

Tribal Authority to Regulate Lapwai Creek Floodplain Activity

Tribal authority to regulate activity within the floodplain of Lapwai Creek derives, generally, from two sources: the tribe's status as a dependent sovereign nation as designated in treaty or by federal delegation through statute. Federal case law defines limits on both authorities. The aspects relevant to this analysis are: ownership of the bed and banks of Lapwai Creek (treaty); Treatment as State provisions of the Clean Water Act (statute); Critical Habitat provisions of the Endangered Species Act (statute); and, local land use zoning (treaty).

Clean Water Act "Treatment as State"

The federal Clean Water Act ("CWA") makes provision for any federally recognized Indian tribe to petition the Environmental Protection Agency for Treatment as a State ("TAS"). Designation of a tribe as TAS confers on the tribe all the authority and responsibility a state has under the CWA.

To be treated as a state a tribe must make a showing 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 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.¹

The Nez Perce Tribe ("Tribe") has a governing body, the Nez Perce Executive Tribal Committee. This committee regulates and oversees the general affairs of the tribe and acts as tribal government.² The Tribe has worked with the Idaho DEQ and the USEPA to establish water management policies for water resources that are held by the Tribe, water resources held by the United States in trust on behalf of the Tribe and water resources within the boundaries of the reservation.³ The issue at question is whether the Administrator believes that the Tribe is reasonably capable of carrying out the functions to be exercised in a manner consistent with the terms and

¹ 33 U.S.C.A. § 1377(e).

² Official Nez Perce Website. <http://www.nezperce.org/content/NPTEC/index.html>

³ South Fork Clearwater River Subbasin Assessment and TMDLs. Public Comment Draft. Idaho Department of Environmental Quality, Nez Perce Tribe, U.S. Environmental Protection Agency

purposes of the CWA. There is no case law that defines the qualities the Administrator is looking for. However, the EPA Administrator has granted TAS to the Kootenai, Coeur d'Alene and Shoshone-Bannock Tribes, which may give an indication how the Administrator may rule if petitioned by the Nez Perce.⁴ If the Tribe is granted TAS status, it will be able to regulate water resources on the entire reservation regardless of land ownership status.

Under section 303(d) of the Clean Water Act, states, territories, and authorized tribes are required to develop lists of impaired waters.⁵ These are waters that are too polluted or otherwise degraded to meet the water quality standards set by states, territories, or authorized tribes. The law requires that these jurisdictions establish priority rankings for waters on the lists and develop total maximum daily loads for these waters.

A Total Maximum Daily Load ("TMDL") is a calculation of the maximum amount of a pollutant that a body of water can receive and still safely meet water quality standards.⁶ TMDLs are immediately enforceable against point source dischargers (i.e. pollution that enters a stream from a pipe such as from a waste water treatment plant)⁷ but can only be enforced to control non point source ("NPS") pollution if the state or tribe adopts a regulatory mechanism as authorized under §319.⁸ No state or tribe has elected to regulate NPS from the largest NPS generator, agriculture, instead relying on voluntary implementation of Best Management Practices. Several TMDLs have been written by the state with the cooperation of the Tribe on streams that cross the Nez Perce reservation. The Tribe is currently independently preparing TMDLs for reservation waters.

If the Tribe petitions for and is granted TAS, the Tribe, after promulgating water quality standards consistent with the CWA, could choose to regulate NPS pollution allowing the Tribe to uniformly enforce the standards upon all NPS dischargers in the Lapwai Basin regardless of tribal or non-tribal status. But as pointed out earlier, no state or tribe has chosen to take such a politically, economically and emotionally charged step.

⁴ Tribes: Water Quality Standards & Criteria. U.S. EPA. <http://www.epa.gov/waterscience/tribes/approvable.htm>

⁵ 33 U.S.C.A. § 1313.

⁶ Ibid.

