General Principles of Sovereignty and Federal Trust Responsibility

Working Effectively with Tribal Governments

February 1, 2010
Sacramento, California

(Materials developed by National Indian Justice Center for prior training for U.S. EPA, Region 9.)
Sovereignty - Defined

• Sovereignty is the Right of Self-Governance.
• It is the right of an entity to make its own laws and to be governed by them.
• It’s important to know the difference between Sovereignty and Sovereign Immunity.
  – Sovereign immunity is the right to be free from suit; the right not to be sued in court.
  – “Sovereign” cannot be sued because the Sovereign’s assets are the assets of the community as a whole.
Treaty-making process

• For a treaty to become valid after it is signed by U.S. and tribal government representatives, it must be sent back to Washington D.C. and approved or ratified by Congress.

• Only 374 treaties with tribes have been ratified by Congress. (Of the 374 treaties, all have been violated in some form by the U.S.)
Sovereign Status of Indian Tribes

• Tribal Sovereignty was initially recognized by the U.S. as a result of having entered into treaties with Tribes.
  – The U.S. only negotiates treaties with sovereign entities.
  – The U.S. may expand or contract its recognition of tribal sovereign authority.
California Indian History 101

• 18 Treaties with California Indians setting aside 7.5 million acres of land negotiated from 1850-51.
  – Treaties were not ratified and were placed under an injunction of secrecy.

• California Land Claims Act of 1851
  – Resulting in loss of tribal villages and scattered landless Indians in California.

• There are 109 federally recognized tribes in California + very large urban Indian population.
Tribal Sovereign Status

• Inherent Tribal Sovereign Authority

  – Possess Inherent Sovereignty by virtue of being.

  – Subject to Tribal Powers only.

• Legal Sovereign Status of Tribes

  – Possess legal sovereign status because of treaty making between tribes and U.S./foreign powers.

  – Subject to Plenary Power of Congress, Interpretation of law by Federal Courts and some State Powers.
Jurisdiction is the scope to which the laws apply (persons, places, activities, real property, etc.).

**Types of Jurisdiction**

**Civil Jurisdiction**
- Plaintiff v. Defendant
- Offense against Person
- Fines, Injunctions

**Criminal Jurisdiction**
- Government v. Defendant
- Offense against Community
- Prison, Fine, Injunctions

**Civil Regulatory**
- Gov’t Agency v. Person

**Civil Adjudicatory**
- Person v. Person
Johnson v. McIntosh (1829)

- This case applied and adopted the **Discovery Doctrine** into U.S. case law.
- Discovery Doctrine **gave the U.S. the exclusive right to extinguish the original tribal right of possession by purchase or conquest.**
- Discovery Doctrine only left Tribes with the **Right to Use and Occupy the Land.**
- This theory gave the discovering Government title to all land as a result of having arrived onto the continent.
- U.S. Supreme Court held that Indians did not have the power to give (nor could a non-Indian receive from an Indian) title to land upon which Indians lived.
- This case served to protect federal land grants (federal land patents) which the federal government used to settle the territories.
Cherokee Nation v. Georgia (1831)

• State of Georgia attempted to apply state law over Cherokee Nation in an effort to “annihilate the Cherokees as a political society.”

• Cherokee Nation filed suit as a foreign nation directly in U.S. Supreme Court.

• U.S. Supreme Court held that Cherokee Nation was not a foreign nation but a Domestic Dependent Nation.
Worcester v. Georgia (1832)

- Two missionaries were sentenced to 4 years hard labor by state of Georgia for residing in Cherokee Nation without a license and without taking oath to support the Georgia Constitution and laws.
- Worcester challenged the jurisdiction of Georgia Courts.
- U.S. Supreme Court held that Indian nations were distinct, independent political communities in which state law has no effect.
- President Jackson purportedly said Marshall has made his decision, now let him enforce it. No mechanism in place to enforce, South Carolina tries to leave the Union, Jackson begs Georgia to let missionaries go. Missionaries pardoned in 1883.
Federal Trust Relationship

• Initially this responsibility was described as the relationship of a “guardian to its ward.”
• Now it is called the Federal Trust Relationship.
• Pursuant to the Federal Trust Relationship, the federal government owes a fiduciary duty to the tribes to protect their interests in the lands and resources held for their benefit.
Federal Trust Relationship

- A legal trust comes to an end. The Federal Trust Relationship will end only when the tribes cease to exist (legally or otherwise).

