

# USING PLENARY POWER AS A SWORD: TRIBAL CIVIL REGULATORY JURISDICTION UNDER THE CLEAN WATER ACT AFTER *UNITED STATES V. LARA*

BY  
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*This essay examines the implications of the Supreme Court's decision in United States v. Lara for tribes seeking Treatment-as-State (TAS) status under the Clean Water Act (CWA). It concludes that, because the CWA recognizes and affirms tribal sovereignty over water quality, the CWA should be read, under Lara, to reinvest tribal sovereignty. First, this article delineates the pre-Lara requirements for TAS status and examines the interpretation by the Environmental Protection Agency (EPA) of the CWA's TAS provisions. Second, the article explains in detail Lara, its implications, and the context of prior Supreme Court cases on tribal sovereignty. Finally, this essay argues that the CWA's plain language, its legislative history, and its other provisions support a reading that reinvests tribal sovereignty.*

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## I. INTRODUCTION

In April 2004, the Supreme Court decided the groundbreaking Indian law case, *United States v. Lara*.<sup>1</sup> *Lara* settled the issue of whether Congress can restore previously divested tribal sovereignty. Since Congress has plenary power over tribes and tribal sovereignty, it has long been the law of the land that Congress can abridge that sovereignty.<sup>2</sup> Whether Congress' plenary power also enables it to reinvest tribal sovereignty, however, remained unanswered.<sup>3</sup> Nonetheless, many assumed that Congress could not. In *Lara*, the Supreme Court finally addressed this issue and, to the astonishment of some Indian law practitioners and the relief of many, the Court held that, just as plenary power allows Congress to divest tribal sovereignty, so too does this power allow Congress to reinvest tribal sovereignty.<sup>4</sup>

*Lara*, a criminal case concerning the Double Jeopardy Clause,<sup>5</sup> considered whether Congress could reinvest Indian tribes' criminal jurisdiction over non-member Indians.<sup>6</sup> However, its implications go far

<sup>1</sup> 541 U.S. 193 (2004).

<sup>2</sup> See, e.g., *United States v. Wheeler*, 435 U.S. 313, 319 (1978) (stating that Congress has plenary authority to legislate for Indian tribes in all matters); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209–10 (1978) (stating that an intrinsic limitation of Indian tribes' authority is the power to try non-Indian citizens of the United States only in a manner Congress allows); *United States v. Kagama*, 118 U.S. 375, 381–84 (1886) (stating that because Indian tribes are geographically within the United States, they are subject to acts of Congress).

<sup>3</sup> See, e.g., *Lara*, 541 U.S. at 206–07 (holding that the Constitution allows Congress to change judicially made federal Indian law).

<sup>4</sup> *Id.* at 197, 209–10.

<sup>5</sup> U.S. CONST. amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”).

<sup>6</sup> *Lara*, 541 U.S. at 193, 210.



beyond the criminal context. In light of the principle that the Supreme Court's "application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision,"<sup>7</sup> *Lara* may well have immediate and wide-ranging effects in the civil context, under any statute that can be read to recognize and affirm tribal sovereignty.<sup>8</sup>

This article examines *Lara*'s effect on tribes' ability to obtain Clean Water Act (CWA)<sup>9</sup> treatment-as-state (TAS)<sup>10</sup> status. Based on *Lara*, the article concludes that the CWA should be read to recognize and affirm tribal sovereignty, thereby reinvesting tribal sovereignty over regulation of water quality. Furthermore, this article concludes that *Lara* should be applied retroactively to all tribal applications for TAS status under the CWA. Such a reading of the CWA would considerably reduce the burdens on tribes applying for TAS status which, prior to *Lara*, included the requirement that tribes affirmatively show that their sovereignty to regulate water quality within their reservations had not been divested. This article's suggested reading of the CWA would also be consistent with the intent of the TAS program and EPA's interpretation that the program is based on inherent tribal authority.

## II. OVERVIEW OF THE CLEAN WATER ACT AND THE PRE-*LARA* TREATMENT AS A STATE PROCESS

Because delegation of power by Congress requires an affirmative act by the federal government granting tribes limited, specifically-defined power, usually in a narrow context,<sup>11</sup> whereas a tribe's inherent sovereignty is amorphous, not necessarily subject to constitutional limitations, and generally exists independently of federal recognition (although it may be implicitly or explicitly abrogated by Congress),<sup>12</sup> courts tend to be more comfortable enforcing delegated tribal power than inherent tribal sovereignty.<sup>13</sup> Accordingly, in the pre-*Lara* context, power based on

<sup>7</sup> *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 90 (1993).

<sup>8</sup> See *Lara*, 541 U.S. at 198 (stating the language of the statute at issue in *Lara*, 33 U.S.C. §1301(2) (2000), "recogniz[es] and affirm[s] the "inherent" authority of a tribe over all Indians).

<sup>9</sup> Federal Water Pollution Control Act, 33, U.S.C. §§ 1251-1387 (2000).

<sup>10</sup> In 1987, Congress amended the CWA to authorize EPA to treat Indian tribes as states under section 518(e). 33 U.S.C. § 1377(e) (2000). In 1991, after full notice-and-comment rule-making, EPA issued a final rule implementing this provision and setting forth the requirements Indian tribes would have to meet in order to be granted TAS status: 1) the tribe must be federally recognized; 2) the tribe must have a governing body carrying out substantial governmental duties and powers; 3) the functions to be exercised by the tribe must pertain to the management and protection of water resources which are held by the tribe, held by the United States in trust for the tribe, or otherwise within the borders of the reservation; and 4) the tribe must be capable of carrying out the functions of the Act. 40 C.F.R. § 131.8(a) (2003).

<sup>11</sup> See *United States v. Mazurie*, 419 U.S. 544, 554-59 (1975) for an example of the Court's treatment of congressional delegation in the tribal context.

<sup>12</sup> See, e.g., FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 231-32 (1982 ed.) (describing the nature and parameters of inherent tribal sovereignty); *id.* at 664 (regarding the federal constitution's applicability to tribes).

<sup>13</sup> Compare *Mazurie*, 419 U.S. at 554-59 (regarding a delegation affecting non-members of the tribe) with *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 659 (2001) (regarding inherent

delegations created much more certainty for tribes facing court challenges to their jurisdiction.

### *A. The Clean Water Act*

The CWA relies on two primary components to protect water quality.<sup>14</sup> First are "Effluent Limitation Guidelines" promulgated by the Environmental Protection Agency (EPA).<sup>15</sup> These technology-based limits on discharges into water bodies "restrict the quantities, rates, and concentrations of specified substances discharged from point sources."<sup>16</sup> In addition to the Effluent Limitation Guidelines, the CWA also provides for "water quality standards," which "express the desired condition" of a particular waterway, based on the designated use of the waterway.<sup>17</sup> These two components of the CWA work together to regulate water quality. For example, where cumulative effects from many point sources are at issue, a discharger who is in compliance with an effluent limitation guideline may nonetheless be required to reduce his or her discharge in order to comply with a water quality standard.<sup>18</sup> Under the CWA, as originally enacted, only the states or the federal government could adopt water quality standards.<sup>19</sup>

In 1987, Congress amended the CWA to allow EPA to treat Indian tribes as states and thus to specifically authorize tribes' adoption of their own water quality standards.<sup>20</sup> Section 518(e) of the CWA allows EPA to treat a tribe as a state "to the degree necessary to carry out the objectives of this section" if:

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

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sovereignty over non-members).

