



Clean Water Act Water Quality Standards and Treatment in  
a similar manner as a State (TAS) Application

March 23, 2021

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# ROAD MAP FOR TODAY...

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- **Overview of Treatment in a Similar Manner as a State**
  - *What is TAS?*
  - *What programs are eligible?*
  - *What are the requirements for a TAS application?*
  - *Why do I want it?*
- **Regulatory TASs – A Closer Look**
  - *Impressionistic History of TAS Practices*
  - *Special Issues for **Regulatory** TASs*



Environmental laws envision a state-federal partnership. States must implement; EPA must on tribal lands.



Tribes can apply to EPA to implement most programs directly, “similar to” states.



Tribes generally submit one TAS application per program.

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## What is TAS?

# Regulatory TAS By the Numbers

## TAS Approvals to Operate Regulatory Programs

The chart below lists the environmental regulatory programs for which EPA has approved federally recognized tribes for TAS. Environmental regulatory programs are those programs developed and adopted by the tribe for submission to, and approval by, EPA that involve an exercise of regulatory authority by the applicant tribe.

<b>Regulatory Program</b>	<b>Number of Authorized Tribes (Number in R9)</b>
CAA § 110 - <a href="#">Tribal Implementation Plan</a> (TIP)	7 <b>(2)</b>
CAA § 111 - <a href="#">New Source Performance Standards</a> (NSPS)	2 <b>(1)</b>
CAA § 112 - <a href="#">National Emissions Standards for Hazardous Air Pollutants</a> (NESHAP)	2 <b>(1)</b>
CAA Title V - <a href="#">Operating Permit Program</a>	4 <b>(1)</b>
CWA §§ 303(c) / 401 - <a href="#">Water Quality Standards</a> (WQS) Program	70 <b>(26)</b>
SDWA § 1413 - <a href="#">Public Water System Supervision</a> (PWSS) Program	1 <b>(1)</b>
SDWA § 1425 - <a href="#">Underground Injection Control</a> (UIC) Program, Class II Wells	2 <b>(1)</b>
TSCA §§ 402, 404, 406 - <a href="#">Lead Abatement</a> and/or <a href="#">Renovating, Repair, and Painting</a> (RRP) Program	4 <b>(0)</b>
Total	92 <b>(33)</b>

# TAS-Eligible Programs

## Regulatory

- **Clean Water Act (CWA)**
  - Water Quality Standards (303(c))
  - Water Quality Certification (401)
  - Impaired Waters (305) and TMDLs (303(d))
  - NPDES (402) Permits
  - Fill Permits (404)
- **Safe Drinking Water Act (SDWA)**
  - Public Drinking Water System Supervision (PWSS)
  - Underground Injection Control (UIC)
- **Toxic Substance Control Act (TSCA)**
  - Lead (Pb) Program
- **Clean Air Act (CAA)**
  - Certain portions of the CAA
  - Outlined under the Tribal Authority Rule (TAR)

## Financial Assistance Eligibility (FAE)

- **CWA 106:** Water Pollution Control\*
  - **CWA 319:** Nonpoint Source Management\*
  - **CAA 105:** Air Pollution Planning and Control\*
- \*requires matching



# Requirements

For EPA to approve TAS, the tribe must:

1. Be federally recognized;
2. Have a governing body with substantial duties and powers over a reservation;
3. Have authority to regulate resources on the reservation; and,
4. Be capable of carrying out an effective program.

# EPA Review – Step 1: Application

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- *EPA staff may work with the tribe to develop an application.*
- *Tribe's formal submittal 40 CFR 131.8 (letter from Chairperson to EPA R9 and Tribal Counsel statement).*
- *EPA program and ORC staff evaluate completeness, discuss potential gaps with the tribe.*
- *Tribe submits supplemental information if necessary.*
- *EPA establishes the official Administrative Index.*

# EPA Review - Step 2: Public Process

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- 30-days for comment on tribe’s assertion of jurisdiction
  - *“Appropriate Governmental Entities” letters to governor(s) and certain federal agencies*
  - *Public (newspaper) notice requesting comment through AGEs*
  - *Local Government collaboration, if applicable*
- Tribe may respond to comments.



