



# **TRIBAL WATER QUALITY STANDARDS UNDER THE CLEAN WATER ACT**

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# What is TAS?

- Congress has amended several federal environmental laws to specifically give EPA the authority to treat tribes in the same manner as the statute treats states
  - Clean Water Act (CWA), the Safe Drinking Water Act (SDWA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Clean Air Act (CAA)
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# Indian Law Rule: Limited State Authority in Indian country

- EPA generally provides oversight and funding for state programs authorized under federal environmental laws.
  - In Indian country, the state laws generally are not applicable for purposes of compliance with federal laws.
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## EPA approval of State programs

Unless EPA has explicitly approved a state program as applying in Indian country in prior EPA approvals, State regulations are not effective within the boundaries of that Indian country land for purposes of complying with federal law.

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# The result in Indian country?

- State programs approved by EPA are not in effect unless explicitly approved.
  - EPA has the responsibility for implementing federal environmental programs.
  - There is often a gap in regulatory oversight and tools – No detailed state and local rules, state enforcement, state inspectors.
  - Tribes have limited ability to implement federal laws with nonmembers on the reservation.
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# How to fill the regulatory gap?

- Direct implementation by EPA
  - Develop federal rules to fill regulatory gap
  - Approve Tribal TAS and programs
  - Build capacity of Tribes to assist EPA
  - Develop cooperative approaches with Tribes, States, and locals
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# Section 518(e), 1987 Amendments to the Clean Water Act

Eligibility criteria:

- 1. The tribe is federally recognized.*
  - 2. The tribe has a governing body carrying out substantial duties and powers.*
  - 3. The functions to be exercised pertain to protection of water resources within reservations.*
  - 4. The tribe is reasonably capable of carrying out an effective program.*
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## Water Quality Standards Regulation, 40 CFR Part 131, amended in 1991 to add TAS process

- Tribes may adopt water quality standards under the Clean Water Act by taking two steps:
    - Apply for TAS and receive EPA approval
    - Adopt and submit water quality standards in the same manner as a state, and receive EPA approval.
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# Water Quality Standards Regulation

- TAS procedures at 40 CFR 131.8 specify:
    - Information the tribe must submit.
    - EPA's procedures for responding to TAS submissions.
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# EPA's Procedures to Review TAS Applications for Standards

- Step 1 – Tribe Submits Application
    - Pre-application discussions
    - Tribe submits application to EPA Region.
    - EPA evaluates completeness of the application.
    - EPA holds conference call with the tribe to identify any gaps in the application or issues.
    - Tribe may submit supplemental information
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# EPA's Procedures to Review TAS Applications for Standards (cont'd)

- Step 2 – Comment Period
    - EPA notifies appropriate governmental entities, starting a 30-day period for comment on the Tribe's application.
    - Public Notice of Comment Opportunity also published in local newspapers (comments to be submitted through appropriate governmental entities)
  - Step 3 – EPA Review
    - EPA team reviews the application and the comments.
    - EPA may request more information from the tribe.
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## EPA's Procedures to Review TAS Applications for Standards (cont'd)

- Step 4 – Proposed Findings of Fact (if needed)
    - If the application includes an assertion of inherent authority over non-member activities, EPA prepares Proposed Findings of Fact regarding tribal authority over non-members that form the basis for EPA's review of the tribe's inherent authority under the Montana test.
    - EPA solicits comments on the Proposed Findings from the tribe, appropriate governmental entities, and the public (with comments to be submitted through appropriate governmental entities)
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## EPA's Procedures to Review TAS Applications for Standards (cont'd)

- Step 5 – Final Decision
    - EPA team reviews application, any proposed Findings of Fact, all comments submitted.
    - Regional Administrator makes final decision.
    - Regional Administrator notifies tribe in writing and transmits appropriate supporting materials.
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# 1991 TAS Regulation Water Quality Standards

- EPA's 1991 rulemaking addressed the question of tribal authority to establish WQS under the CWA.
  - Debate over whether the CWA is a Congressional delegation of authority to eligible tribes for reservation waters
  - EPA adopted a "cautious" approach and required that tribes demonstrate authority on a case-by-case basis.
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# What is the jurisdiction of Tribes?

- Under the *reserved rights doctrine*, tribes retained (“reserved”) rights as prior and continuing sovereign governments.
  - Tribes have authority to protect tribal self-government and to control internal relations.
  - The inherent authority of an Indian tribe to regulate nonmember conduct is limited.
  - Tribal governments also may exercise authority over nonmembers as granted or delegated by Congress.
  - Tribes are subject to the plenary power of Congress.
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# “Indian Country” and the Scope of Section 518

- “Indian country” (18 U.S.C. 1151) includes\*
  - “All land within the limits of any Indian reservation under the jurisdiction of the United States government...”
  - “All dependent Indian communities...”
  - “All Indian allotments...”
- Section 518 applies to
  - Water resources within the borders of the Indian reservation\*\*