<sup>14</sup> See William L. Andreen, *Water Quality Today—Has the Clean Water Act Been A Success?*, 55 ALA. L. REV. 537, 547–48 (2004) (stating the two primary components of the CWA are regulation of point source discharges and retention and expansion of a system of state water quality standards); see also 33 U.S.C. § 1311(a) (2000) (forbidding pollution discharge) and *id.* § 1313 (adopting state water quality standards).

<sup>15</sup> 33 U.S.C. §§ 1311, 1314(b) (2000); see also *Albuquerque v. Browner*, 97 F.3d 415, 419 n.4 (10th Cir. 1996) (explaining effluent limitation guidelines as uniform, technology-based standards).

<sup>16</sup> *Browner*, 97 F.3d at 419 n.4 (summarizing 33 U.S.C. §§ 1311, 1314).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (citing *Env'tl. Prot. Agency v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 n.12 (1976)); Andreen, *supra* note 14, at 548–49.

<sup>19</sup> 33 U.S.C. § 1313 (2000); Alex Tallchief Skibine, *The Chevron Doctrine in Federal Indian Law and the Agencies' Duty to Interpret Legislation in Favor of Indians: Did EPA Reconcile the Two in Interpreting the "Tribes as States" Section of the Clean Water Act?*, 11 ST. THOMAS L. REV. 15, 15–16 (1998).

<sup>20</sup> Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified as amended at 33 U.S.C. § 1377 (2000)); Skibine, *supra* note 19, at 15–16 & n.4.



otherwise within the borders of an Indian reservation; and

(3) 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.<sup>21</sup>

### *B. EPA's Interpretation of section 518(e) and Its Implications for Indian Tribes*

This sub-part explains EPA's decision to treat section 518 as based on inherent tribal sovereignty and the hurdles and considerable uncertainty that this decision resulted in for tribes seeking to exercise jurisdiction under section 518.

#### *1. EPA has Interpreted section 518 as Based on Inherent Sovereignty Rather Than as a Delegation*

Given that the statutory language accords discretion to EPA about whether to treat a tribe as a state,<sup>22</sup> and that the requirements for such treatment are not particularly onerous, many, including Justice White, initially viewed the language as creating a delegation of authority to tribes, rather than relying upon their inherent sovereignty.<sup>23</sup> Nonetheless, in its administrative guidelines and regulations implementing section 518(e), EPA took the view, based ostensibly on the ambiguity of the section's legislative history, that section 518(e) is a recognition of inherent sovereignty, rather than a delegation.<sup>24</sup> Federal courts eventually upheld this interpretation, according deference to EPA.<sup>25</sup>

<sup>21</sup> 33 U.S.C. § 1377(e) (2000).

<sup>22</sup> *Id.* § 1377(e)(3). This discretion is evident in subsection (3)'s reference to "the Administrator's judgment."

<sup>23</sup> Skibine, *supra* note 19, at 39–40 (discussing Justice White's plurality opinion in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 428 (1989)); see also Regina Cutler, *To Clear the Muddy Waters: Tribal Regulatory Authority under Section 518 of the Clean Water Act*, 29 ENVTL. L. 721, 738–39 (1999) (discussing the effect of the Ninth Circuit's failure to recognize section 518 of the CWA as a direct delegation of tribal regulatory authority in *Montana v. Env'tl. Prot. Agency*, 137 F.3d 1135 (9th Cir. 1998)).

<sup>24</sup> Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,880 (Dec. 12, 1991) (codified at 40 C.F.R. 131(2003)); 40 C.F.R. § 131.8 (2005).

<sup>25</sup> *Wisconsin v. Env'tl. Prot. Agency*, 266 F.3d 741, 744, 748 (7th Cir. 2001); *Montana v. Env'tl. Prot. Agency*, 137 F.3d 1135, 1140 (9th Cir. 1998) (*EPA II*); *Montana v. Env'tl. Prot. Agency*, 941 F. Supp. 945, 950–51 (D. Mont. 1996) (*EPA I*), *aff'd* 137 F.3d 1135 (9th Cir. 1998). The courts in both *Wisconsin* and *EPA I* clearly accorded deference to EPA on this issue. The court in *EPA II* equivocated about deferring to EPA on whether inherent tribal sovereignty is a proper predicate to TAS status under section 518(e), but nonetheless also appears to have done so:

We agree with appellants insofar as they contend that the scope of inherent tribal authority is a question of law for which EPA is entitled to no deference. *EPA's decision to adopt inherent tribal authority as the standard intended by Congress may well be viewed in a deferential light* because the statute's language and legislative history were not entirely clear. EPA's delineation of the scope of that standard, however, has nothing to do with its own expertise or with any need to fill interstitial gaps in the statute committed to its regulation. Therefore, EPA's delineation of the scope of tribal inherent



## 2. The Pre-Lara Implications for Tribes of EPA's Reliance on Inherent Sovereignty

### a. The Supreme Court's Progressive Narrowing of Tribal Sovereignty

Practically speaking, EPA's decision to treat section 518(e) as a recognition of inherent sovereignty rather than a delegation meant that tribes faced considerable hurdles in achieving TAS status before *Lara*.<sup>26</sup> A line of cases, beginning with *Montana v. United States*,<sup>27</sup> held that tribes' civil regulatory authority over non-members on their reservations has been divested except to the extent that 1) such authority is necessary to protect a tribe's political integrity, economic security, health, or welfare, or 2) the non-member has entered into a consensual relationship with the tribe.<sup>28</sup> This was particularly applicable to land owned in fee by non-members.<sup>29</sup> The Court has increasingly narrowed these exceptions to the divestment of tribes' civil regulatory authority,<sup>30</sup> causing tribes seeking to assert such authority to have to make complicated showings as to the extent to which either 1) the activity sought to be regulated poses a threat to tribal health,

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authority is not entitled to deference.

*EPA II*, 137 F.3d at 1140 (emphasis added).

<sup>26</sup> See, e.g., Cutler, *supra* note 23, at 735-41 (describing lack of tribal authority over beds of navigable streams as an impediment to tribal CWA jurisdiction under *Montana v. United States*, 450 U.S. 544 (1981)).

<sup>27</sup> 450 U.S. 544 (1981).

<sup>28</sup> *Id.* at 565-66. For a comprehensive discussion of the Supreme Court's trend toward divestment of tribal sovereignty, see generally Ann Tweedy, *The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INT. L.J. 147 (2000). The trend has continued (and expanded) in opinions such as *Nevada v. Hicks*, 533 U.S. 353 (2001) (holding tribal court lacked jurisdiction to hear claims arising from state officials search of a tribal member's home on a reservation for evidence of crimes occurring off the reservation), and *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001) (holding that tribe may not tax non-member patrons of a hotel on tribal land). *Hicks* viewed tribal ownership of the land as only one factor in determining whether the tribe had jurisdiction to regulate activities on that land. 533 U.S. at 360. While *Hicks* can and should be limited to its facts, some courts have applied the case in other contexts to defeat tribal jurisdiction on on-reservation, tribally owned land. See, e.g., *Ford Motor Co. v. Todecheene*, 394 F.3d 1170 (9th Cir. 2005) (holding that the tribal court lacked jurisdiction to hear a product liability claim for one-vehicle accident on tribal land because the car manufacturer did not form a consensual relationship with the tribe). Indeed, as Alex Tallchief Skibine has suggested, tying tribal TAS jurisdiction only to inherent tribal sovereignty under federal common law (as defined and redefined by the Supreme Court) could eventually put tribes in the ironic position of having statutorily mandated jurisdictional authority, and yet being precluded by federal common law from exercising it. Skibine, *supra* note 19, at 40. Such an interpretation of the TAS provisions would run directly contrary to the language of the CWA, which explicitly authorizes EPA to treat tribes as states.