  Trustee = all federal branches of government

  **Res (lands and resources held in trust for Tribes or their members)**

  **Beneficiary = Tribes and their Members**
Federal Tribal Trust Relationship

**SETTLOR**
Entity that creates a Trust

**TRIBES**

**TRUSTEE**
Creates Trust, Manages Assets,
Holds Fiduciary
Responsibility

**BENEFICIARY**
Entity entitled to receive the principal
And/or income from the trust

*Common law prohibits the settlor and trustee from being the same entity to protect against mismanagement of assets.

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## Criminal Jurisdiction

<table>
<thead>
<tr>
<th>Year</th>
<th>Case/Act</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1881</td>
<td>U.S. v. McBratney</td>
<td>Allowed Colorado to assert jurisdiction over Non-Indian v. Non-Indian crime committed on reservation, without action by Congress.</td>
</tr>
<tr>
<td>1883</td>
<td>Ex Parte Crow Dog</td>
<td>Tribes retain exclusive jurisdiction over Indian v. Indian crimes. Murder of one Indian by another Indian. Tribe opted for traditional punishment (filling-shoes-of-victim).</td>
</tr>
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## Criminal Jurisdiction

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<tr>
<td>1887</td>
<td>General Allotment Act</td>
<td>Break up of Indian Country. Loss of 90 million acres.</td>
</tr>
<tr>
<td>1896</td>
<td>Talton v. Mayes</td>
<td>5th Am. Of U.S. Bill of Rights does not apply to Cherokee Nation such that a grand jury is required. Finds that Tribal authority is from inherent source not federal power.</td>
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### Criminal Jurisdiction

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<tr>
<td>1903</td>
<td>Lone Wolf v. Hitchcock</td>
<td>Ruled that treaties could be abrogated/breached if Congress deems it in tribes’ best interests. Established plenary power of Congress.</td>
</tr>
<tr>
<td>1978</td>
<td>Oliphant v. Suquamish</td>
<td>Non-Indian assaults tribal officer and resists arrest, includes high speed chase during Chief Seattle Days Celebration on reservation. Court held that tribe had no inherent sovereignty to assert criminal jurisdiction over Non-Indians without an explicit act of Congress.</td>
</tr>
<tr>
<td>1968</td>
<td>Indian Civil Rights Act</td>
<td>Congress adopts ICRA to ensure that Tribal Governments do not violate certain civil rights.</td>
</tr>
<tr>
<td>1978</td>
<td>U.S. v. Wheeler</td>
<td>The Double Jeopardy Clause of the U.S. Constitution does not bar federal prosecution under the Major Crimes Act of an Indian defendant following earlier conviction in tribal court of lesser included offense arising from the same acts.</td>
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**Criminal Jurisdiction**

<table>
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<tr>
<th>Year</th>
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<tr>
<td>1991</td>
<td>Congress’ Duro-fix</td>
<td>Tribal leaders lobby Congress and get an amendment to Indian Civil Rights Act which recognizes the inherent sovereignty of tribes to assert jurisdiction over all Indians.</td>
</tr>
<tr>
<td>2004</td>
<td>U.S. v. Lara</td>
<td>Lara, non-member Indian ignored Spirit Lake Tribe’s order excluding him from its reservation. He struck a federal officer arresting him. He pleaded guilty in Tribal Court to the crime of violence to a policeman. The Federal Government then charged him with the federal crime of assaulting a federal officer. Lara claimed that, because key elements of that crime mirrored elements of his tribal crime, he was protected by the Double Jeopardy Clause. <strong>Held:</strong> Because the Tribe acted in its capacity as a sovereign authority, the Double Jeopardy Clause does not prohibit the Federal Government from proceeding with the present prosecution for a discrete federal offense.</td>
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# Civil Jurisdiction

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<td>1959</td>
<td>Williams v. Lee</td>
<td>State court lacks subject matter jurisdiction over dispute between Indian and Non-Indian arising on reservation. Test set forth below.</td>
</tr>
<tr>
<td>1981</td>
<td>U.S. v. Montana</td>
<td>Test to determine Civil Regulatory jurisdiction over a non-Indian on non-Indian owned lands within reservation. Case law post-Montana allowed regulatory jurisdiction if only one of the prongs were met. States only need meet #4.</td>
</tr>
<tr>
<td>1982</td>
<td>Merrion v. Jicarilla</td>
<td>Tribe has civil jurisdiction over non-Indians on Indian land and regulatory powers over non-Indian land within Indian country.</td>
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Montana Test for Tribal Civil Regulatory Jurisdiction

