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## The Tribal Sovereign as Citizen: Protecting Indian Country Health and Welfare Through Federal Environmental Citizen Suits

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THE TRIBAL SOVEREIGN AS CITIZEN:  
PROTECTING INDIAN COUNTRY HEALTH  
AND WELFARE THROUGH FEDERAL  
ENVIRONMENTAL CITIZEN SUITS

James M. Grijalva\*

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INTRODUCTION

As civil governments with territorial claims to natural resources like land, air and water, Indian tribes have public trust responsibilities to protect their citizens' related interests on the same theory applied to state governments.<sup>1</sup> Like states, tribal governments discharge their obligations by exercising inherent sovereignty independently and in conjunction with the federal government. In terms of managing environmentally harmful activities in Indian country, tribes can develop regulatory programs separately or in partnership with the U.S. Environmental Protection Agency (EPA) through particular state-like regulatory roles.

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1. See, e.g., *State of California v. Superior Court (Lyon)*, 29 Cal.3d 210 (Cal. 1981) (state public trust); See also *Berrey v. ASARCO, Inc.*, 439 F.3d 636 (10th Cir. 2006) (Quapaw Tribe asserted public trust responsibility to address mining contamination).

Either programmatic approach requires substantial commitments of tribal and federal staff time and resources necessary for creating required administrative infrastructure. Both can also trigger difficult legal challenges on the scope of inherent tribal sovereignty and the extent of Indian country, which can have dramatic impacts on other important tribal interests. Litigation risks and large resource needs have stunted the growth of tribal environmental programs, but Indian country health and welfare risks do not wait for effective regulation.

Environmental citizen suits offer tribal governments an attractive tool for protecting some of their interests without the effort and risk involved in program development. These congressionally authorized federal claims can force EPA to take important mandatory actions and force facilities to comply with applicable pollution requirements. A citizen plaintiff needs no independent basis for controlling the actor, so a tribe need not show inherent sovereignty over a non-Indian polluter to prevail. And a defendant may not avoid liability by arguing it is located outside Indian country. That avoids so-called Indian country diminishment cases, and also extends a measure of tribal control into aboriginal territories ceded long ago.

This Article suggests that federal environmental citizen suits can serve tribal sovereignty interests without presenting the legal risks tribes face when they attempt direct regulation of non-Indians. Section I briefly describes governmental regulatory roles tribes may play in the implementation of federal environmental law and policy. Section II overviews the conceptual and procedural framework for tribal claims as "citizens." Section III argues that in bringing environmental citizen suits, tribal governments exercise their inherent sovereign power and responsibility to protect the health and welfare of tribal citizens and the quality of the Indian country environment. Section IV concludes that, while suits directed at one facility cannot and should not replace comprehensive tribal programs, they offer concrete benefits to tribes without risking adverse judicial decisions on the scope of tribal sovereignty and Indian country.

#### I. TRIBAL GOVERNMENTAL ROLES IN THE FEDERAL ENVIRONMENTAL SYSTEM

EPA's Indian program began developing in 1973,<sup>2</sup> just three years after the modern era of federal environmental law began. The federal government's broad powers arising from historic relations with indigenous nations implied that general federal laws applied to Indian country,<sup>3</sup>

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2. See James M. Grijalva, *The Origins of EPA's Indian Program*, 15 KAN. J. L. & PUB. POL. 191 (2006) (examining historical antecedents to EPA's 1984 Indian Policy).

3. See *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).

presumably including the federal environmental laws.<sup>4</sup> The modern environmental laws were structured on a new federal-state relationship called cooperative federalism, which envisioned a structured partnership acknowledging both the national interest in environmental management and states' historic responsibility over public health and welfare.<sup>5</sup>

But cooperative federalism as originally designed faltered in Indian country. In the early 1970s the Supreme Court's jurisprudence indicated "State laws generally are not applicable to tribal Indians or an Indian reservation except where Congress has expressly provided that State laws shall apply."<sup>6</sup> The early environmental laws were silent on Indian country implementation,<sup>7</sup> suggesting federal reliance on state program implementation would leave a regulatory gap in the circle of national protection. EPA's practical stopgap response was direct federal implementation; EPA would not delegate Indian country programs to states.<sup>8</sup>

Direct federal implementation, however, was the old paradigm for federal management of Indian affairs. The modern era of Indian policy, which began about the same time EPA was created, centered on tribal self-determination.<sup>9</sup> EPA embraced self-determination as soon as any federal agency, creating a tribal regulatory role animating federal air quality requirements in 1974.<sup>10</sup> That role mirrored the program opportunity

4. See, e.g., *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985) (Resource Conservation and Recovery Act); *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) (Resource Conservation and Recovery Act); *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972) (National Environmental Policy Act).

5. Cf. ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY* 495 (2003) (describing the impact of the 1970 Clean Air Act's federal-state design on modern environmental law); COUNCIL ON ENVIRONMENTAL QUALITY, *ENVIRONMENTAL QUALITY: THE FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY* 73-74 (Aug. 1970) (describing the new "regional" approach to air pollution control).

6. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-71 (1973). See, e.g., *Worcester v. Georgia*, 31 U.S. 515 (1832) (barring state law from Indian country as an unacceptable interference with federal-tribal relations); *Rice v. Olson*, 324 U.S. 786, 789 (1945) (noting "the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history"); *Williams v. Lee*, 358 U.S. 217, 220 (1959) (barring on-reservation state action that "[i]nfringed on the right of reservation Indians to make their own laws and be ruled by them").

7. See, e.g., *Federal Water Pollution Control Act of 1972*, Pub. L. No. 92-500, § 2, 86 Stat. 886 (1972) (defining Indian tribes as municipalities but making no other reference to Indian country).

8. Final Rules, National Pollutant Discharge Elimination System, 38 Fed. Reg. 13,528, 13,530 (May 22, 1973) (codified at 40 C.F.R. § 125.2(a)(2)).

9. See, e.g., Special Message to Congress on Indian Affairs, 213 Pub. Papers 564 (July 8, 1970); Indian Education Act, Pub. L. No. 92-318, 86 Stat. 235 (1972).

10. Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. 42,510 (Dec. 5, 1974) (codified at 40 C.F.R. § 52.21(c)(3)(i)).

available to states. A broader conception of state-like regulatory roles for tribes was captured in official EPA policies in 1980<sup>11</sup> and 1984.<sup>12</sup>

Congress followed EPA's lead in the mid-1980s. EPA was directed to treat tribes "as states" in 1986 amendments to the Safe Drinking Water Act<sup>13</sup> and the Superfund law,<sup>14</sup> 1987 amendments to the Clean Water Act,<sup>15</sup> and 1990 amendments to the Clean Air Act.<sup>16</sup> Tribes with treatment-as-a-state or TAS status were eligible to implement federal environmental programs in Indian country, and their program decisions became federally enforceable on pollution sources both inside and outside tribal territories.<sup>17</sup> Within federal dictates, TAS gave effect to tribal value judgments on the environmental quality of Indian country, thus helping protect the health and welfare of tribal citizens and others living in Indian country.

Tribal TAS program development has begun in earnest for some tribes, but effective Indian country regulation is still a distant hope for most. Practical constraints like time, money and institutional inertia affect tribes and EPA. Overlaying those not insignificant barriers are the political and legal landmines associated with the issue of tribal regulation of non-Indians.

The Supreme Court's 1981 decision in *Montana v. United States*<sup>18</sup> said tribes retain inherent sovereignty over non-members whose Indian country activities threaten tribal health or welfare, but in 25 years the Court has never decided in favor of a tribe on that basis. Instead, it has consistently rejected tribes' claims across a broad range of subjects, including the power to prescribe general zoning requirements,<sup>19</sup> impose wildlife management restrictions,<sup>20</sup> tax businesses serving tribal citizens and other

11. EPA Policy for Program Implementation on Indian Lands (Dec. 19, 1980) (on file with author).

12. Environmental Protection Agency, *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, (November 8, 1984) <http://www.epa.gov/indian/1984.htm> [hereinafter 1984 Indian Policy].

13. 1986 Safe Drinking Water Act Amendments, Pub. L. No. 99-339, Title III, § 302(a), 100 Stat. 665 (June 19, 1986) (codified at 42 U.S.C. § 300j-11).

14. 1986 Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, Title II, § 207(e), 100 Stat. 1706 (Oct. 17, 1986) (codified at 42 U.S.C. § 9626).

15. 1987 Clean Water Act Amendments, Pub.L. No. 100-4, Title V, § 506, 101 Stat.76 (Feb. 4, 1987) (codified at 33 U.S.C. § 1377).

16. 1990 Clean Air Act Amendments, Pub. L. No. 101-549, § 107(d), 104 Stat. 2464 (Nov. 15, 1990, codified at 42 U.S.C. § 7601).

17. *E.g.*, *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981) (affirming EPA's approval of a tribal air quality redesignation despite objections over its impacts on off-reservation pollution sources).

18. 450 U.S. 544 (1981).

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

20. *Montana*, 450 U.S. 544.

reservation residents and visitors,<sup>21</sup> decide wrongful death cases arising from car accidents on reservation roads,<sup>22</sup> and decide property damage cases arising from the on-reservation conduct of state officials.<sup>23</sup> In each case, the Court acknowledged the general subject matter implicated legitimate tribal welfare interests, but found these interests inadequately impacted by the on-reservation activities of non-members. Simple threats to tribal health or welfare were insufficient; the real question was whether the Court felt tribal control over the activity was necessary to protect tribal self-government.

The cases offer little guidance on that famously indeterminate test. It ostensibly respects tribal sovereignty, counseling tribal control wherever self-government is hindered. Yet, the Court seems to expect evidentiary proof of an actual, direct and significant connection with the specific non-Indian activity at issue. That requirement differs starkly from the deferential standard of review more commonly applied to state and federal legislative determinations of the public interest. Curiously, the Court has shown little interest in the tribes' views as represented by the legislative judgments underlying the cases. Nor does the Court hesitate to substitute its contrary interpretations of tribal interests, often influenced by the unproven assumption that state governmental mechanisms can or do adequately protect tribal interests.