<sup>29</sup> *Hicks*, 533 U.S. at 359.

<sup>30</sup> See *id.* at 360-65 (holding that tribal authority to regulate state officers in executing process related to the off-reservation violation of state laws is not essential to tribal self-government or internal relations); *Shirley*, 532 U.S. at 654-59 (rejecting broad interpretations of the exceptions to the divestment of tribes' civil regulatory authority); *Strate v. A-1 Contractors*, 520 U.S. 438, 456-59 (1997) (holding that the exceptions do not apply to highway-accident tort suits between non-Indians on an on-reservation state highway); see also *supra* note 28 and sources cited therein.



welfare, economic security, or political integrity, or 2) the regulation is authorized based on a consensual relationship with the regulated party.<sup>31</sup>

*b. EPA's Presumption in Favor of Tribal Sovereignty*

Nonetheless, despite the Supreme Court's increasingly narrow reading of the so-called *Montana* exceptions and an EPA pledge to interpret the TAS provisions according to evolving case law,<sup>32</sup> EPA has ameliorated this burden somewhat by effectively creating a presumption in favor of tribal jurisdiction under the CWA, because of the obviously strong potential for water quality to directly affect a tribe's health and welfare and the fact that the threat posed to tribal health and welfare is serious and substantial.<sup>33</sup> The effects of EPA's presumption should not be overestimated, however. Despite the presumption, tribes need to submit very detailed applications to the EPA, affirmatively demonstrating their inherent sovereignty over water quality, a demonstration that many tribes will not be able to make.<sup>34</sup> Additionally, the presumption does not provide tribes who are accorded TAS status any security for two reasons. First, it is very possible that a court could conclude that the presumption was invalid based on case law from other contexts construing (and limiting) tribal sovereignty. Secondly, the Supreme Court could conceivably completely divest tribal sovereignty over non-members at some future point, an action which would render section 518 virtually useless as a tribal tool, irrespective of the presumption.<sup>35</sup>

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<sup>31</sup> Tribes with treaty-based fishing rights are very likely to have an additional substantive right to protect water-quality (both on- and, in many cases, off-reservation) based on the language and intent of the applicable treaty. *See, e.g.,* United States v. Washington, 384 F. Supp. 312, 403 (W.D. Wash. 1974) (holding that tribes have regulatory authority over treaty-protected fisheries); *see also infra* note 78 and sources cited therein; 133 CONG. REC. 976, 999–1000 (1987) (discussing treaty rights to habitat protection in a memorandum from Ducheneaux/Broken Rope to Morris K. Udall); 133 CONG. REC. 1250, 1281–82 (1987) (same). Tribes that have this independent basis to protect water quality may not be as significantly affected by *Lara's* reinvestment. Nonetheless, the reinvestment should ease their burden to prove their right to protect habitat and should simplify matters for them.

<sup>32</sup> Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,878, 64,880 (Dec. 12, 1991) (codified at 40 C.F.R. 131 (2003)).

<sup>33</sup> *Id.* at 64,878 (stating that “there are substantial legal and factual reasons to assume that Tribes ordinarily have the legal authority within a reservation” and that “the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare”); *see also* Skibine, *supra* note 19, at 18, 50 (describing EPA's presumption that tribes have jurisdiction over water pollution). The requirement that the threat to tribal health or welfare be “serious and substantial” derives from dicta in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 410 (1989), which EPA subsequently adopted as an interim requirement pending further guidance from the Supreme Court. 56 Fed. Reg. at 64,878. The Ninth Circuit later enshrined the dicta as part of the test for establishing tribal sovereignty, at least in TAS cases, in *EPA II*, 266 F.3d at 744, 749; Cutler, *supra* note 23, at 733.

<sup>34</sup> Part II.B.2.c, *infra*.

<sup>35</sup> Part II.B.2.d, *infra*.



Given that the CWA provides for tribal jurisdiction over on-reservation waters as long as the tribe meets, to the satisfaction of EPA, the three relatively straightforward application requirements,<sup>36</sup> EPA's presumption appears to be entirely consistent with Congressional intent, as manifested in the language of the CWA.<sup>37</sup> In practice, however, this pre-*Lara* presumption was in considerable tension with EPA's requirement that tribes affirmatively show sovereign authority to regulate water quality before qualifying for TAS status, especially in light of the Court's increasing limitation on such authority.

*c. The Difficulties Tribes Face in Attaining TAS Status*

Despite EPA's purported presumption in favor of tribal jurisdiction, its policy has resulted in both substantial uncertainty and burdens for tribes by requiring tribes to show inherent sovereignty to attain TAS. EPA determines whether a tribe is qualified for TAS status on a case-by-case basis,<sup>38</sup> and it requires a tribe to submit a fairly lengthy application in order to receive such status.<sup>39</sup> In its application, the tribe must first describe the types of sovereign

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<sup>36</sup> Federal Water Pollution Control Act, 33 U.S.C. § 1377(e) (2000). For requirements see *supra* note 21 and accompanying text.

<sup>37</sup> See, e.g., *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (noting that "[t]he starting point in discerning congressional intent is the statutory text").

<sup>38</sup> 56 Fed. Reg. at 64,878.

<sup>39</sup> 40 C.F.R. § 131.8(b) (2003). Subsection (b) imposes the following application requirements which are more onerous than the requirements of the CWA:

- (1) A statement that the Tribe is recognized by the Secretary of the Interior.
- (2) A descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. The statement should:
  - (i) Describe the form of the Tribal government;
  - (ii) Describe the types of governmental functions currently performed by the Tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population, taxation, and the exercise of the power of eminent domain; and
  - (iii) Identify the source of the Tribal government's authority to carry out the governmental functions currently being performed.
- (3) A descriptive statement of the Indian Tribe's authority to regulate water quality. The statement should include:
  - (i) A map or legal description of the area over which the Indian Tribe asserts authority to regulate surface water quality;
  - (ii) A statement by the Tribe's legal counsel (or equivalent official) which describes the basis for the Tribes assertion of authority and which may include a copy of documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertion of authority; and
  - (iii) An identification of the surface waters for which the Tribe proposes to establish water quality standards.
- (4) A narrative statement describing the capability of the Indian Tribe to administer an



authority it is currently exercising, a requirement that appears to be based on subsection (1) of section 518(e) and the bases for such authority.<sup>40</sup> Second, it must submit a statement by legal counsel showing why the tribe should be allowed to regulate water quality under *Montana* and its progeny, which is a difficult task, given the increasing narrowness of the *Montana* exceptions.<sup>41</sup> Finally, among other requirements, the tribe must describe its management experience, including existing and past projects, and demonstrate its ability to administer water quality standards, both of which appear to be based on subsection (3) of section 518(e).<sup>42</sup>

These application requirements are likely to preclude many tribes from attaining TAS status, either because the tribe lacks the resources to devote to the lengthy application process or because the tribe cannot meet the standards substantively. For instance, a tribe with neither a highly developed infrastructure nor extensive management experience might be unable to demonstrate its entitlement to TAS status to EPA's satisfaction.<sup>43</sup>

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effective water quality standards program. The narrative statement should include:

(i) A description of the Indian Tribe's previous management experience which may include, the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.), the Indian Mineral Development Act (25 U.S.C. 2101 et seq.), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a);

(ii) A list of existing environmental or public health programs administered by the Tribal governing body and copies of related Tribal laws, policies, and regulations;

(iii) A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government;

(iv) A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards;

(v) A description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan which proposes how the Tribe will acquire additional administrative and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise.

