

28TH ANNUAL NATIONAL NALSA MOOT COURT COMPETITION

FEBRUARY 21 - 23, 2020 | BERKELEY, CALIFORNIA



PRESS RELEASE – ANNOUNCEMENT OF ACTIVE COMPETITION

The National Native American Law Student Association (NNALSA) has established a long-running, respected national moot court competition. This year the 28th Annual NNALSA Moot Court is hosted by the Berkeley NALSA and will take place on February 21-23rd, 2020 in Berkeley, California. The competition is now active with the release of the moot court problem and the opening of team registration.

Information regarding the 28th Annual NNALSA Moot Court may be accessed by visiting the Berkeley NALSA Moot Court website at <https://www.law.berkeley.edu/event-services/nalsa/>. The website will provide the problem, team registration, NNALSA Moot Court rules, agenda, posting of substantial inquires, and travel and hotel recommendations.

Championship Round Judge Panel The 28th Annual NNALSA Moot Court is currently working on scheduling the Championship Round Judges. Official announcement coming soon!

Deadline for Team Registration is December 6, 2019. Each team must visit the Berkeley NALSA Moot Court website to complete an online registration [form](#), pay the [registration fee of \\$250](#), and upload letter(s) as stated in NNALSA Moot Court Rule 4.2 or 4.3. Competitors will automatically receive their confidential random team number once the registration process has completed.

Please note that this team number **does not** reflect whether the Team will be arguing for the Plaintiff/Petitioner or Defendant/Respondent. Once Team Registration has closed, the NNALSA Vice President will assign which sides Teams will be arguing for in their written briefs to ensure competition fairness and transparency.

Deadline for submission verifying payment of membership dues is December 6, 2019. In accordance NNALSA Moot Court Rule 4.2, each competitor must submit documents that verify that (1) the individual's local chapter has submitted its dues, (2) the individual has submitted NNALSA Individual Membership dues, and (3) the individual has submitted local chapter individual membership dues. Competitors will submit all documentation during their team registration. NNALSA membership and local chapter dues can be paid on the NNALSA Moot Court [website](#). Once Teams have completed registration, the NNALSA Vice President will verify that they have paid all their required dues and send a confirmation email.

Deadline for Team Brief submission is January 3, 2020. Each team must submit its final brief online in a PDF format as set forth in NNALSA Moot Court Rule 13.6(c). Teams may not revise its brief after submission to the competition. Competitors may visit the Berkeley NALSA Moot Court website to [submit briefs](#).

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Substantive Inquiry Competitors may submit substantive inquiries regarding the official Moot Court rules and problem to the Rules Committee by emailing the inquiry to nnalsa.vicepresident@gmail.com. Please put “*Substantive Inquiry*” in the subject line. The Moot Court Administrator and the Host School will post any inquiries and the official responses to them on the National NALSA website and Berkeley NALSA website within a week of receipt. **All inquiries must be directed to the Competition Administrator at least 7 days before oral arguments.**

Lodging Information Please see relevant lodging information on the Berkeley NALSA Moot Court [website](#). We understand that for some Teams lodging costs can prevent them from competing. Our hope is to make it possible for everyone who wants to compete at Berkeley to attend. Berkeley NALSA is compiling a list of Berkeley students who want to open their apartments and homes to competitors. If you would like to stay with a host Berkeley student because of costs please email nnalsamootcourt2020.lodging@gmail.com with the subject line “*Housing Needed for (competitor names)*” We may not be able to accommodate everyone but will do our best to find you housing.

Volunteer to be a Judge Volunteer judges are vital to our competition. Please visit the Berkeley NALSA Moot Court [website](#) to sign-up. Brief Judges will be needed after the student competitors submit their appellate briefs. Brief Judges can score one to five briefs from home. Oral Argument Judges sit on a panel of three and individually score the oral arguments throughout the moot court competition on February 21-23, 2020. Each Judge determines the number of rounds they judge based on his/her availability. Additionally, the Berkeley NALSA will host a three-hour Continuing Legal Education session for interested judges on the morning of February 21st, 2020.

Sponsor the 28th Annual Moot Court Competition The NNALSA Moot Court competition is a student-led competition, which requires grassroots fundraising. If you would like to sponsor the competition, you can do so [here](#).

Social Media Be sure to follow us on our social media accounts for updates on the Moot Court competition!

- Berkeley NALSA Twitter: @2020Nnalsa
- National NALSA Facebook: @NationalNALSA
- Instagram: 2020nnalsamootcourt
- Instagram: @NationalNALSA

CONTACT INFORMATION:

For questions regarding the NNALSA Moot Court rules and NNALSA verification, please contact:

Cora Tso

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For questions regarding the 28th Annual Moot Court Competition, please contact:

Berkeley Law NALSA

nnalsamootcourt2020@gmail.com

(ORDER LIST: 590 U.S.)

FRIDAY, NOVEMBER 1, 2019

CERTIORARI GRANTED

19-1320 BERKELEY RIVER INDIAN TRIBE V. U.S. EPA

No. _____

**In The
Supreme Court of the United States**

BERKELEY RIVER INDIAN TRIBE,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY,

Respondent.

*On Writ of Certiorari to the
United States Court of Appeals for the Thirteenth
Circuit*

PETITION FOR WRIT OF CERTIORARI

Sophia Danan
Counsel of Record
Attorney General
BERKELEY RIVER INDIAN
TRIBE
P.O. Box 1000
Lakeville, Berkeley 20001

QUESTION PRESENTED

Section 518 of the Clean Water Act (CWA) authorizes the U.S. Environmental Protection Agency (EPA) to treat Indian Tribes with reservations in a manner similar to states (TAS). In 2016, following public comment and consultation with Tribes, EPA concluded that Section 518 delegates authority to Indian Tribes to administer regulatory programs over their entire reservations. Four years later, EPA suddenly reversed course. Without consulting Indian Tribes, the Agency returned to its pre-2016 interpretation that Tribes applying for TAS status must demonstrate inherent authority to regulate waters and activities on their reservations under *Montana v. United States*, 450 U.S. 544 (1981). EPA applied this interpretive rule to deny the Berkeley River Indian Tribe's petition for TAS status, concluding that the Tribe had failed to provide specific facts to overcome a presumption that Indian Tribes lack regulatory authority over nonmembers unless such authority is "necessary to protect tribal self-government or to control internal relations."

The questions presented are:

1. Whether EPA acted unlawfully and arbitrarily and capriciously in reinterpreting Section 518 of the CWA to require Indian Tribes to demonstrate inherent authority under the *Montana* rule.
2. Whether Indian Tribes lack inherent authority to regulate nonmember activities that impact water quality within their reservations unless such authority is necessary to protect tribal self-government or to control internal relations.

(i)

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

No. 19-1101

D.C. Docket No. 3:19-cv-00100-SDT

BERKELEY RIVER INDIAN TRIBE,

Plaintiff-Appellant,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant-Appellee

Appeal from the United States District Court
For the Middle District of Berkeley

Before MADISON, FRANKLIN, and WORTHINGTON, Circuit Judges.

WORTHINGTON, Judge:

The U.S. Environmental Protection Agency denied the Berkeley River Indian Tribe's application for treatment in a manner similar to a state (TAS) under Section 518 of the Clean Water Act (CWA). The Tribe challenged that action under the Administrative Procedure Act (APA), arguing that the EPA's interpretation of Section 518 to require an applicant tribe to demonstrate inherent authority under *Montana v. United States*, 450 U.S. 544 (1981), was contrary to the CWA; that EPA acted unlawfully and arbitrarily and capriciously when adopting that interpretation; and that, in any event, even if *Montana* applies, it had inherent authority to regulate nonmember activities that impact water quality within its reservation. On cross motions for summary judgment, the District Court held that EPA acted lawfully and reasonably under Section 518 and the *Montana* line of cases in denying the Tribe's application for TAS status. We now affirm.