⁷ 33 U.S.C.A. § 1251(a)(7)

⁸ 33 U.S.C.A. §1329(2)(b)(2)

Treaties and treaty rights

The legal relationship of the Nez Perce Tribe (Tribe) to non-tribal governments and individuals is rooted in the treaty entered into between the Tribe and the U.S. government in 1855, renegotiated in 1863 and then modified by the Agreement of 1893. In the 1855 treaty, the Tribe surrendered claim to 6.5 million acres of their 14 million acres of aboriginal lands in exchange for the U.S. government's guarantee of the inviolability of the agreed to reservation boundaries, the right to fish and hunt at all the Tribe's usual and accustomed places and other conditions, goods and services. Shortly thereafter, in 1859, gold was discovered by trespassing prospectors on the north side of the Clearwater River and along the Salmon River. Instead of enforcing the treaty agreement to prohibit white trespass, the federal government negotiated a decrease in the size of the reservation to exclude the gold fields and other lands resulting in today's 650,000-acre reservation. In 1893 under the U.S. policy of tribal termination and assimilation, lands within the reservation boundaries were "allotted" to tribal members in 160 acre parcels to provide for individual rather than common ownership of tribal land then the balance of lands after allotment were opened to white settlement. Today, the Tribe controls, through a combination of allotment and common trust lands, approximately 15% of the 1863 Treaty lands.

In examining the issue of floodplain activity, the issue of regulatory authority becomes the first matter of review: whose jurisdiction is it? In *Montana*⁹ the U.S. Supreme Court examined the issue of whether the Crow Tribe had authority over the bed and banks of the Big Horn River as it flowed through the reservation for purposes of regulating hunting and fishing or whether the ownership of the riverbed had passed to the state upon its admittance to the Union. The *Montana* court held that as the Crow treaties did not contain language referencing the riverbeds nor did they contain rights to fishing, the bed and banks of the river belonged to the state not the Tribe.

In *Namen*¹⁰ where a different set of facts were examined, the Ninth Circuit Court of Appeals held that the Flathead Reservation included the bed and banks of the southern half of Flathead Lake on the grounds that the 1855 Hells Gate Treaty specifically named the lake and its geographic

⁹ *Montana v. U.S.*, 101 S.Ct 1245 (1972).

¹⁰ *Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Namen*, 665 F.2d 951 (C.A. Mont. 1982).

relationship to the reservation boundary as well as acknowledgement of the tribe's ownership in the form of lease payments from a hydro-electric company. This distinction was affirmed in the Coeur d'Alene Tribe's claim to the bed and banks of Lake Coeur d'Alene as stated by the U.S. Supreme Court in *Idaho v U.S.*:

Both the Supreme Court and the Ninth Circuit have held that a tribe's dependence on submerged lands constitutes a "public exigency." Because the Plaintiffs in this case have shown that the Tribe's survival was dependent on the retention of the disputed submerged lands, they also have shown that a "public exigency" supported the Executive reservation of those same lands.... Furthermore, in this case the evidence is sufficient to establish the existence of other circumstances that also constitute a "public exigency." The facts demonstrate that an influx of non-Indians into the Tribe's aboriginal territory prompted the Federal Government to negotiate with the Coeur d'Alenes in an attempt to confine the Tribe to a reservation and to obtain the Tribe's release of its aboriginal lands for settlement. Before it would agree to these conditions, however, the Tribe demanded an enlarged reservation that included the Lake and rivers. Thus, the Federal Government could only achieve its goals of promoting settlement, avoiding hostilities and extinguishing aboriginal title by agreeing to a reservation that included the submerged lands. Under similar circumstances, courts have found a "public exigency" sufficient to justify the Federal Government's decision to reserve the submerged lands.¹¹

A similar set of facts pertains to the Nez Perce reservation. The 1855 Treaty creates an easement for navigation on waters that are on the reservation, potentially implying that the underlying bed is in tribal ownership: "The use of the Clear Water and other streams flowing through the reservation is ... secured to citizens of the United States for rafting purposes, and as public highways."¹²

