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### Interjurisdictional Relations Under Federal Water Quality Law: A Guide Through the Maze

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**Interjurisdictional Relations Under  
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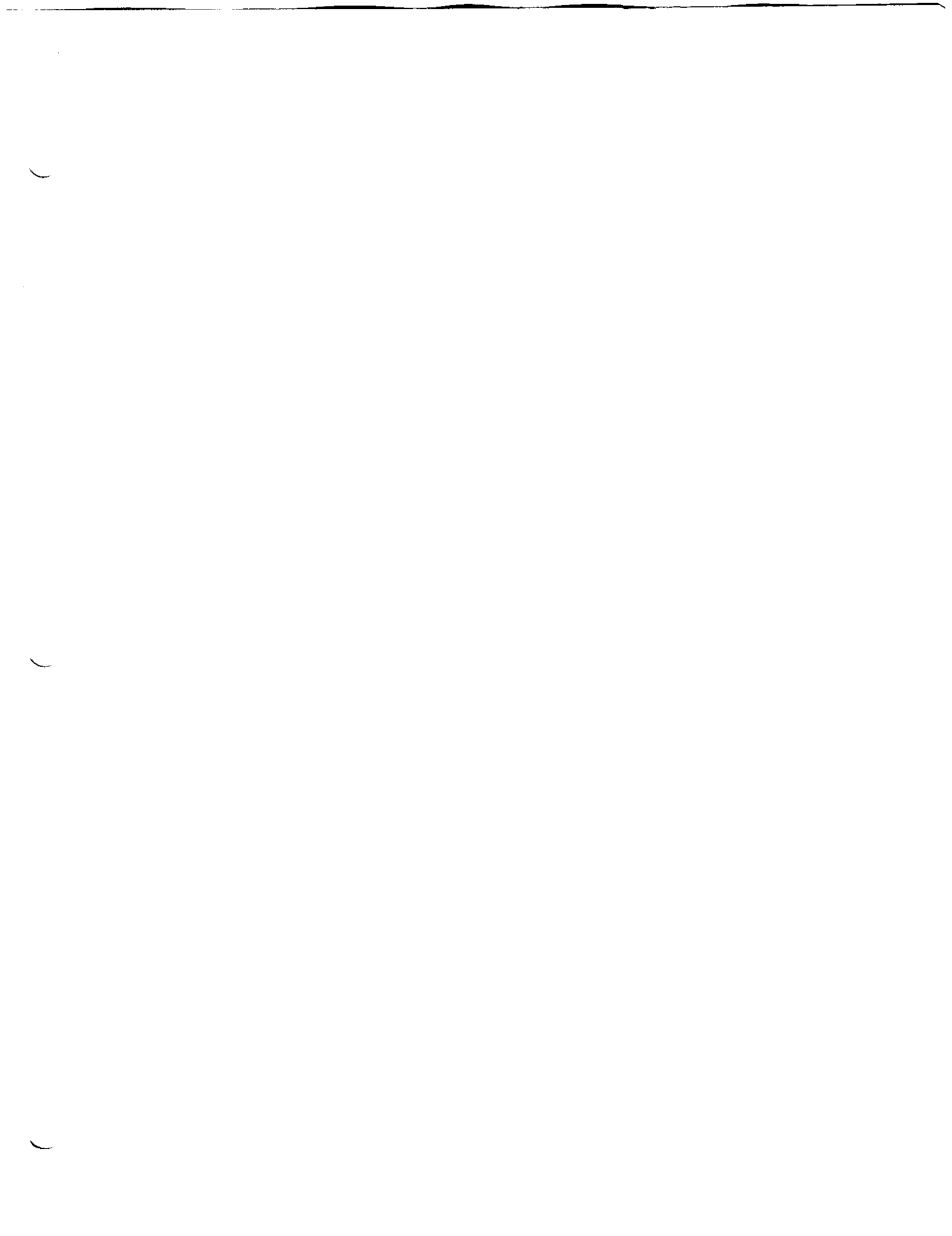
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**Boundaries and Water: Interjurisdictional Issues**

Natural Resources Law Center  
University of Colorado School of Law  
June 5-7, 1989



## I. INTRODUCTION

- A. Water as a Private/Public Resource
- B. Water Quantity vs. Water Quality
- C. Federal vs. State Roles
- D. The Interjurisdictional Dimension
- E. The Pluralistic Model Under the Clean Water Act, the Endangered Species Act and the Federal Power Act
- F. Nonstatutory Federal Water Quality Law (including Indian treaties and the Common Law)

## II. STATE/FEDERAL RELATIONS

- A. Relationship Between CWA and State Water Quality Laws
  - 1. CWA section 510 (33 U.S.C. § 1370) provides that the CWA does not limit states' authority to regulate water quality, as long as states do not attempt to adopt or enforce standards more lenient than those under the CWA. States may adopt and enforce more stringent standards. See, e.g., U.S. Steel Corp. v. Train, 556 F.2d 822

(7th Cir. 1977) (state limitations supercede less stringent CWA standards).

2. While the CWA provides for use of state and local agencies in achieving its goals, it does not constitute a grant of federal powers to those agencies. Thus, state and local agencies' powers to regulate water quality are limited to powers granted under state law. Northern Colorado Water Conservancy Dist. v. Board of County Commissioners of the County of Grand, 482 F. Supp. 1115 (D. Colo. 1980).