These multiple red flags have not been lost on tribes considering environmental program development, nor on the EPA who must approve those programs. EPA's Indian program decisions have frequently prevailed in the lower courts,<sup>24</sup> but the Supreme Court has yet to review one. The Court's sole Indian country environmental case offered no guidance on the scope of inherent tribal sovereignty. But the result and rationale of that case gave tribes and EPA pause nonetheless. The Court upheld state regulation of an on-reservation landfill owned and operated by a four-county municipal waste district, concluding the landfill's location was no longer Indian country subject to federal (and tribal) control.<sup>25</sup> Congress diminished the size of the reservation in 1894, the Court reasoned, when it ratified the tribe's agreement to sell certain reservation lands including the landfill property.

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21. *Atkinson Trading Post v. Shirley*, 532 U.S. 645 (2001).

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

23. *Nevada v. Hicks*, 533 U.S. 353 (2001).

24. *See, e.g., City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996) (inclusion of tribal water quality conditions in federal discharge permit); *Administrator, State of Arizona v. EPA*, 151 F.3d 1205 (9th Cir. 1998) (tribal air quality redesignation); *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998) (tribal water quality standards); *Arizona Public Service Comm'n v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000) (tribal air quality redesignation); *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001) (tribal water quality standards).

25. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

Many tribal advocates perceive the Court's diminishment theory and its *Montana* jurisprudence as a two-pronged attack on tribal self-government over non-Indians. The scope of both inherent tribal power and tribal territory are shrinking. Unpredictability and apprehension have had a pernicious chilling effect on tribal program development. In that context, environmental citizen suits filed by tribal governments offer a safer alternative to protect tribal health and welfare interests, and thus tribal self-government interests.

## II. TRIBAL ENFORCEMENT OF FEDERAL ENVIRONMENTAL LAWS THROUGH CITIZEN SUITS

The federal environmental laws provide significant federal enforcement powers and generally preserve states' pre-existing enforcement authority. Nonetheless, in every major federal environmental law enacted or amended since 1970, Congress has included provisions authorizing civil suits by private individuals and non-federal entities seeking enforcement of the law.<sup>26</sup> These "citizen suits" may be directed at EPA for failing to perform duties mandated by Congress and at facilities alleged to be in violation of applicable requirements. Essentially, Congress vested those who will ultimately bear the consequences of poorly implemented national environmental policies with tools for addressing them.<sup>27</sup>

That tool seems especially appropriate for tribal governments responsible for serving their citizens' health and welfare interests. The absence of effective regulatory programs in Indian country arguably makes legal violations more likely to occur and less likely to be prosecuted by states or EPA. EPA has officially acknowledged its trust responsibility to protect tribal health and welfare<sup>28</sup> and to enforce the law in Indian country,<sup>29</sup> but Indian country has seen few direct federal pro-

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26. See Toxic Substances Control Act (TSCA) § 20, 15 U.S.C. § 2619 (2000); Endangered Species Act (ESA) § 11(g), 16 U.S.C. § 1540(g) (2000); Surface Mining Control and Reclamation Act (SMCRA) § 520, 30 U.S.C. § 1270 (2000); Marine Protection, Research, and Sanctuaries Act § 105(g), 33 U.S.C. § 1415(g) (2000); Deepwater Ports Act § 16, 33 U.S.C. § 1515 (2000); Clean Water Act (CWA) § 505, 33 U.S.C. § 1365 (2000); Clean Air Act (CAA) § 304, 42 U.S.C. § 7604 (2000); Resource Conservation Recovery Act § 7002, 42 U.S.C. § 6972 (2000); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 310, 42 U.S.C. § 9659 (2000); Emergency Planning and Community Right to Know Act (EPCRA) § 326, 42 U.S.C. § 11046 (2000); Safe Drinking Water Act (SDWA) § 1449, 42 U.S.C. § 300j-8 (2000); Outer Continental Shelf Lands Act § 23, 43 U.S.C. § 1349(a) (2000).

27. See *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974) (finding the CAA citizen suit provision "a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced").

28. 1984 Indian Policy, *supra* note 12, at 3.

29. *Id.* at 4.

grams and even fewer enforcement actions.<sup>30</sup> Tribal TAS programs are growing, but it will take more time and financial resources from both EPA and tribes before tribes fill the regulatory gap in partnership with EPA. Until that time, tribal citizen suits offer programmatic and facility-specific options for protecting important tribal interests.

### *A. Tribes' Eligibility for Bringing Citizen Suits*

#### 1. Tribes as "Persons" Under the Environmental Statutes

The major regulatory and remedial environmental statutes uniformly authorize "any person" to act as a private attorney general by bringing civil suit seeking enforcement of statutory and administrative requirements.<sup>31</sup> Deputized persons include natural persons, legal persons such as partnerships and corporations, and state and federal governmental entities.<sup>32</sup> But the statutory definitions of "person" do not similarly include tribal governments. Nor are citizen suit provisions included in the statutory TAS provisions, although arguably EPA's TAS regulations opened the door to tribal CAA citizen suits.<sup>33</sup>

Tribes are nonetheless able to bring citizen suits, so long as they are willing to suffer certain indignities. In the pre-TAS era, Congress often

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30. On occasion, however, tribal health concerns and the trust responsibility can motivate EPA to act. *See, e.g.*, Consent Decree and Final Judgment Among the United State of America and the Sac and Fox Nation and Tenneco Oil Co., (CIV-96-017-C) (W.D. Ok. 1996) (SDWA action brought by EPA and the Department of the Interior on behalf of the Tribe for underground water contamination caused by oil and gas mining on and near tribal lands); John M. Glionna, *Poisoned River Threatens Tribal Heritage*, LOS ANGELES TIMES, Apr. 22, 2000, at A1. (describing the Washoe Tribe's successful effort to convince EPA to declare an abandoned mine contaminating tribal waters as a federal Superfund site).

