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Oil and Water in the Indian Country

Judith Royster

JUDITH V. ROYSTER*

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I. INTRODUCTION

Congress first authorized general oil and gas leasing on Indian lands in the 1920s.[1] For more than seven decades, non-Indian oil and gas companies have conducted exploration and production activities on Indian lands,[2] with all of the attendant environmental effects.[3] And yet surprisingly little attention has been paid in Indian country by tribes,[4] by the federal government,[5] or by

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* Associate Professor of Law, University of Tulsa, Tulsa, Oklahoma.

1. Congress amended the general leasing act for Indian lands in 1924 to permit oil and gas leases on reservations set aside by treaty and by congressionally-ratified agreement. 25 U.S.C. § 398 (1924); *see also* British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159, 164 (1936). In 1927, Congress again amended the act to permit oil and gas leases on reservations set aside by executive order. 25 U.S.C. §§ 398a-388e (1927). These leasing statutes were replaced by the Indian Mineral Leasing Act of 1934, 25 U.S.C. § 396a-396g (1938), which has now been superseded by the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (1991). Absent this congressional authorization, Indian lands are not open to mineral development by non-Indians. Trade and Nonintercourse Act, 25 U.S.C. ¶ 177 (1946). On the development of mineral exploitation of Indian lands, *see generally* Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 TULSA L.J. 541, 552-94 (1994).

2. Indian lands contain some three to six percent of the nation's known oil and gas reserves. MARJANE AMBLER, BREAKING THE IRON BONDS: INDIAN CONTROL OF ENERGY DEVELOPMENT 74 (1990) (approximately three percent); A. David Lester, *The Environment from an Indian Perspective*, 12(1) EPA JOURNAL 27, 28 (Jan/Feb. 1986) (six percent of onshore oil and gas). Some 40 reservations have oil and gas deposits, estimated at 4.2 billion barrels of oil and 17.5 trillion cubic feet of gas. AMBLER, *supra* at 74.

3. *See, e.g.*, United States v. Tenneco Oil Co., Complaint, No. CIV-96-0171-C (W.D. Okla. filed Jan. 31, 1996) [hereinafter Tenneco Complaint] (alleging permanent and irreparable pollution of the Sac and Fox Nation's groundwater by oil and gas activities); Lyon v. Amoco Production Co., 923 P.2d 350 (Colo. Ct. App. 1996) (suit by non-Indian landowners within Indian country alleging air, water, and soil contamination by gas wells and drilling operations on Ute tribal lands).

4. In the early 1970s, some tribes placed a moratorium on mineral development in order to assert greater tribal control over the mineral estate. One factor in this decision for some tribes was the lack of environmental protection measures for tribal lands and resources. AMBLER, *supra* note 2, at 72. But Indian tribes, essentially without bargaining power prior to the Indian Mineral Development Act of 1982, lacked any real opportunity to insist on environmental controls of oil and gas activities. *See* AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT: TASK FORCE SEVEN: RESERVATION AND RESOURCE DEVELOPMENT AND PROTECTION 49 (1976).

5. A prime example of federal inattention involves the contamination of the groundwater of the Sac and Fox Nation. *See infra* text accompanying notes 114-28. In 1977, not long after the contamination had been documented, the Nation requested the BIA to take the lead in filing a lawsuit. *Federal Government's Relationship with American Indians, Hearings Before the Special Comm. on Investigations of the Senate Select Comm. on Indian Affairs, Part 9*, 101st Cong., 35 (statement of Elmer Manatowa, Chief of the Sac and Fox Nation) [hereinafter

the oil companies[6] to the regulation and control of the environmental impacts of oil and gas development.

That lack of attention can have, and in some cases has already had, devastating consequences for the Indian tribes. Pollution of tribal lands and waters can impair the ability of tribes to fully function as governments for their people and their territory.[7] More importantly, pollution impacts the heart of tribes: the land itself. The degradation or destruction of resources is always a catastrophe, but for Indian nations it is a tragedy. Indian tribes reside in and remain deeply committed to territories greatly diminished from their aboriginal range. Thus, "relocation is not an option for Indian people."[8]

Hearings]. Despite repeated requests by the Nation, no action was taken until January 1996, when the Department of Justice filed suit against Tenneco Oil Company, raising claims of public nuisance, private nuisance, negligence, gross negligence, breach of contract, unjust enrichment, and violation of the Safe Drinking Water Act. Tenneco Complaint, *supra* note 3. As Senator DeConcini noted in 1989, "somebody is certainly doing one lousy job in protecting the interest of the Sac and Fox Nation." *Hearings, supra*, at 46.

The federal government acts as trustee for Indian lands and resources. Both the Indian Mineral Leasing Act of 1938 and the Indian Mineral Development Act of 1982 impose enforceable fiduciary duties on the Department of the Interior. *See* Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. REV. 327, 334-38 (1995). The only specific requirement that the Interior Department consider the environmental effects of mineral development, however, appeared in the 1982 Act regulations, which became effective in April 1994. *See* 59 Fed. Reg. 14,960 (1994). Under those regulations, the Secretary of the Interior may not approve a mineral development agreement unless the Secretary determines that the benefits to the tribe outweigh the adverse environmental impacts. 25 C.F.R. § 225.22(c)(2) (1995).

6. To the contrary, one of the traditional attractions of oil and gas leases on Indian lands was the potential shelter from stricter state environmental laws. *See Indian Mineral Development: Hearings on S. 1894 Before the Senate Select Comm. on Indian Affairs*, 97th Cong., 178 (1982) (statement of Russel L. Barsh).

7. The Tenth Circuit recently described "the four critical elements necessary for tribal sovereignty" as land, water rights, mineral rights, and government jurisdiction. City of Albuquerque v. Browner, 97 F.3d 415, 418 n.2 (10th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3694 (Nov. 10, 1997).

8. Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 286 n.356 (1996). Professor Tsosie notes, therefore, that Indian communities "cannot afford a catastrophe such as Love Canal, where the only means of protecting the population from hazardous conditions is removal." *Id. See also* Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Pinatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133, 1153 (1994) ("Without the land, in other words, there is no tribe."); Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 250 (1989) ("Land is inherent to Indian people; they often cannot conceive of life without it."); Lester, *supra* note 2, at 28 ("To relocate tribal members from their homeland would adversely affect the well-being of the tribe far beyond any damage suffered by non-Indians. Indians simply cannot pull up roots and move as do nomadic Americans.").

And so this article will explore environmental regulation of oil and gas development in Indian country, concentrating on the protection and regulation of water resources. Part II will look at the legal bases for tribal environmental regulation within the Indian country, with a focus on the environmental program which seems to be the initial one for tribes to develop: water quality standards. Part III will look at lessons for the oil and gas industry from this tribal activity.

II. TRIBAL PROTECTION OF WATER RESOURCES

A. Tribal Environmental Regulation

Tribal authority to protect and regulate water resources flows from two primary sources.[9] First, tribes retain inherent governmental powers to regulate unless the exercise of that authority has been ceded by treaty or abrogated by federal statute, or is otherwise "inconsistent with" the dependent sovereign status of the tribes. Second, tribes may operate federal programs which the federal government is authorized to delegate. These two sources of tribal authority in environmental affairs are symbiotic.

As a general proposition, tribes retain all powers of any sovereign that have not been lost through one of three legal mechanisms.[10] The first means is arguably voluntary: a tribe may cede its sovereign authority in a treaty. In the environmental arena, however, there is no indication that any tribe ceded any authority in any treaty. Second, the exercise of tribal authority may be abrogated by federal statute. Certain aspects of tribal environmental authority may have been abrogated or preempted by statute. For example, several courts have held that the federal citizen suit provisions abrogate tribal sovereign immunity from suit[11] and tribal courts have been divested of

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9. Treaties, which also serve as a source of tribal governmental powers, are not specifically implicated in environmental regulation. To the extent that the important modern issue in tribal environmental authority is the magnitude of that authority over non-Indian activities on fee lands, the U.S. Supreme Court has essentially held that any treaty-reserved power to regulate on fee lands has been abrogated by loss of title to those lands. Inherent tribal authority to regulate, however, can survive the abrogation of the treaty right. *See generally* Montana v. United States, 450 U.S. 544 (1981); Brendale v. Yakima Indian Nation, 492 U.S. 408 (1989); South Dakota v. Bourland, 508 U.S. 679 (1993).

10. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122-23 (1942) (tribes retain all powers that are not limited by treaty or act of Congress); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (tribal powers may be implicitly divested as inconsistent with tribal status).

11. *See, e.g.*, Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094, 1096-97 (8th Cir. 1989) (Resource Conservation and Recovery Act (RCRA)); Backcountry Against Dumps v. Environmental Protection Agency (EPA), 100 F.3d 147, 152 (D.C. Cir. 1996)

jurisdiction to hear citizen suits under the environmental statutes.[12] Similarly, federal environmental statutes may preempt tribal authority to regulate in a manner inconsistent with the statutory scheme. The Hazardous Materials Transportation Act,[13] for example, prohibits any tribal or state regulation of the transport of hazardous materials that is not "substantively the same" as federal regulations.[14] Beyond these specific statutory provisions, however, the federal environmental statutes do not abrogate or contract inherent tribal governmental powers.[15]

Inherent tribal authority may, however, be lost through the implicit divestiture doctrine first articulated in *Oliphant v. Suquamish Indian Tribe*[16] and applied to tribal regulatory powers in *Montana v. United States*.[17] Under this theory, tribes retain full regulatory authority over tribal members and tribal lands,[18] but may exercise authority over nonmembers on fee lands[19] only in certain circumstances. For environmental purposes, the most important of those circumstances is determined by the "direct effects" test from *Montana*: tribes retain inherent regulatory authority over nonmembers on fee lands

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(RCRA); Atlantic States Legal Found. v. Salt River Pima-Maricopa Indian Community, 827 F. Supp. 608, 609-10 (D. Ariz. 1993) (RCRA and Clean Water Act); Public Serv. Co. v. Shoshone-Bannock Tribes, 30 F.3d 1203, 1206-07 (9th Cir. 1994) (Hazardous Materials Transportation Act). *But see* James M. Grijalva, *Environmental Citizen Suits in Indian Country, in* 8TH ANNUAL CONF. ON ENV'T & DEV. IN INDIAN COUNTRY (ABA SONREEL 1996) (arguing that subjecting tribes to citizen suits is contrary to the doctrine requiring Congress to clearly state its intent to abrogate tribal sovereign immunity, and will interfere with the EPA's policy of government-to-government relations with tribes).

12. *Blue Legs*, 867 F.2d at 1097-98.

13. 49 U.S.C. §§ 1801-1819 (1988 & Supp. II 1990, Supp. III 1991, Supp. IV 1992))

14. The Act directs the Secretary of Transportation to issue regulations "for the safe transportation of hazardous materials," including the designation of hazardous materials; packing, handling, and labeling requirements; shipping documentation; notification and reporting requirements; and requirements for packages and containers used in transportation. 49 U.S.C. § 1804(a). Any law or regulation of a state or Indian tribe on these subjects which is not "substantively the same" as the federal law or regulation is preempted. 49 U.S.C. § 1804(a)(5). *See* Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458 (8th Cir. 1993).

15. On the contrary, the federal laws, by treating tribes as states, generally expressly recognize tribal authority to regulate. *See infra* text accompanying notes 25-28.

16. 435 U.S. 191, 208 (1978) (holding that tribes are impliedly divested of criminal jurisdiction over non-Indians because it is inconsistent with their status as dependent sovereigns).

17. 450 U.S. 544, 563-65 (1981). *See generally* N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353 (1994).

18. *Montana*, 450 U.S. at 505; Brendale v. Yakima Indian Nation, 492 U.S. 408, 445 (Stevens, J.), 460 (Blackmun, J.) (1989).