B. Federal Waivers of Sovereign Immunity

1. CWA section 313 (33 U.S.C. § 1323) requires all federal facilities and activities to comply with substantive as well as procedural aspects of state water quality laws. This section was amended in 1977 to reverse a U.S. Supreme Court decision holding that federal facilities need not obtain an NPDES permit from states with EPA approved permit programs. See EPA v. California, 426 U.S. 200 (1976).
  - a. Courts are split over whether this section waived federal sovereign immunity from

civil penalties assessed against the federal government under state water quality laws. See Ohio v. U.S. Dep't of Energy, 689 F. Supp. 760 (S.D. Ohio 1988) (section 313 waives federal sovereign immunity from civil penalties "arising under" federal law, including state laws implementing state NPDES permit program); California v. U.S. Navy, 845 F.2d 222 (9th Cir. 1988) (section 313 does not waive federal sovereign immunity from state civil penalties).

2. CWA section 404(t) (33 U.S.C. § 1344(t)) subjects federal agencies discharging dredged or fill material into the navigable waters of a state to the substantive and procedural requirements of state law to the same extent as any person.
  - a. Friends of the Earth v. U.S. Navy, 841 F.2d 927 (9th Cir. 1988) held that the state of Washington's Shoreline Management Act (SMA) regulates dredging and water quality, obligating the Navy to obtain an SMA permit. The court also held that the Coastal Zone Management Act does not affect the CWA's waiver of sovereign immunity.

C. Clean Water Act § 402 (33 U.S.C. § 1442)

1. Section 402(b) allows states to take over issuance of NPDES permits from EPA. EPA must turn over permit issuance authority to a state if the state satisfies statutory and regulatory criteria (see § 402(b), 40 C.F.R. § 123), including having a procedure to consider recommendations of other states which may be affected by issuance of a particular NPDES permit (see § 402(b)(5)).

a. EPA may withdraw approval of states' NPDES permit issuance authority. See § 402(c).

b. For a discussion of friction between EPA and the state of Colorado over Colorado's attempts to make its NPDES program less restrictive, see T. Foster, EPA versus Colorado: National Unity versus State Flexibility, 1 Nat'l Res. & Evt. 27 (Winter 1986).

2. Section 402(d) authorizes EPA to veto a state-issued NPDES permit and issue its own permit.



- a. EPA regulations set forth the grounds upon which EPA must base a veto under § 402(d). See 40 C.F.R. § 123.44. EPA may veto a state permit if the permitting state has rejected recommendations from an affected state without adequate reasoning. See 40 C.F.R. § 123.44(c)(2).
- b. When EPA vetoes a state NPDES permit and assumes permitting authority, such action is not judicially reviewable until EPA actually issues its own permit or refuses to issue a permit altogether. Champion International Corp. v. EPA, 850 F.2d 182 (4th Cir. 1988). The Champion court also held that EPA had properly assumed permitting authority from North Carolina when that state refused to alter a permit to take Tennessee's water quality standards into account.
- c. While federal courts may review EPA's veto of a state NPDES permit (after EPA itself acts to issue or deny the permit), federal courts cannot review EPA's refusal to veto a state permit. District of Columbia v. Schramm, 631 F.2d 845 (D.C. Cir. 1980).

However, in Save the Bay, Inc. v. EPA, 556 F.2d 1282 (5th Cir. 1977), the court noted in dicta that a court could review an EPA refusal to veto a state permit if a party claimed that the proposed permit contained a violation of federal guidelines which EPA had not considered, or if a party alleged that unlawful factors had tainted EPA's exercise of its discretion. State courts are the proper forum for resolving questions about state-issued NPDES permits.

- d. EPA's veto of a permit issued by the State of Washington was invalid because it was based on an ad hoc determination of what constituted the best practicable technology for a certain plant rather than uniform effluent standards applicable to the industry as a whole. State of Washington v. EPA, 573 F.2d 583 (9th Cir. 1978). See also Cleveland Electrical Illuminating Co. v. EPA, 603 F.2d 1 (6th Cir. 1979) (EPA abused its discretion in vetoing state permit); Ford Motor Co. v. EPA, 567 F.2d 661 (6th Cir. 1977) (EPA veto invalid because agency did not base decision on guidelines or express statutory provision).

- e. Alleged EPA "coercion" did not transform an NPDES permit decision of a state agency into a federal agency action reviewable in federal court. Shell Oil Co. v. Train, 585 F.2d 408 (9th Cir. 1978).

D. Clean Water Act § 401 (33 U.S.C. § 1341)

Section 401(a) requires each applicant for a federal license or permit whose activity "may result in any discharge to the navigable waters" to obtain certification from the state in which the discharge would originate that the discharge will comply with state water quality standards and CWA effluent limits. Absent state certification, the federal agency may not issue the license or permit. Under § 401(d), states may place conditions on their certification. These conditions become conditions on the federal permit.

- 1. Federal permit programs which require § 401 certification.
  - a. EPA has given the states no guidance as to which federally permitted activities are subject to § 401 certification. EPA regu-

lations simply restate statutory language (see 40 C.F.R. § 121.1(a)).

- b. FERC licenses for dam construction are subject to § 401 certification. See 18 C.F.R. § 4.38(e)(2) (FERC regulations requiring § 401 certification).
- c. The § 401 certification requirement seems to be limited to point sources, since the statute applies to "any discharge." But see Runsel & Meyers, State Water Quality Certification and Wetland Protection: A Call to Awaken the Sleeping Giant, 7 Va. J. Nat. Res. L. 339, 347-48 (1988) (suggesting that § 401 applies to nonpoint sources as well).

2. Impacts states may consider in the § 401 certification process.

- a. Although the issue has not been definitively settled, the wording and legislative history of § 401 suggest that states may evaluate all of the water quality implications of a project over its lifetime when making a § 401 certification decision, not

merely immediate point source discharges.

See Ransel & Meyers at 348-53.

- b. In Power Authority v. Williams, 101 A.D.2d 659 (N.Y. App. Div. 1984), a New York state court held that "discharge" within the meaning of § 401 included pollution arising from causes other than specific discharges of identifiable pollutants. The court found that a transfer of water from an upper reservoir to a lower reservoir was a discharge within the CWA's broad definition of the term, where the transfer could affect water temperature.

