

Native lands lack clean water protections, but more tribes are taking charge

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Across the roughly 1,300 square miles of the White Earth Indian Reservation in northwest Minnesota, tribal members harvest wild rice in waters that have sustained them for generations. They've been working for decades to restore sturgeon, a culturally important fish, and they harvest minnows and leeches to supply bait for anglers across the country.

But the White Earth Band can no longer depend on the clean, abundant waters that make those activities possible. Droughts brought on by climate change and irrigation for agriculture have threatened the reservation's rivers and lakes. Manure runoff from factory farms could poison the water that's left.

Last year, the tribal government passed an ordinance to restrict withdrawals of water from the reservation and adjacent lands that share an aquifer. Under the statute, farms and other businesses seeking to withdraw more than 1 million gallons per year must obtain a permit from the [tribe](#).

"White Earth firmly believes that if they did not take this action, the health and well-being of their members would be imminently harmed," said Jamie Konopacky, the tribe's environmental attorney. "Because of the growing concern about massive water appropriations, they passed this ordinance to give themselves independent permitting authority."

The tribe's action has not stopped the state from issuing water withdrawal permits on reservation land, a dispute currently being contested in tribal court. While the legal battle is with a farmer, not the state, Minnesota officials are examining the jurisdictional issues in play, and the tribe is urging them to recognize its sovereignty.

White Earth leaders are joining a growing effort by tribal nations to protect waters in Indian Country—asserting their sovereignty to target pollution that's threatening wild rice in Minnesota, shellfish in Washington and salmon in California.

Some of the nations have passed tribal ordinances to regulate polluters on reservation lands. Others have sought authority under the federal Clean Water Act to establish their own water quality standards, giving them a legal mechanism to combat pollution coming from upstream.

"The tribe's treaty right to harvest and consume shellfish and finfish is not a meaningful right if they're not safe to eat," said Hansi Hals, natural resources director for the Jamestown S'Klallam Tribe on Washington state's Olympic Peninsula.

Last year, the U.S. Environmental Protection Agency gave the Jamestown S'Klallam Tribe approval to issue its own water quality standards under the Treatment as a State (TAS) program. That status essentially gives tribes the same regulatory power over certain water quality programs as states, once they have proven their jurisdiction on waters that run through or connect to reservation and tribal trust lands. The tribe plans to adopt standards under that authority sometime next year.

Meanwhile, the EPA is working to establish "baseline" water quality standards for tribes that have not yet adopted their own, ensuring that all Native lands receive Clean Water Act protections.

As tribes establish their own standards and permitting programs, some experts believe they could play a critical role in fighting pollution and ensuring that the resources they depend on for subsistence and cultural values are preserved.

But tribal leaders acknowledge that regulatory programs are expensive and time-consuming to establish, and some tribes can't afford them. And many tribes that seek to assert their sovereignty risk costly legal battles with industry-friendly states, which are reluctant to give up their own permitting authority. Meanwhile, a new presidential administration could appoint EPA leaders hostile to tribal interests, undoing recent efforts.

Asserting sovereignty

In 1987, Congress passed a provision allowing tribes to set their own

water quality standards in the same manner as states, recognizing that Native reservations had been left out of the powers delegated to states under the Clean Water Act.

"Clean Water Act standards don't exist in Indian Country," said Jim Grijalva, a professor at the University of North Dakota School of Law and a longtime advocate for tribal water programs. "The problem is a racist assumption that tribes shouldn't have the governmental right to do anything."

While the Treatment as a State program sought to correct that, its lengthy and complicated approval process has made it challenging for tribes to pursue that option. Only 84 of the nation's 574 federally recognized tribes are recognized under the TAS program. And only 326 tribes have reservation land, further limiting the nations that can apply.

But momentum is growing. A 2016 EPA rule streamlined the application process, and 22 tribes—more than a quarter of those approved—have earned TAS status since 2020.