1. Is there a consensual relationship between the non-Indian and the Tribe? (May include contracts or other dealings.) OR

2. Does the Non-Indian’s activity threaten or have a direct impact upon:
   a. Economic Security of the Tribe,
   b. Political Integrity of the Tribe, or
   c. Health, Safety or Welfare of the Tribe.
Termination and Relocation

• The U.S. Government sought to move Indians off of the Reservation into the Urban Center
• Through P.L. 280, the U.S. Government sought to end the Federal/Tribal trust relationship
• Resulted in loss of land and homelessness

• (a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.
### 28 U.S.C. § 1360. State civil jurisdiction in actions to which Indians are parties.

(P.L. 280 Civil Provisions)

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• (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.
Public Law 280: Criminal Provisions § 1162. State jurisdiction over offenses committed by or against Indians in the Indian country:

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:
§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country: (Public Law 280: Criminal Provisions)

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§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country: (Public Law 280: Criminal Provisions)

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.
### Civil Jurisdiction

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<th>1987</th>
<th>Cabazon v. California</th>
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<td>If the intent of a state law is generally to prohibit certain conduct, it falls within P.L. 280’s grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and P.L. 280 does not authorize its enforcement on Indian lands.</td>
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Cabazon v. California (1987)

- California sought to apply its laws governing the operation of bingo games to bingo games operated by the Cabazon and Morongo Bands of Mission Indians.
- Riverside County also sought to apply its ordinances regulating bingo and card games to the tribal gaming operations.
- U.S. Supreme Court held that although state laws may be applied to tribal Indians on their reservations if Congress has expressly consented, Congress has not done so here either by P.L. 280 or by the Organized Crime Control Act of 1970.
Cabazon v. California (1987)

• The State of California attempted to apply a law from its criminal code governing gaming under the assumption that P.L. 280 would allow state criminal law to apply to Indians on reservations.

• The U.S. Supreme Court found that the law was not “Criminal/Prohibitory” but the statute was rather “Civil/Regulatory” in nature.
  
  – *If the intent of a state law is generally to prohibit certain conduct, it falls within P.L. 280’s grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and P.L. 280 does not authorize its enforcement on Indian lands.*
Civil Regulatory v. Criminal Prohibitory

What sort of jurisdiction may the States assert?

Intent of the Law

<table>
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<tr>
<td>Prohibitory (generally, criminal law)</td>
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<tr>
<td>Regulatory (generally, civil regulatory)</td>
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State Juris if act violates state public policy

Tribal Juris if tribal laws consistent w/ State Law
Indian Gaming Regulatory Act

• IGRA was passed by Congress in 1988 as a response to the Cabazon case.
• IGRA provides for establishment of or requires:
  – All Indian gaming must occur on trust lands;
  – National Indian Gaming Commission oversees enforcement;
  – Gaming classes I, II, III and allocation of regulatory authority between tribe and state;
  – Tribal Gaming Ordinances to regulate operations, use of revenues, audits, contractors, licensing of employees;
  – Off-reservation environmental impact statements prior to gaming;
  – Tribal-State Compacts for Class III gaming activity

Addressing the jurisdiction of a tribal court over an action arising out of an auto accident involving non-Indians on a state highway right-of-way on the Ft. Berthold Reservation, ND, the Court held that a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction, finding that subject to controlling provisions in treaties and statutes, and the exceptions outlined in Montana v. U.S., the civil authority of Indian tribes and tribal courts does not extend to the actions of non-tribal members on non-Indian fee lands.
Montana Test for Tribal Civil Regulatory Jurisdiction

1. Is there a consensual relationship between the non-Indian and the Tribe? (May include contracts or other dealings.) OR

2. Does the Non-Indian’s activity threaten or have a direct impact upon:
   a. Economic Security of the Tribe,
   b. Political Integrity of the Tribe, or
   c. Health, Safety or Welfare of the Tribe.
Nevada v. Hicks (2001)

- A tribal court does not have jurisdiction to adjudicate the alleged tortious conduct of state games wardens in executing a search warrant of a tribal member’s home on tribal trust land.