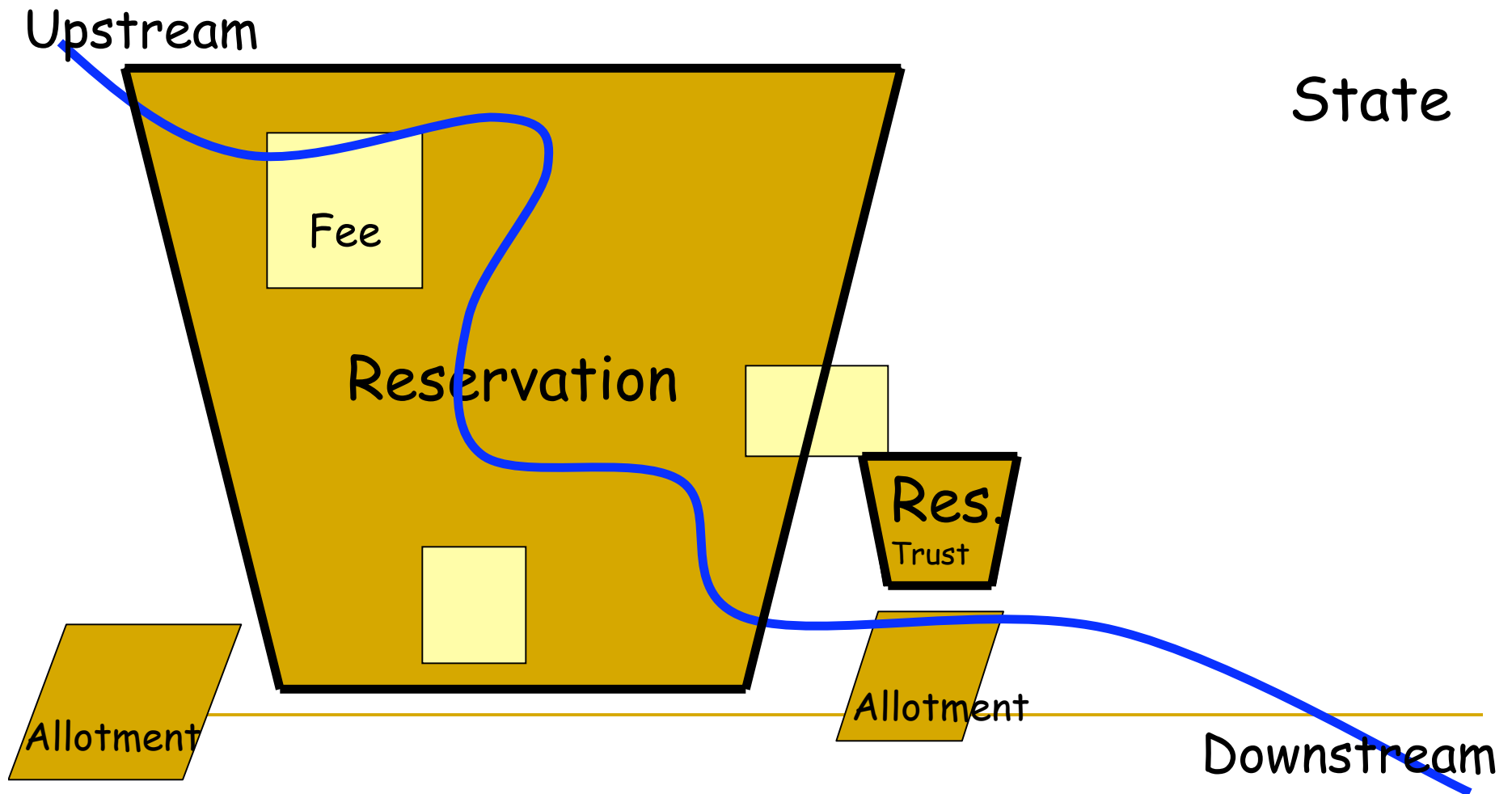
\*Courts have used this definition of "Indian country" for questions of criminal and civil jurisdiction.

\*\*Trust lands formally set apart for the use of tribes are "within a reservation" for purposes of section 518 (e)(2), even if they have not been formally designated as "reservations."

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# Applicability of WQS in Indian Country

(When I follow the WQS... – which apply?)



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# Tribal Inherent Civil Authority

## **Montana v. United States**

450 U.S. 544 (1981)

In general, absent express authorization by federal statute or treaty, a Tribe's inherent power does not reach beyond what is necessary to protect tribal self-government or to control internal relations.