19. "Fee lands," in this context, refers to lands owned in fee by nonmembers of the tribe. Lands held in trust or subject to a restriction on alienation, as well as lands owned in fee by the tribe or its members, are referred to in this article as "tribal lands" or "Indian lands."

where the nonmember conduct "threatens or has some direct effect on" tribal sovereign interests such as economic security, political integrity, or health and welfare.[20]

In its subsequent decision in *Brendale v. Yakima Indian Nation*,[21] the Court arguably made the direct effects test more stringent and therefore more difficult for tribes to meet. Justice White, author of the four-justice plurality opinion, posited that nonmember conduct "must be demonstrably serious and must imperil" tribal sovereign interests for inherent tribal authority to survive.[22] Justice Blackmun, writing for three dissenting justices, argued that tribes retain their inherent authority where nonmember conduct impacts "significant" tribal interests.[23] Nonetheless, a few years later in *South Dakota v. Bourland*, the Court simply quoted the *Montana* test as the applicable law without even referring to any of the language used in *Brendale*.[24] It thus appears that the *Montana* version of the direct effects test survives intact.

In addition to the exercise of retained inherent powers, tribes may also regulate environmental matters pursuant to federal authorization. Tribes, like states, are generally authorized under the federal environmental statutes[25]

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20. 450 U.S. at 566.

21. 492 U.S. 408 (1998).

22. *Id.* at 431.

23. *Id.* at 457.

24. 508 U.S. 679, 695 (1993); *see also* Strate v. A-1 Contractors, 117 S. Ct. 1404, 1409 (1997). On remand from *Bourland*, the Eighth Circuit expressly declined to decide whether *Brendale* had modified the *Montana* direct effects test, on the ground that the result in the case before it would be the same in any case. South Dakota v. Bourland, 39 F.3d 868, 870 n.4 (8th Cir. 1994); *see also* Lower Brule Sioux Tribe v. South Dakota, 917 F. Supp. 1434, 1446 & n.17 (D.S.D. 1996). The dissenting judge in *Bourland* noted that the Supreme Court's *Bourland* opinion merely quoted *Montana* exactly. "I see nothing in the Supreme Court's *Bourland* decision, which remanded this case, to indicate that *Brendale* altered the inquiry under *Montana*." 39 F.3d at 871 (Heaney, J., dissenting).

25. This article will concentrate on the Water Acts: the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (1994 & Supp. I 1995)), and the Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f-300j (1994). Statutory provisions that treat tribes as states, however, are found in all the major federal environmental statutes, with one exception. *See, e.g.*, Clean Air Act § 301(d), 42 U.S.C. § 7601(d) (1994); Comprehensive Environmental Response, Compensation, and Liability Act § 126, 42 U.S.C. § 9626 (1994). The exception is the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992 (1994 & Supp. I 1995). Although the EPA proposed rules for tribes to take primacy for the RCRA municipal solid waste landfill permit program, 61 Fed. Reg. 2584 (1996), and the hazardous waste management program, 61 Fed. Reg. 30,472 (1996), the D.C. Circuit subsequently held that the EPA has no authority under the statute to approve a tribal solid waste management plan. Backcountry Against Dumps v. EPA, 100 F.3d 147, 151 (D.C. Cir. 1996). The court held that RCRA's plain language requires "states" to submit solid waste management plans, that RCRA defines Indian tribes as municipalities and not as states, and that therefore treating Indian tribes as states under RCRA violates the express language of the act. *Id.* at 150-51. *But see* Nance v. EPA, 645 F.2d 701 (9th Cir. 1981), *cert. denied sub nom.*, Crow Tribe of Indians v.

to take primacy for the federal programs.[26] Unlike states, however, tribes must be certified by the EPA for treatment as a state (TAS) in order take primacy for a federal program.[27] Tribes seeking program authorization must meet three basic requirements. Those requirements under the two Water Acts are similar: tribes must demonstrate that they have a functioning government, that the program they seek to operate is within their jurisdiction, and that they will be reasonably capable of carrying out the federal program.[28]

EPA, 454 U.S. 1081 (1981) (upholding EPA's approval for the Northern Cheyenne Tribe to redesignate the air quality of its reservation at a time when the Clean Air Act had not been amended to accord redesignation authority to tribes). The *Backcountry* court remarked, however, that nothing in its decision affected the continuing sovereign right of the tribe to control solid waste management activities within its territory. 100 F.3d at 151.

26. *See* CWA § 518, 33 U.S.C. § 1377; SDWA § 1451, 42 U.S.C. § 300j-11. Primacy, in this context, means that a state or tribe has received approval from the EPA to operate a federal environmental program within that state's or tribe's territory.

27. Originally the EPA required tribes to seek treatment as a state as a preliminary step. Only after this prequalification could tribes apply for program authorization. In 1994, however, the EPA merged the two-step process into one: tribes may now seek the TAS designation as part of their application for program authorization. Indian Tribes: Eligibility of Indian Tribes for Financial Assistance, 59 Fed. Reg. 13,814 (1994) (to be codified at 40 C.F.R. pts. 35, 130) (amendment to interim final rule on financial assistance); Indian Tribes; Eligibility for Program Authorization, 59 Fed. Reg. 64,339 (1994) (to be codified at 40 C.F.R. pts, 123, 124, 131, 142, 144, 145, 233, 501) (final rule on program authorization). In addition, once a tribe has initial approval as a state, applications for other programs or assistance need only provide additional information unique to those other programs. 40 C.F.R. § 131.8(b)(6) (1996); *see also* Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, see Fed. Reg. 64, 876 (1991) (to be codified at 40 C.F.R. pt. 131) 56 Fed. Reg. 64,876, 64,883, 64,885 (1991).

28. The SDWA provides that a tribe may be treated as a state if:

> (A) the Indian Tribe is recognized by the Secretary of the Interior and has a governing body carrying out substantial governmental duties and powers;
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> (B) the functions to be exercised by the Indian Tribe are within the area of the Tribal Government's jurisdiction; an
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> (C) the Indian Tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this subchapter and of all applicable regulations.

42 U.S.C. § 300j-11(b)(1); *see also* 40 C.F.R. § 142.72 (1996) (public water system program); *id.* § 145.52 (underground injection control program).

The CWA provides that a tribe may be treated as a state if:

> (A) the tribe has a governing body carrying out substantial governmental duties and powers;
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> (B) 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

The TAS requirement of tribal jurisdiction, although generating some controversy as to fee lands, is clear as to Indian lands. At its barest minimum, inherent tribal authority extends to tribal members and Indian lands.[29] By contrast, states may exercise jurisdiction over Indian persons and lands within Indian country[30] only in "exceptional circumstances"[31] or where Congress has expressly granted that authority to the states.[32] The EPA has long maintained, however, that the federal environmental laws do not represent a

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> (C) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

33 U.S.C. § 1377(e); *see also* 40 C.F.R. § 131.8.

The EPA has expressly noted that the first requirement under the Water Acts—the recognition and substantial governmental functions components—is functionally identical. Accordingly, a tribe which meets that requirement under either of the Water Acts will establish that it meets the requirement under both. Indian Tribes: Eligibility of Indian Tribes for Financial Assistance, 59 Fed. Reg. 13,814, 13,815 (1994) (financial assistance); Indian Tribes: Eligibility of Indian Tribes for Program Authorization, 59 Fed. Reg. 13,820, 13,821 (1994) (to be codified at 40 C.F.R. pts. 123, 131, 142, 144, 145, 233, 501). The EPA will continue its case by case review of the remaining two requirements: tribal jurisdictional authority and programmatic capability. 59 Fed. Reg. at 13,816; *id.* at 13,822.

29. *See* cases cited *supra* note 18; *see also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983).

30. "Indian country" is defined as:

> (a) 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, (b) all dependent Indian communities . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1994).

Although the definition is found in the criminal code, it applies in the civil context as well. *See* DeCoteau v. Dist. County Court, 420 U.S. 425, 427 n.2 (1975); Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1540-41 (10th Cir. 1995); Mustang Production Co. v. Harrison, 94 F.3d 1382, 1385 (10th Cir. 1996) *cert. denied sub nom.*, Mustang Fuel Corp. v. Hatch, 117 S. Ct. 1288 (1997). In addition, in the context of a tax dispute, the Supreme Court recently held that the relevant issue in determining whether land is Indian country under § 1151(a) is not the existence of a formal reservation, but rather whether the lands have been set aside for the use of Indians under federal protection. Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 125, 128 (1993); *see also* Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 511 (1991).

31. *Mescalero Apache*, 462 U.S. at 331-32. The only "exceptional circumstance" cited by the Court was state regulation of treaty reserved rights to hunt and fish as reasonable and necessary for conservation of species. *Id.* at 332.

32. *See, e.g.*, Public Law 280, which required some and permitted all other states to take civil and criminal jurisdiction over Indians within the Indian country. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953), as amended by the Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 78 (1968).

congressional grant of authority to the states to regulate, and that position was upheld by the federal courts as it pertains to Indian lands.[33] As to tribal lands, then, the jurisdictional lines are clear: tribes retain their inherent authority and nothing in the federal environmental statutes granted any regulatory power to the states.

Regulatory authority over fee lands within Indian country, however, is a more complicated issue.[34] The EPA has consistently taken the position that reservations[35] must be treated as "single administrative units,"[36] rejecting as unworkable and environmentally unsound the checkerboard principle that would allow states to take primacy for nonmember lands and waters within Indian country.[37] Instead, states have no authority to extend their environmental programs within reservations absent a congressional grant of authority.[38]

Because the EPA posits that the federal environmental statutes do not operate as a grant of authority to the states, even as to fee lands,[39] the states must find some grant of authority independent of the federal environmental laws. No state has been able to do so. States are thus barred

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33. Washington Dep't of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985) (Resource Conservation and Recovery Act); *see also* Phillips Petroleum Co. v. EPA, 803 F.2d 545, 552 (10th Cir. 1986) ("All parties agree that the Oklahoma state government has no power to prescribe an underground injection control program regulating the Osage Indian Reserve.").

34. The *Washington Dep't of Ecology* court, for example, expressly declined to decide "whether Washington is empowered to create a program reaching into Indian country when that reach is limited to non-Indians." *Id.* at 1468.

35. The EPA considers "trust lands formally set apart for the use of Indians" to be reservations, citing *Citizen Band*, 498 U.S. at 511. Amendments to Water Quality Standards Regulations That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,881 (1991) (to be codified at 40 C.F.R. pt. 131). *See also Sac and Fox Nation*, 508 U.S. 114.

36. EPA, FEDERAL, TRIBAL AND STATE ROLES IN THE PROTECTION AND REGULATION OF RESERVATION ENVIRONMENTS: A CONCEPT PAPER 3 (1991) [hereinafter EPA CONCEPT PAPER].

37. Amendments to Water Quality Standards Regulations That Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,876, 64,878.

38. *See, e.g.*, 45 Fed. Reg. 33,066, 33,378 (1980); EPA, ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN LANDS: EPA INDIAN WORK GROUP DISCUSSION PAPER 9 (1983).

39. Based on the court's decision in *Washington Dep't of Ecology*, the State of Washington amended its RCRA petition to assert authority only over non-Indian hazardous waste activities on Indian lands. Washington; Final Authorization of State Hazardous Waste Management Program, 51 Fed. Reg. 3782, 3783 (1986) (to be codified at 40 C.F.R. pt. 271). The EPA rejected this approach, stating that absent independent state authority to regulate within Indian country, the EPA would retain jurisdiction "on Indian lands," which the EPA interpreted as synonymous with Indian country. *Id.* Nothing daunted, the State of Washington asserted jurisdiction under the Safe Drinking Water Act over underground injection wells on Indian lands. 53 Fed. Reg. 43,080 (1988). The EPA noted that the state's argument was the same one rejected in *Washington Dep't of Ecology*, only weaker because the SDWA, unlike RCRA, treated tribes as states and therefore directly contemplated tribal regulation. EPA accordingly denied the state's application.

from taking primacy under the federal statutes anywhere within Indian country. The issue then becomes the extent to which tribes are eligible for primacy over fee lands within their territories.

Although the Clean Water Act, at least, seems by its plain language to recognize tribal jurisdiction over all surface waters within reservation boundaries,[40] the EPA has interpreted the statutory language otherwise. According to the EPA, the Water Acts do not constitute a blanket authorization for tribes to regulate throughout their territories, but rather recognize the inherent rights of tribes.[41] As a consequence, the EPA has determined, the Water Acts authorize tribes to take primacy for federal programs to the extent that the tribes would have inherent authority to regulate.