(5) Additional documentation required by the Regional Administrator which, in the judgment of the Regional Administrator, is necessary to support a Tribal application.

(6) Where the Tribe has previously qualified for eligibility or treatment as a State under a Clean Water Act or Safe Drinking Water Act program, the Tribe need only provide the required information which has not been submitted in a previous application.

<sup>40</sup> *Id.* § 131.8(b)(2). This requirement appears to be based on subsection (1) of 33 U.S.C. § 1377(e).

<sup>41</sup> *Id.* § 131.8(b)(3).

<sup>42</sup> *Id.* § 131.8(b)(4).

<sup>43</sup> However, this result would be at least arguably consistent with the statutory text. Again, 33 U.S.C. § 1377(e) requires that:

(1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United



More importantly, tribes that do not have favorable treaty or executive order language to rely on as a basis for their exercise of sovereign authority may have difficulty convincing EPA that they should be accorded TAS status.<sup>44</sup> Furthermore, tribes whose sovereignty has been subject to severe incursions by the federal government, such as tribes whose reservations were disestablished and then reestablished, or were unrecognized for a period of time and then rerecognized,<sup>45</sup> may be unable to show entitlement to regulate water quality under *Montana* and its progeny.<sup>46</sup>

Such results are inconsistent with the plain language of the CWA.<sup>47</sup> Tribes should neither be barred from being accorded TAS status simply because their history precludes their exercise of regulatory authority over non-members under *Montana* nor because they lack a treaty or other federal document to demonstrate their sovereign authority. The discretion accorded to EPA under the statute does not justify these agency-imposed limitations because they are not relevant to section 1377's requirements.<sup>48</sup>

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States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and

(3) the Indian tribe is reasonably expected to be capable, 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.

<sup>44</sup> Both 40 C.F.R. § 131.8(b)(2)(iii) and (3)(ii) ask the tribe to identify the source or basis on which the tribe exercises sovereign authority. Tribes should not need affirmative treaty language to justify their exercise of sovereign authority because they have aboriginal authority that continues to exist provided that it is not ceded by treaty or other means. *See United States v. Winans*, 198 U.S. 371, 381 (1905) (discussing aboriginal rights to land). The requirement that the tribe identify the source of its authority and the fact that both the statute and the regulation accord a great deal of discretion to EPA inject a considerable amount of uncertainty into the process. So far, however, all the published cases address challenges by states and local governments to TAS status being accorded to tribes; there are not yet any published cases brought by tribes challenging the legitimacy of the requirements imposed on them by EPA.

<sup>45</sup> *United States v. Anderson*, 736 F.2d 1358, 1361 (9th Cir. 1984); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 44-45 (9th Cir. 1981).

<sup>46</sup> *Compare Anderson*, 736 F.2d at 1366 (holding that the state, rather than the tribe, had authority to regulate on-reservation water rights, based in part on the fact that the reservation had been "opened for entry and settlement" rather than merely allotted), *with Walton*, 647 F.2d at 52 (holding that the tribe had met its burden under *Montana* to show that its sovereignty to regulate reservation water rights had not been divested). Tribes seeking to regulate water quality have a stronger argument that their authority has not been divested because the quality of water is more obviously and directly tied to tribal health and welfare than the acquisition of water rights.

<sup>47</sup> *See Federal Water Pollution Control Act*, 33 U.S.C. § 1377(e) (2000) (stating that the Administrator can treat an Indian tribe as a State "only if— (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers; (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources . . . ; and (3) 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").

<sup>48</sup> *Id.* § 1377(e)(3). While it appears that the Administrator has sole discretion when determining whether a tribe is capable or not, this determination should be based on the tribe's ability to administer water quality standards. A tribe's history or lack of a treaty or federal document to show sovereign authority has nothing to do with administering water quality



*d. The Uncertainty Faced by Tribes with TAS Status Under the Pre-Lara Framework*

In addition to the requirements of the application itself, tying TAS status to inherent sovereign authority, as delineated by the Supreme Court, has resulted in considerable uncertainty for tribes. Although individual grants of TAS status have been upheld in court, the fact remains that EPA's presumption in favor of tribal jurisdiction has only been tested in three circuits to date and remains vulnerable to the Supreme Court's or other Circuits' defeasance.<sup>49</sup> Furthermore, because EPA has construed the availability of TAS status under the CWA to be dependent upon a tribe's ability to independently claim civil regulatory authority under federal common law, the TAS provision itself, at least pre-*Lara*, was in danger of being rendered meaningless by Supreme Court decisions in contexts other than the CWA that could conceivably further limit, or even eliminate remaining tribal regulatory authority.<sup>50</sup> Presumably under the pre-*Lara* framework, given EPA's understanding of TAS status as being tied to tribal authority to regulate under federal common law, if the Supreme Court were to hold that tribal civil regulatory authority had been completely divested, such a decision would retroactively deprive tribes who had already been accorded TAS status of their CWA regulatory authority because the basis of their regulatory authority would have been destroyed.

The problems with this framework quickly become apparent. If the provisions merely echo evolving jurisprudential standards of tribal jurisdiction, then they would be duplications and seemingly unnecessary. Moreover, it seems absurd for a statute to recognize a right to regulate while at the same time *sub silentio* making that right subject to complete defeasance by case law addressing other types of regulation. This impractical framework was remedied by *United States v. Lara*,<sup>51</sup> one of the few recent Supreme Court decisions that favorably impacted the inherent sovereign authority of tribal governments.

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standards.

<sup>49</sup> For a discussion of TAS status in the Seventh Circuit, see generally *Wisconsin v. Env'tl. Prot. Agency*, 266 F.3d 741 (7th Cir. 2001) (upholding EPA's TAS designation of the Chippewa Indians). For a similar Tenth Circuit decision, see generally *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996) (recognizing that Isleta Pueblo can regulate City of Albuquerque's waste treatment plant located upstream from the reservation). Additionally, for a similar Ninth Circuit decision, see generally *Montana v. Env'tl. Prot. Agency*, 137 F.3d 1135 (9th Cir. 1998) (upholding EPA's designation of TAS status in the face of challenge by landowners on the reservation who were subject to tribe's water quality standard program).

<sup>50</sup> See Skibine, *supra* note 19, at 40 (explaining the view that the common law may shift to a narrower view of tribal sovereignty); see also discussion in *supra* note 28 (describing the Supreme Court's recent divestment of tribal sovereignty).

<sup>51</sup> 541 U.S. 193, 196 (2004) (holding that Congress can vest authority in a tribe to prosecute non-member Indians as part of their sovereign authority). For restrictions on sovereign authority see *supra* notes 48–50.