- *As to non-tribal members, a tribal court’s inherent adjudicatory authority is at most as broad as the tribe’s regulatory authority.*

- Tribal authority to regulate state officers in executing process related to off-reservation violation of state laws is not essential to tribal self-government or internal relations.

- The rule that, where non-tribal members are concerned, the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations ... cannot survive without express congressional delegation (as per Montana rule) applies to both Indian and non-Indian land.

- The land’s ownership status is only one factor to be considered, and while that factor may sometimes be dispositive, tribal ownership is not alone enough to support regulatory jurisdiction over non-members.
Nevada v. Hicks (Continued)

• Beware of dicta in Federal Indian Law cases . . .
• Our cases make clear that the Indians right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation’s border. Though tribes are often referred to as sovereign entities, it was long ago that the Court departed from Chief Justice Marshall’s view that the laws of [a State] can have no force within reservations boundaries.\(^1\) Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State.\(^2\)


Plaintiff-Appellant Terrence Bressi is a non-Indian who filed this action against four officers of the Tohono O’odham Police Department ("Tribal Police Department") and the United States after he was stopped and cited at a roadblock on a state highway crossing the Tohono O’odham Nation Indian Reservation.


He also sought relief under § 1983 and the right to privacy provision of art. 2, § 8 of the Arizona Constitution for his subsequent citation and arrest.

Finally, Bressi sought relief under the Federal Tort Claims Act against the United States on a malicious prosecution claim arising out of Bressi’s aborted prosecution.

The district court granted summary judgment to the Officers and the United States separately. The court held that the Officers’ operation of the roadblock was purely a tribal endeavor; therefore, sovereign immunity barred Bressi’s § 1983 and *Bivens actions*. See *United States v. Oregon*, 657 F.2d 1009, 1013 n.8 (9th Cir. 1981) ("[Sovereign immunity] extends to tribal officials when acting in their official capacity and within their scope of authority."). The court also held that Bressi’s malicious prosecution claim under the Federal Tort Claims Act failed because there was an independent prosecutorial decision to pursue the complaint against Bressi.
• The situation is complicated, however, by the fact that the roadblock was set up on a state highway. Unlike the case within most of the reservation, the Nation is not a gate-keeper on a public right of way that crosses the reservation. See *Strate v. A-1 Contractors*, 520 U.S. 438, 455-56 (1997). The usual tribal power of exclusion of nonmembers does not apply there.

• [2] On the other hand, the state highway is still within the reservation and is part of Indian country. 18 U.S.C. § 1151(a). The tribe therefore has full law enforcement authority over its members and nonmember Indians on that highway. See *United States v. Lara*, 541 U.S. 193, 210 (2004) (*upholding* 25 U.S.C. § 1301(2), in which Congress reaffirmed tribal criminal jurisdiction over nonmember Indians). The tribe accordingly is authorized to stop and arrest Indian violators of tribal law traveling on the highway. In the absence of some form of state authorization, however, tribal officers have no inherent power to arrest and book non-Indian violators. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). This limitation has led to obvious practical difficulties.
This rule permitting tribal authority over non-Indians on a public right-of-way is thus a concession to the need for legitimate tribal law enforcement against Indians in Indian country, including the state highways. The amount of intrusion or inconvenience to the non-Indian motorist is relatively minor, and is justified by the tribal law enforcement interest. Ordinarily, there must be some suspicion that a tribal law is being violated, probably by erratic driving or speeding, to cause a stop, and the amount of time it takes to determine that the violator is not an Indian is not great. If it is apparent that a state or federal law has been violated, the officer may detain the non-Indian for a reasonable time in order to turn him or her over to state or federal authorities.
Government-to-Government

Branches of Federal Government
- Legislative Branch
  - U.S. Constitution
  - U.S. Congress
    - Article I
    - Creates Law
  - Executive Branch
    - U.S. President
      - Article II
      - Enforces Law
  - Judicial Branch
    - U.S. Federal Courts
      - Article III
      - Interprets Law

Branches of Tribal Government
- Legislative Branch
  - Tribal Council
  - Creates Law
- Executive Branch
  - Chairman/Council
  - Enforces Law
- Judicial Branch
  - Interprets Law
Sample Tribal Government Organization Chart
Modern Tribal Governance

- Tribal Constitution
- Legislative Process and Record
- Code of Laws, Ordinances, Resolutions
- Consistency establishes the community standard
- Cooperation and collaboration
EPA Statutes and The Role of Tribal Governments in Managing Reservation Environments
Regulatory Authority in Indian Country

To answer this question, you must ask which government is asserting regulatory authority, over whom, and the type of landholding where the activity occurs, within Indian Country. For most cases the question before the court is generally may tribes assert tribal regulatory jurisdiction over non-Indians OR may a state assert state regulatory jurisdiction over Indians and/or non-Indians.