31. *See, e.g.*, 33 U.S.C. § 1365(a), (g) (CWA); 42 U.S.C. § 7604(a) (CAA); 42 U.S.C. § 6972(a) (RCRA); 42 U.S.C. § 9659(a) (CERCLA); 42 U.S.C. § 11046(a) (EPCRA); 42 U.S.C. § 300j-8(a) (SDWA).

32. *See, e.g.*, 33 U.S.C. § 1362(5) (CWA); 42 U.S.C. § 7602(e) (CAA); 42 U.S.C. § 6903(15) (RCRA); 42 U.S.C. § 9601(21) (CERCLA); 42 U.S.C. § 11049(7) (EPCRA); 42 U.S.C. § 300f(12) (SDWA).

33. Unlike other statutory TAS provisions, the CAA left to EPA responsibility for determining which CAA programs were appropriate for tribal treatment as a state. 42 U.S.C. § 7601(d)(2). EPA identified nearly all CAA programs as appropriate. Tribal Air Rule, 63 Fed. Reg. 7254 (Feb. 12, 1998) (amending 40 C.F.R. pts. 9, 35, 49, 50 and 81). EPA specifically exempted the provision authorizing citizen suits against states following comments objecting that including the provision might constitute an administrative waiver of tribal sovereign immunity. *Id.* at 7260-61. Arguably, then, a tribe's CAA TAS status does not render it vulnerable as a citizen suit defendant, but does qualify it as a citizen suit plaintiff.



defined Indian tribes as municipalities.<sup>34</sup> Municipalities are included as persons under those statutes, so tribes willing to be labeled as state subdivisions for this purpose could bring citizen suit. That option is not available under the Emergency Planning and Community Right to Know Act (EPCRA), the Comprehensive Environmental Response and Liability Act (CERCLA), or the Clean Air Act (CAA), so tribes impacted by their violations may be forced to sue as “organizations” representing their members’ interests.<sup>35</sup> Alternatively, a lead tribal official could sue as an individual representing tribal citizens’ interests.<sup>36</sup>

## 2. Tribes’ Standing to Sue Violators

An advantage of citizen suits over TAS programs is they do not require a showing of tribal regulatory jurisdiction over the defendant. They do require a plaintiff show constitutional standing to bring the case independent of Congress’ authorization of citizen claims.<sup>37</sup> Environmental organizations assert their members’ interests to satisfy standing.<sup>38</sup> Presumably, the tribe’s governmental status gives it authority to represent its citizen’s interests in a similar fashion.<sup>39</sup>

The tribal government would need to show some of its citizens have suffered a cognizable legal injury, caused by the defendant’s allegedly illegal action, which can be redressed by a court’s favorable ruling.<sup>40</sup> Cognizable injuries include harm to aesthetic, conservational, and recreational interests,<sup>41</sup> which arguably include tribal cultural uses of the natural environment. The Warm Springs Tribes had standing to challenge allegedly illegal actions on a tributary of the John Day River where tribal citizens possessed treaty-protected fishing rights in the river.<sup>42</sup>

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34. See, e.g., 33 U.S.C. § 1362(10) (CWA); 42 U.S.C. § 6903(13) (RCRA); 42 U.S.C. § 300f(10) (SDWA).

35. Compare Public Interest Research Group of N. J., Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64 (3rd Cir. 1990), cert. denied 498 U.S. 1109 (1991).

36. See, e.g., Scott v. City of Hammond, 741 F.2d 992 (7th Cir. 1984) (CWA citizen suit filed by state attorney general).

37. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 572–73 (1992).

38. See, e.g., Powell Duffryn, 913 F.2d at 70 (finding organizational standing where members have individual standing, their interests are germane to the organization’s purpose, and their individual participation is not required); Sierra Club v. SCM Corp., 747 F.2d 99 (2d Cir. 1984) (holding environmental group did not have standing where it did not allege that its members had suffered an injury-in-fact caused by defendant’s discharge).

39. Compare United States Dept. of Energy v. Ohio, 503 U.S. 607 (1992) (addressing substantive issues presented by Ohio’s citizen suit against a federal facility with no reference to questions of standing).