3. State law requirements relevant to § 401 certification.

- a. Under § 401(d), states may condition § 401 certifications to satisfy "any ... appropriate requirement of state law." It is unclear whether "appropriate" state laws include only those dealing with state water quality standards required by CWA § 303 or whether a state can impose conditions based on any state law that somehow relates to water quality.

b. It is also unsettled whether states may deny a certification based on "appropriate" state laws mentioned in § 401(d), or whether states may only deny certification if a federally permitted activity will violate the CWA sections listed in § 401(a). Courts have split on this issue. In Marmac Corp. v. Dep't of Natural Resources of West Virginia, No. 81-1792 (Cir. Ct. Kanawha Co. 1982), the court held that West Virginia could deny certification on the basis of appropriate state laws mentioned in § 401(d). However, in Arnold Irrigation Dist. v. Dep't Environmental Quality, 717 P.2d 1274 (1986), the Oregon Court of Appeals held that a state may not base § 401 certification denial on state law alone, unless the state law implemented the CWA sections listed in § 401(a). However, the court interpreted § 401(d) broadly, noting that states may condition (but not deny) a § 401 certification on the basis of virtually any state law somehow related to water quality. States may be able to avoid this issue altogether by incorporating all state laws related to water quality into

their water quality standards adopted pursuant to CWA § 303. Tennessee has adopted this approach. See Hollis v. Tennessee Water Quality Control Bd., No. 83-1352-I (Tenn. Ch. Cpp. 1984) (denial of certification based on definition of pollution within state § 303 water quality standards).

E. Clean Water Act Section 303 (33 U.S.C. § 1313)

1. Section 303(c) requires states to adopt "designated uses" of navigable waters.
  - a. EPA regulations require that designated uses include all uses actually being attained (40 C.F.R. § 131.10(i)).
  - b. In order to designate uses below the goal of "fishable-swimmable" waters set forth in CWA section 101(a)(2), states must find that this goal cannot be met even after imposing the technology-based effluent limitations required by CWA sections 301(b) and 306 and implementing controls on non-point sources (40 C.F.R. § 131.10(j)). However, EPA's authority to enforce this requirement is uncertain. The court in

Associated Industries of Alabama v. Train,  
9 E.R.C. (BNA) 1561 (N.D. Ala. 1976)  
invalidated EPA's disapproval of Alabama  
water quality standards under a similar  
regulation, holding that the CWA did not  
authorize EPA's minimum "fish and wildlife"  
standard. Moreover, private parties cannot  
assert such an argument if the state in-  
volved does not object to the EPA's minimum  
standards. See Homestake Mining Co. v.  
EPA, 477 F. Supp. 1279 (D.S.D. 1979).

2. Section 303(c) requires states to adopt water  
quality standards to protect designated uses,  
and at least once every three years review and,  
if appropriate, modify these standards. EPA  
evaluates state standards, and promulgates its  
own substitute standards if a state refuses to  
modify state standards EPA deems inadequate.
  - a. Neither section 303 nor EPA regulations  
specify the minimum number or type of pol-  
lutants for which states must establish  
water quality criteria. Though EPA undoub-  
tedly has authority to require states to  
regulate a certain pollutant or promulgate  
its own standard for that pollutant, EPA



has wide discretion in deciding which pollutants require standards, as well as over what type of standards are necessary. See Board of County Commissioners of Calvert County v. Costle, No. 78-0572 (D.D.C. 1980); Environmental Defense Fund v. Costle, 657 F.2d 275 (D.C. Cir. 1981).

- b. EPA regulations require states to base narrative water quality criteria on "biomonitoring methods," and require numerical standards to be based on either EPA "guidance" criteria promulgated under section 304(a) or "other scientifically defensible methods" (40 C.F.R. § 131.11(b)). In Mississippi Comm'n on Natural Resources v. Costle, 625 F.2d 1269 (5th Cir. 1980), the court upheld EPA's refusal to consider economic data in promulgating a more restrictive standard for dissolved oxygen than Mississippi deemed adequate.
- c. Persons may not challenge EPA decisions on state water quality standards under the CWA's citizen suit provision, but may be able to do so under § 702 of the Administrative Procedure Act (APA). Scott v.

City of Hammond, Indiana, 741 F.2d 992 (7th Cir. 1984).

3. EPA regulations contain an antidegradation policy which requires states to implement a policy protecting water quality necessary for existing instream uses (40 C.F.R. § 131.126(a)(1)). Also, where water quality exceeds the "fishable-swimmable" standard, states must protect existing water quality rather than simply protecting existing uses (40 C.F.R. § 131.12(a)(2)).
  - a. States may permit degradation of high quality waters above the "fishable-swimmable" level if existing uses are not harmed and the state finds the action "necessary to accommodate important economic or social development" (40 C.F.R. § 131.12(a)(2)).
  - b. States may not permit any water quality degradation of water designated by a state as an Outstanding National Resource Water (40 C.F.R. § 131.12(a)(3)).
4. EPA must approve various state water quality implementation plans.

- a. Section 303(e) requires states to have an approved "continuing planning process." Failure of a state to have an approved planning process precludes EPA from authorizing that state to issue NPDES permits. Under this section, EPA need only approve the planning process in general, not the specific plans produced by the process. City of New Haven v. Train, 424 F. Supp. 648 (D.C. Conn. 1976). EPA regulations outline the required contents of the continuing planning process. See 40 C.F.R. § 130.5.
- b. Section 303(d) requires states to identify water for which CWA effluent limits are insufficient to meet applicable water quality standards, as well as establish total maximum daily loads (TMDL) for problem pollutants. If EPA approves a state's findings and TMDL's, this becomes part of the state's 303(e) plan. If EPA disapproves, it must itself identify problem areas and set TMDL's. Failure of a state over a long time period to submit proposed TMDL's may amount to "constructive submission" of no TMDL's, triggering EPA's obligation to

approve such action or set TMDL's itself.  
Scott v. City of Hammond, Indiana, 741 F.2d  
992 (7th Cir. 1984). The CWA citizen suit  
provision permits persons to challenge  
EPA's failure to promulgate TMDL's for a  
recalcitrant state. Id.