In order to determine whether tribes have inherent authority to operate the federal programs on fee lands as well as Indian lands,[42] the EPA applies the *Montana* direct effects test[43] as modified by the Court in *Brendale v. Yakima Indian Nation* and reaffirmed in *South Dakota v. Bourland*.[44] Before the EPA will authorize a tribe to take primacy on nonmember as well as Indian lands, the agency must be satisfied that "the potential impacts of

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40. As noted, the CWA refers to "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.*" 33 U.S.C. § 1377e(2) (1994) (emphasis added). Justice White, writing for the plurality in *Brendale*, cited § 1377(e) as an example of express congressional delegation to tribes. Brendale v. Yakima Indian Nation, 492 U.S. 408, 428 (1989). More recently, a federal district judge noted that § 1377(e) "seems to indicate plainly that Congress did intend to delegate such authority to tribes," and noted the "common-sense" of that interpretation. Montana v. EPA, 941 F. Supp. 945, 951-52 (D. Mont. 1996).

41. Amendments to Water Quality Standards Regulations That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,880 (1991). The EPA's conclusion was based on its reading of the legislative history as "ambiguous and inconclusive," noting that "if Congress had 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.* at 64,879.

42. As noted earlier, tribes retain full authority over activities on Indian lands. *See supra* text accompanying notes 29-33.

43. 450 U.S. 544, 566 (1981); *see supra* text accompanying note 20.

44. *Brendale*, 492 U.S. 408 (1989); South Dakota v. Bourland, 508 U.S. 679 (1993). Although *Bourland* does not appear to apply a modified *Montana* direct effects test, but rather simply quotes the *Montana* language, *see supra* text accompanying note 24, the EPA has taken a cautious approach. The EPA rejected the idea that *Brendale* had overruled *Montana*, but also recognized that a majority of justices in *Brendale* had attempted to reformulate the language of the *Montana* test. Accordingly, EPA interpreted *Brendale* as requiring, under the *Montana* test, some impact on tribal interests that is more than de minimis. *See* Amendments to Water Quality Standards Regulations That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,877-78 (1991).

regulated activities on the tribe are serious and substantial."[45] Nonetheless, the EPA believes that tribes generally will be able to satisfy that threshold requirement because "the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare."[46] More specifically, the EPA has stated that the CWA itself represents a congressional determination that activities which affect the quality of surface waters have serious and substantial impacts on health and welfare.[47] Thus, although the EPA will continue to make a case-specific determination of jurisdiction for each tribe, it believes that tribes will ordinarily be able to make the required showing.[48]

The EPA's approach has now been approved by the federal courts. In *Montana v. U.S. Environmental Protection Agency* (EPA),[49] the court noted that the EPA's interpretation of the federal environmental laws and the agency's reconciliation of its environmental policy with its Indian policy were entitled to substantial deference.[50] Based on its review of the *Montana-Brendale-Bourland* line of cases, the court held that the EPA's interpretation was consistent with the agency's regulations, and neither arbitrary or capricious nor contrary to law.[51]

Thus, in environmental matters, the relationship between inherent tribal regulatory authority and tribal primacy under the federal statutes is symbiotic. Tribes retain authority to regulate water resources on nonmember fee lands as well as Indian lands when the nonmember activities affecting the water resources have the potential for substantial impacts on reservation health and welfare. Because the control and prevention of water pollution are crucial to health and welfare, nonmember

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45. *Id.*; *see also* Subtitle D Regulated Facilities; State/Tribal Permit Program Determination of Adequacy, State/Tribal Implementation Rule (STIR), 61 Fed. Reg. 2584, 2590 (1996) (to be codified at C.F.R. pts. 239, 258) (proposed State/Tribal Implementation Rule for municipal solid waste facilities). The specific requirements of a tribal TAS application are detailed at 40 C.F.R. § 131.8(b) (1996) (CWA); and 40 C.F.R. §§ 142.72 and 145.52 (1996) (SDWA).

46. Amendments to Water Quality Standards Regulations That Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,878.

47. *Id.* The same analysis should apply to the Safe Drinking Water Act and effects on groundwater.

48. Amendments to Water Quality Standards Regulations That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,877. Where a tribe cannot show jurisdiction over one or more specific on-reservation sources, however, the EPA will retain federal jurisdiction. EPA CONCEPT PAPER, *supra* note 36, at 3-4.

49. 941 F. Supp. 945 (D. Mont. 1996). The case is presently on appeal to the Ninth Circuit.

50. *Id.* at 956, 958. *See also Washington Dep't of Ecology*, 752 F.2d at 1469; City of Albuquerque v. Browner, 97 F.3d 415, 422 (10th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3694 (Nov. 10, 1997).

51. *Montana v. EPA*, 941 F. Supp. at 958.

activities that have the potential to adversely affect water resources will have the requisite substantial impacts. In consequence, tribes should generally have inherent authority to regulate the waters of Indian country and should also, if they choose, be authorized by the EPA to operate the federal programs of the Water Acts.

B. Tribal Primacy and Water Quality Standards

Indian tribes have moved relatively slowly to take primacy under the federal environmental laws, and much of the tribal activity has taken place under the Clean Water Act. A 1994 survey showed that 77 tribes have TAS under the Water Acts, several under more than one program.[52] Although the vast majority of these TAS approvals are for grant programs or other programs that may provide federal financial assistance,[53] several tribes have taken primacy for water quality programs. In particular, a number of tribes have TAS under section 303 of the Clean Water Act for the purpose of establishing water quality standards.[54]

Section 303 mandates state promulgation of water quality standards (WQS), designed to supplement the national technology-based effluent standards for surface waters.[55] Unlike the technology-based standards,

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52. GOVER, STETSON AND WILLIAMS, SURVEY OF TRIBAL ACTIONS TO PROTECT WATER QUALITY AND THE IMPLEMENTATION OF THE CLEAN WATER ACT 54 (1994) [hereinafter WATER QUALITY SURVEY].

53. *Id.* The survey reports that 76 tribes had received TAS under CWA section 106, 33 U.S.C. § 1256 (1994), which provides grants for pollution control programs. In addition, 16 tribes had received TAS for the clean lakes program under CWA section 314, 33 U.S.C. § 1324 (1994 & Supp. I 1995), and five for the nonpoint source management program under CWA section 319, 33 U.S.C. § 1329 (1994). Both programs call for financial assistance to states for program implementation. *See* 33 U.S.C. § 1324(b), § 1329(h). As to the tribal focus on these two programs, the survey notes that: "It is not clear whether this reflects especially severe problems in these areas, or whether the Tribes simply are grabbing at any kind of EPA funding available." WATER QUALITY SURVEY, *supra* note 52, at 55.

54. The survey reports that five tribes had received TAS under CWA section 303, 33 U.S.C. § 1313 (1994). WATER QUALITY SURVEY, *supra* note 52, at 54. In Appendix 2, it identifies these tribes as the Eastern Band of Cherokee (page 7), the Pueblos of Isleta (page 22), Sandia (page 39), and San Juan (page 40), and the Seminole Tribe of Florida (page 42). The appendix also revealed at least five tribes with CWA section 303 TAS applications pending or in process. Since the survey data were collected, at least five additional tribes have received TAS under CWA section 303: the Confederated Salish and Kootenai Tribes of the Flathead Reservation, and four tribes in Wisconsin: the Sokaogon (Mole Lake) Chippewa, the Oneida, the Menominee, and the Lac du Flambeau Band of Chippewa.

55. For more detail on the WQS program, see generally David S. Baron, *Water Quality Standards for Rivers and Lakes: Emerging Issues*, 27 ARIZ. ST. L.J. 559 (1995). *See also* James M. Grijalva, *Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters*, 71 N.D. L. REV. 433, 450-53 (1995).

which are set uniformly for point source discharges,[56] WQS are established for the particular receiving body of water.[57] The state first determines the designated uses for each water body within its jurisdiction.[58] Designated uses must protect existing uses of waterways[59] and are subject to a federal minimum standard that fishable/swimmable uses be protected.[60] In addition, states are required to consider a federal list of use designations,[61] but are nonetheless expressly free to adopt designated uses that are more protective than the federal standards.[62] Once a state has designated the uses of its surface waters, it promulgates WQS designed to achieve and protect those uses.[63] State WQS may be in the form of either numeric criteria or narrative standards,[64] although numeric criteria are required where possible.[65] Water quality criteria may be based on the EPA's suggested criteria, modified as necessary for local conditions, or on any method grounded in sound science.[66]

State WQS and the use designations upon which the WQS are based are then submitted to the EPA for approval.[67] In order to approve proposed WQS, the EPA must determine that the proposed WQS: (a) are consistent with the CWA and the federal implementing regulations, (b) will protect the designated uses, (c) are based on adequate scientific analysis, and (d) will protect downstream WQS.[68] Economic feasibility is not a factor in the EPA's approval process.[69]

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56. CWA § 301, 33 U.S.C. § 1311 (1994 & Supp. I 1995).

57. CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A).

58. 40 C.F.R. § 131.10 (1995).

59. 40 C.F.R. § 131.12, § 131.10(h)C(i) (1996).

60. CWA § 101(a)(2), 33 U.S.C. § 1251(a)(2) (1994). The "fishable/swimmable" label is a shorthand designation for the congressional goal, expressed in CWA section 101(a)(2), of "water quality which provides for the protection of fish, shellfish, and wildlife and provides for recreation in and on the water."

61. CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A) (1994). These uses include "public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation." 40 C.F.R. § 131.10(a).

62. CWA § 510, 33 U.S.C. § 1370 (1994).

63. CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A).

64. *See* CWA § 304(a), 33 U.S.C. § 1314(a) (1994). Both types are typically used, with narrative criteria such as "no odor" applied to all waters, and numeric criteria developed for each designated use category. *See* Baron, *supra* note 55, at 571.

65. 40 C.F.R. § 131.11(b) (1996).

66. *Id.*

67. CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A) (1994).

68. 40 C.F.R. § 131.5(a), § 131.10(b).

69. Homestake Mining Co. v. EPA, 477 F. Supp. 1279, 1283 (D.S.D. 1979); *see also* City of Albuquerque v. Browner, 97 F.3d 415, 426 (10th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3694 (Nov. 10, 1997) (noting that the attainability of more stringent state or tribal standards "is a matter for the EPA to consider in its discretion").

Tribes that take primacy under section 303 of the CWA have essentially the same rights and obligations as states for the surface waters within their jurisdictions.[70] As noted, a tribe's jurisdiction will extend to all waters within the boundaries of the reservation so long as the tribe can demonstrate to EPA's satisfaction that activities on nonmember lands have the potential for serious and substantial impacts on tribal sovereign interests such as health and welfare.[71] Because pollutant discharges from point sources on fee lands within Indian country have that potential, the EPA has granted full territorial primacy over surface waters to tribes.[72] Tribes with primacy under section 303, therefore, will generally designate uses and establish WQS for all waters within the exterior boundaries of their reservations.

Tribes with TAS under section 303 also have the same right as states to promulgate WQS that are stricter than the federal minimum standards.[73] The statutory grant of authority to tribes does not expressly refer to the savings clause in section 510 of the CWA, which preserves more stringent state authority.[74] Nonetheless, because section 510 only recognizes inherent state authority, and because Indian tribes also retain inherent powers of environmental regulation, the section 510 savings clause for states does not limit tribal governmental authority.[75] Instead, the EPA's position that tribes may establish more stringent WQS is reasonable because that authority comports with inherent tribal governmental powers.[76] Consequently, tribes

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70. *City of Albuquerque*, 97 F.3d at 423 n.9; *see generally* CWA § 518(e), 33 U.S.C. § 1377(e) (1994). For more detailed examinations of tribal WQS, see Grijalva, *supra* note 55, and Denise D. Fort, *State and Tribal Water Quality Standards Under the Clean Water Act: A Case Study*, 35 NAT. RESOURCES J. 771 (1995).

71. *See generally* Montana v. EPA, 941 F. Supp. 945, 957-58 (D. Mont. 1996); *see also supra* text accompanying notes 45-48.