40. Defenders of Wildlife, 504 U.S. at 560–61.

41. Sierra Club v. Morton, 405 U.S. 727, 738 (1972).

42. Oregon Natural Desert Ass’n v. Thomas, 940 F. Supp. 1534, 1538 (D. Oregon 1996).

Although cognizable injuries are broad, they cannot be speculative. Citizens must allege injuries that are imminent both temporally<sup>43</sup> and spatially.<sup>44</sup> The injury must also be distinct from the legal violation that is the subject of the citizen suit. The plaintiff must show the permit or standard violation caused a cognizable environmental harm to have standing.<sup>45</sup> Injuries resulting from wholly past violations are insufficient<sup>46</sup> unless recurrence can be reasonably expected.<sup>47</sup>

### 3. Other Procedural Issues

Congress vested substantial authority in EPA to ensure the federal environmental laws are faithfully executed and enforced. Citizen suits extended some of that authority to so-called “private attorneys general.” Citizen suits also put the public in a position to insist EPA follow Congressional mandates. However, Congress intended that citizen suits supplement rather than supplant governmental enforcement. So Congress imposed two procedural hurdles citizen suit plaintiffs must overcome before federal courts will exercise jurisdiction over their claims.

The first hurdle is notice. Typically, the plaintiff is required to notify the defendant and relevant agencies of an impending suit, and may not file for a specified time (often 60 to 90 days) after giving notice.<sup>48</sup> The theory is that the notice may induce the defendant to come into compliance voluntarily within the notice period.<sup>49</sup> Alternatively, the plaintiff’s announced intention might goad EPA into taking action.<sup>50</sup> Either way, the plaintiff’s notice may by itself obviate the need for citizen enforcement. Hence, courts

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43. *E.g.*, *Defenders of Wildlife*, 504 U.S. at 572–73 (finding citizen allegations of “someday” intentions to return to international areas allegedly affected by challenged action insufficient).

44. *E.g.*, *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 887–89 (1990) (finding general allegations of citizen uses of thousands to millions of acres of lands “in the vicinity” of the challenged action insufficient).

45. *See, e.g.*, *NRDC v. Texaco*, 2 F.3d 493, 505 (3d Cir. 1993); *Powell Duffryn*, 913 F.2d at 71–73; *Sierra Club v. SCM Corp.*, 747 F.2d 99, 102 (2d Cir. 1984).

46. *E.g.*, *Steel Co. v. Citizens for a Better Env’t.*, 523 U.S. 83, 107–09 (1998) (finding an order for civil penalties and injunctive relief would not redress asserted injuries plaintiff suffered in the past from company’s failure to file required toxic inventory reports).

47. *E.g.*, *Friends of the Earth, Inc. v. Laidlaw Env’tl Servs.*, 528 U.S. 167, 187–88 (2000) (holding citizens may have standing to seek civil penalties for violations ongoing at the time of the complaint or that could continue in the future).

48. *See* 33 U.S.C. § 1365(b)(1)(A) (CWA); 42 U.S.C. § 7604(b)(1)(A) (CAA); 42 U.S.C. § 6972(b)(1)(A) (RCRA); 42 U.S.C. § 9659(d)(1) (CERCLA); 42 U.S.C. § 11046(d)(1) (EPCRA); 42 U.S.C. § 300j-8(b)(1)(A) (SDWA).

49. *E.g.*, *Steel Co.*, 523 U.S. at 88 (dismissing citizen suit because defendant filed eight years of required toxic inventory reports during the notice period).

50. Perhaps that result could be assisted by a tribal plaintiff’s reminder to federal agencies of their trust responsibilities for tribal health and welfare and the quality of the Indian country environment.

usually interpret the notice requirements as jurisdictional, and dismiss plaintiffs who fail to comply.<sup>51</sup> The Pueblo of San Juan was excluded from a CWA citizen suit for failing to give notice, even though its co-plaintiffs had done so.<sup>52</sup> In limited circumstances, a citizen suit may be filed immediately after notice for substantial emergencies,<sup>53</sup> or releases of toxic or hazardous pollutants.<sup>54</sup>

A second procedural hurdle for citizen suit plaintiffs is referred to as the government enforcement bar. Otherwise legitimate citizen suits are barred if EPA "has commenced and is diligently prosecuting a civil action" seeking compliance for the same violation asserted in the citizen suit.<sup>55</sup> A government prosecution may be commenced during the notice period, but once the citizen suit complaint is filed, later enforcement action does not bar the suit.<sup>56</sup> The prosecution bar also applies to state enforcement actions taken consistent with federal program requirements.<sup>57</sup> It generally does not apply to administrative enforcement actions<sup>58</sup> unless Congress so specifies.<sup>59</sup>

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51. See, e.g., *Hallstrom v. Tillamook County*, 493 U.S. 20, 32 (1989) (failure to comply with 60 day notice requirement of RCRA citizen suit provision required dismissal of suit); *South Carolina Wildlife Fed'n v. Alexander*, 457 F. Supp. 118 (D.S.C. 1978) (failure to comply with 60 day notice requirement of CWA citizen suit provision for two of three facilities required dismissal of suit as to those facilities).

52. *New Mexico Citizens for Clean Air and Water v. Espanola Mercantile Co., Inc.* 72 F.3d 830, 833-34 (10th Cir. 1996). In a different CWA case, the court found notice given by co-plaintiffs was sufficient for the Warm Springs Tribes' suit. *Oregon Natural Desert Ass'n*, 940 F. Supp. at 1539.