"The learning curve has been slow at times, but tribes are realizing the ability to use their sovereign authority under the Clean Water Act as part of their arsenal for protection," said Ken Norton, chair of the National Tribal Water Council, a tribal advocacy group.

Norton also directs the Tribal Environmental Protection Agency for the Hoopa Valley Tribe in California, which was among the first tribes approved for TAS status in 1996. The tribe's regulatory authority on the Klamath River enabled it to negotiate the extension of a state-run salmon hatchery that was slated to close under a dam-removal plan.

"Our voice at the table, not as a stakeholder but as a regulatory entity, was strengthened because we had these federally approved water quality

standards," Norton said.

Grijalva, the law professor, noted that tribal standards can take into account factors such as the dietary habits of Native people who harvest food from the landscape.

"Tribes have inherent rights to make value judgments that are different than their neighbors," he said. "If you set a dioxin standard, mercury standard or selenium standard based on risk to the average white guy, you're not accounting for the tenfold increase in exposure to an Indigenous person."

In Michigan's Upper Peninsula, members of the Keweenaw Bay Indian Community fish for lake trout, brook trout and walleye on the reservation's lakes and rivers. The tribe earned TAS status in 2020 and is working to issue water quality standards by the end of the year.

"We're a fishing community, so the protection of water quality is of utmost importance," said Dione Price, the tribe's environmental specialist and environmental health section lead. "This really does give the tribe a seat at the table in water protection."

The Karuk Tribe in California also received TAS approval in 2020. Grant Johnson, the tribe's water quality program manager, said that step came after years of securing funding, hiring staff and building proficiency to ensure it could craft detailed regulations, monitor its waters and enforce its standards.

The Keweenaw Bay and Karuk tribes are among the 37 nations that have received TAS authority but are still working to issue water quality standards or waiting on EPA approval of those thresholds. While many are well underway, the staffing levels and expertise required to run a water quality program remain a major hurdle for some tribes.

"It's great to take advantage of the politically open moment, but many tribes don't have the resources and support to make their own standards," said Sibyl Diver, a lecturer at Stanford University's Earth Systems Program who has published research on TAS.

Diver also noted that many reservations are within states that are hostile to tribal sovereignty and environmental regulations. Such tribes are likely to face lawsuits from state governments and conservative groups, and may not have the resources for expensive legal battles.

New authorities

While many tribes have set standards that are more stringent than their neighbors, experts say that even thresholds that only match federal minimums give tribes a major tool. Just by holding that authority, tribes can participate in permitting decisions on upstream waters.

For the Chehalis Tribe in Washington state, water quality standards allow it to protect the salmon that swim in the Chehalis River.

"The tribe having its own standards means that if there's a project or an issue that's happening upstream, the tribe now has a say in what's happening rather than waiting for the federal government to act on it," said Jeff Warnke, the tribe's director of government and public relations.

While more tribes work toward that regulatory power, others have started by setting tribal ordinances for their own reservations. Some, like the White Earth Band in Minnesota, see the establishment of an internal program as a precursor for pursuing TAS authority. Norton, with the National Tribal Water Council, said more tribal nations have issued such regulations in recent years, although specific figures are hard to come by.

Meanwhile, more tribes may seek to create or expand water ordinances after the U.S. Supreme Court's ruling earlier this year to remove millions of acres of wetlands from Clean Water Act jurisdiction, leaving their protection up to states and tribes.

As more tribes work to set up their own programs, the EPA has proposed a "baseline" water quality standard for tribal lands that are not yet covered under TAS. If the rule moves forward, it would provide protection for 76,000 miles of rivers and streams and 1.9 million acres of lakes and reservoirs that currently lack standards, the agency said.

"Some states like the fact that there's no rules in Indian Country," said Grijalva, the law professor. "But if a significant part of the country is not protected because it doesn't have the most basic water quality standards, EPA isn't doing its job."

The federal agency did not make a spokesperson available for comment.

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