- c. Section 208 (33 U.S.C. § 1288) requires states to formulate and submit for EPA approval waste treatment management plans for areas with substantial water quality problems. EPA may provide grants to help implement approved plans, including grants to control non-point source pollution.
  - d. Section 319 requires states to formulate management programs for controlling non-point source water pollution, including identification of best management practices for reducing non-point source pollutants. EPA must approve state programs in order for states to be eligible for implementation grants.
5. Regulation of federal non-point pollution sources.

- a. States may enjoin federal activities causing non-point source pollution which leads to a violation of state water quality standards. This is true even if the federal activity complies with best management practices set by the state. Northwest Indian Cemetery Protection Association v. Peterson, 795 F.2d 688 (9th Cir. 1986), rev'd on other grounds, 108 S. Ct. 1319.
- b. Since non-point source pollution is not subject to standards enforceable under 33 U.S.C. § 1311(b)(1)(C), private individuals may not sue federal non-point polluters under the CWA's citizen suit provision (plaintiffs were forced to employ this circuitous attempt to proceed under the CWA because the statute's citizen suit provision, § 505, does not list state water quality standards adopted pursuant to § 303 as enforceable by interested parties). However, citizens may enforce alleged state water quality standard violations against such a polluter pursuant to the APA. Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842 (9th Cir. 1987).

F. Clean Water Act § 404 (33 U.S.C. § 1344). Section 404 authorizes the Army Corps of Engineers to issue permits for discharge of dredged or fill materials into navigable waters at specified sites.

1. Sections 404(g) and (h) allow states to assume permitting authority for dredged and fill discharges into so-called "non-traditionally navigable" waters, which are not presently used or "susceptible" to use as a means to transport foreign or interstate commerce (i.e., not traditionally navigable waters).

a. EPA regulations set forth components state programs must include to win approval. See 40 C.F.R. § 233.

b. Only Michigan has taken advantage of this provision to assume 404 permitting authority. See 40 C.F.R. § 230.60.

2. Section 404(j) authorizes EPA to object to 404 permits a state proposes to issue.

a. If the state permitting agency does not alter the permit to satisfy the objections, EPA may assume authority over that permit.

b. EPA may waive its authority to review certain types of state-issued permits. See § 404(k); 40 C.F.R. § 233.51.

3. EPA may withdraw its approval of a state permitting program if the program is not in accord with § 404 or its implementing regulations. See § 404(i); 40 C.F.R. § 233.53.

G. Wallop Amendment to the Clean Water Act

In 1977, Congress added section 101(g) (33 U.S.C. § 1251(g)) to the CWA. Known as the Wallop Amendment, § 101(g) provides that nothing in the CWA shall supercede or abrogate states' right to allocate water or established state water rights. It also directs federal agencies to cooperate with state and local agencies to eliminate pollution "in concert with" water management programs. For courts' interpretation of this provision, see discussion of Riverside Irrigation Dist. v. Andrews, III(A)(2)(b), infra.

H. Electric Consumer Protection Act of 1986 (EPCA).

The EPCA amended the Federal Power Act. Under these amendments, states have increased authority to make

recommendations to the Federal Energy Regulatory Commission (FERC) concerning proposed hydroelectric power projects' effects on fish and wildlife. This authority presumably extends to recommendations on water quality issues, since water quality affects fish and wildlife. For further discussion, see III(c)(2), infra.

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### III. INTRAFEDERAL RELATIONS

#### A. Endangered Species Act, Section 7 (16 U.S.C. § 1536)

When it enacted the ESA, Congress articulated a federal policy to conserve species listed as threatened or endangered "regardless of cost." See Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978). As of 1988, 76 species of fish native to the United States were listed. Significant changes in the quantity or quality of a water resource could also affect many other listed species. Section 7(a)(2) prohibits any federal or federally-authorized activity which jeopardizes the continued existence of any listed species or destroys or adversely modifies a listed species' critical habitat.

1. Whenever an agency action may affect listed species, the agency must consult with the Fish and Wildlife Service or National Marine Fisheries Service (the Secretary). The Secretary issues a biological opinion detailing the project's effects on listed species and concluding whether or not the project is likely to violate § 7(a)(2). If the project may violate this section, the Secretary sets forth "reasonable and prudent alternatives" which would avoid such a

result. While courts accord the biological opinion "great weight" when reviewing an agency's compliance with § 7(a)(2), the action agency retains discretion to decide whether or not to proceed with a project. See Stop H-3 v. Dole, 740 F.2d 1442 (9th Cir. 1984).

- a. In Nebraska v. Rural Electrification Administration, 12 E.R.C. (BNA) 1156 (D. Neb. 1978), the court found that REA and the Corps had violated section 7 by failing to consult with the Secretary prior to providing financial guarantees and issuing a 404 permit, respectively, for the proposed Grayrocks Dam, when operation of the dam could affect listed species.
  
- b. To prevent a project from gaining momentum prior to completion of § 7 consultation, § 7(d) forbids any irreversible or irretrievable commitments of resources prior to the time the Secretary issues a biological opinion. The Nebraska v. REA court, supra, held that REA's funding guarantees and the Corps' grant of a 404 permit for the Grayrocks Dam constituted such unlawful resource commitments (construing FWS regulations later codified as § 7(d)).