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## Montana v. United States

Tribes generally lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, with two exceptions:

(1) a tribe may retain jurisdiction over nonmembers engaged in consensual relationships, or

(2) a tribe may retain inherent power to exercise civil authority over the conduct of nonmembers on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

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## EPA's Formulation of the Montana Test As Discussed in Preamble to 1991 Rule

- EPA will evaluate tribal assertions of authority over nonmember activities on a case-by-case basis, based on the Montana test.
  - EPA will rely upon an operating rule that evaluates whether the potential impacts of regulated activities on the tribe are “serious and substantial.”
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## EPA's Formulation of the Montana Test

- Activities affecting water quality may have serious and substantial effects on public health and welfare. Pollutants in surface water are quite mobile and that impacts to nonmember lands of a reservation are very likely to impair the tribal lands.
  - Water quality management serves the purpose of protecting public health and safety, which is a core governmental function critical to self-government.
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## EPA Approach and Specific TAS Decisions Upheld in Court -- Examples

- EPA's approval of stringent water quality standards (City of Albuquerque, 10<sup>th</sup> Cir.)
  - EPA's test of tribal authority upheld for the Flathead Reservation (9th Cir.)
  - Asserted state ownership of beds did not preclude finding of tribal authority to set WQS for Mole Lake Reservation (7<sup>th</sup> Cir.)
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## TAS Decisions For Water Quality Standards and sec. 401 Water Quality Certifications

- Puyallup Tribe
  - Confederated Tribes of the Chehalis  
Reservation
  - Tulalip Tribes
  - Spokane Tribe
  - Kalispel Indian Community
  - Port Gamble Indian Community
  - Makah Indian Tribe
  - Lummi Nation
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# TAS Decisions For Water Quality Standards and sec. 401 Water Quality Certifications

## Oregon

- Confederated Tribes of the Warm Springs Reservation
- Confederated Tribes of the Umatilla Indian Reservation

## Idaho

- Coeur d'Alene Tribe
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# Pending TAS Decisions For Water Quality Standards

## Washington

- Swinomish Tribal Community
- Yakama Nation

## Idaho

- Shoshone-Bannock Tribes
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# Tribal Water Quality Standards

- A tribe with TAS must still obtain federal approval of the WQS it submits to EPA before those standards can become effective under the CWA.
  - Upon EPA approval, tribal WQS apply to the reservation waters covered by the TAS decision.
  - Approved WQS do not impose any direct enforceable requirements on any party, unless and until they are incorporated into a permit or used as the basis for some other regulatory decision.
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# Public Participation when Adopting Tribal Water Quality Standards

- Like states, tribes must follow the procedures for developing EPA-approved standards
  - EPA's water quality standards regulation at 40 C.F.R. Part 131, and the public participation regulations at 40 C.F.R. Part 25:
    - make the proposed standards and supporting analyses available to the public prior to a public hearing
    - provide advance notice of public hearings and public comment opportunities
    - submit response to comments along with adopted WQS to EPA for review and approval
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# Is the TAS Process Working?

- Since the 1987 amendments, only 57 tribes have applied; 40 tribes approved for TAS, with 30 tribal water quality standards approved
  - Case-by-case analysis burdensome
  - Recent cases limit tribal inherent authority over nonmembers
  - Each approval subject to challenge
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# ***PUD No. 1 of Pend Oreille***

***County v. EPA*** No.1:04CV022

***(D.D.C) 12/23/04***

- PUD challenged Sec. 401 of the CWA water quality certification for part of Box Canyon Dam relicensing, EPA's use of Washington standards, and TAS and standards approval
  - PUD claims that no 401 cert is required if there is no "discharge of a pollutant" from "meaningfully distinct" waterbodies, citing *South Florida Water Mgt Dist v. Miccosukee*
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## In the Absence of EPA-Approved Tribal Standards. . .

- Point source dischargers still require an NPDES permit (generally from EPA).
  - Regulatory actions within Indian country can proceed on the basis of
    - Technology-based requirements (NPDES)
    - Downstream state WQS met at the downstream or adjacent boundary with Indian country.
    - Cooperative approaches.
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# Tribal Applications for Clean Water Act Programs

- Section 303(c) – Water quality standards
    - 40 tribes found eligible to date
  - Section 303(d) – Assessments and TMDLs
    - No applications to date
  - Section 401(a) – Certifications
    - 40 tribes, same as 303(c) above
  - Section 402 – NPDES permits
    - 1 pending application (Navajo Nation)
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# **Government Accountability**

## **Office Review of TAS**

- Sen. Inhofe, R-Okla, requested that GAO evaluate whether EPA has followed its processes for review and approval of TAS requests by Tribes under the CWA.
  - GAO found that EPA's reviews take too long; generally takes from about 1 year to more than 4 years.
  - GAO thinks EPA should develop a written strategy, including time frames for the review process, with more opacity so the tribal applicants will know the review status.
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# EPA's Draft TAS Strategy

- **Common Expectations** – EPA works with tribes to establish common expectations concerning the TAS process.
  - **Tools for Tribal Applicants** – EPA supplies additional tools to assist applicants in preparing TAS applications and to facilitate timely reviews.
  - **Internal Review Procedures** – EPA establishes improved internal review procedures to facilitate more efficient TAS reviews and continues to promote consistent application of established TAS review criteria.
  - **Open Communications** – EPA works with each tribal applicant to facilitate regular and effective communications regarding the TAS review process.
  - **Reaching Out to Other Governments and the Public** – EPA identifies potential approaches for EPA to reach out to other governmental entities and to the public, if appropriate, to improve understanding of TAS.
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