### III. THE COURT'S HOLDING IN *LARA* AND WHAT IT MEANS FOR TRIBES APPLYING FOR TAS STATUS

#### A. *The Court's Holding in Lara*

In *Lara*, the Court held that a statute “recogniz[ing] and affirm[ing] the inherent authority of a tribe to bring a criminal misdemeanor prosecution against an Indian who is not a member of that tribe” actually restores the tribal sovereignty previously held to have been divested.<sup>52</sup> Moreover, the Court held that, based on its plenary power over tribes, Congress was constitutionally authorized to restore tribal sovereignty, just as, in countless cases, the Court had previously held that Congress was constitutionally authorized to divest tribal sovereignty.<sup>53</sup>

To understand why *Lara* was such a watershed case, it is necessary to see it in the context of the previous twenty-five years of Indian law jurisprudence, in which, with virtually every case it decided, the Court held more tribal sovereignty to have been divested.<sup>54</sup> The trend of divesting tribal sovereignty began with a case addressing tribal criminal jurisdiction,<sup>55</sup> but quickly spilled over into the civil context as well.<sup>56</sup> The Court looked with increasing suspicion upon tribes’ attempts to assert sovereignty over non-members, even within their reservations.<sup>57</sup> Many commentators anticipated

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<sup>52</sup> *Lara*, 541 U.S. at 196 (quoting 25 U.S.C. § 1301(2)) (internal quotations omitted).

<sup>53</sup> *Id.* at 196, 199–207; see also *Duro v. Reina*, 495 U.S. 676, 679 (1990) (holding that the type of sovereign authority at issue in *Lara* to have been divested).

<sup>54</sup> See Tweedy, *supra* note 28, at 149–71 (discussing the Supreme Court’s trend toward divestment of tribal sovereignty).

<sup>55</sup> *Olipphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203, 210 (1978) (holding that “[b]y submitting to the overriding sovereignty of the United States, Indian tribes . . . necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress”). This holding was based on questionable implications gleaned from treaties not at issue in the case, “unspoken” congressional assumptions, the silence in the Suquamish Tribe’s treaty as to the issue of criminal jurisdiction, and the perceived inconsistency of a tribe’s exercise of such jurisdiction over non-Indians with the tribe’s dependent status.

<sup>56</sup> *Montana v. United States*, 450 U.S. 544, 564 (1981) (holding that a tribe lacked authority to regulate hunting and fishing on fee land owned by non-members within the reservation and stating broadly that “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes”).

<sup>57</sup> See Tweedy, *supra* note 28, at 149–71 (discussing the Court’s gradual divestment of tribal sovereignty and moving toward a consent-based concept of sovereignty); see also *Nevada v. Hicks*, 533 U.S. 353, 364, 369, 374 (2001) (holding that tribal courts do not have authority to regulate state officials’ execution of process on-reservation for violation of state laws off reservation, that tribal courts do not have jurisdiction over section 1983 suits, and there was no need to exhaust these claims in tribal courts before bringing them in federal courts); *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 659 (2001) (holding that the Navajo Tribe did not have the authority to impose tax on non-member hotel guests). Based on *Hicks* and *Shirley*, the Ninth Circuit justified its own further divestment of tribal jurisdiction by stating that “we cannot ignore the clear guidance from the Court that tribal jurisdiction is to be limited rather than expanded.” *Ford Motor Co. v. Todecheene*, 394 F.3d 1170, 1176 (9th Cir. 2005). One has to wonder why the Court is legislating, without clear direction from Congress, in an area over which Congress has plenary power. Indeed, such determinations are inconsistent with current federal policy on tribal government. See, e.g., Executive Order No. 13,175, 65 Fed. Reg. 67,249 (2000) (stating that “[t]he United States recognizes the right of Indian tribes to self-government



the eventual complete demise of tribal sovereignty over non-members.<sup>58</sup> Moreover, while the Court ostensibly relied on federal statutes and other expressions of congressional intent in rendering these decisions, it often seemed that the Court was merely implementing its own agenda.<sup>59</sup>

Had Congress not rectified this trend, then it is likely that tribal sovereignty over non-members would eventually come to no longer exist. The issue came to a head when Congress tried to undo, through legislation, the Court's decision in *Duro v. Reina*.<sup>60</sup> *Duro* held that a tribe did not have the authority to criminally prosecute an Indian who committed a crime on its reservation if the defendant was a member of another tribe (*i.e.*, a non-member Indian).<sup>61</sup> The *Duro* decision posed severe governance problems for tribes because of the large number of non-member Indians who live on most reservations.<sup>62</sup> In 1990, Congress attempted to remedy the problem by amending the Indian Civil Rights Act<sup>63</sup> (ICRA) to specifically provide for criminal jurisdiction over non-member Indians who committed crimes on the reservations of tribes in which they were not enrolled.<sup>64</sup> In *Lara*, the Court heard a challenge to this legislation brought by a non-member Indian who had been subjected to tribal criminal jurisdiction.<sup>65</sup> *Lara* argued that the legislation could only validly create a delegation of federal authority and that, because he was being tried by the federal government after his tribal prosecution, the federal prosecution violated the Double Jeopardy Clause.<sup>66</sup>

The Court rejected that view and held that the ICRA amendment did not create a delegation of federal authority.<sup>67</sup> Instead the court held that, by amending the ICRA, Congress clearly intended to reinvest tribal sovereignty (rather than to delegate federal authority)<sup>68</sup> and that, based on its plenary power, Congress was constitutionally authorized to reinvest tribal

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and supports tribal sovereignty and self-determination").

<sup>58</sup> See, e.g., L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996) (examining the change in the nature and extent of tribal power, and noting the decline of sovereignty based on land ownership); Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993) (examining geographically-based and membership-based sovereignty and the implications of rejecting a geographically-based concept of sovereignty and emphasizing a more membership-based concept of sovereignty).

<sup>59</sup> See Tweedy, *supra* note 28, at 149–71 (discussing the Court's seemingly arbitrary gradual divestment of tribal sovereignty and movement toward a consent-based concept of sovereignty).

<sup>60</sup> 495 U.S. 676 (1990).

<sup>61</sup> *Id.* at 692–96.

<sup>62</sup> See, e.g., Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts over Non-member Indians: An Examination of the Basic Framework of Inherent Tribal Sovereignty Before and After Duro v. Reina*, 38 FED. B. NEWS & J. 70, 71–73 (1991).

<sup>63</sup> Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303 (2000).

<sup>64</sup> *Id.* § 1301(2) (as amended by Department of Defense Appropriations Act, 1991, Pub. L. No. 101–511, § 9077(b), 104 Stat. 1856, 1892 (1990)) (amending the Indian Civil Rights Act to allow tribes "to exercise criminal jurisdiction over all Indians"); see also *id.* § 1301(4) (defining "Indian" as broader than simply those who are enrolled in other federally recognized tribes).

<sup>65</sup> 541 U.S. 193, 196–99 (2004).

<sup>66</sup> *Id.* at 197.

<sup>67</sup> *Id.* at 199, 210.

<sup>68</sup> *Id.* at 199.



sovereignty.<sup>69</sup> Thus, *Lara* stands for the proposition that tribes have regained an important aspect of sovereignty, namely the ability to criminally prosecute non-member Indians.

*B. Lara's Implications Outside the Criminal Law Context*

*Lara's* holding that Congress can reinvest tribal sovereignty is certain to have wide-ranging implications, both inside and outside the criminal law context.<sup>70</sup> While the decision considered only criminal jurisdiction, its effects potentially reach far beyond the criminal context. Tribal criminal jurisdiction has been, by far, the most circumscribed by the Supreme Court.<sup>71</sup> If Congress can reinvest a type of jurisdiction that the Court had held to have been completely abolished, *i.e.*, criminal jurisdiction over non-members, it intuitively follows that Congress can reinvest other, less intrusive types of jurisdiction, such as civil regulatory or adjudicatory jurisdiction.