The facts and legal background are fully laid out in the District Court’s opinion and we see no need to repeat them here. We review the District Court’s grant of summary judgment *de novo*. Under the APA, 5 U.S.C. § 706(2), we may set aside agency action only if it is “procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.” *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). An agency is entitled to deference when interpreting an ambiguous statute it administers. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). Moreover, “[t]he scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The EPA reasonably interpreted Section 518 of the CWA to require an applicant tribe to demonstrate inherent authority under *Montana*. According to the Tribe, Section 518 is a delegation of regulatory authority to Indian tribes. The EPA concluded that the Supreme Court’s decision in *United States v. Wilson* and our unpublished decision in *Berkeley Bank & Loan v. Hayes Family Ranch* created substantial uncertainty about the Tribe’s preferred interpretation of Section 518. The EPA’s interpretation of Section 518, which is ambiguous, was reasonable and we see no reason to set it aside.

The Tribe points out that the EPA had adopted its preferred interpretation in 2016. But prior to that, the agency had for many years interpreted the statute in precisely the way it interprets the statute now. In any event, “[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change.” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). EPA has done so.

There were, moreover, no procedural irregularities in the EPA’s adoption of its rule reinterpreting Section 518. The Tribe objects to an alleged lack of consultation under Executive Order 13175 and EPA’s policies, but neither affords the Tribe a judicially enforceable right. We therefore reject the Tribe’s argument that the EPA’s actions were procedurally unlawful.

Finally, the Tribe argues that it has inherent authority to regulate water quality within the Reservation. While we do not defer to the EPA’s interpretation of federal Indian law, *see Montana v. EPA*, 137 F.3d 1135, 1140 (9th Cir. 1998), we also do not substitute our judgment of the facts for that of the agency. Instead, we ask whether the agency has “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.” *State Farm*, 463 U.S. at 43.

The EPA rationally determined that the Tribe had failed to demonstrate that it has inherent authority to regulate water quality for purposes of the Tribe’s TAS application. The Supreme Court has explained that “the tribes have, by virtue of their incorporation into the American republic, lost ‘the right of governing . . . person[s] within their limits except themselves.’” *Plains Commerce Bank v. Long Island Family Land and Cattle Co., Inc.*, 554 U.S. 316, 328 (2008) (quoting *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 209 (1978)). The Court recognized as much in the civil regulatory context with its pathbreaking decision in *Montana v. United States*, 450 U.S. at 544. The exceptions to the *Montana* rule of no-jurisdiction “are

‘limited’ ones.’” *Plains Commerce*, 554 U.S. at 330 (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997)). The EPA concluded that the Tribe had failed to demonstrate that either of the limited *Montana* exceptions applies because the Tribe’s TAS application relied upon generalized findings of a threat to water quality. Such generalized findings do not show a threat to tribal self-government or internal relations and therefore do not overcome the strong presumption against tribal jurisdiction over nonmembers.¹ See *Dolgencorp v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 177 (5th Cir. 2014) (Smith, J., dissenting).

II

Because the EPA lawfully and reasonably denied the Berkeley River Indian Tribe’s application for TAS treatment, we **AFFIRM** the district court’s decision granting summary judgment to the agency.

¹ The Tribe would distinguish *Montana* because, it argues, it has “property rights arising from the historic use of the Reservation’s waters.” But we agree with those court of appeals that have considered *Montana* relevant to questions of tribal versus state regulatory authority over waters. See *United States v. Anderson*, 736 F.2d 1358, 1364 (9th Cir. 1984); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981).

**Berkeley River Indian Tribe
Office of the Chairperson**

Ms. Alison Smith
Regional Administrator
United States Environmental Protection Agency
100 Main Street
Bay City, Berkeley 20002

**Re: Request by the Berkeley River Indian Tribe for Section 303 and 401 Program
Authority under the Clean Water Act**

Dear Administrator Smith:

Section 518 of the Clean Water Act (CWA), 33 U.S.C. § 1377(e), authorizes the United States Environmental Protection Agency (EPA) to grant program authority to an Indian Nation for purposes of Sections 303 and 401 of the Clean Water Act, 33 U.S.C. § 1313 & 1341. The Berkeley River Indian Tribe hereby submits an application for Section 303 and 401 program authority under the CWA.

We request that EPA process this application expeditiously. If you have any questions, please contact me or Laura Medina, Director of the Tribal Environmental Office. We look forward to approval of this application.

Respectfully submitted,

Chairperson Louise Samuels
Berkeley River Indian Tribe

cc: Sophia Danan, Attorney General
Laura Medina, Director, Environmental Office
James Miller, Project Officer, U.S. Environmental Protection Agency

Enclosures

Application for Treatment-as-State Status Under Section 518 of the Clean Water Act for Purposes of the Water Quality Standards and Certification Programs Under Clean Water Act Sections 303(c) and 401

The Berkeley River Indian Tribe submits this application for treatment-as-state status under Section 518 of the federal Clean Water Act (CWA), 33 U.S.C. § 1377, and its implementing regulations, *see* 40 C.F.R. Part 131. Section 518 of the CWA authorizes the United States Environmental Protection Agency (U.S. EPA) to treat an eligible Indian Tribe as a state in the management and protection of water resources “within the borders of an Indian reservation,” including for Section 303(c) water quality standards and Section 401 water quality certifications.

I. Introduction and Background

The criteria for treatment-as-state status under Section 518 are as follows: (i) the applicant is a federally recognized Tribe; (ii) the Tribe has a governing body carrying out substantial governmental duties and functions; (iii) the water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources that are within the boundaries of the Tribe’s reservation; and (iv) the Tribe is reasonably expected to be capable of administering an effective water quality standards program.

II. Federal Recognition

The Berkeley River Indian Tribe is a federally recognized Tribe listed on the Secretary of the Interior’s list of federally recognized Tribes.

III. Tribal Governance and Authority over the Reservation

The Berkeley River Indian Tribe has resided in what is now called Lake County since immemorial. As recognized in its Constitution and Bylaws, the Tribe possesses and exercises inherent sovereign authority over its lands and waters. The Berkeley River Indian Reservation was established in 1875 by an Executive Order and encompasses 150,000 acres in Lake County in the State of Berkeley. The Tribe has 3,000 citizens, nearly all of whom reside on the Reservation. In addition, there are approximately 500 nonmembers residing on the Reservation, many of whom are non-Indians. The Reservation’s boundaries include approximately 1,500 acres of non-Indian fee lands.

Under the Tribe’s Constitution and Bylaws, the Tribal Council is the governing body of the Tribe. Article 5 of the Constitution and Bylaws direct the Council “to protect Tribal property, wildlife, and natural resources” and to “promote the safety and general welfare of the Tribe and the Reservation community.” The Council has authority under the Constitution and Bylaws to regulate members of the Tribe as well as nonmembers who enter into consensual relationships with the Tribe or its members or whose activities occur within or otherwise affect the Reservation community. The Council has authority to negotiate agreements with Federal, State, Tribal, and local governments; sell lease, or encumber Tribal lands or other Tribal assets; and prevent sales, leases, or encumbrances without the consent of the Council.

The Tribal Government exercises a wide range of governmental powers, including providing government services, adopting and implementing regulatory programs, and taxation. Its laws address issues ranging from economic development to education, environmental and natural resource protection, housing, Indian child welfare, labor and employment regulation, land use regulation, public safety, and public works.

Pursuant to its constitutional authority, the Council created a Tribal Environmental Office. This Office is tasked with implementing the Tribe's environmental protection and stewardship programs, including Tribal regulation of water quality on the Reservation. For example, the Environmental Office administers the Tribe's Water Quality Ordinance as well as its other environmental programs. The Tribal Environmental Office consists of a director and four staff, including a hydrologist.

The Tribe's Judiciary consists of a lower Tribal Court and a Supreme Court. The Judiciary has jurisdiction over civil and criminal matters, including civil enforcement of the Tribe's environmental programs.