72. For example, in granting primacy to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the EPA noted nonmember activities such as "discharges from an RV park and campground, discharges from sewage treatment plants, discharges from a town's storm drains, leakage from gasoline service stations, diesel fuel spills, and gas tank overflows." *Montana v. EPA*, 941 F. Supp at 958. The EPA also determined that the Tribes needed "clean water for a domestic water supply and to maintain fish, aquatic life and other wildlife for both subsistence and cultural reasons." *Id.* Because the nonmember discharges had the potential for serious and substantial effects on the tribal need for clean water, and thus on tribal health and welfare, the EPA found that the Tribes retained inherent authority to set WQS for all surface waters within the Flathead Reservation. *Id.*

73. *City of Albuquerque*, 97 F.3d at 423.

74. That is, CWA section 518(e), 33 U.S.C. § 1377(e), lists a number of the sections of the CWA for which the EPA is authorized to treat tribes as states. Not included in this list is CWA section 510, 33 U.S.C. § 1370 (1994), which preserves the right of states to adopt measures more stringent than the federal minimum standards.

75. *City of Albuquerque*, 97 F.3d at 423.

76. *Id.*

with section 303 primacy may promulgate WQS that protect unique tribal uses and values.[77]

Although tribes have moved cautiously to take primacy for the CWA programs, at least ten tribes have now received primacy under the section 303 program for WQS,[78] and a number of those tribes have already established designated uses and water quality criteria. Federal courts have upheld the right of tribes to exercise environmental authority over all waters within the reservation and to promulgate WQS which are more stringent than the federal minimum standards. With their basic rights to operate as states under the CWA recognized, more tribes can be expected to seek primacy for the environmental programs.

III. LESSONS FROM THE WQS FRONT

Although most tribal activity under the Water Acts has been focused on the water quality program, WQS have limited applicability to oil and gas exploration and production activities. Nonetheless, the development of tribal WQS offers three levels of lessons for the oil and gas industry. The first level of lessons is the extent to which tribal WQS affect oil companies operating in or near Indian country. Despite their limited applicability, tribal WQS may directly impact oil and gas operations in several ways. The second level of lessons concerns the ability and willingness of tribes to assume program primacy under the federal environmental laws. As tribes begin to expand their reach, tribes with oil and gas activities in their territories may take primacy over programs such as the underground injection control program that offer direct regulation of oilfield development. And at the third level, the lesson is a broader one of respecting the governmental authority of Indian tribes over the resource development of their lands.

A. Applicability of Tribal WQS

The primary importance of water quality standards is their applicability in discharge permits. The CWA prohibits the discharge of any pollutant from a point source into the navigable waters without a permit under the National Pollution Discharge Elimination System (NPDES)

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77. The Isleta Pueblo, for example, designated a use of the Rio Grande running through the Pueblo for "primary contact ceremonial use," and promulgated stringent water quality criteria to achieve that use. *See City of Albuquerque*, 97 F.3d at 428-29 (upholding the EPA's approval of the designated use against a claim that it violated the Establishment Clause). For a discussion of tribal incorporation of traditional values into environmental decisionmaking, see Tsosie, *supra* note 8, at 288-300.

78. *See supra* note 54.

program.[79] NPDES permits, in turn, limit the discharge of specified pollutants in two ways. All NPDES permits contain technology-based effluent standards that limit the amount, rate, and concentration of pollutants that can be released.[80] In addition, permits may contain further effluent limitations based not on technology, but on the WQS set for the receiving body of water.[81]

Water quality-based limitations are incorporated into NPDES permits in any of four ways. First, states and tribes may, at their option and with federal approval, take primacy for the NPDES permit program.[82] If a state, or a tribe treated as a state, takes primacy for the NPDES program and establishes WQS,[83] it will incorporate its WQS into the NPDES permits through additional effluent limitations as it deems necessary. Second, if a state or tribe has not taken primacy for the NPDES program and the EPA therefore issues NPDES permits within that jurisdiction,[84] the state or tribe may review the federal permits within its territory for compliance with its WQS.[85] Under section 401 of the CWA, a state or tribe may certify the federally-permitted activity, certify it with conditions, or refuse certification in which case the federal permit may not issue.[86] Third, if the EPA issues a NPDES permit, the permit limitations must protect the WQS of the downstream states or tribes. EPA regulations, upheld as reasonable by the United States Supreme Court, require that federal NPDES permits "ensure compliance with the applicable water quality requirements of all affected

79. CWA § 402, 33 U.S.C. § 1342 (1994).

80. *See* CWA § 402(a)(2), 33 U.S.C. § 1342(a)(2); CWA § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A) (1994).

81. CWA § 402(a)(2), 33 U.S.C. § 1342(a)(2); CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

82. CWA § 402(b), 33 U.S.C. § 1342(b). To date, no tribe has taken primacy for the NPDES permit program. WATER QUALITY SURVEY, *supra* note 52, at 55.

83. As noted earlier, states are required to promulgate WQS for waters within their jurisdictions. CWA § 303, 33 U.S.C. § 1313 (1994). Several tribes have TAS for purposes of setting WQS. WATER QUALITY SURVEY, *supra* note 52, at 54.

84. The federal government retains the authority to issue NPDES permits within any state or reservation where the state or tribe has not taken primacy for the NPDES program. *See* CWA § 402(b), 33 U.S.C. § 1342(b) (1994).

85. *See* Arkansas v. Oklahoma, 503 U.S. 91, 103 (1992) (noting that "the EPA has construed the Act as requiring that EPA-issued NPDES permits also comply with § 401(a)").

86. 33 U.S.C. § 1341 (1994). *See generally* Debra L. Donahue, *The Untapped Power of Clean Water Act Section 401*, 23 ECOLOGY L.Q. 201 (1996). To date, three tribes, including the Pueblos of Sandia and San Juan, have received TAS under the § 401 certification program. WATER QUALITY SURVEY, *supra* note 52, at 54, app. 2 at 39, 40.

States,"[87] including tribes treated as states for the purpose of setting WQS.[88] And fourth, even if a state or tribe has taken primacy for the NPDES program, it is required to at least consider the WQS of downstream states in its permit decisions. The issuing state or tribe must provide notice to affected states and tribes, and either accept or explain its rejection of written recommendations by the affected governments.[89] An affected state or tribe that is dissatisfied with the upstream government's permit decision may request that the EPA exercise its authority to block any state or tribal NPDES permit which is inconsistent with the CWA.[90]

The oil and gas industry, however, operates largely apart from the NPDES program. First, the CWA regulates the discharge of "pollutants," and oilfield water or other materials injected into state-approved wells[91] are expressly exempted from the definition of "pollutant."[92] Thus, the underground disposal of oilfield wastes and the injection of produced water for secondary recovery are not subject to the NPDES permit program. Second, the EPA is prohibited from requiring a NPDES permit for uncontaminated stormwater runoff from oil and gas operations.[93] But most

87. *Arkansas*, 503 U.S. at 105 (quoting State Program Requirements, 40 C.F.R. § 123.25 (1991)).

88. *See* City of Albuquerque v. Browner, 97 F.3d 415, 423-24 (10th Cir. 1996), cert. denied, 65 U.S.L.W. 3694 (Nov. 10, 1997).

89. CWA § 402(b)(3), 33 U.S.C. § 1342(b)(3); CWA § 402(b)(5), 33 U.S.C. § 1342(b)(5).

90. CWA § 402(d)(2), 33 U.S.C. § 1342(d)(2); *see also* International Paper Co. v. Ouellette, 479 U.S. 481, 490 (1987).

91. This should include wells approved by a tribe that has taken primacy for the underground injection control program, *see* 42 U.S.C. § 300h-300h-1 (1994), and wells on Indian lands approved by the EPA under its retained authority. *See id.* § 300h-1(e). *See generally infra* Section III.B.

92. Under the CWA, "pollutant" does not mean:

> water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

CWA § 502(6)(B), 33 U.S.C. § 1362(6)(B) (1994).

93. CWA § 1342(l)(2), 33 U.S.C. § 1342(l)(2) (1994). Under this section, the EPA may not require, or "directly or indirectly require any State to require" a NPDES permit, so long as the stormwater runoff is "composed entirely" of runoff from point sources "used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations."

importantly, with respect to onshore facilities,[94] EPA regulations provide that there shall be "*no* discharge of waste water pollutants into navigable waters from any source" associated with oil and gas operations.[95] To implement those regulations, the EPA has issued a general NPDES permit covering onshore oil and gas extraction point sources in four states with significant oil and gas development of Indian lands.[96] This general permit, like the regulations, unconditionally prohibits the discharge into navigable waters of all waters and wastes resulting from oil and gas activities.[97] Because oil and gas wastes may not be discharged into the navigable waters, tribal WQS do not offer tribes any direct control over the disposal of oil and gas wastes.

Nonetheless, tribal water quality standards may still impact oil and gas activities in a number of significant ways. For example, congressional policy provides that no discharges of oil should be permitted into the navigable waters.[98] Section 311 of the Clean Water Act prohibits the discharge of oil in quantities that may be harmful to public health or welfare or the environment.[99] The EPA has, in turn, determined that a discharge is of sufficient quantity to be harmful if it violates applicable water quality standards.[100] Consequently, a discharge of oil of any kind into the navigable waters which violates applicable tribal WQS is a violation of the Clean Water Act.

In addition, oil and gas operations are subject to a general federal permit for storm water discharges. In 1992, the EPA issued a final NPDES permit for storm water discharges associated with industrial activity, a permit which applies to Indian lands in 21 states.[101] Facilities engaged in

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94. Most oil and gas operations on Indian lands will fall into the onshore category. Onshore facilities are defined as those "engaged in the production, field exploration, drilling, well completion and well treatment in the oil and gas extraction industry which are located landward of the inner boundary of the territorial sea." Oil and Gas Extraction Point Source Category, 40 C.F.R. § 435.30 (1996).

95. 40 C.F.R. § 435.32 (emphasis added).

96. *See* Final WPDES General Permits for the Oil and Gas Extraction Point Source Category, Onshore Subcategory-States of Louisana (LAG320000), New Mexico (NMG320000), Oklahoma (OKG320000), and Texas (TXG320000), 56 Fed. Reg. 7698 (1991).

97. *Id.* at 7703.

98. CWA § 311(b)(1), 33 U.S.C. § 1321(b)(1) (1994). Section 311 defines oil as "including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil." *Id.* § 311(a)(1), 33 U.S.C. § 1321(a)(1).

99. *Id.* § 311(b)(3), 33 U.S.C. § 1321(b)(3).

100. Discharge of Oil, 40 C.F.R. § 110.3(a) (1996). The statutory authority for a regulatory determination of the harmful quantity threshold is found at CWA § 311(b)(4), 33 U.S.C. § 1321(b)(4).

101. Final WPDES General Permits for Storm Water Discharges Associated with Individual Activity, 57 Fed. Reg. 41,236 (1992). Indian lands are covered in the following states: Alaska, Arizona, California, Colorado, Florida, Idaho, Louisiana, Maine,

"industrial activity" for purposes of the general permit include oil and gas exploration, production, processing, and treatment operations.[102] Although the permit generally authorizes the discharge of uncontaminated storm water upon submission of a notice of intent, a storm water discharge is not covered if it is contributing or may reasonably be expected to contribute to a violation of water quality standards.[103] Thus, the discharge of storm waters from oil and gas facilities is only authorized if the discharge will not violate applicable tribal WQS.[104]

Tribal water quality standards may also be applicable in cases of contamination resulting from oil and gas operations. For example, to the extent that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) applies to the clean up of oil and gas contamination,[105] clean up must ensure compliance with all applicable or relevant and appropriate requirements (ARARs) of federal and state environmental laws.[106] Tribal WQS under section 303 of the Clean Water

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Massachusetts, Mississippi, Montana, New Hampshire, New Mexico, Nevada, North Carolina, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming.

102. *Id.* at 41,320.

103. *Id.* at 41,239-40.

104. Nonetheless, the EPA recently issued an interim policy statement providing that water quality-based effluent limitations will not apply to stormwater discharge permits. *See* Water Pollution: Numeric, Water Quality Based Effluent Limits Do Not Apply to Storm Water Permits, EPA Says, 27 Env't Rep. (BNA) 840 (Aug. 9, 1996).