# EPA Review – Step 3: Decision

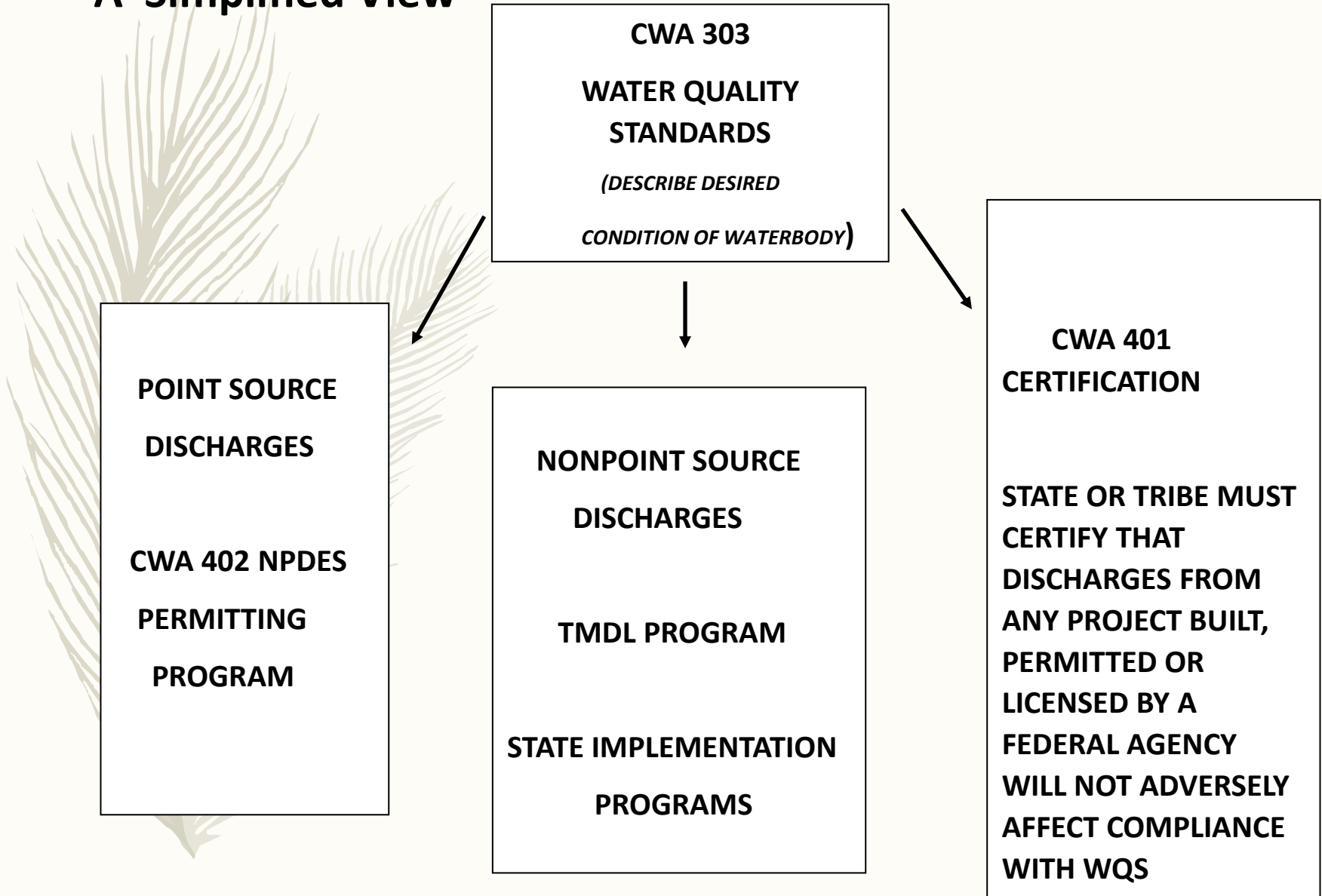
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- *EPA team (including HQ for regulatory TAS) reviews draft decision document and response to comments.*
- *Regional Administrator makes final decision.*
- *If approved, RA notifies tribe in writing and presents a certificate at an RTOC meeting.*



Regulatory  
TASs – A  
Closer Look

# The Federal Clean Water Act Regulatory Scheme – A Simplified View



# Water Quality Standards

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## Three Components:

- **Designated uses** -- Defines the water quality goal for individual waters
- **Water Quality Criteria** – The numeric or narrative standards that must be met instream in order to provide for the designated use
- **Antidegradation Policy** – Designed to protect existing high quality waters