In other words, because tribes originally had full, undisputed sovereignty over their respective territories,<sup>72</sup> it follows that Congress can reinvest tribal sovereignty of any type and over any issue, provided that it avoids unconstitutionally infringing upon the rights of states or individuals. However, given Congress's less than stellar record on tribal issues, tribes may face considerable difficulty in motivating Congress to reinvest their sovereignty. It is probably reasonable to expect only modest gains in terms of legislation affirmatively based on *Lara*. Nonetheless, because *Lara* should apply to any statute that is properly viewed as recognizing and affirming tribal sovereignty over a given subject matter,<sup>73</sup> and because based on the Supreme Court's own case law, it should apply retroactively to such

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<sup>69</sup> *Id.* at 199–207. The source of this plenary power is somewhat ambiguous. The Court in *Lara* links it to the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, and the Treaty Clause, *id.* art. II, § 2, cl. 2. *Lara*, 541 U.S. at 201. Justice Thomas, concurring in the judgment, disagrees that those two provisions give rise to plenary power and questions the very existence of such power. *Id.* at 218, 224 (Thomas, J., concurring in the judgment). Whatever the textual source of the power, it has long been recognized and rarely been questioned. *See, e.g.*, *United States v. Kagama*, 118 U.S. 375, 380–85 (1886); *see also* *United States v. Wheeler*, 435 U.S. 313, 319 (1978) (referencing “the undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government”). For a more in-depth discussion of plenary power, see FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 217–20 (1982). Although, given its characteristically whimsical treatment of Indian law, the Court could conceivably abolish plenary power, to do so would be a dramatic departure from centuries-old jurisprudence.

<sup>70</sup> *See, e.g.*, Anne-Marie Tabor, *Sovereignty in the Balance: Taxation by Tribal Governments*, 15 U. FLA. J.L. & PUB. POL’Y 349, 399 & n.321 (2004) (recognizing *Lara's* potential to impact tribal authority in the taxation arena).

<sup>71</sup> *See Duro*, 495 U.S. at 688 (noting that “[t]he exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves a far more direct intrusion on personal liberties” than civil jurisdiction).

<sup>72</sup> *See, e.g.*, *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (recognizing that “[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as undisputed possessors of the soil, from time immemorial”).

<sup>73</sup> *See supra* notes 70–72 and accompanying text.



statutes,<sup>74</sup> the holding will likely have implications for statutory interpretation not fully understood upon the statute's enactment.

*C. Why Lara Requires the TAS Provision of the CWA Be Read to Reinvest Tribal Sovereignty*

This sub-part explains that the application of the principles enunciated in *Lara* to section 518 are completely consistent with the plain language of section 518, the legislative history of the Act, and other sections of the Act. First, because the plain language of section 518 imposes only three simple application requirements; rather than requiring a detailed showing of tribal sovereignty independently supported by federal common law, it is properly viewed as recognizing and affirming tribal sovereignty under *Lara*. Second, the legislative history is consistent with this reading of the Act. Although there is no reason to resort to legislative history because the terms of the section are clear, the legislative history is ambivalent, containing both comments that support this reading and those that detract from it. Such an ambivalent legislative history does not provide any basis to depart from the Act's language. Finally, the references to and incorporation of federal common law regarding jurisdiction in other sections of the Act suggest that such limitations should not be read into section 518.

*1. Interpreting section 518(e) to Reinvest Tribal Sovereignty is Consistent with the CWA's Plain Language*

Assuming section 518(e) is not a delegation,<sup>75</sup> the plain language of that

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<sup>74</sup> *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 90 (1993) (holding that the Supreme Court's "application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision").

<sup>75</sup> As discussed in Part II, *supra*, section 518(e) of the CWA authorizes EPA to treat a tribe as a state, and therefore allows the tribe to promulgate its own water quality standards to regulate on-reservation discharges, if: 1) the "tribe has a governing body carrying out substantial governmental duties and powers," 2) the water quality standards at issue pertain to on-reservation water resources (or on-reservation portions of such resources), and 3) EPA reasonably expects the tribe to be capable of regulating water quality consistently with the CWA and other applicable regulations. 33 U.S.C. § 1377(e) (2000). As discussed above, EPA interprets the tribal regulatory authority authorized by this provision as being based on tribes' inherent sovereignty as defined (and limited) by the Supreme Court and therefore as being subject to the vagaries of the Court's future holdings on sovereignty in the civil regulatory context. Part II, *supra*; see also 56 Fed. Reg. 64,876, 64,880 (1991) (stating EPA's belief that the statutory text of section 518(e) does not limit EPA's authority to regulate the tribes); Skibine, *supra* note 19, at 39 (arguing that the plain meaning of section 518(e) supports EPA's regulation of the tribes as states); Cutler, *supra* note 23, at 739 (stating EPA's interpretation of section 518(e)). Although this interpretation was subsequently upheld in several federal courts, *Wisconsin v. Env'tl. Prot. Agency*, 266 F.3d 741, 744 (7th Cir. 2001); *Montana v. Env'tl. Prot. Agency*, 137 F.3d 1135, 1138 (9th Cir. 1998); *Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996); *Montana v. Env'tl. Prot. Agency*, 141 F. Supp. 2d 1259, 1262 (D. Mont. 1998); *Montana v. Env'tl. Prot. Agency*, 941 F. Supp. 945, 950 (D. Mont. 1996), the language of the statute itself, particularly in light of the discretion accorded to EPA in determining whether to grant TAS status, could easily have been viewed as authorizing EPA to delegate civil regulatory authority to tribes, a result that, prior to *Lara*, would have created considerably more security for tribes.



subsection is most logically read to recognize and affirm tribal sovereignty; therefore under *Lara*, it should be viewed to reinvest such sovereignty. Section 518(e) authorizes EPA to treat a tribe as a state for purposes of on-reservation water quality regulation whenever the "tribe has a governing body carrying out substantial governmental duties and powers" and EPA reasonably expects the tribe to be able to regulate water quality in compliance with the CWA and other applicable regulations.<sup>76</sup> On their face, these are minimal requirements. If Congress wanted to require tribes to prove themselves by independently demonstrating their sovereign right to regulate on-reservation water quality under federal common law, it certainly could have said so.<sup>77</sup> Indeed, Congress did make explicit statements that it was not affecting existing jurisdictional parameters in other parts of the CWA and, with respect to Alaskan Natives, in section 518 itself.<sup>78</sup> The absence of a similar statement regarding tribal jurisdiction further bolsters the conclusion that section 518(e) should be read to recognize and affirm tribal sovereignty. In other words, based on *Lara*, to *reinvest* it.

There is no textual basis for EPA's strained interpretation and wholesale incorporation of Supreme Court sovereignty cases, past, present, and future, into the statute.<sup>79</sup> Prior to *Lara*, because of the uncertainty about whether Congress could reinvest tribal sovereignty, EPA did not have a firm basis for holding that the statute reinvests tribal sovereignty to regulate on-reservation water quality.<sup>80</sup> Now, barring a reversal of EPA's view on

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*See* Part II, *supra*. The case for delegation has been convincingly made by other commentators. *See, e.g.,* Skibine, *supra* note 19, at 39–40 (arguing that section 518 should be viewed as a delegation of authority to tribes); Cutler, *supra* note 23, at 738–39 (arguing that section 518(e) is properly viewed as an express delegation). However, it is worth noting that delegations are not to be lightly inferred. *See, e.g.,* *Michigan v. Env'tl. Prot. Agency*, 268 F.3d 1075, 1082 (D.C. Cir. 2001) (stating that delegations should not be lightly presumed). Although it is possible that EPA may change its position on the delegation issue in the future, or that a future conflict among the circuits might result in Supreme Court review and reversal, or even that the Supreme Court might accept certiorari on the issue in the absence of such a conflict and ultimately hold that section 518(e) did create a delegation, this article assumes that courts will continue to view section 518(e) as being based on tribes' inherent sovereignty rather than as effecting a delegation.