Montana’s presumption against tribal jurisdiction over fee land owned by non-Indians within reservation boundaries is not absolute.

U.S. Supreme Court cases have set out three "limited exceptions" to the presumption:

1. A tribe can regulate non-members on non-Indian fee land that is within a reservation if that power is delegated to the tribe by Congress. U.S. v. Mazurie, 419 U.S. 544, 553-54 (1975).

The other two exceptions come from an Indian tribe's retained, inherent sovereignty:

(a) to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" and to

(b) to "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana, 450 U.S. at 565-66; see also Nevada v. Hicks, 121 S. Ct. 2304, 2309-10 (2001).

These two exceptions are the Montana exceptions.
Civil Regulatory Authority Tests

• Explicit Federal Delegation

• Tribal Sovereignty
  – Assumption that state regulatory laws do not apply in Indian Country
    • Williams v. Lee
    • Canon of Construction
  – Assumption that there is a tradition of tribal sovereign immunity or inherent self-government in the specific area of regulatory law.

• Federal Preemption
  – Backdrop of Tribal Sovereignty
  – Federal laws and statutes in the area of regulatory law have divested tribes of authority, or
  – Federal permission given to states to apply state law with respect to the area of regulatory law.
Statutes that Provide Treatment as State (TAS) Status for Tribes:

- The Clean Air Act (CAA)
- The Clean Water Act (CWA)
  - Water Quality Standards and 401 Certifications
  - National Pollution Discharge Elimination System (NPDES) Permits
  - 404 Dredge and Fill Permits
  - Sewage Sludge Management Program
- The Safe Drinking Water Act (SDWA)
  - Public Drinking Water System Supervision (PWSS) Program
  - Underground Injection Control (UIC) Program
- The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) provides a role for tribes.
- The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) explicitly include a provision that affords tribes substantially the same treatment as states with respect to certain provisions of the Acts.
- Although the Toxic Substances Control Act (TSCA) and the Emergency Planning and Community Right-to-Know Act (EPCRA) do not explicitly provide for TAS, EPA has taken the position that it has the discretion to approve tribes to implement certain programs in the same manner as states in order to fill gaps in how the statutes are implemented in Indian country.
TAS Simplification Rule

Indian Tribes; Eligibility for Program Authorization [Federal Register: December 14, 1994]

- ENVIRONMENTAL PROTECTION AGENCY 40 CFR Parts 123, 124, 131, 142, 144, 145, 233, and 501 [FRL-5119-9] RIN 2020-AA20 Indian Tribes; Eligibility for Program Authorization

- AGENCY: Environmental Protection Agency (EPA). ACTION: Final rule.

- SUMMARY: This action amends regulations addressing the role of Indian tribes so as to make it easier for tribes to obtain EPA approval to assume the role Congress envisioned for them under certain environmental statutes. Three EPA regulatory statutes address the tribal role specifically by authorizing EPA to treat tribes in a manner similar to that in which it treats states: The Clean Water Act (CWA), the Safe Drinking Water Act (SDWA), and the Clean Air Act (CAA).
All three statutes specify that, in order to receive such treatment, a tribe must be **federally recognized** and possess a **governing body** carrying out substantial duties and powers. In addition, each requires that a tribe possess **civil regulatory jurisdiction** to carry out the functions it seeks to exercise. Finally, all three require that a tribe be **reasonably expected to be capable of carrying out those functions**. The Agency initially chose to implement provisions of the Clean Water and Safe Drinking Water Acts regarding Indian tribes by establishing a **formal prequalification process** under which tribes can seek eligibility under these statutes.
TAS Simplification Rule

Indian Tribes; Eligibility for Program Authorization [Federal Register: December 14, 1994]