# What DOES it mean to receive TAS for WQS (Sec. 303) ?

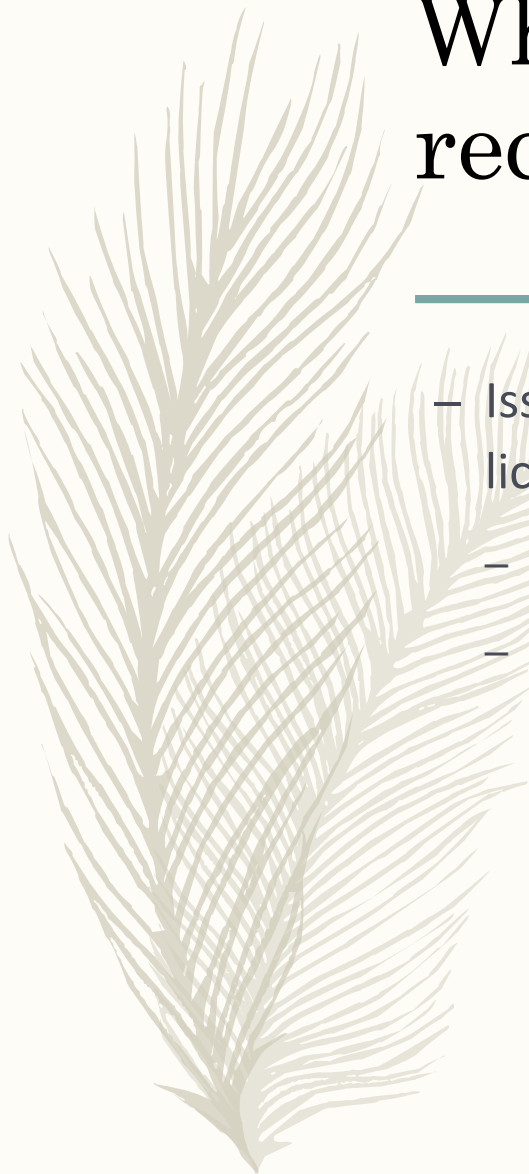
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- administer the WQS Program (but not other CWA programs)
- Eligible to apply for federal approval of tribal water quality standards
- Remember that major conflicts between tribal standards and adjacent state standards will be resolved by the Regional Administrator (40 CFR 131.7)
- Some workload issues: Triennial review

# What DOES it mean to receive TAS for Sec 401?

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- Issue Water quality certifications for federal permits and licenses for activities that discharge to reservation waters.
- federal permits & licenses: NPDES; Sec. 404 permit
- evaluate whether discharge is consistent with Tribe's WQS and decide to grant, deny, or condition a water quality certification under Sec 401 of the CWA.





# Does TAS for CWA Sec. 303 give a Tribe enforcement authority?

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- No. EPA's approval would not include any direct enforceable requirements on any party.
- Once approved, WQS can serve as a basis for actions such as effluent limits in permits, which are enforceable.



# So What Does TAS NOT do?

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- It does not expand Tribe's existing jurisdiction
- It does not make any Jurisdictional Determinations under CWA 404 as to status as a WOTUS
- It does not deal with groundwater at all.
- It does not deal with water rights or fishing rights





# An Impressionistic History of TAS Practices

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- EPA Indian Policy (1984)
- Authorities for TASs:
  - 40 CFR 131.8 (1991 and 1994) for the Clean Water Act (Section 518)
  - 40 CFR 49 (1998) for the Clean Air Act (Section 301(d))
  - 40 CFR 142.72 & 142.76 (1988, 1994, 1998) for the Safe Drinking Water Act (Section 1451)
- TAS Strategy (2008)
- Tribal Consultation Policy (2011)
- Reinterpretation Rule for CWA (2016): <https://www.epa.gov/wqs-tech/revised-interpretation-clean-water-act-tribal-provision>

# Special Issues for WQS TASs



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- Every Tribe is Different:
  - Each Tribe has its own reason for seeking WQS TAS.
  - Each reservation is configured differently, with different water resources within its boundaries that may benefit from WQSs.
  - Each Tribe is different in the developmental stage and focus of its environmental programs.
  - Do what makes the most sense for your Tribe, and EPA is there to help!