IV. Management and Protection of Water Resources of the Reservation

The water quality standards and water quality certification programs to be administered by the Tribe will assist in managing and protecting water resources within the borders of the Reservation. The boundaries of the Reservation for which the Tribe is seeking authority to administer water quality standards and water quality certification programs are identified by the 1875 Executive Order. The surface waters for which the Tribe proposes to establish water quality standards include the Berkeley River, Big Lake, and the Lakeville Wetlands.

The Berkeley River bisects the Reservation as it runs from the San Domingo Mountains towards the ocean. In addition, Big Lake and the Lakeville Wetlands are partly within the Reservation Boundaries. The lifeways of the Tribe have long been intertwined with each of these water bodies. Traditionally, the Tribe's economy depended upon the fish and wildlife of the river, lake, and wetlands. Today, the Tribe relies upon its water resources for drinking water, and its economy substantially depends upon recreational activity at Big Lake. These waters, moreover, continue to play a crucial role in the cultural life of the Tribe.

Numerous activities, including those on fee lands and leased lands within the Reservation, directly threaten the Tribe's water resources. For example, a study by the Tribal Environmental Office, conducted in conjunction with the College of Environmental Science at Berkeley State University, showed that discharges occurring at an RV campground near Big Lake, as well as leakage from a gasoline service station, threaten the waters of the Reservation.

V. Tribal Legal Counsel Statement

The attached statement from the Tribal Attorney General details the jurisdictional basis for the Tribe's authority to regulate water quality on the Reservation. The Reservation areas described in section 4 of the application were established by the 1875 Executive Order. The

Tribe's Constitution and Bylaws demonstrate the Tribe's exercise of authority in general over the reservation.

As a self-governing Nation, the Tribe has inherent sovereign authority over resources within the exterior boundaries of the Reservation. In protecting Tribal property, wildlife, and natural resources through the adoption and implementation of water quality standards, the Tribe is exercising this inherent sovereign authority to regulate activities that may threaten or have a direct effect on the political integrity, the economic security, and the health and welfare of the Tribe. As a sovereign, the Tribe maintains jurisdiction over waters that flow in and through the Reservation as well as lands within the Reservation, including non-Indian fee lands with the Reservation's exterior boundaries.

In addition, the basis for the Tribe's assertion of authority under this application is the express congressional delegation of authority to eligible Indian Tribes to administer regulatory programs over their reservations contained in Section 518 of the Clean Water Act. The U.S. Environmental Protection Agency's recognized this delegation of authority in *Revised Interpretation of Clean Water Act Tribal Provisions*, 81 Fed. Reg. 30,183 (May 16, 2016), and only recently and erroneously reversed its interpretation, as discussed in the attached statement from the Tribal Attorney General. There are no limitations or impediments to the Tribe's authority or ability to effectuate the delegation of authority from Congress.

VI. Tribal Capability

The Tribe is capable of administering effective water quality standards and water quality certification programs, as described below. The overall organization of the Tribe's government and experience in managing environmental programs is described in Part III above.

The responsibilities to establish, review, implement and revise water quality standards will be assigned to the Tribal Environmental Office, described in Part III above. The Tribal entity that will be responsible for conducting water quality certifications under CWA section 401 is the Director of the Tribal Environmental Office.

Experienced staff members are already on board in the Tribal Environmental Office and trained to administer water quality standards and certification programs. This includes the Director of the Office, who has been with the Office since 2009, and who holds a PhD in Environmental Science, as well as a hydrologist, who holds a PhD in Hydrology, and three staff who hold Bachelor's degrees in Environmental Science. These staff have received professional training from a wide variety of sources, including the U.S. EPA, the U.S. Fish and Wildlife Service, the U.S. Bureau of Indian Affairs, the State of Berkeley's Department of Environmental Protection, and the Institute for Tribal Environmental Professionals.

**Berkeley River Indian Tribe
Office of the Attorney General**

Ms. Alison Smith
Regional Administrator
United States Environmental Protection Agency
100 Main Street
Bay City, Berkeley 20002

Re: Statement by Attorney General Concerning the Legal Basis for the Regulatory Authority of the Berkeley River Indian Tribe to Regulate Water Quality on the Berkeley River Indian Reservation

Dear Administrator Smith:

The Berkeley River Indian Tribe is a federally-recognized Indian Tribe that possesses inherent authority and full control over waters and resources within the boundaries of the Berkeley River Indian Reservation. This letter sets out the legal basis for the Tribe's regulatory authority over water quality within the Reservation's boundaries for purposes of the Tribe's application for treatment in a manner similar to states (TAS) under Section 518 of the Clean Water Act (CWA), 33 U.S.C. § 1377(e). The Tribe is seeking TAS status for purposes of implementing Sections 303 and 401 of the CWA, 33 U.S.C. § 1313 & 1341.

The CWA is a comprehensive program of cooperative federalism that tasks the EPA with working with states and Tribes to regulate the discharge of pollutants into lakes, rivers, streams, wetlands, and coastal areas. In 1987, Congress amended the CWA to provide for Tribal implementation of CWA programs within Indian reservations. Section 518(e) of the CWA authorizes EPA to treat an Indian Tribe as a state for a variety of CWA purposes, including the setting of water quality standards under Section 303(c) and water quality certifications under Section 401. 33 U.S.C. § 1377(e). The statute sets three criteria for TAS status:

- (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.

33 U.S.C. § 1377(e). Congress has recognized that a Tribe meeting these criteria is best-suited to regulating the quality of Tribal waters.

The Berkeley River Indian Tribe is entitled to TAS status under Section 518 of the CWA. The Tribe is federally recognized and possesses and exercises inherent sovereign authority over its lands and waters. The Reservation was established in 1875 by Executive Order. The Tribal Government exercises substantial governmental duties and powers pursuant to its Constitution and Bylaws. Article 1 of the Constitution and Bylaws provides that Tribal “jurisdiction extends to all lands and waters within the boundaries of the Berkeley River Indian Reservation.” Article 5 further provides that the Tribal Council has the authority and the responsibility “to protect Tribal property, wildlife, and natural resources” and to “promote the safety and general welfare of the Tribe and the Reservation community.” The Tribe will exercise this authority to regulate water quality within the boundaries of the Reservation.

By its plain terms, Section 518 of the CWA delegates authority to Indian Tribes to manage water quality within their reservations. As EPA recognized in 2016, Section 518(e)(2) “requires only that the functions to be exercised by the tribe pertain to the management and protection of reservation water resources,” while Section 518(h)(1) “defines Indian reservations to include all reservation land irrespective of who owns the land.” *Revised Interpretation of Clean Water Act Tribal Provision*, 81 Fed. Reg. 30,183, 30,185 (May 16, 2016). Thus, Section 518 delegates authority to Tribes to regulate waters and activities on their reservations. Accordingly, EPA concluded in 2016 that “an applicant tribe can generally rely on the congressional delegation of authority in section 518 as the source of its authority,” without making a showing that the Tribe has inherent authority under *Montana v. United States*, 450 U.S. 544 (1981). *See id.* at 30,190.

The EPA recently and abruptly reversed course by issuing a new interpretive rule revoking its 2016 rule. Under EPA’s new rule, Tribes applying for TAS status must again demonstrate inherent authority to regulate waters and activities on their reservations under *Montana*. This new interpretive rule is similar to the EPA’s 1991 interpretation of Section 518, *see* 56 Fed. Reg. 64,876 (Dec. 12, 1991), but goes further than the 1991 rule by requiring Tribes to overcome a presumption that they lack regulatory authority over nonmembers unless such authority is “necessary to protect tribal self-government or to control internal relations.” *See* EPA Final Interpretive Rule at 5.

Because the Tribe has satisfied the statutory criteria and received delegated authority under Section 518, the EPA should grant this application for TAS status.¹ EPA’s recent reversal of its 2016 interpretive rule was unlawful, arbitrary and capricious, and procedurally improper. The rule was unlawful because it violated the plain terms of Section 518, which delegates authority to Tribes irrespective of land status. The rule was arbitrary and capricious because it lacked a reasoned and reasonable basis.