<sup>76</sup> 33 U.S.C. § 1377(e) (2000).

<sup>77</sup> Skibine, *supra* note 19, at 40.

<sup>78</sup> 33 U.S.C. § 1268(g) (2000) ("Nothing in this section shall be construed to affect the jurisdiction, powers, or prerogatives of any department, agency, or officer of the Federal Government or of any State government, or of any tribe . . ."); 33 U.S.C. § 1377(g)(1) ("No provision of this chapter shall be construed to . . . grant, enlarge, or diminish, or in any way affect the scope of the governmental authority, if any, of any Alaska Native organization, including any federally-recognized tribe, traditional Alaska Native council, or Native council organized pursuant to the Act of June 18, 1934 (48 Stat. 987), over lands or persons in Alaska."). If subsection (e) is read, as EPA has interpreted it, to not affect existing tribal jurisdiction, then subsection (g)(1) is superfluous. Such a reading conflicts with the principle that "[i]t is [a court's] duty to give effect, if possible, to every clause and word of a statute" and that courts must, therefore be 'reluctan[t] to treat statutory terms as surplusage' in any setting." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) and *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 698 (1995)).

<sup>79</sup> Skibine, *supra* note 19, at 40.

<sup>80</sup> *But see id.* at 20, 39 (suggesting that section 518 can be validly read to recognize and affirm tribal sovereignty and referring to the statute later construed in *Lara*). While I agree with



whether section 518(e) created a delegation, reinvestment is the only interpretation of section 518(e) that is faithful to its plain text.<sup>81</sup> There is no other way to give effect to Congress's authorization for tribes to be treated as states upon a showing that they meet three simple requirements. Of course, unlike the statute at issue in *Lara*, section 518(e) does not specifically state that it is recognizing and affirming tribal sovereignty.<sup>82</sup> Nonetheless, because the statute imposes only minimal requirements as the predicate to tribal jurisdiction, it does so implicitly.

## *2. The Legislative History of section 518(e) Does Not Preclude an Interpretation Reinvesting Tribal Sovereignty*

EPA relied heavily on section 518(e)'s ambiguous legislative history to support its conclusion that the subsection was not a delegation but merely a recognition of any tribal sovereignty that could be independently supported by common law at the time of application.<sup>83</sup> Admittedly, some of the statements by Senators and Representatives could be used to argue against legislative intent to reinvest tribal sovereignty.<sup>84</sup> However, it has long been

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Mr. Skibine that EPA could legitimately have found a reinvestment of tribal sovereignty prior to *Lara*, adoption of his view by EPA would have undoubtedly been extremely controversial without direct Supreme Court support. It is clear EPA attempted to steer clear of controversy as much as possible in implementing section 518(e) based on the agency's comments in the Federal Register. See generally Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876 (Dec. 12, 1991) (codified at 40 C.F.R. 131). Thus, although such an interpretation would have been legally supportable, it would not have been practical from EPA's standpoint.

<sup>81</sup> Indeed, EPA came very close to conceding this point when it stated that "the statute itself constitutes, in effect, a legislative determination that activities which affect surface water and critical habitat quality may have serious and substantial impacts" and that "Congress has expressed a preference for Tribal regulation of surface water quality to assure compliance with the goals of the CWA." 56 Fed. Reg. at 64,878.

<sup>82</sup> See 33 U.S.C. § 1377(e) (2000) (stating that EPA "is authorized to treat an Indian tribe as a State . . . to the degree necessary to carry out the objectives of this section").

<sup>83</sup> 56 Fed. Reg. at 64,879-80; see, e.g., 133 CONG. REC. S1003-02 (daily ed. Jan. 21, 1987) (statement of Sen. Burdick) (debating section 518(e)'s intent).

<sup>84</sup> For example, Representative Morrison stated that "[t]here is nothing in the existing law nor in the proposed amendments . . . which in any way expands the substantive rights of an Indian tribe to a quantity or quality of water." 133 CONG. REC. 999 (1987). As EPA itself recognizes, others, such as Senator Inouye, made conflicting statements tending to suggest that tribes would have regulatory jurisdiction under the amended section over all water within the borders of their reservations. 56 Fed. Reg. at 64,880 (quoting 133 CONG. REC. 1583 (1987)). It is clear from a comprehensive review of the legislative history that the legislators' two main concerns with respect to Indian tribes were that section 518(e) not expand tribes' rights to water quantity and that the subsection not enable tribes to exercise off-reservation regulation. See, e.g., 133 CONG. REC. 1281 (1987) (statements by Senator Burdick that "[n]othing in this act shall affect or interfere with any existing water quantities rights" and that "[t]hose water quality standards set by Indian tribes . . . will not be used off reservation borders"); see also 133 CONG. REC. 1589 (1987) (statement by Senator Hatch) (reiterating Senator Burdick's earlier statement with respect to water quantity). Finally, accurate interpretation of the legislative statements regarding states' rights and expansion of tribal authority is complicated by the fact that the question of whether the federal government or the state, in the absence of tribal jurisdiction, would have the right to regulate water quality on on-reservation fee land is at best ambiguous. This is because state regulatory authority on Indian reservations has often been held to be



settled that the definitive test of legislative intent is the language of the statute itself and that legislative statements that conflict with a statute's plain language should be ignored.<sup>85</sup> Moreover, statements of certain legislators to the effect that the TAS provisions do not expand tribal jurisdiction directly conflict with statements of other legislators to the effect that, under section 518(e), tribes would have jurisdiction over all the water sources within the boundaries of their reservations.<sup>86</sup> Thus, the legislative history of section 518(e) is, at best, a mixed bag from which no substantive conclusions on this issue can be deduced.<sup>87</sup>

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preempted under the Supremacy Clause and because the doctrine of preemption is construed much more broadly when applied in Indian Country. COHEN, *supra* note 69, at 272–79. Thus, under the doctrine of preemption, state authority to regulate on Indian reservations may be preempted on one reservation (as a result of treaty language, for example) but not on another reservation within the same state. Compare *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981) with *United States v. Anderson*, 736 F.2d 1358, 1366 (9th Cir. 1984). Additionally, section 518(e) itself, based on its plain language, appears to preempt state authority to regulate on-reservation water quality. Federal Water Pollution Control Act, 33 U.S.C. § 1377(e) (2000); 56 Fed. Reg. 64,876, 64,878, 64,885 (statements by EPA that “Congress has expressed a preference for Tribal regulation of surface water quality to ensure compliance with the goals of the CWA” and that “EPA . . . concurs . . . that the intent of Congress . . . is to support Tribal governments in assuming authority to manage various water programs”); Daniel I.S.J. Rey-Bear, *The Flathead Water Quality Standards Dispute: Legal Bases for Tribal Regulatory Authority Over Non-Indian Reservation Lands*, 20 AM. INDIAN L. REV. 151, 213–16 (1996). While EPA itself purports to disavow preemption, see *id.* at 201, EPA's statement as to what actions it will take when a tribe does not meet the standards for TAS could only be based on preemption or a determination that state regulation infringes on tribal sovereignty. 56 Fed. Reg. at 64,885 (stating that, when a tribe's application does not meet the regulatory standards, “[r]ather than formally deny[ing] the request, EPA will continue to work cooperatively with the Tribe in a continuing effort to resolve deficiencies . . . so that Tribal recognition as a State may occur” and noting that “the Administrator has authority to promulgate Federal standards” in the interim).