# Special Issues for Regulatory TASs: Congressional Delegation Defined

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- Congressional Delegation for TAS: An express delegation of authority by Congress allowing tribes to administer regulatory programs within their reservations.
- EPA has interpreted Section 518 of the CWA to be an express delegation of authority to Tribes for TAS over their reservations.
  - See 2016 Reinterpretation Rule, 81 FR 30183

# Special Issues for Regulatory TASs: Congressional Delegation Statutes

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## ○ Section 518(e)(2), (h)(1) of CWA:

- Provides eligibility for tribal programs covering water resources "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 expressly defines Indian reservations to include "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent and including rights-of-way. . ."

## ○ *Section* 301(d)(2)(B) of CAA:

- provides for eligibility for tribal programs covering air resources "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction."

# Special Issues for Regulatory TASs: Focus of Congressional Delegation

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- Congressional Delegation Test: The main focus is identifying the geographic boundaries of the Indian reservation area.
  - Tribes may be the best source for information about reservation boundaries.
  - Boundary information can also be obtained from DOI, including BIA Office of Trust Affairs.
- Special circumstances should be considered (i.e. specific statutory language regarding TAS, prohibitions contained in leases, etc.).

# Special Issues for Regulatory TASs: What Reservation Areas Are Included

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- Both formal and informal Reservations are included as Reservation areas for CWA Congressional Delegation.
  - “Formal reservations” are established through treaties, statutes, or executive orders.
  - Tribal trust lands outside of a formal reservations are considered “informal reservations”.
    - *See 56 FR at 64881; 63 FR at 7257–58; Arizona Public Service Co. v. EPA, 211 F.3d 1280, 1292–94 (D.C. Circuit 2000)*



# Special Issues for Regulatory TASs: Where must Inherent Sovereignty Still Be Shown?

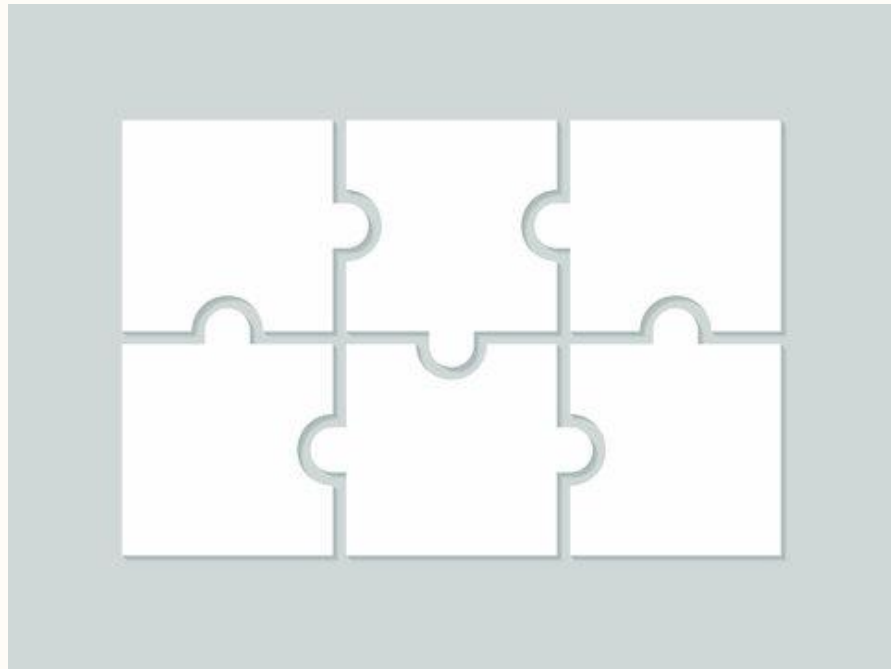
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- Inherent Sovereignty: The inherent right or power of tribes to self-govern first recognized in *Cherokee Nations v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).
  - Applies only to TASs where there is no Congressional Delegation (i.e. SDWA) and requires an Inherent Authority analysis.
- To be able to regulate nonmembers, a tribe must demonstrate that the nonmember (1) entered consensual relationships with the tribe or (2) its conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Montana v. United States*, 450 U.S. 544 (1981)

# Special Issues for Regulatory TASs

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- TAS for Segments of Reservation