The 1863 Treaty, negotiated as a result of settler incursion on Nez Perce land, places the north border of the reservation on the north bank of the Clearwater River.¹³ While the intent of the negotiators for such placement has not been researched in the historical record by this author, the specific choice to use the north bank as the border rather than the south bank with its proximity to the rest of the reservation implies intent. As an additional sign of intent, the Tribe has reserved the right to continue to seek redress from the federal government for the construction of Dworshak Dam on reservation land:

It is important that you understand that the Tribe is not releasing all claims against the United States for damages from the construction and operation of the Dworshak Dam. Potential claims relating to destruction of hunting and fishing sites, trespass on tribal land, and fair and honorable dealing, just to name a few, would be the subject of future discussions between the

¹¹ *Idaho v. U.S.*, 121 S.Ct. 2135, (2001)

¹² Article III, 1855 Nez Perce Treaty, 12 Stats., 957 (1859).

¹³ 1863 Nez Perce Treaty, 14 Stat. 647 (1867).

Tribe and the United States aimed at an equitable resolution.¹⁴

Assuming that the Tribe wished to assert their ownership of the bed and banks of streams on the reservation, *Namen* and common law regarding trespass and nuisance support extension of ownership to regulatory authority. Specifically, the Tribe could assert regulatory authority over floodplain development that could be injurious to the riparian area and the stream itself regardless of the tribal or non-tribal ownership status of the land.

Whether the Tribe *should* assert such authority is a political decision to be made by the Tribe. The outcome of the Salish-Kootenai Tribe's litigation in *Namen* was the establishment of joint tribal/state authorities for administration of tribal shoreline and fishing regulations.

"Critical Habitat" and the Endangered Species Act

The Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1531 *et seq.* empowers the U.S. Department of Commerce, via the National Oceanic and Atmospheric Association (NOAA) Fisheries Division, to enforce its terms by regulating both public and private land use practices in a manner consistent with furthering the ESA's goal of protecting anadromous fish species which have been listed as endangered. The ESA provides several substantive measures to aid in its effectiveness and NOAA has promulgated regulations to implement their enforcement. The measures a party is subject to under the ESA depends on the party's status as governmental or private.

Lapwai Creek, Idaho is part of the historical range of the Snake River steelhead, an anadromous fish species listed as endangered under the ESA and subject to regulation by NOAA. The primary form of ESA regulation of public action is found in §7 of the ESA which requires federal action not jeopardize species or destroy critical habitat. *Tennessee Valley Authority v. Hill*, 98 S.Ct. 2279 (1978). Critical habitat is area on which physical or biological features essential to species conservation and which may require special management or protection. 16 U.S.C. § 1533(a)(3)(A). The floodplain, including the riparian zone, on the shore of Lapwai Creek is critical habitat for Snake River steelhead under the ESA definition.

¹⁴ Senate Committee on Indian Affairs. (2004, July 20). Hearing on S. 2605. *Prepared Statement of Anthony D. Johnson, Chairman, Nez Perce Tribal Executive Committee* .

ESA §9 prohibits “take” of endangered species on both public and private land. To “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.” One does not need to know that a species is listed in order to have taken it, it must simply be known that a plant or animal was taken under the definition provided by the ESA. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 2407 (1995). The ruling in *Babbitt* provides for broad enforcement of the ESA for private actors.