¹ Because the EPA’s new rule was not final agency action, the Berkeley River Indian Tribe could not challenge it directly under the APA. *See* EPA Final Interpretive Rule at 2. The Tribe requests that the EPA now reconsider its erroneous interpretation of Section 518 and evaluate the Tribe’s application for TAS status under the statutory standards that Congress plainly prescribed, which do not require the Tribe to demonstrate inherent authority under the *Montana* test.

To justify its new interpretive rule, EPA pointed to a recent decision of the Supreme Court and a recent decision of the Thirteenth Judicial Circuit. *See* EPA Final Interpretive Rule at 4-5. Neither decision addressed the interpretation of Section 518. Nor did they address delegations of federal authority to Indian Tribes generally. The first decision, *United States v. Wilson*, concerned the interpretation of the Lacey Act, which is irrelevant to the interpretation of the CWA, and did not, contrary to the EPA’s reading, hold or even suggest that Congress may not delegate authority to Indian Tribes. Indeed, the Supreme Court has held that Congress may do so. *See United States v. Mazurie*, 419 U.S. 544 (1975). The second decision, an unpublished per curiam opinion, simply erred in concluding that the *Montana* line of cases creates a strong presumption that Tribes lack regulatory jurisdiction over nonmembers. *See Berkeley Bank & Loan v. Hayes Family Ranch*, slip op. at 2. Contrary to the EPA’s conclusion, neither case creates “substantial uncertainty” about Congress’s delegation of authority to Indian Tribes in Section 518. *See* EPA Final Interpretive Rule at 3.

Moreover, EPA’s reversal of its 2016 rule was procedurally improper. EPA did not engage in consultation with Tribes prior to issuing its new rule. According to EPA, consultation was not required because the new interpretive rule “neither imposes substantial direct compliance costs on federally recognized tribal governments, nor preempts tribal law.” *Id.* at 7. In addition, EPA opined, it sufficed that Tribes were able to submit written comments on the proposed rule along with other members of the public. *See id.* Consultation was required, however, under Executive Order 13175 and the EPA’s Policy on Consultation and Coordination, particularly because the new interpretive rule imposes direct costs on Indian Tribes applying for TAS status.

In short, EPA should return to its 2016 interpretation of Section 518 and conclude that Congress has delegated to the Tribe authority to regulate waters and activities within the Reservation.

Even if, however, EPA continues to adhere to its erroneous interpretation, the Tribe has inherent authority to regulate water quality within the Reservation. This authority is affirmed in the Tribe’s Constitution and Bylaws. The Tribe has consistently exercised its inherent sovereign authority by exercising a wide range of governmental powers in both civil and criminal matters.

As an initial matter, the Tribe has property rights arising from its historic use of the Reservation’s waters. *Cf. Idaho v. United States*, 533 U.S. 262, 274 n.5 (2001). This case is thus distinguishable from *Montana* itself.

The Tribe, moreover, has found that insufficient regulation of water quality on the Reservation directly threatens the political integrity, economic security, and health and welfare of the Tribe. The Tribe therefore has inherent authority to regulate water quality on the Reservation not only under its Constitution and Bylaws, but also under the *Montana* test. Contrary to the EPA’s recent misinterpretation, the *Montana* test does not require a Tribe to overcome a strong presumption before it may exercise its inherent authority to regulate water quality within its reservation. Numerous activities, including those on fee lands and leased lands within the Reservation, pose a direct threat to the Tribe, its members, and its resources. Accordingly, the Tribe may regulate those activities by exercising its inherent sovereign authority over its lands and waters.

A recent study by the Tribal Environmental Office, conducted in conjunction with the College of Environmental Science at Berkeley State University, concluded that insufficient regulation “poses a direct threat to water quality on the Reservation, including the quality of the Berkeley River, Big Lake, and the Lakeville wetlands.” The study further found that “in practice, it is difficult, if not impossible, to separate the effects of water quality impairment on non-Indian fee lands from impairment on tribal lands within the Reservation because actions on fee lands have immediate and direct effects on water quality and thus on other users of water within the Reservation.”

The study highlighted several examples to prove the point that activities within the Reservation may directly threaten water quality without regard to land status. For one, the study found that leakage from the Big Lake Trading Post, a gasoline service station, directly threatened water quality for the Tribe and its members. The Big Lake Trading Post is operated by a non-Indian company on Indian trust land within the exterior boundaries of the Reservation. The Tribe authorized the use of these lands for the operation of a gas station pursuant to a decision of the Tribal Council and a business lease executed between the Big Lake Trading Post Co. and the Tribe. As the Tribal Environmental Office’s study found, leaking of gasoline from the Big Lake Trading Post, including leaking from an underground storage tank, has seeped into a creek that runs into the Berkeley River. The Tribe has inherent authority to address such a threat to Tribal waters, as well as any similar threat arising from activities pursuant to an agreement with the Tribe, under the *Montana* test, which recognizes that 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.” *Montana*, 450 U.S. at 565.

The Tribal Environmental Office’s study also found that activities on non-Indian fee land threaten water quality on the Reservation. As one example, the study pointed to discharges occurring at an RV campground near Big Lake. The Big Lake RV Campground is operated by Big Lake RV Co., a non-Indian company, on non-Indian fee land within the Reservation. The Tribe’s scientific study found that “discharges from the Big Lake RV Campground into the Berkeley River and Big Lake have caused and will continue to cause serious and substantial impacts on the water quality of the Reservation. These impacts in turn harm fish and wildlife within the Reservation’s waters, as well as the cultural life of the Tribe.” The Tribe has inherent authority to address these threats under *Montana*, which recognizes that a Tribe’s inherent authority extends to “conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.” *Montana*, 450 U.S. at 566.

The Berkeley River Indian Tribe has authority to regulate to protect water quality on the Berkeley River Indian Reservation. Congress has delegated such authority to the Tribe, and the Tribe possesses inherent authority to regulate waters and activities within the Reservation. If you require any additional information regarding the Tribe’s regulatory authority, please contact my office before EPA makes its final determination regarding the Tribe’s application for TAS status.

Respectfully submitted,

Attorney General Sophia Danan
Berkeley River Indian Tribe

cc: Louise Samuels, Chairperson
Laura Medina, Director, Environmental Office
James Miller, Project Officer, U.S. Environmental Protection Agency

United States Environmental Protection Agency
Region X
100 Main Street
Bay City, Berkeley 20002

Chairperson Louise Samuels
Berkeley River Indian Tribe
500 Lake Road
P.O. Box 1000
Lakeville, Berkeley 20001

Re: Berkeley River Indian Tribe's Treatment as a State Application for Surface Water Quality Standards

Dear Chairperson Samuels:

EPA has reached a final determination on the Berkeley River Indian Tribe's application for treatment as a state (TAS) under Section 518 of the Clean Water Act (CWA). EPA has determined that the Tribe's application does not meet all the criteria for TAS status and therefore is denying the Tribe's application, for the reasons discussed in the accompanying decision document.

Sincerely,

April Jones
Water Division

cc: Sophia Danan, Attorney General
Laura Medina, Director, Environmental Office
James Miller, Project Officer, U.S. Environmental Protection Agency

DECISION DOCUMENT
FOR
THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S DENIAL OF
THE BERKELEY RIVER INDIAN TRIBE'S APPLICATION
FOR TREATMENT IN A SIMILAR MANNER TO A STATE
UNDER CLEAN WATER ACT SECTION 518
FOR PURPOSES OF THE WATER QUALITY STANDARDS AND CERTIFICATION
PROGRAMS UNDER CLEAN WATER ACT SECTIONS 303(C) AND 401

I. Background

* * * [Omitted] * * *

II. Requirements for TAS Approval

Section 518(e) of the CWA sets forth criteria for determining if a tribe is eligible for TAS status and requires EPA to promulgate regulations implementing the TAS process. The statutory criteria for TAS treatment are:

(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.

33 U.S.C. § 1377(e). EPA has implemented Section 518 by promulgating regulations defining these criteria, including the requirements of Section 518(e)(2), which the EPA has interpreted to require tribes applying for TAS to demonstrate inherent authority over waters and activities on their reservations.