<sup>85</sup> See generally *Lamie v. United States Tr.*, 540 U.S. 526, (2004); *United States v. Oregon*, 366 U.S. 643 (1961). In *Lamie* the Court noted that “[t]he starting point in discerning congressional intent is the existing statutory text . . . . It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its own terms.” 540 U.S. at 534 (citations and internal quotation marks omitted). Similarly, in *Oregon*, the Court held that “[h]aving concluded that the provisions of [the applicable provision] are clear and unequivocal on their face, we find no need to resort to the legislative history of the Act.” 366 U.S. at 648. The *Oregon* Court also noted that statements by legislators that conflict with the plain language of statute, “even when they stand alone, have never been regarded as sufficiently compelling to justify deviation from the plain language of a statute.” *Id.* at 648. In the case of the TAS provisions of the CWA, the legislative statements to the effect that the provisions did not expand tribal jurisdiction do not “stand alone” but are contradicted by other legislative statements suggesting that tribes would have full regulatory jurisdiction over water quality within the boundaries of their reservations. See *supra* note 78.

<sup>86</sup> 133 CONG. REC. S1003 (1987).

<sup>87</sup> See *Lamie*, 540 U.S. at 539–42 (stating that “[t]hough we find it unnecessary to rely on the legislative history behind the [statutory amendment], we find it instructive that the history creates more confusion than clarity about the congressional intent” and concluding that “[t]hese uncertainties illustrate the difficulty of relying on legislative history here and the advantage of our determination to rest our holding on the statutory text”).



*3. Interpreting section 518(e) as Reinvesting Tribal Sovereignty is Consistent with Other Provisions of the CWA*

Section 518(a) must be interpreted consistently with section 1251(g)<sup>88</sup> which states:

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.<sup>89</sup>

Because section 1251(g) pertains only to water *quantity*, interpreting section 518(e) to reinvest tribal jurisdiction over water quality on the reservation in no way interferes with the strictures of section 1251(g).<sup>90</sup> Based on section 518(e)'s explicit incorporation of the disclaimer in section 1251(g), the lack of a similar disclaimer regarding water quality should be taken as an indication that section 518(e) positively affects tribal jurisdiction over water quality. Thus, subsection (a)'s incorporation of section 1251(g) is entirely consistent with, and indeed supports, reading section 518(e) as a recognition and affirmation of tribal sovereignty over water quality.

Furthermore, reading section 518 as a reinvestment is also supported by two other provisions in the CWA. First, section 1268(g)(1), a provision of the Clean Water Act of 1987 (the same Act in which section 518(e) was adopted) that pertains to implementation of the Great Lakes Water Quality Agreement, contains an explicit disclaimer that "[n]othing in this section shall be construed . . . to affect the jurisdiction, powers, or prerogatives of any department, agency, or officer of the Federal Government or of any State government, or of any tribe . . . ."<sup>91</sup> Second, section 518 itself contains

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<sup>88</sup> See 33 U.S.C. § 1377(a) (2000) (stating that "[n]othing in this section shall be construed to affect the application of section 1251(g) of this title").

<sup>89</sup> *Id.* § 1251(g) (2000).

<sup>90</sup> Most tribal water quantity rights are long-standing, pre-dating statehood in many instances, because such rights have a priority date of either time immemorial, or at the very latest, the creation of the tribe's reservation. COHEN, *supra* note 69, at 590-91. In addition to the tribal reserved rights discussed in the above-cited pages of COHEN, many tribes also have on- and off-reservation water rights that are based on their treaty-based fishing rights. See *United States v. Washington*, 506 F. Supp. 187, 206 (W.D. Wash. 1980) (holding that tribal treaty fishing rights require the state to refrain from taking actions that would impair the habitat necessary to preserve the tribes' treaty-protected fishing rights), *rev'd on other grounds*, 759 F.2d 1353 (9th Cir. 1982); *Confederated Tribes of the Umatilla Reservation v. Alexander*, 440 F. Supp. 553 (D. Or. 1977) (issuing declaratory judgment that dam construction could not go forward without Congressional authorization because of harm to treaty-protected fisheries). For an in-depth discussion of the implications of treaty fishing rights *vis-a-vis* protection of habitat resources (which necessarily includes protection of water quality and water quantity), see generally Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part II): Asserting a Sovereign Servitude to Protect Habitat of Imperiled Species*, 25 VT. L. REV. 355 (2001); Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part I): Applying Principles of Sovereignty to Protect Imperiled Wildlife Populations*, 37 IDAHO L. REV. 1 (2000).

<sup>91</sup> Federal Water Pollution Control Act, 33 U.S.C. § 1268(g)(1) (2000); Pub. L. No. 107-303.



an explicit disclaimer with respect to the jurisdiction of Alaska Native organizations:

No provision of this chapter shall be construed to . . . grant, enlarge, or diminish, or in any way affect the scope of the governmental authority, if any, of any Alaska Native organization, including any federally-recognized tribe, traditional Alaska Native council, or Native council organized pursuant to the Act of June 18, 1934 (48 Stat. 987), over lands or persons in Alaska.<sup>92</sup>

Under EPA's view that section 518(e) does not affect tribal jurisdiction, the above provisions, particularly the subsection in section 518 itself that relates to Alaska Native organizations, would be entirely superfluous. However, the Supreme Court held that "[i]t is [a court's] duty to give effect, if possible, to every clause and word of a statute" and that a court must be "reluctan[t] to treat statutory terms as surplusage" in any setting.<sup>93</sup> In the context of the TAS provision, in order to give effect to these disclaimers, section 518(e) must be read as a reinvestment that does affect tribal jurisdiction. If Congress had wanted section 518(e) to have no effect on tribal jurisdiction, it would have ensured that result by stating as much in section 518(g)(1)<sup>94</sup> or by adding a similar subsection with respect to tribal jurisdiction generally. It simply did not do so.

#### IV. CONCLUSION

The Supreme Court's decision in *United States v. Lara*<sup>95</sup> can be expected to have wide-ranging retroactive effects based on the principle that courts must give retroactive effect to rules of law enunciated by the Supreme Court.<sup>96</sup> *Lara* should be read to reinvest sovereignty in the context of any statute that is properly understood to recognize and affirm tribal sovereignty. While tribes may have difficulty motivating Congress to enact such statutes and while it is likely that there are only a limited number of such statutes already on the books, the TAS provision of the CWA is one area where *Lara* should have retroactive effects that are beneficial to tribes. Of course, as is the case any time a tribe risks going to court, only time will tell.

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<sup>92</sup> *Id.* § 1377(g)(1).

<sup>93</sup> *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citations omitted).

<sup>94</sup> 33 U.S.C. § 1377(e), (g)(1).

<sup>95</sup> 541 U.S. 193 (2004).

<sup>96</sup> *Hammer v. Virginia Dep't of Taxation*, 509 U.S. 86, 89 (1993).