105. CERCLA by its plain language excludes liability for the release of "petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance" under CERCLA and for "natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas)." CERCLA § 101(14), 42 U.S.C. § 9601(14) (1994). In addition, CERCLA appears to exclude liability for any hazardous waste which would be exempt under the Resource Conservation and Recovery Act (RCRA). *See* CERCLA § 101(14)(C), 42 U.S.C. § 9601(14)(C). RCRA, in turn, excepts "drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil or natural gas" from identification as hazardous wastes. RCRA § 3001(b)(2)(A), 42 U.S.C. § 6921(b)(2)(A) (1994). Nonetheless, if the waste exempt from hazardous waste regulation under RCRA falls within one of the other definitions of hazardous substance in CERCLA, *see* 42 U.S.C. § 9601(14), CERCLA liability will generally attach for its release. *See, e.g.*, Eagle-Picher Industries v. EPA, 759 F.2d 922, 926-29 (D.C. Cir. 1985). *See generally* Daniel L. McKay, *RCRA's Oil Field Wastes Exemption and CERCLA's Petroleum Exclusion: Are They Justified?*, 15 J. ENERGY NAT. RESOURCES & ENVTL. L. 41 (1995); Patricia M. Botsko, *Overview of Environmental Regulations of Hazardous Substances in the Oil Patch*, *in* ENVIRONMENTAL REGULATION OF THE OIL AND GAS INDUSTRY (Rocky Mtn. Min. L. Found. 1993).

106. CERCLA § 121(d), 42 U.S.C. § 9621(d)(2)(A) (1994).

Act should be considered an ARAR, thus ensuring that CERCLA clean up efforts attain tribally-determined standards of water quality.[107]

Moreover, tribes may recover natural resources damages under both CERCLA and the Oil Pollution Act.[108] Natural resources are defined as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources,"[109] a definition which certainly encompasses the surface waters of Indian country. Thus tribes may recover natural resources damages for injury to surface waters resulting from a release of oil or hazardous substances.[110] Injury occurs if the oil or hazardous substance causes a violation of applicable water quality standards.[111] Consequently, oil companies may be liable for natural resources damages to tribes if a release of oil or hazardous substances results in a violation of tribal WQS.

Tribal WQS thus affect oil and gas exploration and production activities in a number of ways. Because those effects are limited, however, tribal environmental regulation of surface water resources impacted by oil

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107. Grijalva, *supra* note 55, at 470. CERCLA appears to provide, however, that WQS are not automatically ARARs, but rather that the determination is made on a case by case basis. *See* 42 U.S.C. § 9621(d)(2)(B)(i).

108. The CERCLA natural resources liability provision is found at section 107(f), 42 U.S.C. § 9607(f) (1994) (providing for liability to an Indian tribe for "injury to, destruction of, or loss of natural resources . . . belonging to, managed by, controlled by, or appertaining to" the tribe or held in trust for the tribe or its members). The OPA provision is found at section 1006(a)(3), 33 U.S.C. § 2706(a)(3) (1994) (providing for liability to an Indian tribe for damages to natural resources "belonging to, managed by, controlled by, or appertaining to" the tribe). *See generally* Rachel Jacobson & Peter Monson, *Natural Resource Damages: Tribes as Trustees, in* 5TH ANNUAL CONFERENCE ON NATURAL RESOURCES MANAGEMENT AND ENVIRONMENTAL ENFORCEMENT ON INDIAN LANDS (ABA SONREEL 1993).

109. CERCLA § 101(16), 42 U.S.C. § 9601(16); OPA § 1001(20), 33 U.S.C. § 2701(20) (1994).

110. Liability under CERCLA is for the release or threatened release of a hazardous substance. CERCLA § 107(a), 42 U.S.C. § 9607(a). As already noted, the definition of hazardous substance expressly excludes "petroleum, including crude oil or any fraction thereof," as well as natural gas. *See supra* note 105.

Liability under the OPA is for the discharge or the substantial threat of a discharge of oil into or upon the navigable waters. OPA § 1002(a), 33 U.S.C. § 2702(a) (1994). Oil is defined as "oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil," but specifically excludes any kind of oil that is covered as a hazardous substance under CERCLA. *Id.* § 1001(23), 33 U.S.C. § 2701(23).

The OPA establishes a scheme "to fill the void created by CERCLA's petroleum exclusion." David E. Pierce, *Regulating Surface Water Impacts Associated with Exploration, Development, Production, and Transportation, in* ENVIRONMENTAL REGULATION OF THE OIL AND GAS INDUSTRY 4-28 (Rocky Mtn. Min. L. Found. 1993). The two statutes together offer wide-ranging, but not comprehensive, protection. A release of natural gas, or a release of oil that is not into the navigable waters, but which injures natural resources, generally escapes liability.

111. Natural Resource Damage Assessments, 43 C.F.R. § 11.62(b)-(c) (1996).

and gas development is largely indirect. But direct tribal environmental regulation of oil and gas companies operating in Indian country is a short step away.

B. Tribal Control of Environmental Programs

Tribal WQS programs represent the first wave of tribal primacy under the federal environmental laws. Some tribes will doubtless refrain from taking primacy under any of the available environmental programs, and few tribes will likely have the resources—human, financial, or technical—to take primacy under all the available programs.[112] But many tribes will certainly seek primacy under a number of the environmental programs.

Initially, however, tribes may carefully choose which programs to pursue, focusing limited resources on priority problems.[113] And if tribes with limited resources are turning first to water quality issues of immediate concern, regulation of oil and gas activities may soon take precedence for some tribes. Exploration, production, and disposal activities of oil companies can have devastating effects on tribal water resources.

Perhaps the clearest example is the groundwater of the Sac and Fox Nation.[114] Since 1924, the Tenneco Oil Company has engaged in oil and gas activities on Sac and Fox tribal lands,[115] eventually leasing 760 acres of the

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112. For tribes that do not take primacy, the EPA retains the authority to administer the environmental programs in Indian country. *See* EPA CONCEPT PAPER, *supra* note 36, at 3-4.

113. A 1994 survey posited that tribes are generally responding to particular water quality issues and "picking their spots" to seek TAS. WATER QUALITY SURVEY, *supra* note 52, at 53. The survey continues: "This may suggest a lack of comprehensive water quality planning; the Tribes may be primarily responding to existing problems rather than preventing them. However, given that Tribal funds usually are sparse and federal funds are extremely limited, the Tribes have little choice but to prioritize water quality issues and address only the most serious." *Id.*

114. Several of the statements in the discussion that follows are supported by allegations of the Tenneco Complaint, *supra* note 3. For purposes of this narrative, all allegations of the complaint will be accepted as true. Nonetheless, Tenneco has denied certain factual allegations of the complaint, as well as all liability. *See* United States v. Tenneco Oil Co., Proposed Consent Decree and Final Judgment Among the United States of America and the Sac and Fox Nation and Tenneco Oil Co. at ¶ 9, No. CIV-96-017-C (W.D. Okla.) [hereinafter Tenneco Decree]. The settlement agreement provides that the parties "do not admit any allegation, finding, determination or conclusion contained in the litigation, nor do they admit liability for any purpose or admit any issues of law or fact or any responsibility for the contamination at the tribal lands." *Id.* ¶ 13.

115. Prior to 1965, oil and gas activities on Sac and Fox lands were conducted by the H.F. Wilcox Oil and Gas Company and its predecessor in interest, J.C. Cooke Oil and Gas Company. Tenneco Complaint, *supra* note 3, at 3-4. Wilcox Oil merged into Tenneco on September 7, 1965, and Tenneco assumed all the liabilities and obligations of Wilcox. *Id.* at

tribe's 880 acres of trust lands.[116] Under its leases, Tenneco engaged in exploration and production of oil and gas, including secondary recovery and the disposal of oilfield wastes.[117] Over the years, Tenneco Oil injected some sixty three million barrels of salt water under fewer than 800 acres of land,[118] contaminating the aquifer and leaving the Nation without a source of fresh drinking water.

The Sac and Fox lands overlie the Vamoosa-Ada aquifer.[119] This freshwater aquifer, the only natural source of drinking water on or under the Sac and Fox tribal lands, lies between 25 and 250 feet underground.[120] After World War II, when oil production on Sac and Fox lands declined, Tenneco began secondary recovery operations, injecting produced water into some of the wells at a depth of about 3000 feet.[121] Because the Vamoosa-

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4. At some time subsequent to 1986, Mesa Midcontinent Limited Partnership and James Q. Maguire, Jr. and J.Q. Maguire apparently became successors in interest to all or part of Tenneco Oil. *Id.* at 8-9. In mid-December 1996, Tenneco Oil Company was purchased by El Paso Natural Gas Company. *El Paso Natural Gas Unit Settles Pollution Charges for $3.5 Million*, DALLAS MORNING NEWS, Dec. 24, 1996, at 13D. In this narrative, "Tenneco" will be used to refer to the Tenneco Oil Company and its predecessors and successors in interest on the Sac and Fox tribal lands. Tenneco no longer holds any leases on Sac and Fox tribal lands. Tenneco Decree, *supra* note 114, at ¶ 15.

116. In 1867, after nearly eight decades of forced migrations, the Sac and Fox located on a reservation in the Indian Territory comprised of almost 480,000 acres. Treaty with the Sauk and Foxes, Feb. 18, 1867, 15 Stat. 495; MURIEL H. WRIGHT, A GUIDE TO THE INDIAN TRIBES OF OKLAHOMA 226 (1986). Within a generation, the Sac and Fox accepted allotment of tribal lands in severalty and cession of the remaining lands to the United States. Act of February 13, 1891, ch. 165, 26 Stat. 749 (1891). Nonetheless, the Nation retained approximately 880 acres, the seat of the Sac and Fox Agency, as tribal trust lands. Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 118 (1993) (referencing 800 acres reserved under the 1891 Agreement); Tenneco Complaint, *supra* note 3, at 3 (referencing 880 acres currently held in trust, plus an additional 80 acres held in fee by the Nation subject to a restriction on alienation). These tribal trust lands are Sac and Fox Indian country, *Sac and Fox*, 508 U.S. at 125, and today house the tribal headquarters, a health clinic, the national library, a food distribution warehouse, a campground, a rodeo ground, and an RV and mobile home park. *Hearings*, *supra* note 5, at 107 (prepared testimony of Elmer Manatowa, Chief, Sac and Fox Nation).

In 1935, Tenneco entered into an oil and gas lease for approximately 720 acres, Tenneco Complaint, *supra* note 3, at 3, and in 1949, a second lease for an additional 40 acres of tribal lands. *Id.* at 4.

117. *Id.* at 5.

118. FINAL REPORT AND LEGISLATIVE RECOMMENDATIONS: A REPORT OF THE SPECIAL COMM. ON INVESTIGATIONS OF THE SENATE SELECT COMM. ON INDIAN AFFAIRS, 132 (1989) [hereinafter REPORT].

119. Tenneco Complaint, *supra* note 3, at 4.

120. *Hearings*, *supra* note 5, at 31 (statement of Curtis Canard, Tribal Geotechnical Services, Inc., consultant to the Sac and Fox Nation). *See also* REPORT, *supra* note 118, at 132-33.

121. *Hearings*, *supra* note 5, at 31-32; REPORT, *supra* note 118, at 132.

Ada aquifer is a "leaking bucket," the salt water migrated into the shallower freshwater aquifer and into some abandoned oil wells.[122]

Prior to 1948, the Vamoosa-Ada aquifer provided a source of fresh drinking water for the Sac and Fox lands. In the early 1950s, however, tribal members began to complain about the quality of the water.[123] Water from a well drilled in 1964 failed the drinking water guidelines of the U.S. Health Service.[124] A long series of studies followed, each arriving at similar conclusions:[125] the aquifer under Sac and Fox lands is contaminated with benzene, sodium, chloride, and sulfates;[126] the contamination is the result of exploration, production, and disposal activities by the oil companies;[127] and the contamination is extensive and "beyond rehabilitation."[128] The aquifer which served as the fresh drinking water supply for the Sac and Fox before World War II is now unusable.