- c. Section 7(h) authorizes a committee made up of Cabinet-level officials to grant exemptions from § 7. To date, the Committee has considered only three exemption requests, all prior to 1980. It granted an exemption for the Grayrocks Dam, but the exemption merely ratified an agreement worked out by the parties prior to the Committee's consideration of the issue. See The 1978 Amendments to the ESA: Evaluating the New Exemption Process Under § 7, 9 E.L.R. 10,031 (1979).

2. Impacts considered during § 7 consultation.

- a. In National Wildlife Federation v. Coleman, 529 F.2d 352 (5th Cir. 1976), rehearing denied, 532 F.2d 1375, cert. denied under Boteler v. NWF, 426 U.S. 979 (1976), the court made it clear that a project's indirect as well as immediate impacts on listed species should be considered during § 7 consultation.

b. In Riverside Irrigation Dist. v. Andrews, 568 F. Supp. 586 (D. Colo. 1983), aff'd, 758 F.2d 508 (10th Cir. 1985), plaintiffs challenged the Army Corps' refusal to grant a 404 permit for a proposed dam due to adverse impacts the dam's operation would have on whooping crane habitat downstream. The court held that § 404 of the Clean Water Act permitted the Corps to consider a project's potentially deleterious downstream effects on listed species when deciding whether to issue a 404 permit. The court found that since the Corps could consider such impacts under § 404, it was required to do so under the ESA. Finally, the court held that CWA § 101(g), the so-called Wallop Amendment, had no bearing on its holding even if action by the Corps under § 404 affected state water right law. The Tenth Circuit upheld the district court's holding on § 101(g), but also noted in dicta that a fair reading of the Wallop Amendment indicated that where both a state's interest in allocating water and the federal government's interest in protecting the environment are implicated, Congress intended "an accommodation," which

could best be reached in the context of an individual permit process. 758 F.2d at 513.

3. Agencies' duty to conserve listed species.

- a. ESA §§ 2(c)(1) and 7(a)(1) affirmatively require federal agencies to use their authorities to conserve (i.e., further the recovery of) threatened and endangered species.
  
- b. When she issues a biological opinion after § 7 consultation on a proposed project, the Secretary may include "conservation recommendations" to assist the action agency in meeting its duty to conserve listed species. While the Secretary interprets agencies' compliance with such recommendations as wholly discretionary (see 50 C.F.R. § 402.14(j)), the legal significance of such recommendations has never been litigated.

4. Section 7's effect on water issues.

A 1987 GAO report concluded that § 7 has had little effect on water development in the arid West, where the greatest potential for conflict exists between water users and species' needs. This conclusion holds true even for the over-subscribed Platte and Colorado River systems, for which various strategies have evolved to avoid jeopardy biological opinions.

- a. The Secretary has issued several so-called "Windy Gap" biological opinions (so named after the first opinion, concerning the Windy Gap diversion). In return for a water developer's agreement to pay a fee based on water depletion to be caused by a proposed project, the Secretary issues a no jeopardy biological opinion and uses the money for research, habitat enhancement, and other species conservation measures. However, critics have charged that these payments do not compensate for harm to species caused by diminished flows. This arrangement also is of questionable legal validity under the ESA, as FWS assesses fees based purely on plugging a project's

anticipated water depletion into a mathematical formula, rather than on the cost of specific actions necessary to offset the project's adverse impacts on listed fish species. This scheme is arguably outside the scope of the Secretary's authority under ESA § 7.

- b. Federal and state agencies and interested groups have formed "coordinating committees" for the Colorado and Platte systems in an attempt to formulate and secure funding for fish conservation plans which will not interfere with water development.

5. Section 9.

- a. Section 9 forbids all persons -- not just federal agencies -- from taking species listed as endangered. ESA regulations also prohibit takings of most threatened species (see 50 C.F.R. § 17.31(a)). "Harm" to a listed species is included within this taking proscription (see 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3). Harm includes foreclosing a species' prospects for recovery. Palila v. Hawaii Dept. of Land

and Natural Resources, 649 F. Supp. 1070 (D. Ha. 1986), aff'd, 852 F.2d 1106 (9th Cir. 1988).

- b. Section 10 permits takings "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." However, the Secretary may set forth mandatory reasonable and prudent measures to minimize incidental takings caused by a federal activity. See 16 U.S.C. § 1536(b)(4). The Secretary has similar power with respect to all other entities. See 16 U.S.C. § 1539(a)(2).

#### 6. The Simpson Amendment

In 1982, Senator Simpson added a clause to the ESA providing that "Federal agencies shall cooperate with state and local agencies to resolve water resource issues in concert with conservation of endangered species." See 16 U.S.C. § 1531(c)(2). It is unclear whether this language gives states any voice in § 7 consultation or any other federal interagency cooperation pursuant to the ESA.



B. Clean Water Act § 404

1. Section 404(b)(1) requires each 404 permit issued by the Army Corps of Engineers to be consistent with guidelines developed by the Corps "in conjunction with" EPA. This statutorily mandated power sharing arrangement is unique in American environmental law. The guidelines appear at 40 C.F.R. § 230.
  - a. The 404(b)(1) guidelines include a presumption that dredged or fill material should not be discharged into the aquatic ecosystem unless it can be demonstrated that a proposed discharge will not have an "unacceptably adverse impact" on an ecosystem. See 40 C.F.R. § 230.1(c).
  - b. The Corps recognizes the 404(b)(1) guidelines as binding, and denies 404 permits to activities which would not comply with the guidelines. See 33 C.F.R. § 320.4.
2. Section 404(c) authorizes EPA to in effect veto 404 permits issued by the Corps. EPA may take such action when it determines, after public participation and consultation with the Corps,

that a proposed discharge will have an "unacceptable adverse effect" on water supplies, fish, wildlife, or recreation areas.