EPA has determined that the application of the Berkeley River Indian Tribe for TAS status meets the requirements of federal recognition, substantial governmental duties and powers, and capability to carry out the regulatory functions under the CWA. EPA is denying the Tribe’s application, however, because the Tribe has failed to meet the requirement of demonstrating inherent authority over waters and activities on its reservation.

A. Federal Recognition

* * * [Omitted] * * *

B. Substantial Governmental Duties and Powers

* * * [Omitted] * * *

C. Jurisdiction Over Waters Within the Borders of the Tribe’s Reservation

In order to qualify for TAS status for all the waters and activities described in the Tribe’s application, the Tribe must overcome a presumption that it lacks regulatory authority over nonmembers unless such authority is necessary to protect tribal self-government or to control internal relations. The Tribe’s application has failed to overcome this presumption.

The Tribe first argues that it does not need to demonstrate inherent authority over waters and activities within the borders of the Berkeley River Indian Reservation. In particular, the Tribe contends that Section 518 of the CWA delegates authority to Indian Tribes to manage water quality within their reservations. EPA has determined, however, that Section 518 does not delegate authority to Indian tribes. To the contrary, the Agency has returned to its longstanding position that a tribe seeking TAS must show that impairment of the reservation's waters would affect "the political integrity, the economic security, or the health and welfare of the tribe." See EPA Interpretive Rule at 3. The Agency has consistently taken the position that its interpretation of Section 518 must reflect the latest available judicial guidance. The current interpretation does so.

The Tribe's arguments to the contrary were considered and rejected by the Agency in its interpretive rulemaking. As EPA explained, the Supreme Court's decision in *United States v. Wilson* created substantial uncertainty about the constitutionality of legislative delegations to other sovereigns. The Thirteenth Judicial Circuit's decision in *Berkeley Bank & Loan v. Hayes Family Ranch, Inc.*, moreover, held that a Tribe presumptively lacks jurisdiction over nonmembers and may overcome this strong presumption only by showing that jurisdiction is "necessary to protect tribal self-government or to control internal relations." See *Berkeley Bank & Loan*, slip op. at 2. The Tribe has offered no reason for the Agency to reconsider its interpretation of this precedent, which necessarily guides the Agency's interpretation of Section 518. Moreover, the Tribe's procedural arguments were considered and rejected by the EPA in its interpretive rulemaking. See EPA Interpretive Rule at 7.

The Tribe next argues that it has overcome the strong presumption against inherent sovereign authority under the *Montana* test. First, the Tribe points to generalized findings that insufficient regulation of water quality on the Reservation threatens the Tribe and its members. But such generalized findings do not suffice to overcome the strong presumption that tribes lack regulatory authority over nonmembers because such findings do not demonstrate specific threats to tribal self-government or internal relations.

Next, the Tribe points to a study conducted by the Tribal Environmental Office that offered two examples of purported threats to tribal waters and activities. The first example involves a trading post operated by a non-Indian company on Indian trust land pursuant to a business lease from the Tribe. The Tribe argues it has demonstrated inherent authority to regulate this business based upon the consensual relations exception to the *Montana* rule. But in order to overcome the strong presumption against tribal jurisdiction over nonmembers, the Tribe must do more than point to a business lease. It must further show that regulation is necessary to protect tribal self-government or to control internal relations. The Tribe's application fails entirely to make this showing.

Finally, the Tribe offers an example involving a campground on non-Indian fee land within the Reservation. According to the Tribe, discharges from this campground threaten fish and wildlife and "the cultural life of the Tribe." These findings, even if accepted, do not suffice to overcome the strong presumption against Tribal jurisdiction. Such threats do not show that

regulation is necessary to protect the Tribe's self-government or to control internal relations within the Tribe.

D. Capability

* * * [Omitted] * * *

III. Conclusion

EPA has determined that the application of the Berkeley River Indian Tribe for TAS status fails to meet one of the necessary requirements under Section 518. Because the Tribe has failed to show that it has inherent authority over all the waters and activities that it aims to regulate, its application for TAS status is denied.

Revised Interpretation of Clean Water Act Tribal Provision

* * * [Omitted] * * *

AGENCY: Environmental Protection Agency (EPA)

ACTION: Final Interpretive Rule

SUMMARY: Section 518 of the Clean Water Act (CWA), enacted as part of the 1987 amendments to the statute, authorizes EPA to treat eligible Indian tribes with reservations in a manner similar to states (TAS) for a variety of purposes, including administering each of the principal CWA regulatory programs and receiving grants under several CWA authorities. In 1991, EPA adopted an interpretation of Section 518 that required tribes to demonstrate inherent authority to regulate waters and activities on their reservations in order to receive TSA treatment. In 2016, the Agency issued an interpretive rule removing that requirement and interpreting Section 518 as a delegation of authority by Congress to Indian tribes to administer regulatory programs over their entire reservations, subject to the eligibility requirements in section 518. Throughout, the Agency has taken a prudential approach to interpreting Section 518 that stresses changing judicial guidance concerning the scope of Indian tribes' inherent authority and congressional delegations of lawmaking authority. Today, the Agency is returning to the longstanding interpretation of Section 518 that it adopted in 1991. This reinterpretation requires tribes applying for TAS to demonstrate inherent authority over waters and activities on their reservations.

* * * [Omitted] * * *

I. General Information

A. *Does this interpretive rule apply to me?*

* * * [Omitted] * * *

B. *What interpretation is the Agency making?*

* * * [Omitted] * * *

C. *How was this rule developed?*

EPA proposed the reinterpretation in the Federal Register. The proposed reinterpretation is available in the docket for this rule. During the 60-day public comment period, EPA provided informational webinars for the public. EPA received a total of 46 comments from the public on

the proposed interpretive rule. A majority of the non-tribal commenters expressed support for the rule. Sections III and IV address issues and questions about the proposal that the commenters raised.

D. What is the Agency's authority for issuing this reinterpretation?

The CWA, 33 U.S.C. 1251 et. seq., including Section 518 (33 U.S.C. 1377).

E. Judicial review

This interpretive rule, which sets forth EPA's revised interpretation of CWA section 518, is not a final agency action subject to immediate judicial review. This interpretive rule is not determinative of any tribe's eligibility for TAS status. Rather, it notifies prospective applicant Indian tribes and others of EPA's revised interpretation. Today's interpretive rule would be subject to judicial review only in the context of a final action by EPA on a TAS application from an Indian tribe for the purpose of administering a CWA regulatory program based on the revised interpretation.

II. General Information and Background

In 1987, Congress amended the CWA and added Section 518, which authorizes EPA to treat eligible Indian tribes similarly to states for a variety of purposes, including administering each of the principal CWA regulatory programs and receiving grants under several CWA funding authorities.

In particular, Section 518(e) of the Act sets forth criteria for determining if a tribe is eligible for TAS status and requires EPA to promulgate regulations implementing the TAS process. The statutory criteria for TAS treatment are:

- (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.

33 U.S.C. § 1377(e). EPA has implemented Section 518(e) by promulgating regulations governing Section 303(c) water quality standards, *see* 40 C.F.R. 131.8; Section 401 water quality certifications, *see* 40 C.F.R. 131.4(c); Section 402 National Pollutant Discharge Elimination System (NPDES) permitting, *see* 40 C.F.R. 123.31-123.34; Section 404 dredge or fill permitting, *see* 40 C.F.R. 233.60-233.62; and Section 405 sewage sludge management programs, *see* 40 C.F.R. 501.22-501.25.

In 1991, EPA interpreted Section 518(e) to require a tribe to demonstrate its inherent authority under federal Indian law when applying for TAS status. *See* 56 FR 64876 (Dec. 12, 1991). It rejected the interpretation that Congress delegated federal authority to tribes in Section 518(e). Instead, the Agency adopted a case-by-case approach to determine based upon factual findings whether a tribe has inherent authority over waters and activities on their reservations. Such an approach, the Agency concluded, was justified in light of substantial uncertainty about the scope of inherent tribal authority under federal Indian law, including the Supreme Court’s decisions in *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989), as well as uncertainty about whether Congress intended to delegate federal authority to tribes through Section 518(e). In the face of this uncertainty, EPA adopted an interpretation requiring a tribe seeking TAS to show that impairment of its reservation’s waters would affect “the political integrity, the economic security, or the health or welfare of the tribe.” 56 FR at 64877.