There is no supply of drinking water remaining anywhere on Sac and Fox tribal lands. All drinking water must now be brought in from outside the reservation. Off-reservation wells supply tribal drinking water,[129] and the Nation has recently entered into a temporary contract with a nearby city to supply water,[130] but both sources are inadequate for tribal needs. Without a permanent and adequate supply of drinking water, commercial development of the Nation's lands has been essentially suspended.[131]

In June 1997, Tenneco, the Sac and Fox Nation, and the federal government entered into a settlement agreement to rectify the drinking

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122. *Hearings, supra* note 5, at 32.

123. *Id.* at 31.

124. *Id.*

125. The studies included a regional study by the U.S. Geological Survey in 1978; technical studies by the Bureau of Indian Affairs in 1979; a surface water study by the BIA in 1980; additional studies in 1982 and 1984; and an analysis by the EPA Office of Drinking Water in 1986. *Id.* at 32-33.

126. Tenneco Complaint, *supra* note 3, at 7-8; *Hearings, supra* note 5, at 32.

127. *Hearings, supra* note 5 at 32-33; *see also* REPORT, *supra* note 118, at 132.

128. *Hearings, supra* note 5, at 33.

129. In the 1970s, the Indian Health Service located a fresh water supply two miles south of the Sac and Fox country and drilled two wells. *Id.* at 31.

130. Tenneco Complaint, *supra* note 3, at 7.

131. *Hearings, supra* note 5, at 36 (statement of G. William Rice, Attorney General, Sac and Fox Nation), 37 (statement of Truman Carter, Treasurer, Sac and Fox Nation). Sac and Fox industries have been located from 30 to 150 miles from the tribal lands. *Id.* at 37-38 (statement of Truman Carter), 107 (prepared testimony of Chief Elmer Manatowa). On occasion, the Nation has even been forced, during interruptions in the off-reservation well water supply, to make portable outhouses available to employees and visitors to Sac and Fox lands. *Id.* at 38 (statement of Truman Carter).

water problems of the Nation.[132] Tenneco agreed to a total settlement of $3.5 million,[133] including $1.16 million in direct payments to the Sac and Fox Nation.[134] In addition to the payments, Tenneco will purchase three tracts of land as sources of potable water,[135] drill supply wells, construct treatment systems, and lay pipeline.[136] Tenneco's ultimate obligation is to provide a potable water supply of at least 207 sustainable gallons per minute from the tracts it purchases.[137] This drinking water supply will allow the Sac and Fox Nation, "'for the first time in 40 years,'" to go forward with economic development of its reservation.[138] In Sac and Fox country, development plans are already underway: the Nation intends to open a juvenile detention facility in 1997, and is planning a health clinic and apartments for elderly tribal members.[139]

The consent decree with Tenneco will thus bring the Sac and Fox Nation an adequate supply of safe drinking water and permit long-suspended use of tribal lands. But the decree will do nothing to restore the Vamoosa-Ada aquifer. While the settlement will provide enormous benefits to the Nation, preventing the contamination of the groundwater in the first place would have saved decades of struggle and lost opportunities.

Adequate regulation of Tenneco's activities could perhaps have prevented the destruction of the Sac and Fox aquifer, but federal enforcement of environmental laws has been lax in Indian country[140] and

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132. *See* Tenneco Decree, *supra* note 114. The settlement agreement was reached in mid-December 1996, and the consent decree was published in the Federal Register on February 6, 1997. Notice of Lodging of Consent Decree, United States v. Tenneco Oil Co., 62 Fed. Reg. 5654 (1997). Following an extended comment period, the district court entered the decree on June 2, 1997. Conversation with Kalyn Cherie Free, U.S. Department of Justice, in Tulsa, Oklahoma (June 8, 1997).

133. Bill Swindell, *Oil Firm, Tribe Settle Lawsuit*, TULSA WORLD, Dec. 24, 1996, at A11.

134. Tenneco Decree, *supra* note 114, at ¶¶ 24-25. The payments and other conditions of the settlement will be implemented in three phases. Of the initial payment of $580,000, at least $75,000 will be dedicated to cleanup of oilfield debris, removal of abandoned oilfield equipment, and cleanup and maintenance of producing oil wells. *Id.* ¶ 24.

135. The three tracts must comprise a minimum of 120 acres. *Id.* ¶ 18D. The tracts will be conveyed to the Sac and Fox Nation, which will petition the Department of the Interior to take the lands into trust. *Id.* ¶ 18F.

136. *Id.* ¶¶ 18A-B. Tenneco also agreed to: install a water intake structure and pump on the Deep Fork River for future tribal use, *id.* ¶ 18G; remove a surface impoundment, *id.* ¶ 19; and contract with a nursery to plant 250 pecan trees on tribal land, *id.* ¶ 20.

137. *Id.* ¶ 18C.

138. Swindell, *supra* note 133, at A11 (quoting Dora Young, Principal Chief of the Sac and Fox Nation).

139. *Id.* Phase I of the settlement calls for Tenneco to provide potable water sufficient to allow the juvenile detention center to open. Tenneco Decree, *supra* note 114, at ¶ 18A.

140. There was little regulation of underground injection activity anywhere until 1965, *see* Catherine Vandemoer, *The Development of Underground Injection Control Programs on Indian Lands: Issues, Challenges, and a Blueprint for Tribal Program Development*, *in* MINERAL

the Nation itself lacked the resources and the information to act.[141] The lesson for other tribes is clear:[142] effective protection of water resources from the impacts of oil and gas operations may depend upon tribal environmental programs.

The federal water program with the most immediate and direct impact on the oil and gas industry is the underground injection control (UIC) program of the SDWA.[143] As illustrated by the Sac and Fox experience, underground injection has dual importance in the oil and gas context. First, once the natural pressure in a reservoir has dropped, companies may inject produced water or gas into the oil reservoir to force the remaining oil into production wells.[144] Second, because oilfield waste water may not be discharged to surface waters, the primary method of disposal is by injection into wells.[145]

The UIC program is intended to prevent underground injection that could endanger existing or potential underground drinking water sources.[146] Regulation is accomplished by imposing construction, operating,

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DEVELOPMENT ON INDIAN LANDS 17-2 (Rocky Mtn. Min. L. Found. 1989), and no federal program covering Indian lands until 1988. *See* Underground Injection Control Programs on Indian Lands, 53 Fed. Reg. 43,084, 43,096 (1988) (to be codified at 40 C.F.R. pt. 147). Moreover, the mere existence of a federal program does not guarantee that it is adequately enforced. *See, e.g.*, WATER QUALITY SURVEY, *supra* note 52, at 66 (noting the lack of "reliable indications that the EPA itself is administering and enforcing the Clean Water Act on those reservations where the Tribal governments are not").

141. *See, e.g., Hearings, supra* note 5, at 41-44 (statement of G. William Rice) (noting the tribal reliance on the Department of the Interior to monitor oil lessees, and the lack of tribal resources to force the Department to act). In addition, of course, Tenneco's activities on the Sac and Fox Reservation took place long before the Water Acts authorized tribes to take primacy.

142. *See* Vandemoer, *supra* note 140, at 17-23 (noting "newly discovered ground water contamination" on a number of reservations, including the Navajo, Jicarilla Apache, Wind River, Southern Ute, and Osage).

143. 42 U.S.C. §§ 300h, *et. seq.* (1994 & Supp. I 1995); *see generally* Elizabeth H. Temkin & Mary C. Larson, *Overview of Federal Underground Injection Control Program, in* ENVIRONMENTAL REGULATION OF THE OIL AND GAS INDUSTRY (Rocky Mtn. Min. L. Found. 1993). Nonetheless, the SDWA expressly prohibits the EPA from requiring, or requiring the states to require in state-operated UIC programs, provisions which "interfere with or impede" either underground injection of produced water or underground injection for secondary recovery of oil or gas, unless necessary to protect underground sources of drinking water. Identical language appears at 42 U.S.C. § 300h(b)(2) (regulations for state programs), § 300h-1(c) (EPA program for states without primacy) (1994). Nothing, however, would prohibit a state or a tribe from choosing to impose such requirements. *See* 42 U.S.C. § 300h-2(d).

144. JOHN S. LOWE, OIL AND GAS IN A NUTSHELL 7 (3d ed. 1995).

145. Marion Yoder & Thomas H. Owen, Jr., *Disposal of Produced Water*, 37 ROCKY MTN. MIN. L. INST. 21-1, 21-3 (1991).

146. 42 U.S.C. § 300h. There is an exemption for aquifers that "cannot now and will not in the future serve as a source of drinking water" because of any one of a number of factors. Underground Injection Control Program: Criteria and Standards, 40 C.F.R. § 146.4(b) (1996).

and monitoring requirements on five classes of underground injection wells;[147] Class II wells are those used for the injection of oilfield waste waters, for enhanced oil and gas recovery, and for the storage of hydrocarbons.[148] All underground injection activities, including construction of the wells, require a permit from the appropriate jurisdiction.[149]

Thousands of Class II injection wells are located in Indian country.[150] In the absence of a tribal UIC program, the EPA regulates these and other injection wells on all "Indian lands," which are defined as all lands within Indian country regardless of ownership.[151] By regulation in 1988, the EPA extended the generic federal UIC program to Indian lands in forty-one states that had taken primacy for non-Indian lands,[152] but retained

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The Vamoosa-Ada aquifer underlying the Sac and Fox Reservation, for example, may be exempt under the criterion that the aquifer is so contaminated that it is economically or technologically impractical to make it fit for human consumption. *See id.* § 146.4(b)(3). Although a number of aquifer exemptions were granted in Indian country, one commentator contends that the exemptions were based on a poor understanding of local conditions and were designed to streamline the administrative burden. Vandemoer, *supra* note 140, at 17-10. Nonetheless, tribes may wish to regulate underground injection even if it will no longer protect groundwater quality. *Id.* at 17-18.

147. 40 C.F.R. § 144.6 (1996).

148. *Id.* § 144.6(b), § 146.5(b). The criteria and standards for Class II wells are found at 40 C.F.R. § 146.21-.24.

Class I wells are used to inject hazardous, nonhazardous, and municipal wastes below the lowermost aquifer. Class III wells are used to inject fluids for the extraction of minerals. Class IV wells are used to inject radioactive or hazardous wastes into or above the lowermost aquifer. Class V wells include all injection wells that do not fall into the other four categories. Vandemoer, *supra* note 140, at 17-12; Temkin & Larson, *supra* note 143, at 6-2-6-4; *see generally* 40 C.F.R. pt. 146.

149. 42 U.S.C. § 300h(b)(1) (1994); 40 C.F.R. § 144.31. Under certain circumstances, existing wells—including existing Class II wells—can be authorized by rule rather than by individual permit. *See* 40 C.F.R. § 144.21-.28.

150. For example, there are some 3600 Class II wells on the Osage mineral reserve alone. Phillips Petroleum Co. v. EPA, 803 F.2d 545, 562 (10th Cir. 1986). In 1988, the EPA found that there were 704 Class II wells on Navajo lands, 15 on Ute Mountain Ute lands, and 194 on Indian lands in Oklahoma other than those of the Osage and Five Civilized Tribes, *see* Underground Injection Control Programs for Certain Indian Lands, 53 Fed. Reg. 43,096, 43,097 (1988) (to be codified at 40 C.F.R. pt. 147), and 200 on the Wind River Reservation. *See* Underground Injection Control Programs on Indian Lands, 53 Fed. Reg. 43,084, 43,085 (1988). A 1989 inventory found a total of 10,116 Class II wells on Indian lands in Colorado, Wyoming, North and South Dakota, Montana, and Utah. *See* Vandemoer, *supra* note 140, at 17-12.

151. *See* 40 C.F.R. § 144.3 ("Indian lands means 'Indian country' as defined in 18 U.S.C. 1151"); *see also id.* § 144.2. The EPA's authority to regulate on Indian lands absent a tribal program is now recognized in the SDWA. 42 U.S.C. § 300h-1(e); *see also Phillips Petroleum*, 803 F.2d at 557.