53. See, e.g., 42 U.S.C. § 6972(b)(2)(A) (imminent and substantial endangerment under RCRA); *Dague v. City of Burlington*, 935 F.2d 1343, 1351-52 (2d Cir. 1991) (notice and delay requirements for commencing citizen suits under RCRA and CWA did not apply where plaintiffs alleged both hazardous and nonhazardous waste claims in a single "hybrid" complaint).

54. See, e.g., 33 U.S.C. § 1365(b)(1)(B) (violations of national performance standards for new sources or toxic pollutants requirements under CWA); 42 U.S.C. § 7604(b)(1)(A) (emissions of hazardous air pollutants under CAA).

55. See, e.g., 33 U.S.C. § 1365(b)(1)(B) (CWA); 42 U.S.C. § 7604(b)(1)(B) (CAA); 42 U.S.C. § 6972(b)(1)(B) (RCRA); 42 U.S.C. § 9659(d)(2) (CERCLA); 42 U.S.C. § 11046(d)(2) (EPCRA); 42 U.S.C. § 300j-8(b)(1)(B) (SDWA).

56. *E.g., Atlantic States Legal Found., Inc. v. Koch Refining Co.*, 681 F. Supp. 609 (D. Minn. 1988).

57. See, e.g., *City of Heath v. Ashland Oil, Inc.*, 834 F. Supp. 971 (S.D. Ohio 1993) (barring RCRA citizen suit for alleged violation of federal provision superseded by state law pursuant to RCRA delegation to the state), 949 F.2d 552 (1st Cir. 1991) (barring CWA citizen suit because of state's diligent enforcement action); *Atlantic States Legal Found. v. Tyson Foods, Inc.* 682 F. Supp. 1186 (N.D. Ala. 1988) (barring CWA citizen suit because of state's diligent enforcement action).

58. See, e.g., *Sierra Club v. Chevron U.S.A., Inc.* 834 F.2d 1517 (9th Cir. 1987) (nonjudicial enforcement action); *Baughman v. Bradford Coal Co., Inc.*, 592 F.2d 215 (3d Cir. 1979) (state administrative hearing board proceeding); *Coal. for Health Concern v. LWD, Inc.*, 834 F. Supp. 953 (W.D. Ky. 1993) (EPA and state administrative orders).

59. See 33 U.S.C. § 1319(g)(6) (federal and state administrative actions to enforce CWA permits or CWA requirements bar civil penalty actions brought via citizen suits); 42 U.S.C. § 6972(b)(2)(B)(iv) (RCRA bar is triggered by EPA's issuance of an administrative

Tribal governments whose suits are precluded by government prosecution may still participate in the compliance process. The statutes generally provide would-be citizen plaintiffs the opportunity to intervene as a matter of right in enforcement actions.<sup>60</sup> Conversely, EPA may choose not to initiate a separate enforcement action and intervene as a matter of right in the citizen suit.<sup>61</sup>

### *B. Suits Against EPA for Non-performance*

One of the two categories of citizen suits of potential value to tribes protecting sovereignty interests are those brought directly against EPA. Congress placed primary responsibility for implementing most of the major environmental laws on EPA, and vested the Agency with significant discretion to get the job done effectively. Congress also mandated the Agency take certain actions, and waived its immunity from suit as an incentive.<sup>62</sup> Citizens were authorized to sue the Administrator for failing to perform statutorily imposed non-discretionary duties.<sup>63</sup>

EPA's mandatory duties generally implicate programmatic actions rather than facility-specific or pollution-specific actions. Nonetheless, they can serve tribal sovereignty interests directly by fostering self-government opportunities and indirectly by ensuring effective management of activities affecting tribal health and welfare interests.

The duties directly serving tribal self-government interests implement the Agency's Indian program. For example, Congress mandated EPA promulgate regulations treating tribes as states within 18 months of amending the CWA<sup>64</sup> and the CAA.<sup>65</sup> Legal and political complexities helped EPA

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order to perform an RI/FS or removal action under CERCLA or an abatement action under RCRA). One court declined to enforce the CWA bar on civil penalties where the administrative action sought compliance but not penalties. See *Washington Public Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883, 886 (9th Cir. 1993).

60. See, e.g., 33 U.S.C. § 1365(b)(1)(B) (CWA); 42 U.S.C. § 7604(b)(1)(B) (CAA); 42 U.S.C. § 6972(b)(1)(B) (RCRA); 42 U.S.C. § 9613(i) (CERCLA); 42 U.S.C. § 11046(h)(2) (EPCRA); 42 U.S.C. § 300j-8(b)(1)(B) (SDWA).

61. See, e.g., 33 U.S.C. § 1365(c)(2) (CWA); 42 U.S.C. § 7604(c)(2) (CAA); 42 U.S.C. § 6972(c)(2) (RCRA); 42 U.S.C. § 9659(g) (CERCLA); 42 U.S.C. § 11046(h)(1) (EPCRA); 42 U.S.C. § 300j-8(c)(2) (SDWA).

62. See *Cascade Conservation League v. M.A. Segale, Inc.* 921 F. Supp. 692, 696 (W.D. Wash. 1996) (holding Congress waived the United States' sovereign immunity as to EPA's actions by the CWA citizen suit provision).

