 U.S.C. § 1151 (1994). *See Montana v. United States*, 450 U.S. at 561-62. The definition of Indian country to which Justice Stewart refers to is identical to the CWA definition of "Indian reservation." *Compare* 18 U.S.C. § 1151 (1994), *with* 33 U.S.C. § 1377(h)(1) (1994). Therefore, Justice Stewart's conclusion that this language covers non-Indian fee land necessarily means that section 518 also covers such land.

[146] *Strate v. A-1 Contractors*, 520 U.S. at 442 (holding that a tribal court's civil jurisdiction does not extend to conduct that takes place on a public highway running across reservation land when that highway is maintained by the state under a federally granted right-of-way).

[147] 133 Cong. Rec. S1103 (daily ed. Jan. 21, 1987) (statement of Sen. Burdick).

[148] *Montana v. Environmental Protection Agency*, 941 F. Supp. 945, 952 (D. Mont. 1996), *aff'd*, 137 F.3d 1135 (9th Cir.), *cert. denied*, 119 S. Ct. 275 (1998).

[149] 33 U.S.C. §§ 1251-1252 (1994) (establishing national goals and policies and directing EPA to establish comprehensive programs for controlling pollution and improving water quality). Preamble to the Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,878 (Dec. 12, 1991).

[150] 56 Fed. Reg. at 64, 878. While these considerations provide cogent support for the delegation argument, it is erroneous to assume that a denial of tribal authority to set water quality standards for water adjacent to or running through fee land would result in a checkerboard of varying water quality standards throughout the reservation. Given the interplay between section 401 and section 303, even if tribes were not given authority to set water quality standards for stream segments adjacent to trust lands, federally permitted discharges into such waters would still be subject to the water quality standards of downstream segments. *See Arkansas v. Oklahoma*, 503 U.S. 91 (1992). If any of those downstream segments run through trust or tribal lands, the upstream discharge, although originating on fee land, would be subject to section 401 certification from the tribe if discharged pursuant to a federally issued NPDES permit. Conversely, discharges originating on tribal or trust land would be subject to state or federal standards for those downstream segments running through or adjacent to fee land. The end result is that unless a discharge from fee land is located at the border of the reservation such that there are no downstream segments adjacent to trust or tribal lands, that discharge will most likely be subject to tribal water quality standards, regardless of who has the authority to set the standards for the segment into which the discharge directly flows. Nevertheless, EPA has chosen to avoid a fragmented approach, preferring instead to assure uniform water quality standards throughout reservation waters by delegating to tribes the authority to set reservation-wide standards. *See*56 Fed. Reg. at 64,876.

[151] *Montana v. EPA*, 137 F.3d at 1140.

[152] *Id.* at 1141 (quoting *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981) for the proposition that nonmember conduct involving tribal water rights fall under the class of conduct that affect the health and welfare of the tribe).

[153] 56 Fed. Reg. at 64,878.

[154] Cross, supra note 5, at 9.

[155] Rey-Bear, supra note 12, at 154.