152. 53 Fed. Reg. 43,084 (1988); *see generally* 40 C.F.R. pt. 147 (1996).

authority to promulgate specialized federal Class II programs for Indian lands that are tailored to tribal concerns.[153] Under this authority, and at the request of the affected tribes, the EPA promulgated tailored programs for certain tribes, primarily located in Oklahoma and New Mexico.[154] For the most part, these tailored programs incorporate selected aspects of the state programs that are more conservative and thus more protective than the generic federal standards.[155]

Indian tribes are authorized to take primacy for the UIC program.[156] To date, at least one tribe has applied for TAS for the UIC program,[157] and several tribes have indicated their intent to seek UIC primacy.[158] No tribe, however, has apparently yet been granted primacy by the EPA.

Tribes concerned about the impacts of underground injection into Class II wells thus have two regulatory options. Tribes may pursue a federal UIC program tailored to local needs,[159] or they may seek primacy to administer the UIC program. The tailored program alternative may be an expedient compromise for tribes with specialized needs and concerns, but without adequate resources to assume primacy, or for whom groundwater is not a sufficiently high priority. It may also be a useful step between federal implementation of the generic UIC program and the development of a tribal program, allowing the tribe time to develop the necessary resources and expertise to seek primacy. Nonetheless, the tailored programs are comprised largely of the generic UIC program provisions, and they are

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153. 40 C.F.R. § 144.2 (1996). The EPA had exercised this authority some years before the Indian amendments to the SDWA, promulgating a particularized Class II UIC program for the Osage mineral reserve in 1984. *See* 40 C.F.R. pt. 147 subpt. GGG (1996). The EPA's authority to do so was upheld by the Tenth Circuit in *Phillips Petroleum*, 803 F.2d 545.

154. 40 C.F.R. pt. 147. The EPA promulgated two sets of specialized UIC regulations. One set applied to all lands of the Navajo Nation and the Ute Mountain Ute Tribe, as well as to all other Indian lands in New Mexico. *See* 40 C.F.R. pt. 147 subpt. HHH. The second set applied to all Indian lands in Oklahoma, except for Class II wells on the Osage reserve and the lands of the Five Civilized Tribes. *See id.* subpt. III.

155. 53 Fed. Reg. 43,096, 43,102 (1988) (to be codified at 40 C.F.R. pt. 147).

156. 42 U.S.C. § 300h-1(e) (1994), § 300j-11(a)(2); *see also* 40 C.F.R. § 144.72.

157. The Mille Lacs Band of Chippewa has applied for UIC primacy. WATER QUALITY SURVEY, *supra* note 52, app. 2 at 11. In addition, the Navajo Nation had an application to assume UIC primacy pending before the EPA as of 1994. Susan R. Stockstill & Lynn H. Slade, *Oil and Gas Development on Indian Lands: Shifting Sovereignties in the Oil Patch*, 45TH OIL & GAS INST. 10-1, 10-56 (Matthew Bender 1994).

158. *See* Vandemoer, *supra* note 140, at 17-14-17-16 (discussing program developments of the Wind River, Ute Mountain Ute, and Navajo Tribes).

159. The EPA noted that "[m]odified programs may be developed for other Indian lands in the future at the request of the Tribe." Underground Injection Control Programs on Indian Lands, 53 Fed. Reg. 43,084, at 43,084 (1988) (to be codified at 40 C.F.R. § 147). Apparently, however, no tribe has done so, and some of the tribes with tailored programs may now be pursuing UIC primacy.

administered by the EPA. Tribes that wish to exercise direct control over UIC activities, and thus over the impacts of oil and gas development on their water resources, will choose instead to pursue primacy to administer the UIC program within their territories.

C. Respecting Tribal Government

Beyond the specific ways in which tribal WQS will impact oil and gas companies, and beyond the potential for future direct tribal regulation of on-reservation oil and gas activities, lies a broader lesson: Indian tribes are governments with authority over their territories and persons who operate within them. Tribes exercise all powers of sovereignty that have not been divested,[160] including authority "over both their members and their territory."[161] Under this inherent sovereignty, tribes retain virtually plenary power to regulate Indian activities and Indian lands,[162] including the conduct of non-Indians that occurs on Indian lands.[163] Moreover, even on fee lands tribes have inherent authority to regulate non-Indians "who enter into consensual relationships with the tribe or its members"[164] or whose conduct directly affects tribal sovereign interests.[165] The Supreme Court has specifically recognized that tribal authority over non-Indians includes the right to tax, license, or otherwise regulate non-Indians who enter into such commercial dealings as "contracts, leases, or other arrangements."[166]

Although these principles should not be new ones for oil companies, the industry has a rocky history of accepting the exercise of governmental powers by Indian tribes.[167] Thus far, the most contentious issues have been those of taxation and tribal court jurisdiction.

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160. *See supra* text accompanying notes 10-24.

161. United States v. Mazurie, 419 U.S. 544, 557 (1975); *see also* Williams v. Lee, 358 U.S. 217, 220 (1959) (tribes retain the inherent right "to make their own laws and be ruled by them").

162. Brendale v. Yakima Indian Nation, 492 U.S. 408, 444 (1989) (Stevens, J.); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983).

163. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 147 (1982) (noting that a "nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose"); *see also* Mescalero Apache, 462 U.S. at 330-31; Montana v. United States, 450 U.S. 544, 557 (1981).

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

165. *Id.* at 566. This aspect of inherent tribal authority is explored *supra* at text accompanying notes 16-24.

166. *Id.* at 565.

167. I do not necessarily mean to single out the oil companies as unique in this regard. Resource extraction industries generally have a history of challenging tribal governmental powers.

Taxation is a basic power of any sovereign, and taxation of natural resource wealth through severance, income, and property taxes is a long-standing practice.[168] Like other governments, tribes have used resource-based taxes as a means of enhancing governmental revenues and regulating the activities of the resource extraction companies.[169] Federal recognition of inherent tribal authority to tax within Indian country dates back at least to the late nineteenth century.[170] In 1904, the U.S. Supreme Court upheld the right of tribes to tax non-Indians who were exploiting the natural resources of the tribal territory.[171]

Nonetheless, when the Jicarilla Apache Tribe imposed an oil and gas severance tax in 1976, lessees of tribal lands sought to enjoin the tax on the ground that the Tribe had not reserved the right to tax in the leases. In *Merrion v. Jicarilla Apache Tribe*, the Supreme Court upheld the tribe's inherent sovereign power to tax nonmembers of the tribe that do business in Indian country.[172] Because the oil and gas lessees availed themselves of the privilege of conducting business on the Jicarilla Reservation and benefited from the provision of tribal services funded by governmental revenues, the severance tax was properly imposed on them.[173] The companies' argument that the tribal tax was not valid once a lease was final, the Court noted, confused the tribe's dual roles as mineral owner and as government.[174] An Indian tribe does not abandon its sovereign powers by failing to reserve them in a commercial contract, and the lessees thus remain

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168. *See* Ronald A. Kaiser & James E. Fletcher, *State Policies and Practices in Coal Severance Taxation*, 27 NAT. RESOURCES J. 591, 595-97 (1987); Denise DiPasquale, et al., *Natural Resource Taxation*, 29 AM. U. L. REV. 281 (1980); Rita Neumann, *Taxation of Natural Resource Production on Tribal Lands*, 63 TAXES 813 (1985).

169. AMBLER, *supra* note 2, at 196-99; Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982). On tribal taxation of mineral producers, see generally Royster, *supra* note 1, at 606-11.

170. *See* Crabtree v. Madden, 54 Fed. 426, 429 (8th Cir. Indian Terr. 1893). In addition to this judicial recognition, the power to tax was affirmed by the Department of the Interior in the 1930s, *see Powers of Indian Tribes*, 55 Interior Dec. 14, 46-48 (1934), *reprinted in* I Op. Solic. Interior Relating to Indian Affairs 1917-1974, at 445, 465-66, and by a congressionally-appointed commission in the 1970s. *See* AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT: TASK FORCE TWO: TRIBAL GOVERNMENT 310 (1976).

171. Morris v. Hitchcock, 194 U.S. 384, 393 (1904) (tax on livestock grazing by non-Indians); *see also* Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 99 (8th Cir. 1956) (same).

172. Merrion, 455 U.S. at 137-38. Three years later, the Court reaffirmed that tribal authority to tax is an inherent sovereign power. Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985). Moreover, the principle that tribes retain inherent authority to tax non-Indian companies doing business in Indian country had been recognized twice by the Supreme Court in the two years prior to the *Merrion* decision. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980); Montana v. United States, 450 U.S. 544, 565 (1981).

173. *Merrion*, 455 U.S. at 137-38, 140-42.

174. *Id.* at 145.

subject to subsequent governmental action such as the levy of severance taxes.[175]

Taxation remains an area in which oil and gas companies continue to challenge tribal authority. After *Merrion*, the oil and gas industry generally accepted tribal taxation of oil leases on tribal lands, but recently the companies have challenged tribal authority to impose taxes on other lands.[176] The Tenth Circuit held in *Mustang Production Company v. Harrison*, however, that tribes have the authority to impose taxes, including taxes on oil and gas production, on lands within tribal jurisdiction.[177] And lands within tribal jurisdiction, the court found, extend to the Indian country,[178] including not only reservations, but also trust allotments located outside the boundaries of any formal reservation.[179] The courts' approach has thus remained consistent since *Merrion*: tribes have authority to tax activities which take place within the tribes' Indian country.

In the context of these recent challenges to tribal taxing authority, the oil companies have also challenged, directly or indirectly, the jurisdiction of tribal courts. An oil and gas company contesting tribal taxes or other regulations must bring suit in the proper forum. And that forum, recent cases maintain, is the tribal courts.

The doctrine of exhaustion of tribal remedies is traceable to *National Farmers Union Insurance Co. v. Crow Tribe*.[180] In *National Farmers*, an insurer

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175. *Id.* at 146-47. If, however, the sovereign expressly bargains away its sovereign power to tax, the lease term would be binding.

176. *See* Texaco, Inc. v. Hale, 81 F.3d 934 (10th Cir. 1996) (oil company challenged oil and gas severance tax and pipeline operator challenged business activity tax, both imposed on activities outside reservation but on lands which companies had conceded were Navajo Indian country); Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294 (8th Cir. 1994), *cert. denied*, 513 U.S. 1103 (1995) (oil company challenged property and gross production taxes, as well as Indian preference in employment law, as applied to lands leased from non-Indians within reservation boundaries). In both cases, the federal lawsuits were dismissed for failure to exhaust tribal court remedies.

177. Mustang Production Co. v. Harrison, 94 F.3d 1382, 1385 (10th Cir. 1996), *cert. denied sub nom.* Mustang Fuel Corp. v. Hatch, 117 S. Ct. 1288 (1997) (Cheyenne-Arapaho oil and gas severance tax).

178. For the statutory definition of Indian country, see *supra* note 30.

179. *Mustang Production*, 94 F.3d at 1385. *See also* Conoco, Inc. v. Arkeketa, 23 Indian L. Rep. 3043 (W.D. Okla. 1996) (Ponca Tribe has authority to impose its oil and gas severance tax on Conoco's leases of trust allotments); Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1542 n.11 (10th Cir. 1995) (Navajo Nation has authority to impose business activities tax on source gains from that portion of off-reservation coal mine that lies within Navajo trust allotments). In *Watchman*, the court also remanded for a determination of whether the mine site, 47% of which is located on trust allotments, is a dependent Indian community.

180. National Farmers Insurance Co. v. Crow Tribe, 471 U.S. 845 (1985). Federal court jurisdiction in *National Farmers* was based on federal question jurisdiction. In Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987), the Court extended the tribal exhaustion

brought suit in federal court to enjoin a tribal court default judgment. The Supreme Court ruled that although a challenge to tribal court jurisdiction presented a federal question, the issue of the tribal court's authority should be heard and decided in the first instance by the tribal court. Exhaustion of tribal remedies, the Court determined, would advance the federal policy of tribal self-government, promote the orderly administration of justice, and provide the federal courts with the benefits of tribal court expertise.[181]

Subsequent to *National Farmers*, the majority of circuits has developed a rule that exhaustion is required whenever there is a "colorable" or "plausible" assertion that tribal courts have jurisdiction in the case.[182] Federal courts are thus generally required to dismiss or abstain in favor of allowing the lawsuit to proceed in tribal court, even though the non-Indian party can assert a proper basis for federal jurisdiction. Once tribal court remedies have been exhausted, the losing party may seek review of the tribal court's jurisdictional ruling in federal court.[183] But the authority to hear the case in the first instance rests with the tribal forum.