- This prequalification process has in the past been referred to as approval for "treatment as a state" ("TAS").
- Tribes that obtain such approval then become eligible to apply for certain grants and program approvals available to states. The Agency's "TAS" prequalification process has proven to be burdensome, time-consuming and offensive to tribes. Accordingly, EPA has adopted a new policy to improve and simplify the process and this regulation implements the new policy. To the extent possible, the Agency plans to use the same process in future regulations regarding determinations of tribal eligibility. As of the effective date of this regulation, it is the intent of EPA to follow the new process in making determinations on tribal eligibility for program authorization. With respect to pending "TAS" applications for program authorization, the Agency will utilize the information contained in such applications to determine tribes' eligibility and tribes will be requested to supplement such applications only to the extent necessary to determine program eligibility.
To Obtain Treatment as a State:

- A tribe must be federally recognized;
- A tribe must possess a governing body carrying out substantial duties and powers;
- A tribe must possess civil regulatory jurisdiction to carry out the functions it seeks to exercise;
- The tribe must be capable of carrying out the functions for the particular Act (inclusion of maps, previous experience, etc.); and
- EPA Regional Office Review and Approval of Tribal TAS Application.
Process to Obtain TAS:

1. Submit Application for TAS pursuant to a specific EPA statute;
2. Upon acceptance of a complete application, 30 day comment period;
3. EPA Review;
4. Proposed Findings of Fact (if needed);
5. Final Decision.
6. If a Tribe has obtained TAS under one of the statutes, it may only need to supply additional information unique to obtaining TAS under a different EPA statute.
What does TAS mean to Tribes?

- Regulatory Program Authorization;
- Jurisdiction to enforce portions of the Acts that provide TAS status for tribes; and
- Eligibility for grants and program approvals available to states
Pursuant to Clean Air Act TAS Status*, Tribes May:

- Qualify for an EPA air program grant (called a section 105 grant) that has a reduced "matching" requirement. For States, the match requirement is 40%. However, the TAR provides Tribes a 5% match in the first two years; the match may increase to 10% in subsequent years. In rare instances, EPA may waive the match requirement based on demonstrated financial hardship.

- Qualify to administer a Clean Air Act program that applies throughout the reservation, even to lands that are owned by non-Indians. A Tribal regulatory program approved under the Clean Air Act would also be enforceable (against pollution sources) by EPA and citizens, as well as by the Tribe.

- Qualify to be treated as an "affected State" under the operating permits program, i.e., receive notice and an opportunity to comment when neighboring States issue permits to facilities having the potential to impact tribal lands.

*40 CFR parts 35 and 49
Clean Water Act

• **WQS and 401 Certifications**
  – Identify surface waters that the tribe proposes to establish water quality standards for;
  – In addition to the application requirements, tribes must show that they have jurisdiction to regulate the surface water quality over the resources that they seek to regulate, including resources on non-Indian owned fee lands.

• Generally, achieved through the application of the ruling in U.S. v. Montana (Montana Test analysis).
Pursuant to CWA/WQS TAS Status, Tribes May:

- Becomes *eligible* to seek federal approval of its WQS.
  - WQS consist of designated uses for water bodies, water quality criteria to protect those uses, and an anti-degradation policy consistent with 40 CFR 131.12.
  - A tribe’s WQS would establish water quality goals for specific water bodies and *serve as the regulatory basis for establishing water quality-based treatment controls and strategies*.
  - To obtain federal approval of its standards, a tribe must develop proposed standards, make them available for public comment, hold a public hearing regarding those proposed standards, and submit them to EPA for approval. Upon EPA approval, tribal WQS would apply to the reservation waters covered by the tribal TAS application. *However, under the CWA, standards do not impose any direct enforceable requirements on any party, unless and until they are incorporated into a permit or used as the basis for some other regulatory decision.*

- Becomes eligible for and (once it designates a certifying agency, see 40 CFR 121.1(e)) assumes authority for issuing water quality certifications under CWA Section 401 for the reservation waters covered by the approval (40 CFR 131.4(c)).

- TAS approval for WQS *does not* give a tribe authority to administer the National Pollutant Discharge Elimination System or any other federal permitting program. *Federal approval for issuing permits would require a separate TAS approval.*
TAS Status Pursuant to the Safe Drinking Water Act (SDWA):

• In addition to the application requirements, tribes must submit:
  – a description of the locations of the public water systems the tribe proposes to regulate;
  – A description of the existing, or proposed, agency of the Indian tribe that will assume primary enforcement responsibility, including a description of the relationship between owners/operators of the public water systems and the agency (40 CFR 142.76(d)(5)).
Pursuant to the SDWA TAS:

- Tribes may be approved for funding for and exercise of primary enforcement responsibility (or “primacy”);