# Special Issues for Regulatory TASs

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– Dealing with Boundaries

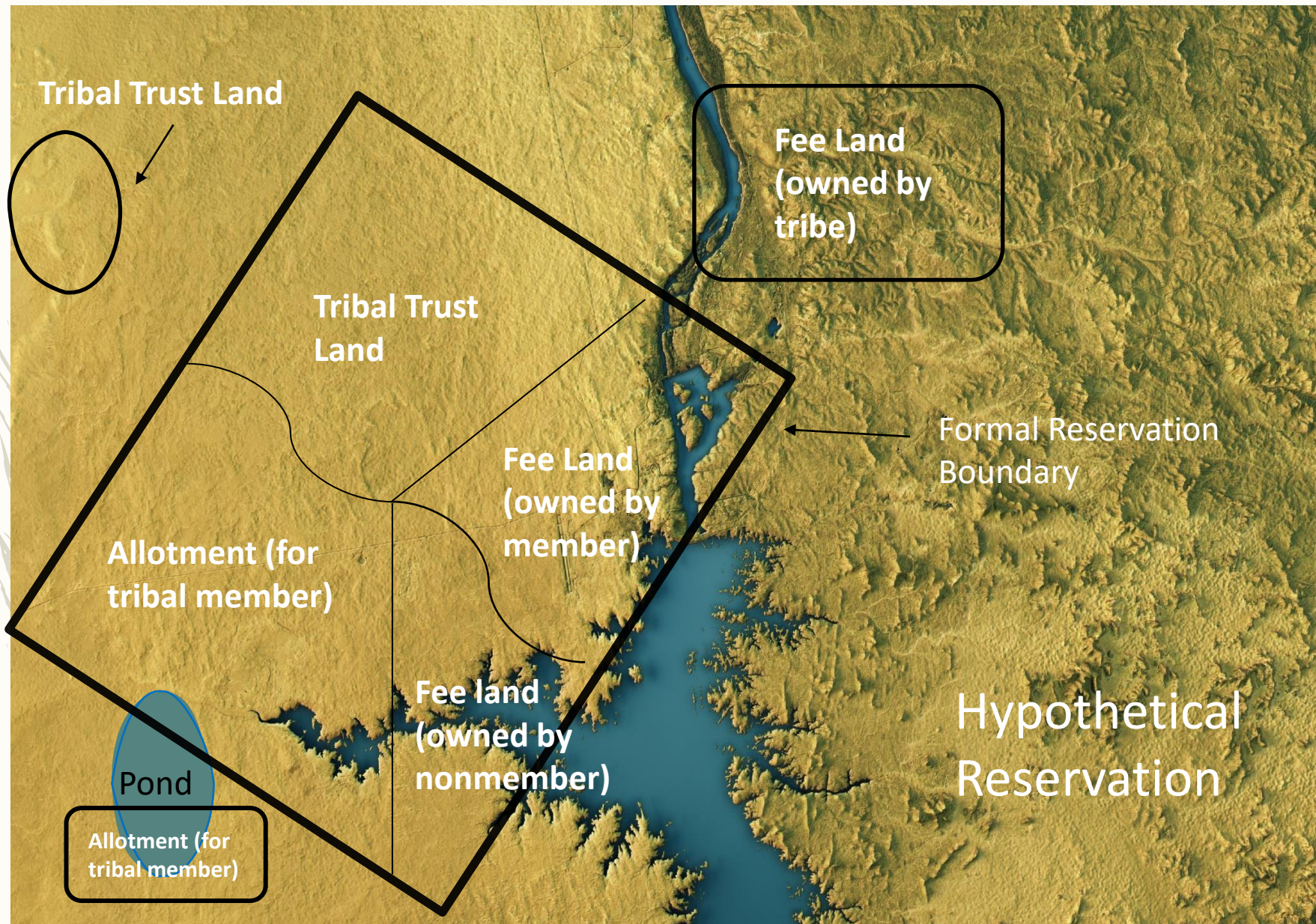


# Special Issues for Regulatory TASs

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- Expanded Reservations





Tribal Trust Land

Fee Land  
(owned by  
tribe)

Tribal Trust  
Land

Formal Reservation  
Boundary

Allotment (for  
tribal member)

Fee Land  
(owned by  
member)

Hypothetical  
Reservation

Fee land  
(owned by  
nonmember)

Pond

Allotment (for  
tribal member)

# Where can I find more information?

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**2016 CWA Reinterpretation**

**2008 TAS “Strategy”**