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doctrine to suits based on diversity as well.

The tribal exhaustion doctrine is an extraordinarily complex area of federal Indian law. For discussions of the doctrine, see Timothy W. Joranko, *Exhaustion of Tribal Remedies in the Lower Courts After National Farmers Union and Iowa Mutual: Toward a Consistent Treatment of Tribal Courts by the Federal Judicial System*, 78 MINN. L. REV. 259 (1993), and Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089 (1995).

181. *National Farmers*, 471 U.S. at 856-57. The Court found, however, that exhaustion of tribal remedies was not required if tribal jurisdiction was asserted in bad faith or with the intent to harass, or was "patently violative of express jurisdictional prohibitions," or if exhaustion would be futile because of a lack of tribal remedies to exhaust. *Id.* at 856 n.21.

182. Stock West Corp. v. Taylor, 964 F.2d 912, 919-20 (9th Cir. 1992) (en banc). See generally Joranko, *supra* note 180, at 268-87 for a circuit-by-circuit analysis.

The U.S. Supreme Court recently held, however, that exhaustion was not required in a tort action between two non-Indians arising out of a traffic accident on a state highway running through the reservations. Strate v. A-1 Contractors, 117 S. Ct. 1404 (1996).

It is not always necessary that the exhaustion issue be raised by one of the parties. *See* United States v. Tsosie, 92 F.3d 1037 (10th Cir. 1996) (affirming district court's sua sponte dismissal to exhaust tribal remedies in a case that was essentially a dispute between two tribal members as to their rights to land within Indian country).

183. *National Farmers*, 471 U.S. at 857; *Iowa Mutual*, 480 U.S. at 19. The federal courts will generally review questions of federal law de novo and the tribal court's findings of fact for clear error. *See Mustang Production*, 94 F.3d at 1384; Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1300 (8th Cir. 1994), *cert. denied*, 513 U.S. 1103 (1995); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313-14 (9th Cir. 1990). In theory, if the federal court affirms the tribal court's jurisdiction, the federal court is "precluded" from relitigating the merits of the case. *Iowa Mutual*, 480 U.S. at 19. Nonetheless, as one court has noted recently, "*National Farmers* and *Iowa Mutual* both contemplate some post-exhaustion review; however, the breadth of that review is as yet undefined." Nevada v. Hicks, 944 F. Supp. 1455, 1469 (D. Nev. 1996). *See generally* Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 KAN. L. REV. (forthcoming 1998).

Nonetheless, oil and gas companies have resisted litigating in tribal court. In case after case challenging tribal governmental authority to tax or otherwise regulate, oil companies have filed suit in federal court. And in every case involving the assertion of tribal authority within Indian country,[184] the oil companies have been sent to tribal court to exhaust their remedies.[185]

The history of the *Mustang Production* litigation is illustrative of challenges to both the tribal power to tax and the primacy of the tribal courts. In 1988, the Cheyenne and Arapaho Tribes adopted an oil and gas severance tax on production from any land "within the jurisdiction" of the Tribes.[186] Nineteen oil companies, whose leases included trust allotments, filed suit in federal district court challenging the Tribes' authority to tax production on allotted lands located outside the boundaries of a formal reservation.[187] The Tribes moved for a stay or dismissal of the federal lawsuit, and the federal district court, pursuant to *National Farmers*, stayed

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184. In *Watchman*, the court determined that the tribal exhaustion doctrine "applies throughout Indian country, not just on formal reservations." Nonetheless, the court noted that although it would apply a bright-line rule requiring exhaustion inside reservation boundaries, "the application of the doctrine may differ outside the formal boundaries of a reservation." 52 F.3d at 1537. Outside reservations, the facts and circumstances of each case are examined to determine whether the policies behind the *National Farmers* rule, *see supra* text accompanying note 181, require abstention.

In *Watchman*, the Navajo Nation sought to apply its business activities tax to source gains from a mine located outside, but adjacent to, the Navajo Reservation. The surface area of the mine site was 47% trust allotments and 7% Navajo Nation lands, with the remainder owned by private parties, the state, and the federal government. The coal estate was owned primarily by the federal government and a private party; none of the subsurface coal was owned by the tribe or its members. 52 F.3d at 1534-35. First, the court held that if the mine site was Indian country, then the *National Farmers* factors required tribal exhaustion, in particular because the lawsuit directly challenged the exercise of the tribe's sovereignty. *Id.* at 1537-39. Second, the court held that the mine site was partly located in Indian country because 47% of the surface area was trust allotments, *id.* at 1541, but that that interest "by itself is not enough to trigger the tribal abstention doctrine." *Id.* at 1542. Accordingly, the court remanded for a determination of whether the mine site was a dependent Indian community, concluding that if it was, the district court should abstain in favor of the tribal court. *Id.*

185. *See* Texaco, Inc. v. Hale, 81 F.3d 934 (10th Cir. 1996) (exhaustion required for tribal assertion of authority to tax oil and gas production on lands outside reservation that oil companies conceded was within tribe's Indian country); *Duncan Energy*, 27 F.3d at 1294 (exhaustion required for tribal assertion of authority to tax oil and gas production on non-Indian lands within reservation); Conoco, Inc. v. Arkeketa, 19 Indian L. Rep. 3085 (N.D. Okla. 1992) (exhaustion required for tribal assertion of authority to tax oil and gas production on trust allotments); Conoco, Inc. v. Ponca Tax Comm'n, 21 Indian L. Rep. 6119 (Pon. Tax Ct. 1994) (subsequent proceeding in tribal court); Conoco, Inc. v. Arkeketa, 23 Indian L. Rep. 3043 (W.D. Okla. 1996) (proceeding on review in federal court).

186. *Mustang Production*, 94 F.3d at 1383.

187. *Id.* at 1384.

the action pending exhaustion of tribal remedies.[188] The companies then filed suit in Cheyenne-Arapaho District Court.[189] In 1991, the trial court granted summary judgment to the Tribes,[190] and the companies appealed to the Cheyenne-Arapaho Supreme Court. That court affirmed, holding that trust allotments were within the civil jurisdiction of the Tribes and that the oil companies availed themselves of doing business on "and taking valuable resources from" Cheyenne-Arapaho lands.[191] The oil companies sought review in federal district court, which determined that the Cheyenne-Arapaho Tribes properly exercised their jurisdiction to tax the lessees.[192] The Tenth Circuit affirmed, holding, as did the Cheyenne-Arapaho courts, that the Tribes' sovereign power to tax non-Indians doing business in the Tribes' territory extended to the whole of the Tribes' Indian country, including its members' trust allotments.[193]

Indian tribes assert their governmental authority over oil and gas operations for the same reasons as other governments. Tribal taxes are a primary means of raising the revenue needed to provide basic governmental services within the Indian country,[194] and the tribal power to tax "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction."[195] Nonetheless, oil companies have appeared insistent on challenging every tribal attempt to exert their taxing authority, and to bring those challenges in federal court. The resulting extra step in litigation, the motion to dismiss for failure to exhaust tribal remedies, forces tribes to expend their limited revenues on litigation expenses that should not be incurred. The oil companies' historical failure to respect tribal governmental authority and institutions, therefore, puts tribes in a double bind. Not only must tribes defend against challenges to their authority to collect revenues, but they must expend their revenues on

188. *Id.*

189. Initially, the companies filed an administrative appeal with the Cheyenne-Arapaho Tax Commission, which ruled that it had no jurisdiction to determine the validity of an act it was charged with enforcing. Mustang Production Co. v. Combs, No. 89-005 (Chey.-Arap. Tax Comm'n, June 14, 1989).

190. Mustang Fuel Corp. v. Cheyenne-Arapaho Tax Comm'n, 18 Indian L. Rep. 6095 (Chey.-Arap. Dist. Ct. 1991).

191. Mustang Fuel Corp. v. Cheyenne-Arapaho Tax Comm'n, 21 Indian L. Rep. 6058, 6065 (Chey-Arap. Sup. Ct. 1993).

192. Mustang Fuel Corp. v. Hatch, 890 F. Supp. 995 (W.D. Okla. 1995).

193. *Mustang Production*, 94 F.3d at 1382.

194. *See* Mustang Fuel Corp. v. Cheyenne-Arapaho Tax Comm'n, 21 Indian L. Rep. at 6060 ("The Cheyenne-Arapaho, lacking substantial financial resources, turned to taxation as a means of providing revenue for the operation of day to day governmental services for Indians and non-Indians in the area.").

195. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982).

motions to dismiss federal court actions that should have been filed in tribal court in the first place.

Like taxes, environmental regulations are an important means for government to manage the economic activity within its jurisdiction. Environmental regulations permit tribes to control or prevent the harmful effects of exploration and production activities on the waters and other resources of the Indian country. Whether tribes are now able to spend their limited resources on developing and implementing sound oilfield environmental programs, or whether those resources will be forced into federal litigation, depends to some extent on the regulated companies. If the oil companies are willing to learn to accept Indian tribes as sovereign governments exercising regulatory authority, and to bring what litigation they believe necessary in tribal court in the first instance,[196] both the tribes and the companies should benefit.

IV. CONCLUSION

In the last few years, Indian tribes have begun to assert environmental authority over their water resources in significant numbers. Initially, many of these tribes are focusing on establishing and enforcing water quality standards for all surface waters within their Indian country. Although WQS have limited direct applicability to oil and gas exploration and production activities, the tribal assertions of environmental authority contain important lessons for the industry.

But the development of tribal environmental programs also contains vital lessons for the Indian tribes, lessons that are abundantly clear from the Sac and Fox groundwater case.[197] Tribes cannot rely on the industry to protect tribal resources. Much of the history of relations between Indian tribes and oil companies has been one of one-sided access to information, bargaining power, and benefits.[198] Neither the federal nor the state governments rely on the oil industry to police itself in environmental matters, and tribes should do no less.

Tribes also cannot rely on the federal trustee to protect tribal resources from environmental damage by oil and gas operations. The Sac and Fox saga may be an extreme example of BIA indifference, but federal abdication of responsibility is not uncommon. Since the tribal amendments

196. Respect for tribal sovereignty does not mean that the oil companies roll over for anything a tribe chooses to do. It does mean that the oil companies accept that tribes are governments with authority over their territories, and that they respect tribal judicial institutions by filing their challenges in tribal court.

197. *See supra* text accompanying notes 114-39.

198. *See generally* Royster, *supra* note 1.

to the federal environmental laws in the mid-1980s,[199] much of the responsibility for environmental protection in Indian country has fallen to the EPA rather than the BIA. And while the EPA has been a far stronger supporter of tribal self-governance, evidence suggests that it too is not adequately administering environmental protection programs in the Indian country.[200]

That leaves environmental regulation of oilfield activities largely up to the tribes themselves. Despite limited tribal financial and technical resources, the potential effects of oilfield contamination on tribal lands and waters demand an effective and enforced regulatory regime. Using their inherent regulatory powers and program authorization under the federal environmental laws, tribes must take control over environmental protection activities in the oil patch.

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199. Following the EPA's initial Indian policy statement, *see* U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (1984), the agency promoted a legislative agenda to put its policy into practice. Between 1986 and 1990, three of the major environmental laws were amended to treat tribes as states (TAS). Clean Air Act Amendments of 1990, 42 U.S.C. § 7601(d) (1994); Clean Water Act Amendments of 1987, 33 U.S.C. § 1377 (1994); Safe Drinking Water Act Amendments of 1986, 42 U.S.C. § 300j-11(a) (1994). *See generally* Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 619-22 (1989).

200. *See* WATER QUALITY SURVEY, *supra* note 52, at 66. The survey report notes that the bulk of EPA funding is going to tribes which already have regulatory programs and financial resources, "leav[ing] many reservations unprotected." The report continues:

> This would not matter quite so much if there were reliable indications that the EPA itself is administering and enforcing the Clean Water Act on those reservations where the Tribal governments are not. There are no such indications, however, and we are quite alarmed that, given the universal complaint of EPA Regional staff that they lack sufficient staff resources to deal with all the Tribes that are pursuing TAS, no effort whatsoever is being made in Indian communities that have not applied for TAS.

Id.