- a. EPA's veto authority is a means to enforce the 404(b)(1) guidelines. EPA regulations provide that the agency will consider the guidelines when deciding whether to exercise its veto authority. See 40 C.F.R. § 231.2(e).
  
- b. EPA has used its § 404(c) authority to veto only five 404 permits. When EPA has vetoed a permit, however, courts have showed deference to the agency's determinations. See, e.g., Bersani v. EPA, 674 F. Supp. 405 (N.D.N.Y. 1987), aff'd, 850 F.2d 36 (2d Cir. 1988). Therefore, EPA essentially can employ § 404(c) to override aberrant interpretations of the 404(b)(1) guidelines by the Corps. See Blumm, A Guide to Federal Wetlands Protection Under Section 404 of the Clean Water Act, 46 Anadromous Fish L. Memo, at 27 (1988).
  
- c. In late March, 1989, EPA Director William Reilly announced that EPA intended to veto

a 404 permit granted by the Corps for the Two Forks Dam southwest of Denver.

C. Federal Power Act, As Amended by the Electric Consumers Protection Act (16 U.S.C. §§ 791a-823)

Under the FPA, the Federal Energy Regulatory Commission (FERC) has authority to license hydropower dams on navigable waters of the United States.

1. Section 4(e) (16 U.S.C. § 797(e)) provides that FERC may issue licenses for projects within federal land reservations only upon making a finding that the project will not interfere with the purpose for which the reservation was created, and that the license shall be subject to conditions the federal land management agency deems necessary for "the adequate protection and utilization of such reservation."

- a. In Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 104 S. Ct. 2105 (1984), the Supreme Court rejected FERC's longstanding view that conditions set forth by other federal agencies pursuant to § 4(e) were simply advisory. The Court unanimously concluded that the statute's

plain meaning required FERC to impose § 4(e) conditions set forth by federal land managers in whose jurisdiction a hydropower project was to be built. However, the Court also concluded that land managers could not attach such conditions to protect federal reservations located downstream of a proposed project. Finally, the Court ruled that an Indian tribe could not prevent FERC from licensing projects on tribal land.

- b. In 1988, FERC held that BLM had no authority to require FERC to obtain a right of way from BLM prior to authorizing construction of a hydroelectric project on BLM land. See 44 FERC ¶ 61,076. While this decision suggests that FERC takes a narrow view of Escondido, this case differed substantially from Escondido in that BLM did not attempt to argue that the project was to take place on a federal "reservation," nor did the agency submit conditions pursuant to § 4(e). However, since the FPA's broad definition of "reservation" includes "lands and interests in lands acquired and held for any public purposes"

(16 U.S.C. § 796(2)), BLM land arguably could be considered a federal reservation.

2. Consideration of a project's impacts on fish and wildlife.

- a. Section 10(j) (16 U.S.C. § 803(j)), added in 1986 by the EPCA, requires FERC to include in its licenses conditions to protect, mitigate damage to, and enhance fish, wildlife and habitat affected by a project. The statute requires FERC to base these conditions on recommendations of the Fish and Wildlife Service, National Marine Fisheries Service, and state fish and wildlife agencies received pursuant to the Fish and Wildlife Coordination Act. FERC may reject such recommendations only after (1) explicitly finding that a recommendation is inconsistent with the FPA's purposes and requirements; and (2) attempting to resolve the inconsistency, giving "due weight" to the recommending agency's expertise and statutory responsibilities. Congress viewed this section as "unmistakably upgrad[ing] the status of recommendations by [state and federal fish and wildlife

agencies]." See H.R. Conf. Rep. No. 934, 99th Cong., 2d Sess. 23 (1986).

- b. In Confederated Tribes and Bands of the Yakima Indian Nation v. FERC, 746 F.2d 466 (9th Cir. 1984), cert. denied, 105 S. Ct. 2358 (1985), the court held that the FPA requires FERC to make the same inquiries, including consideration of protective measures for fish and wildlife, in relicensing proceedings as it makes during initial license determinations. The court also disapproved of FERC's practice of issuing hydroelectric licenses while deferring fish and wildlife measures until after studies are completed.
- c. The EPCA also added protection, mitigation, and enhancement of fish, wildlife, and habitat to the factors FERC must consider when adopting license conditions (see 16 U.S.C. § 803(a)), as well as adding a provision requiring FERC to give "equal consideration" to fish and wildlife and other aspects of environmental quality when deciding whether to issue a license (see 16 U.S.C. § 797(e)).

3. FPA § 18 (16 U.S.C. § 811)

- a. This section provides that FERC shall require its licensees to construct "fishways" recommended by the Secretaries of the Interior or Commerce.
  
- b. In Lynchburg Hydro Assoc., 39 FERC ¶ 61,079 (1987), FERC acknowledged that § 18 empowered the Secretaries of Interior and Commerce to prescribe mandatory conditions for construction, operation, and maintenance of fishways. However, FERC took a very narrow view of this power, drawing a distinction between "fishways" and "more far-reaching conditions" for protection, mitigation and enhancement of fish resources which FERC noted it would consider as agency recommendations under § 10(j). FERC also noted that it intended to define the scope of the Secretaries' § 18 power on a case-by-case basis.
  
- c. In Lynchburg and a subsequent case, Commonwealth Hydroelectric, Inc., 41 FERC ¶ 62,309 (1987), FERC attempted to draw a

distinction between fish screens suggested by the Secretaries, whose sole purpose was to protect fish from project induced injury or mortality -- and thus were merely recommendations under § 10(j) -- and screens to provide for upstream and downstream fish passage, which FERC maintained the Secretaries could mandate under § 18.