63. See, e.g., 33 U.S.C. § 1365(a)(2) (CWA); 42 U.S.C. § 7604(a)(2) (CAA); 42 U.S.C. § 6972(a)(2) (RCRA); 42 U.S.C. § 9659(a)(2) (CERCLA); 42 U.S.C. § 11046(a)(1)(B) (EPCRA) (specified duties); 42 U.S.C. § 300j-8(a)(2) (SDWA).

64. 33 U.S.C. § 1377(e) (2000).

65. 42 U.S.C. § 7601(d) (2000).

miss the CWA deadline by 63 months,<sup>66</sup> and the CAA deadline by 69 months.<sup>67</sup> Those delays postponed development of the tribal self-government interests Congress explicitly preferred for Indian country, contributing to a regulatory gap risking tribes' health and welfare interests. An environmental organization sued EPA for violating the CWA TAS deadline, but the court said a tribal government would be the proper plaintiff to raise the sovereignty interests at stake.<sup>68</sup>

EPA's mandatory duties for setting national emission standards and supervising delegated programs in and near Indian country can indirectly preserve tribal health and welfare. Air pollutant emissions and water pollutant discharges cannot be constrained until EPA promulgates national standards for them, which are often mandated duties.<sup>69</sup> EPA typically has a non-discretionary duty to determine whether state delegated programs comply with the national standards.<sup>70</sup> The Miccosukee Tribe brought a citizen suit against EPA for failing to determine whether a new Florida law revised previously approved state water quality standards for the Everglades' ecosystem.<sup>71</sup> If EPA determines a state's existing program falls short of national standards, it may have a mandatory duty to require the state revise its program.<sup>72</sup> Excessive state delays in submitting required program changes may trigger a mandatory EPA duty to promulgate federal substitutes<sup>73</sup> in a prompt manner.<sup>74</sup>

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66. Treatment of Indian Tribes as States for Purposes of Sections 308, 309, 401, 402, and 405 of the Clean Water Act, 58 Fed. Reg. 67,966 (Dec. 22, 1993) (codified in 40 C.F.R. pts. 122-124, and 501); Clean Water Act; Section 404 Tribal Regulations, 58 Fed. Reg. 8172 (Feb. 11, 1993) (codified in 40 C.F.R. pts. 232, 233).

67. Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254 (Feb. 12, 1998) (codified at 40 C.F.R. pts. 9, 35, 49, 50, and 81).

68. See *Citizens Interested in Bull Run, Inc. v. Reilly*, No. 91-36119, 1993 U.S. App. LEXIS 10386 at \*5-7 (9th Cir. Mar. 4, 1993). No tribes sued EPA to compel TAS promulgation.

69. E.g., *Sierra Club v. Thomas*, 658 F. Supp. 165, 175 (N.D. Cal. 1987) (directing EPA discharge its non-discretionary duty to promulgate nitrogen oxide regulations due in 1979).

70. E.g., *Scott*, 741 F.2d at 997-98 (CWA total maximum daily loads).

71. *Miccosukee Tribe of Indians of Fla. v. United States, Environmental Protection Agency*, 105 F.3d 599 (11th Cir. 1997).

72. E.g., *NRDC v. N.Y. Dept. of Env'tl. Conservation*, 700 F. Supp. 173, 177 (S.D.N.Y. 1988) (finding a non-discretionary duty to set a deadline for revision of a state implementation plan once EPA finds it substantially inadequate).

73. See, e.g., *Scott*, 741 F.2d at 998 (holding the State's several year delay in addressing CWA provisions governing waters of limited quality amounted to a constructive non-submission triggering EPA's mandatory duty to promulgate federal total maximum daily loads); *Alaska Center for the Env't v. Reilly*, 796 F. Supp. 1374, 1377 (W.D. Wash. 1992) (holding the State's thirteen-year failure to address CWA provisions governing waters of limited quality amounted to a constructive non-submission triggering EPA's mandatory duty to promulgate federal total maximum daily loads).

74. See, e.g., *Idaho Sportsmen's Coal. v. EPA*, 951 F. Supp. 962, 966-67 (W.D. Wash. 1996) (rejecting EPA's proposed twenty-five year schedule for promulgation of total

The distinction between these kinds of mandatory duty suits and others involving the exercise of agency discretion is “abstract and conceptual,” but also jurisdictional.<sup>75</sup> Non-discretionary citizen suits may not challenge discretionary agency actions, though the two are often bound up. An Administrator’s duty to set national standards may not become mandatory until EPA makes a discretionary threshold finding of harm.<sup>76</sup> The Administrator’s mandatory duty to issue regulations in the first instance may not have a specified deadline,<sup>77</sup> or may not include modifications sought later.<sup>78</sup> The Jicarilla and Navajo Nations sued EPA after it declined their request to strengthen national standards applicable to proposed coal-fired power plants in the Four Corners region. The court dismissed the Tribes’ citizen suit, finding the Administrator’s duty to determine whether allegedly new evidence justified revision of a standard was discretionary.<sup>79</sup>

Of course, these decisions do not foreclose all legal remedies where federal agency action impairs tribal interests.<sup>80</sup> Although their citizen suit failed, the court noted the Jicarilla and Navajo Nations could claim violation of the CAA provision governing standards revisions and the federal Administrative Procedures Act’s abuse of discretion standard.<sup>81</sup> Similarly, tribes’ health and welfare interests are usually sufficient to intervene when other parties bring these types of cases. The Warm Springs Tribes intervened in an environmental group’s suit challenging the Forest Service’s