In 2016, EPA reversed this longstanding interpretation of Section 518(e) and removed the requirement that a tribe demonstrate inherent authority when applying for TAS. *See* 81 FR 30183. Instead, the Agency concluded that it would treat Section 518 as delegating authority to tribes to regulate waters and activities on their reservations. The Agency continued its practice of looking to the latest and best available congressional and judicial guidance on delegations of authority to tribes. *See* 81 FR at 30186. In light of the then-available judicial guidance, the Agency concluded that “an applicant tribe can generally rely on the congressional delegation of authority in section 518 as the source of its authority,” without making a showing of inherent authority under the *Montana* test.

III. EPA’s Revised Statutory Interpretation

EPA is now revising its interpretation of Section 518(e) in light of new judicial guidance on delegations of authority to tribes. The Agency is returning to its longstanding position that a tribe seeking TAS must show that impairment of its reservation’s waters would affect “the political integrity, the economic security, or the health or welfare of the tribe.” 56 FR at 64877.

We have consistently taken the position that our interpretation of Section 518 must change in response to changing circumstances and judicial guidance concerning the scope of Tribal authority. When we reversed our longstanding interpretation of Section 518(e) in 2016, we did so based upon the best guidance then available. Subsequent developments now require that we return to the cautious approach that we adopted in 1991.

Recent judicial decisions have raised substantial uncertainty about the constitutionality of delegations of federal authority to other sovereigns. Recently, in *United States v. Wilson*, the Supreme Court considered the Lacey Act’s delegation of legislative authority to a foreign nation. The Lacey Act makes it a federal criminal to trade in fish or wildlife “taken . . . in violation of any foreign law.” 16 U.S.C. § 3372(a)(2)(A). In *Wilson*, a criminal defendant challenged his conviction under the Act, arguing that it encompasses only foreign statutes and that it violates the nondelegation doctrine. Five Justices held that the Act does not encompass violations of foreign

regulations, only violations of foreign statutes. In so holding, the Court majority avoided the nondelegation challenge.

Four Justices, including the Chief Justice, addressed the nondelegation issue and in so doing clarified current constitutional doctrine. As the Chief Justice explained:

We have repeatedly stated that Congress may not delegate its legislative powers. It may not delegate legislative authority to the federal Executive. Rather, where Congress tasks the executive branch with implementing federal law, Congress must supply an “intelligible principle” to guide the discretion of “those executing or applying the law.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474-75 (2001). Moreover, Congress may not delegate legislative authority to a private entity. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Department of Transportation v. Association of American Railroads*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) (“Even the United States accepts that Congress ‘cannot delegate regulatory authority to a private entity.’”). Nor may Congress delegate legislative authority to international organizations. See *Natural Resources Defense Council v. EPA*, 464 F.3d 1, 9 (D.C. Cir. 2006) (explaining that delegations of legislative authority to international organizations would “raise serious constitutional questions in light of the nondelegation doctrine”). In short, “[t]he lawmaking function belongs to Congress and may not be conveyed to another branch or entity.” *Ass’n of Am. R.R.*, 135 S. Ct. at 1234 (Alito, J. concurring).

United States v. Wilson, slip op. at 8-9. In light of the nondelegation doctrine, the Chief Justice continued, “Congress can no more delegate to foreign nations” legislative authority than it can delegate such authority to private parties. *Id.* at 8. The Lacey Act violated this prohibition by incorporating another sovereign’s laws into federal law on a prospective basis.

United States v. Wilson creates substantial uncertainty about the constitutionality of legislative delegations to other sovereigns. The concurring Justices noted that the Lacey Act encompasses violations of “any Indian tribal law,” 16 U.S.C. § 3372(a)(1), but explained that the Court did not need to reach the constitutionality of this statutory provision. Nevertheless, *Wilson* raises the possibility that delegations of authority to Indian tribes may be constitutionally suspect, especially in light of the four-Justice concurrence.¹ In light of *Wilson*, and the canon of constitutional avoidance, we therefore interpret Section 518 to require a tribe seeking TAS status to demonstrate inherent authority to regulate. See, e.g., *Clark v. Martinez*, 543 U.S. 371, 382 (2005) (“[The canon of constitutional avoidance] is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.”).

¹ We recognize, as Tribal commenters have stated, that the Supreme Court held that Congress may delegate authority to Indian Tribes in *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975). But it is not clear that *Mazurie* would extend to a delegation of authority to regulate water quality under the Clean Water Act.

In determining whether a tribe has made that demonstration, we are guided by the Thirteenth Judicial Circuit’s recent assessment of the scope of Tribal authority to regulate nonmembers. In *Berkeley Bank & Loan v. Hayes Family Ranch, Inc.*, the Thirteenth Judicial Circuit held that “a Tribe presumptively lacks jurisdiction over nonmembers, ‘especially on non-Indian fee land.’” Slip op. at 2. A Tribe may overcome this strong presumption only by showing that jurisdiction is “necessary to protect tribal self-government or to control internal relations.” *Id.* (internal quotation marks omitted). In deciding whether a Tribe has made such a showing, a court must construe the *Montana* exceptions to the rule against tribal jurisdiction narrowly, “lest [those exceptions] swallow the rule.” *Id.* (internal quotation marks omitted).

The Thirteenth Judicial Circuit’s decision in *Berkeley Bank & Loan* substantially clarifies the scope of tribal jurisdiction under the *Montana* test. As the court of appeals concluded, the Supreme Court doctrine was clear enough that a published opinion was not warranted. In *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.*, 554 U.S. 316, 328 (2008), the Supreme Court cited *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), for the principle that “the tribes have, by virtue of their incorporation into the American republic, lost ‘the right of governing . . . person[s] within their limits except themselves.’” As *Berkeley Bank & Loan* clarifies, *Montana* and its progeny have steadily converged on the no-jurisdiction rule of *Oliphant*. When it comes to civil jurisdiction, “tribes generally have no interest in regulating the conduct of nonmembers,” and may do so only when “nonmember behavior that implicates tribal governance and internal relations.”

In light of this judicial guidance, and substantial uncertainty about an Indian tribe’s authority to regulate nonmembers, we interpret Section 518(e) to require a tribe to make a strong showing of inherent authority when applying for TAS status. Under the Supreme Court’s precedent, as clarified by *Berkeley Bank & Loan*, there is a presumption that an Indian tribe lacks jurisdiction to regulate nonmembers, which may be overcome to the extent that the Tribe shows doing so is necessary to protect tribal self-government or to control internal relations. A Tribe applying for TAS status to regulate nonmembers must provide specific evidence to overcome this presumption against tribal jurisdiction.

IV. Responses to Comments on the Proposed Rules

EPA received numerous comments on the proposed rule addressing the Agency’s rationale for returning to its longstanding interpretation of Section 518. EPA received comments from ten states, a local government association, and two operators of industrial facilities supporting the rule. These commenters argue that Congress did not intend to delegate authority to Tribes and, to the extent that Section 518 is ambiguous, it should not be construed to do so in light of recent judicial precedent.

All thirty Indian Tribes and three tribal organizations that commented opposed the rule. Two states also opposed the rule. These comments disagreed that subsequent judicial developments necessitate revisiting the EPA’s interpretation of Section 518. They also asserted that the plain text of the statute does not permit EPA to revise its interpretive rule. Finally, several Tribes opposing the rule contended that it will impose significant burdens on tribes seeking TSA status.