Lapwai Creek was designated critical habitat for steelhead on February 16, 2000¹⁵. The designation includes “the water, substrate, and adjacent riparian zone of . . . riverine reaches.”¹⁶ Critical habitat designation requires federal agencies to consult with federal fish and wildlife agencies before taking any action that could “result in immediate mortality, injury, or harm to individuals of a listed species”.¹⁷ Designation does not impose any additional restrictions on a private landowner within the critical habitat area beyond those against “take” contained in the species listing:

Finally, NMFS emphasizes that a designation of critical habitat does not prohibit landowners from conducting actions that modify streams or the adjacent terrestrial habitat. Critical habitat designation serves to identify important areas and essential features within those areas, thus alerting both Federal and non-Federal entities to the importance of the area for listed salmonids. Federal agencies are required by the ESA to consult with NMFS to ensure that any action they authorize, fund, or carry out is not likely to destroy or adversely modify critical habitat in a way that appreciably diminishes the value of critical habitat for both the survival and recovery of the listed species. The designation of critical habitat will assist Federal agencies in evaluating how their actions on Federal or non-Federal lands may affect listed salmon and steelhead and determining when they should consult with NMFS on the impacts of their actions.¹⁸

Indian lands are excluded from the critical habitat designation at the request of various potentially affected tribes over issues relating to tribal sovereignty.

Critical habitat designation does not provide any authority to regulate floodplain activity unless it is a federal action, proposal or permit that could affect the functioning of the critical habitat. Even then, the designation only requires the federal action agency to consult with the federal fish and wildlife agencies to determine whether the proposed action will result in harm to the species.

¹⁵ F.R. Vol.65, No.32 7764-7787 (2000)

¹⁶ Id p. 7777

¹⁷ Id p. 7765

¹⁸ Id p. 7770

Local Land Use Zoning

In *Brendale v. Confederated Tribes & Bands of the Yakima Nation*, a plurality for the Court held that a tribe possesses inherent authority to zone non-Indian fee lands inhabited mostly by tribal members within a reservation, but lacked the authority to zone in an area with a substantial non-Indian population.¹⁹ However, because the Justices issued three separate opinions, the *Brendale* decision provides little practical guidance.²⁰ Rather, in a decision eight years later, the Supreme Court announced that *Montana v. United States* is still “the ‘pathmarking case’ concerning tribal civil authority over nonmembers.”²¹ In that case, the Supreme Court declared that the “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, and so cannot survive without express congressional delegation.”²² The Court went on to announce what has come to be known as the Montana Rule; “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe” with two narrow exceptions.²³ First, a “tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”²⁴ Second, a “tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”²⁵ Although the first exception does not apply here, impacts to water quality in the Lapwai Creek watershed may implicate the second exception under certain narrow circumstances.

Recent cases discussing the Montana Rule hold that the second exception is construed very narrowly such that it is now of little utility to the Nez Perce Tribe. *Brendale* held that the effect must

¹⁹ *Brendale v. Confederated Tribes & Bands of the Yakima Nation*, 492 U.S. 408 (1989).

²⁰ In *Brendale*, four justices held that the Yakima Nation had no authority to zone either of the properties at issue in the case; three justices held that the tribe had authority over both properties; and Justices Stevens and O’Connor held that the tribe could zone land that it had a treaty-guaranteed right to exclude non-Indians from, a distinction that has never been substantiated.

²¹ *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997).

²² *Montana v. United States*, 450 U.S. 544, 564 (1981).

²³ *Montana*, 450 U.S. at 565.

²⁴ *Id.*

²⁵ *Montana*, 450 U.S. at 566.

be “demonstrably serious and must imperil the political integrity, economic security, or the health and welfare of the tribe.”²⁶ A mere direct effect, although necessary, is insufficient. More recent Supreme Court cases have further eroded this exception to the Montana rule by rejecting the distinction made between tribal and nontribal land in *Montana* and *Brendale*, ultimately finding that the locus is either irrelevant or, at most, just one factor to consider for jurisdictional purposes.²⁷ Hence, the Supreme Court has significantly diminished Indian sovereignty by limiting tribal civil jurisdiction over non-Indians within the reservation boundaries but for two very narrow exceptions.