D. Fish and Wildlife Coordination Act (16 U.S.C. §§ 661-667(e))

1. The FWCA requires federal agencies to consult with FWS and relevant state fish and wildlife agencies whenever they undertake or authorize diversion or impoundment on any stream or body of water, or water is "otherwise controlled or modified for any purpose ..." 16 U.S.C. § 662(a).
  - a. Federal agencies must give "full consideration" to recommendations they receive pursuant to the FWCA. Id. at § 662(b).
  - b. The Federal Power Act contains a higher standard than "full consideration" applicable to FERC decision making. See III(C)(2)(a), supra.



2. Very small projects and activities by federal agencies on federal land "primarily for land management and use" are exempt from consultation requirements. Id. at § 662(h).

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#### IV. INTERSTATE RELATIONS

##### A. Common Law

1. In City of Milwaukee v. Illinois and Michigan (Milwaukee II), 101 S. Ct. 1784 (1981), the U.S. Supreme Court held that the 1972 amendments to the Clean Water Act had preempted the federal common law of nuisance in the area of water pollution. The Court emphasized this holding in Middlesex County Sewage Authority v. National Sea Clammers Assoc., 101 S. Ct. 2615 (1981), as well as held that persons who suffered as a result of CWA violations had no implied right of action under that statute. Thus, a suit under the citizen suit provision of the CWA constitutes the sole federal remedy available to a state or individual aggrieved by water pollution originating in another state.
  
2. In International Paper Co. v. Ouellette, 107 S. Ct. 805 (1987), the Supreme Court found that the CWA preempted common law nuisance claims against an out-of-state point source polluter when the

action is based on the law of the affected state rather than common law of the state in which the source is located. The Court reasoned that to hold otherwise would seriously interfere with objectives of the CWA by potentially subjecting point sources to several state discharge standards rather than a uniform standard under the CWA. But the Court permitted state common law suits based on the law of the state in which the point source is located, regardless of where the suit is actually brought. The Court reasoned that since the CWA allows a state to adopt stricter standards than those set forth in the CWA, the statute does not preempt state common law to the extent that it regulates point sources within that state.

B. Clean Water Act

1. Section 402(b)(5) provides that in order to assume NPDES permitting authority from E.P.A., a state must have a procedure to allow other states whose waters may be affected by issuance of a permit to submit written recommendations to the permitting state. If the permitting state fails to accept these recommendations, it must notify the affected states and EPA, as well as

give its reasons for rejecting the comments. EPA regulations allow the Administrator to use his § 402(d) veto power over state NPDES permits if a permitting state rejects other states' recommendations without adequate reasons. 40 C.F.R. § 123.44(c)(2). See also Champion International Corp. v. EPA, II(c)(2)(b), supra.

2. When a state establishes designated uses for water bodies within its borders pursuant to § 303, as well as water quality standards to protect those uses, the state must take into consideration water quality standards downstream. A state must "ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters." 40 C.F.R. § 131.10(b). This requirement has potentially far-reaching interstate implications because it could allow downstream states (probably with EPA concurrence) to force upstream states to adopt stricter water quality standards than those states may wish to adopt. There seems to be no express procedure to implement this requirement, however.

C. Interstate Compacts and Agreements

1. The Clean Water Act directs EPA to encourage "cooperative activities" between states to prevent, reduce, and eliminate water pollution. 33 U.S.C. § 1253(a). In the same section Congress also gave its consent for two or more states to enter into compacts promoting cooperative water pollution control efforts and establishing interstate agencies to further such efforts.
  
2. Interstate compacts essentially are binding contracts between states. Agreements between states constitute a compact when they "tend to increase the political power of states at the expense of the federal government." Northeast Bankcorp, Inc. v. Board of Governors, 472 U.S. 159 (1985). Congress must ratify compacts. When ratified, compacts become federal law reviewable in federal court. See, e.g., League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 507 F.2d 517 (9th Cir. 1974), cert. denied, 95 S. Ct. 1398 (1975). There are at least three examples of compacts dealing with water quality.

- a. In 1968, California and Nevada entered into a compact creating a regional agency to protect the Lake Tahoe region, including the waters of the lake itself. See Cal. Gov't Code § 66,800.
  
- b. Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont have entered into a compact creating the New England Interstate Water Pollution Control Commission. The Commission establishes water quality criteria for interstate waters by approving classifications submitted by appropriate agencies of each state. See Conn. Gen. Statutes §§ 22a-309 for text of the compact.
  
- c. In the 1980 Northwest Power Act (16 U.S.C. § 839b) Congress authorized the states of Idaho, Montana, Oregon and Washington to establish the Northwest Power Planning Council, an interstate compact agency. The Council promulgates (1) conservation and electric power plan for the Northwest, and (2) a fish and wildlife protection and restoration program for the Columbia Basin, including improved fish flows. See Seattle

Master Builders v. Northwest Power Planning Council, 786 F.2d 1359 (9th Cir. 1986) (upholding the constitutionality of the Council); Blumm, Reexamining the Parity Promise: More Challenges Than Successes to the Implementation of the Columbia Basin Fish and Wildlife Program, 16 *Envtl. L.* 461 (1986).

D. Equitable Apportionment

In Idaho ex rel. Evans v. Oregon and Washington, 103 S. Ct. 2817 (1983), the Supreme Court extended the equitable apportionment doctrine to anadromous fish. The Court saw no difficulty in extending the doctrine to resources similar to interstate water flows, reasoning that a state may not preserve solely for its own inhabitants a natural resource located within its borders. Conceivably, this reasoning could extend to interstate water quality concerns. For example, if two adjacent states had similar water quality standards, an upstream state could pollute an interstate river to the maximum extent permissible under the water quality standards. As a result, any pollution added from sources in the downstream state would violate the water standards, thus inhibiting development in the downstream state. The downstream

state could petition the court to apportion water quality in the river, or more accurately, to apportion the right to pollute the river equally between the two states.