EPA appreciates but disagrees with these comments. EPA has consistently maintained that its interpretation of Section 518 should depend upon evolving judicial precedent. Subsequent judicial developments have cast substantial doubt upon EPA’s 2016 interpretation. As a result, in keeping with our consistent approach to interpreting Section 518, the Agency is now revising its interpretation. EPA also disagrees with those tribal commenters that argued that the revised interpretation will impose significant burdens on tribes. While tribes will once again have to demonstrate inherent authority when applying for TAS status, the Agency is merely returning to the requirements that applied to applications from 1991-2016. Tribes successfully applied for TAS status during that period and may do so under this interpretive rule so long as they demonstrate inherent authority under the *Montana* test.

V. Effect on Existing EPA Guidance

* * * [Omitted] * * *

VI. Economic Analysis

* * * [Omitted] * * *

VII. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <http://www.epa.gov/laws-regulations/laws-and-executive-orders>.

A. *Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

* * * [Omitted] * * *

B. *Paperwork Reduction Act (PRA)*

* * * [Omitted] * * *

C. *Regulatory Flexibility Act (RFA)*

* * * [Omitted] * * *

D. *Unfunded Mandates Reform Act (UMRA)*

* * * [Omitted] * * *

E. Executive Order 13132: Federalism

* * * [Omitted] * * *

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This interpretive rule has tribal implications because it will directly affect tribes applying in the future to administer CWA regulatory programs. However, because it neither imposes substantial direct compliance costs on federally recognized tribal governments, nor preempts tribal law, tribal consultation was not required by Executive Order 13175. While EPA’s policy is to consult with tribes to the extent possible, consultation is not required by law for this interpretive rule. In any event, EPA provided for a period of notice and public comments, during which interested tribes submitted comments on the proposed rule, and EPA responded to those comments.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

* * * [Omitted] * * *

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

* * * [Omitted] * * *

I. National Technology Transfer and Advancement Act (NTTAA)

* * * [Omitted] * * *

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

The human health or environmental risks addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income, or indigenous populations. This rule affects the procedures tribes must follow to seek TAS for CWA regulatory purposes and does not directly affect the level of environmental protection.

K. Congressional Review Act (CRA)

This interpretive rule is exempt from the CRA because it is a rule of agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties.

* * * [Omitted] * * *

Opinion of the Court

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER
v. DONALD WILSON

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
THIRTEENTH JUDICIAL CIRCUIT

Respondent Donald Wilson appealed his conviction on two counts of violations of the Lacey Act, 16 U.S.C. §§ 3372 & 3373. He contends that the Act, which criminalizes trade in fish or wildlife “taken . . . in violation of any foreign law,” does not encompass violations of foreign regulations. *See* 16 U.S.C. § 3372(a)(2)(A). Furthermore, Wilson argues, the Act violates the nondelegation doctrine by premising a federal criminal conviction upon prospective incorporation of foreign law. Citing the canon of constitutional avoidance, the court of appeals agreed with Wilson that the Act does not encompass violations of federal regulations, creating a split among the circuits. We granted certiorari to resolve this split.

(1)

The United States Coast Guard intercepted the *Seahorse*, a fishing vessel, on the high seas within the exclusive economic zone of the Democratic Republic of the Pacific (DRP). Wilson is the owner and master of the *Seahorse*. There is no dispute that he was engaged in commercial fishing when the Coast Guard intercepted the *Seahorse*. The Coast Guard told Wilson that the Lacey Act prohibited him from fishing in the area without a license from the DRP. Under Regulation 100-11, promulgated by the Department of Commerce of the DRP, it is illegal to fish within the exclusive economic zone without a permit. Based upon this foreign regulation, the Coast Guard issued Wilson a civil citation for violating the Lacey Act.

One week later, the Coast Guard again intercepted the *Seahorse* as Wilson was fishing without a license from the DRP. After contacting the United States Attorney's Office and the National Marine Fisheries Service, Coast Guard officers learned that Wilson had been cited five times for violating the Act. Therefore, the Guard, having boarded the *Seahorse*, arrested Wilson.

The government indicted Wilson for violations of the Act. Section 3372(a)(1) of the Act makes it "unlawful for any person . . . to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plan taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law." 16 U.S.C. § 3372(a)(1). Section 3372(a)(2)(A) of the Act

makes it “unlawful for any person . . . to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce . . . any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law.” *Id.* § 3372(a)(2)(A). Section 3373 provides for civil and criminal enforcement of Section 3372’s prohibitions. *See id.* § 3373(a), (d).

Wilson moved to dismiss the indictment on two grounds. First, he argued that Section 3372(a)(2)(A) does not encompass violations of foreign regulations, only “foreign law[s],” that is, foreign statutes. Second, he argued that the Act, particularly to the extent that it encompasses violations of foreign regulations, is an unconstitutional delegation of legislative authority to foreign nations. The District Court rejected his motion. The jury convicted Wilson of possession with intent to sell and of an attempt to import and transport fish in violation of the Act. Wilson appealed his conviction. Citing the canon of constitutional avoidance, the court of appeals agreed with Wilson that the Act does not encompass violations of federal regulations and therefore vacated his conviction.

II

The Lacey Act does not explicitly include foreign regulations, but provides only that it is “unlawful” to trade fish or wildlife “in violation of any foreign law.” 16 U.S.C. § 3372(a)(2)(A). We now hold that the Act does not encompass foreign regulations.

The plain text of the Act distinguishes between a “law” and a “regulation.” Section 3372(a)(2) criminalizes trade of fish or wildlife in “violation of any *law or regulation* of any State.” 16 U.S.C. § 3372(a)(2) (emphasis added). By contrast, when it comes to foreign law, the same statutory provision criminalizes trade of fish or wildlife “in violation of *any foreign law*,” without expressly encompassing foreign regulations. *Id.* § 3372(a)(2). Thus, Congress apparently limited the scope of the Act to violations of foreign law.

The Act’s definition of “law” does not clearly encompass regulations. Instead, the Act defines “law” as “laws . . . which regulate the taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants.” 16 U.S.C. § 3371(d). The definitional section further distinguishes between “laws . . . which regulate” and “regulations . . . which regulate.” *Id.* Again, then, the statutory indications are that a “law” is different than a “regulation” for purposes of the Act’s incorporation of another sovereign’s laws.

The legislative history also supports Wilson’s interpretation of the Act. In 1981 Congress repealed the predecessor to the Lacey Act, including its provision expressly making a violation of a foreign nation’s “regulation” a predicate for a criminal prosecution under the Act. Prior to 1981, the Act prohibited trade of fish or wildlife in violation of “any law or regulation of any State or foreign country.” Today, the Act refers to only “foreign law.” Congress could have expressly included foreign regulations

within the Act's ambit, and indeed contemplated *and rejected* a provision in the 1981 Senate Bill that would have done just that. *See* S. 736, 97th Cong., 1st Sess., 127 Cong. Rec. 4338 (Mar. 19, 1981). Thus, the legislative history confirms what the plain text of the Act provides: A prosecution under the Act may be predicated on a violation of a foreign "law," but not a violation of a foreign regulation.

Wilson urges us to adopt this construction in order to avoid substantial constitutional questions. In particular, Wilson argues that the Act violates the nondelegation doctrine, particularly if it is construed to reach foreign regulations. In addition, Wilson argues that the rule of lenity favors his interpretation of Congress's intent. We need not invoke either doctrine, however, to conclude that a criminal prosecution under the Act may not be predicated on a violation of a foreign regulation.

* * *

The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE, with whom [three Justices join], concurring in the judgment.

“The principle that Congress cannot delegate away its vested powers exists to protect liberty.” *Dep’t of Transp. v. Ass’n of Am. R.R.*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring). Our constitutional duty is to stand as a bulwark against the erosion of that structural protection of individual rights. I would confront the constitutional issue that the Court today purports to set aside. The Lacey Act delegates legislative authority to foreign nations. It is therefore unconstitutional.