The Ninth Circuit’s most recent treatment of Montana’s second exception offers little reason for Tribes to pursue zoning on fee lands outside of the context of the Clean Water Act treatment-as-state (TAS) provisions because contamination of tribal waters generally has a “serious and substantial effect” on the health and welfare of the tribe.²⁸ In *Bugenig v. Hoopa Valley Tribe* the Ninth Circuit held that the Hoopa Valley Tribe did not have authority under Montana’s second exception to require a buffer zone designed to protect a nearby ceremonial site from logging on adjacent non-Indian fee lands. The Ninth Circuit, consistent with the Supreme Court, emphasized that the second Montana exception “is narrowly construed” reasoning that to hold otherwise, the exception would essentially “swallow the rule because virtually every act that occurs on the reservation could be argued to have some political economic, health or welfare ramification to the tribe.”²⁹ However, another recent Ninth Circuit decision upheld the Salish and Kootenai Tribes’ authority to regulate non-Indian activity on the reservation that threatened tribal water rights and water quality.³⁰ There the Ninth Circuit reasoned that it was “difficult to imagine how serious threats to water quality could not have profound implications for tribal self-government,” whereas the same could not be said of the buffer zone in *Bugenig*.³¹ This distinction between a blanket zoning authority and regulatory authority over water

²⁶ *Brendale*, 492 U.S. at 431.

²⁷ See *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (Court held that the tribe had no authority to adjudicate a tort claim between non-Indians arising from a vehicle accident on a highway right-of-way within the reservation); See also *Nevada v. Hicks*, 533 U.S. 353 (2001) (Held that a tribal court had no jurisdiction over a tort claim alleging excessive force against state officers conducting an investigation on tribal land); See also *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (Held that the Navajo Nation lacked inherent sovereignty to impose a hotel occupancy tax on a hotel within the reservation and owned by a non-Indian).

²⁸ *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210 (9th Cir. 2000).

²⁹ *Bugenig*, 229 F.3d at 1220.

³⁰ *State of Montana v. U.S. E.P.A.*, 137 F.3d 1135 (9th Cir. 1998).

³¹ *Id.*

quality illustrates the dispositive difference that tribal authority to regulate water quality almost always satisfies Montana's second exception. Moreover, this distinction is consistent with the Supreme Court holding in *Strate* because "the conduct of users of a small stretch of highway has no potential to affect the health and welfare of a tribe in any way approaching the threat inherent in impairment of the quality of the principal water source."³² Therefore, the authority of tribal government to regulate fee lands within the reservation pursuant to EPA's regulations to which a tribe's TAS authority is granted is generally valid under the second Montana exception.

Absent a formal delegation of exclusive zoning authority to the Tribe by Congress, if land use controls are to be useful, a parallel and cooperative approach between the Tribe and Nez Perce County is necessary because of checkerboard land use ownership on the Nez Perce reservation. This initial hurdle may prove difficult because a Tribe working with a local county government to enact parallel legislation is simply unheard of or at least unprecedented. In addition, enforcement may be problematic because of the complex jurisdictional issues.

The Nez Perce Tribe and Nez Perce County have little, if any, experience utilizing land use controls for sophisticated endeavors such as the preservation and protection of natural resources. Although land use controls are conceptually possible, they are not likely to be the most effective or beneficial strategy available to the Tribe for preventing or reducing activities that are harmful to the floodplain and steelhead within the Lapwai Creek watershed.

Conclusion

Direct tribal regulatory authority over floodplain development does not currently exist. The most likely path to such authority is through tribal petition to EPA for Treatment as a State under the Clean Water Act but would, after TAS designation, require the Tribe to adopt tribal water quality standards that assert control over non-point source agricultural pollution: a regulatory action so far not taken by any other state or tribe. Assertion of tribal ownership of the bed and banks of reservation waters could provide for indirect development control through Tribal use of common law nuisance and trespass claims against bad actors. The ESA critical habitat designation only carries regulatory

³² *State of Montana*, 137 F.3d at 1141.

authority if it involves a significant federal action requiring consultation with the federal agencies.

Land use zoning is the weakest alternative that could only likely be accomplished as a byproduct of a revolution in the relationship between the Tribe and the County.