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#### V. INTERJURISDICTIONAL RELATIONS INVOLVING INDIAN TRIBES

##### A. Clean Water Act

1. When it amended the CWA in 1987, Congress provided that EPA may treat Indian tribes as states for purposes of most of the CWA's key substantive provisions. See 33 U.S.C. § 1377. Therefore, EPA can authorize tribes to establish designated uses and water quality standards



under § 303, certify federal permits under § 401, take over NPDES and 404 permitting authority pursuant to § 402 and § 404, and receive grants for waste management and non-point management planning.

2. In order to qualify for treatment as a state for CWA purposes, a tribe must satisfy the following conditions (see 33 U.S.C. § 1377(e)):
  - a. The tribe must have a governing body which carries out "substantial governmental duties and powers."
  - b. Functions to be exercised by the tribe under the CWA must pertain to management and protection of water resources held by the tribe, held by the U.S. in trust for the tribe, held by a tribal member subject to a trust restriction on alienation, or within the borders of a reservation.
  - c. The tribe must be capable, in EPA's judgment, of carrying out CWA responsibilities.
3. In addition to the qualifications listed above, a tribe must be recognized by the Secretary of

the Interior. See 33 U.S.C. § 1377(h)(2). The amendments specifically declined to address whether Alaska Native groups meet this standard. Id. at § 1377(g).

4. Congress provided that tribes' authority to act as states under the CWA does not affect states' authority to allocate water resources or existing state water rights. However, this subsection also provides that tribes shall be treated like states for purposes of allocating water resources and protecting existing rights. 33 U.S.C. § 1377(a).
5. Congress authorized tribes and the state or states in which tribal reservations are located to enter into "cooperative agreements" to jointly plan and administer CWA programs. EPA must approve such agreements. 33 U.S.C. § 1377(d).
6. EPA recently issued interim regulations to implement the 1987 amendments related to tribal authorities. See 54 Fed. Reg. 14,354 (Apr. 11, 1989).

B. Indirect Tribal Authority Over Water Resources

1. Because of 19th century treaties signed to avoid an Indian war in the Pacific Northwest, certain Indian tribes are entitled by treaties to 50% of the anadromous fish destined to pass their customary fishing stations. U.S. v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 443 U.S. 658 (1979). Over the past decade, however, courts have wrestled with the question of whether these tribes possess a so-called "environmental right," a right to enjoin both state and federal government entities from carrying out or authorizing activities which may jeopardize fish habitat, including activities affecting water quality.

a. In U.S. v. Washington (Phase II), 506 F. Supp. 187 (W.D. Wash. 1980), a federal district court held that the treaties did contain an implied environmental right. The court held that when a tribe demonstrated a challenged activity produced fishery habitat degradation, the burden shifted to the state to show that the tribe's right to a "moderate living" would not be impaired. However, the Ninth Circuit ultimately

vacated the decision due to an insufficient factual base to define the scope of tribes' rights. See 759 F.2d 1353, 1357 (9th Cir. 1985). Another federal district court applied the test set forth by the Washington district court, but simply remanded the issue of whether an activity would degrade fishery habitat and reduce fish runs for trial. See No Oilport! v. Carter, 520 F. Supp. 373 (W.D. Wash. 1981).

b. In U.S. v. Adair, 723 F.2d 1395 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984), the court held that treaty fishing rights include rights to water flows necessary to support fishing as necessary to provide for the livelihood of tribal members. The court noted that the water right dated from "time immemorial" rather than the date of any treaty or reservation.

c. In Kittitas Reclamation Dist. v. Sunnyside Reclamation Dist., 763 F.2d 1032 (9th Cir. 1985), cert. denied, 474 U.S. 1032, the circuit court upheld a district court order requiring dam releases to preserve salmon redds, after the Yakima Nation sought pro-

tection of their treaty fishing rights. The appellate court held that the district court's order was not precluded by a water adjudication proceedings in state court nor an earlier consent decree which did not consider the rights of the Yakima Nation.

- d. In Joint Bd. of Control v. U.S., 832 F.2d 1127 (9th Cir. 1987), cert. denied, 108 S. Ct. 1732, the court affirmed minimum flows to protect treaty fishing rights despite diminished availability to irrigation users. The court ruled that because the treaty fishing right was a "time immemorial" right, it was prior to any irrigation right, and thus not subject to a duty of "fair and equal distribution" of irrigation water under the Dawes Act (25 U.S.C. § 384).
- e. In Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504 (W.D. Wash. 1988), the court enjoined construction of a marina which would have blocked the tribe's access to a tribal "usual and accustomed" fishing ground. The court held that the tribe's treaty right to access and use of the

fishing grounds could not be impaired or limited absent an act from Congress.

2. Courts have also ruled that, apart from treaty language, land reservations may contain reserved water rights for fish. These rights are confined to on-reservation fishing; they do not extend to all usual fishing stations like the treaty right. Nevertheless, they may affect off-reservation actually because of their early priority date (date of the reservation).

a. In U.S. v. Anderson, 6 Indian L. Rep. F-129 (E.D. Wash. 1979), the court ruled the Spokane Tribe had a reserved right to maintain Chamokane Creek at a temperature of no greater than 68°F. to preserve the fish upon which the tribe depended. Upstream appropriators were thus restrained from diminishing the streamflow below 20 cfs.

b. In Colville Confederated Tribes v. Walton, 752 F.2d 397 (9th Cir. 1985), the court awarded 350 acre-feet per year to the tribe to permit natural instream spawning of Omak Lake trout. Since this right had a priority date of date of the reservation, it was

subject to proportionate sharing with reserved irrigation rights with the same date.

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