I

We have repeatedly stated that Congress may not delegate its legislative powers. It may not delegate legislative authority to the federal Executive. Rather, where Congress tasks the executive branch with implementing federal law, Congress must supply an “intelligible principle” to guide the discretion of “those executing or applying the law.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474-75 (2001). Moreover, Congress may not delegate legislative authority to a private entity. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *Department of Transportation v. Association of American Railroads*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) (“Even the United States accepts that Congress ‘cannot delegate regulatory authority to a private entity.’”). Nor may Congress delegate legislative authority to international organizations. *See Natural Resources Defense Council v. EPA*, 464 F.3d 1, 9 (D.C.

Cir. 2006) (explaining that delegations of legislative authority to international organizations would “raise serious constitutional questions in light of the nondelegation doctrine”). In short, “[t]he lawmaking function belongs to Congress and may not be conveyed to another branch or entity.” *Ass’n of Am. R.R.*, 135 S. Ct. at 1234 (Alito, J. concurring).

The Lacey Act delegates legislative authority by incorporating another sovereign’s laws on a prospective basis. That is, Congress did not simply incorporate foreign law as of the time of the enactment of the Act. Such a static incorporation presents no constitutional problem. *See Panama R.R. Co. v. Johnson*, 264 U.S. 375, 391-92 (1924). Congress, rather, authorized civil enforcement and criminal prosecution for violations of any and all foreign laws that might be enacted subsequently.¹ In effect, therefore, Congress surrendered the definition of federal law—including federal criminal law—to foreign nations without any subsequent review by Congress.

¹ Congress similarly authorized civil and criminal liability for violations of “any Indian tribal law.” 16 U.S.C. § 3372(a)(1). Unlike foreign nations, Indian tribes are “domestic dependent nations.” *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). We need not decide whether Congress violated the nondelegation doctrine by authorizing civil enforcement and federal criminal prosecutions for violations of Indian tribal law.

Congress can no more delegate to foreign nations the authority to determine whether a U.S. citizen will be deprived of her liberty than states can delegate to private entities the authority to deprive a citizen of her property. In *Eubank of City of Richmond*, 226 U.S. 137 (1912), we held that a city violated due process when it authorized property owners on a block to set a minimum setback line by a two-thirds vote. We similarly recognized that a delegation of lawmaking authority may violate a property owner's due process rights in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), where we held that the state could not require a two-thirds vote of neighboring owners before a landowner could construct a home for the poor. In *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), we held that Congress may not delegate legislative authority to private parties to regulate their competitors. While legislatures may rarely violate this constitutional principle, there is no doubt that the private nondelegation doctrine is "alive and well." Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 Harv. J.L. & Pub. Pol'y 931, 944 (2014); see *Department of Transportation v. Association of American Railroads*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) ("Even the United States accepts that Congress 'cannot delegate regulatory authority to a private entity.'). As we said in *Carter Coal*, delegating legislative authority to a private entity is "legislative delegation in its most obnoxious form." 298 U.S. at 311.

The Lacey Act's incorporation of foreign law is as obnoxious and unconstitutional. The Lacey Act does not supply any sort of intelligible principle to guide the incorporation of foreign law. Instead, the Act effectively authorizes foreign nations to set terms under which U.S. citizens will be criminally prosecuted.

II

The United States argues that Congress may prospectively incorporate a foreign nation's laws without violating the nondelegation doctrine. But the constitutionality of prospective incorporation of another sovereign's laws has long been in doubt. *See Hollister v. United States*, 145 F. 773, 779 (8th Cir. 1906) (“[The statute] does not purport to delegate to the state of South Dakota authority at any time in the future to fix, ad libitum, the punishment of federal offenses. This it could not do.”); *United States v. Knight*, 26 F. Cas. 793, 797 (No. 15,539) (D. Me. 1838) (Story, J.) (“I entertain very serious doubts, whether congress does possess a constitutional authority to adopt prospectively state legislation on any given subject; for that, it seems to me, would amount to a delegation of its own legislative power.”).² The United

² Scholars have also questioned whether Congress may delegate legislative authority by incorporating another sovereign's laws prospectively. *See* Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 Minn. L. Rev. 71, 106 (2000) (“the

States argues that any lingering doubt was dispelled by the Supreme Court's decision in *United States v. Sharpnack*, 355 U.S. 286 (1958). In *Sharpnack*, the Court held that Congress did not impermissibly delegate legislative authority when it incorporated state law as governing criminal law in federal enclaves through the Assimilative Crimes Act. *See id.* at 292.

Sharpnack is clearly distinguishable, however. Unlike the several States, foreign nations are not part of our Union. Instead, like private citizens, foreign nations are not subject to the constraints of the U.S. Constitution. A congressional delegation of legislative authority to foreign nations presents the same due process concerns as a delegation of legislative authority to private parties. Such a delegation is therefore unconstitutional. *Cf.* James M. Rice, *Note*,

controversy over the Lacey Act has not been settled by the Supreme Court and the delegation attack continues to be advanced by some commentators”); Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 *Ariz. L. Rev.* 205, 248 (1997) (“the Court has allowed Congress to effectively delegate policymaking discretion that is not constrained by an intelligible principle, allowing states to create the substantive contents of federal law”); Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 *Vand. L. Rev.* 1347, 1369 (1996) (“Nondelegation questions do arise where Congress simply incorporates state laws as they are and as they may change in futuro, without guidelines.”)

The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations, 105 Calif. L. Rev. 539, 544 (2017) (“Fundamental principles of government accountability demand a rigorous analysis of the constitutional limitations on delegations of regulatory power to private parties and international organizations.”).

* * *

The Court leaves for another day the fundamental question of the Lacey Act’s constitutionality. Rather than shirk our duty to address that question, we should have welcomed it. I therefore respectfully concur in the Court’s judgment.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

No. 18-1001

D.C. Docket No. 3:18-cv-00100-TAB

BERKELEY BANK AND LOAN,

Plaintiff-Appellee,

versus

HAYES FAMILY RANCH, INC., et al.,

Defendants-Appellants

Appeal from the United States District Court
For the Middle District of Berkeley

Before GRANT, SAMUELS, and WORTHINGTON, Circuit Judges.

JUDGMENT

This appeal was considered on the record from the District Court and on the briefs of the parties and oral arguments of counsel. The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* 13th Cir. R. 36.

Whether a tribal court has adjudicative authority over nonmembers is a federal question. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987). As the Supreme Court explained in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), and reiterated in *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.*, 554 U.S. 316, 328 (2008) (quoting *Oliphant*, 435 U.S. at 209), “the tribes have, by virtue of their incorporation into the American republic, lost ‘the right of governing . . . person[s] within their limits except themselves.’” This general rule decides this case.

In *Plains Commerce*, the Supreme Court squarely addressed the issue before us: Does a “tribal court [have] jurisdiction to adjudicate a discrimination claim concerning [a] non-Indian bank’s sale of fee land it owned”? 554 U.S. at 320. The Court held it did not. *Id.* Instead, the Court held that a tribe presumptively lacks jurisdiction over nonmembers, “especially on non-Indian fee land.” *Id.* at 330. To overcome this presumption, the tribe must show that jurisdiction is “‘necessary to protect tribal self-government or to control internal relations.’” *Dolgencorp v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 177 (5th Cir. 2014) (Smith, J., dissenting) (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)); see *Plains Commerce*, 554 U.S. at 335 (“While tribes generally have no interest in regulating the conduct of nonmembers, . . . they may regulate nonmember behavior that implicates tribal governance and internal relations.”).

The Defendants-Appellants cannot overcome this presumption. As *Plains Commerce* put it, the exceptions to the rule against tribal jurisdiction “are ‘limited’ ones” and must be construed strictly, lest they “‘swallow the rule.’” *Plains Commerce*, 554 U.S. at 330 (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997)). Indeed, this case, which involves a claim of discrimination filed in tribal court against a non-Indian bank concerning the sale of fee land, is indistinguishable from *Plains Commerce*. We are therefore bound to hold that the tribal court lacked jurisdiction to hear the Hayes Family Ranch’s claim.

For these reasons, it is **ORDERED** and **ADJUDGED** that the District Court’s order enjoining further proceedings in the tribal court is **AFFIRMED**.