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maximum daily loads for water quality limited waters); *Idaho Conservation League v. EPA*, 968 F. Supp. 546, 549 (W.D. Wash. 1997) (holding EPA has a mandatory duty to promulgate federal water quality standards promptly after disapproving state standards); *Sierra Club v. Thomas*, 828 F.2d 783, 796–97 (D.C. Cir. 1987) (holding plaintiffs could make an APA claim for EPA’s unreasonable delay in deciding whether to place strip mines on its list of pollutant sources subject to fugitive emissions regulation, which would fall within the jurisdiction of the Court of Appeals).

75. *Sierra Club v. Norton*, 313 F. Supp. 2d 1291, 1294 (S.D. Ala. 2004) (citing *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 663 (D.C. Cir. 1975)).

76. *E.g.*, *NRDC v. Thomas*, 689 F. Supp. 246, 254 (S.D.N.Y. 1988) (rejecting citizen suit to compel EPA listing of certain substances as hazardous air pollutants until the Agency made a threshold determination of harm, which was discretionary).

77. *Cf.* *Sierra Club v. Thomas*, 828 F.2d 783, 792 (D.C. Cir. 1987) (finding no non-discretionary duty for EPA to determine whether to regulate fugitive emissions from strip mines where no deadline could be readily ascertained from CAA).

78. *See Oljato*, 515 F.2d at 661.

79. *Id.*

80. Tribes also may invoke the provisions of the National Environmental Policy Act requiring federal actors assess the environmental consequences of their proposed major actions. *See, e.g.*, *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 270 (8th Cir. 1980); *Colorado Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1427 (C.D. Cal. 1985).

81. *See Oljato*, 515 F.2d at 663–66. *See also Montana Power Co. v. EPA and Northern Cheyenne Tribe*, 429 F. Supp. 683, 694 (D. Mont. 1977) (addressing an APA claim challenging EPA’s implementation of tribal standards brought by an affected air pollution source).

issuance of grazing permits without certification that state water quality standards would be protected.<sup>82</sup> The Navajo Nation intervened in a state's challenge to federal regulations for mining on Indian lands.<sup>83</sup> But, by their nature as reviews of discretionary decisions, cases like these tend to be less successful because of judicial deference to agency views on complex regulatory questions. Some courts, however, find the federal government's trust responsibility limits agency discretion.<sup>84</sup>

### C. Suits Against Regulated Entities for Pollution Violations

The second type of citizen suit more effectively controls localized, facility-specific impacts. These claims directly prosecute persons or facilities for violating specific effluent limitations, standards, or permit requirements.<sup>85</sup> They are generally brought in the district where the violation occurred or the source is located.<sup>86</sup>

Statutory and regulatory violations vulnerable to citizen suits are as broad as the environmental programs they represent. Generally, any failure by a regulated entity to comply with effluent limitations, control technology requirements, permit conditions, or other applicable substantive standards, is actionable under the citizen suit provisions. For example, a citizen might file suit against a company for failing to file required monitoring reports,<sup>87</sup> discharging pollutants into surface waters without a permit,<sup>88</sup> emitting pollutants in excess of permit limitations,<sup>89</sup> or building

82. *Oregon Natural Desert Assoc. v. Dombeck*, 172 F.3d 1092, 1095 (9th Cir. 1998) (finding state certification not required by the CWA).

83. *New Mexico v. U.S. Dept. of the Interior*, 820 F.2d 441, 442-44 (D.C. Cir. 1987).

84. *See, e.g., Pyramid Lake Paiute Tribe of Indians v. Morton* 354 F. Supp. 252, 256 (D. D.C. 1972) (rejecting the Department of the Interior's "judgment call" balancing the competing interests of an Indian tribe and adjacent water users); *Northwest Sea Farms, Inc. v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996) (finding agency's denial of fish farm permit in tribal treaty fishing area consistent with the federal trust responsibility).

85. *See, e.g.,* 33 U.S.C. § 1365(a)(1) (CWA); 42 U.S.C. § 7604(a)(1) (CAA); 42 U.S.C. § 6972(a)(1) (RCRA); 42 U.S.C. § 9659(a)(1) (CERCLA); 42 U.S.C. § 11046(a)(1) (EPCRA) (for specified violations); 42 U.S.C. § 300j-8(a)(1) (SDWA).

86. *E.g.,* 33 U.S.C. § 1365(c)(1) (CWA); 42 U.S.C. § 7604(c)(1) (CAA); 42 U.S.C. § 6972(a) (RCRA); 42 U.S.C. § 9659(b)(1) (CERCLA); 42 U.S.C. § 11046(b)(1) (EPCRA) (for specified violations).

87. *E.g., Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1110-11 (4th Cir. 1988) (allowing CWA citizen suit to proceed on claims of company's failure to file required quarterly discharge reports).

88. *E.g., Espanola Mercantile*, 72 F.3d at 831 (addressing CWA citizen suit for unpermitted water discharges).

89. *See, e.g., Chevron U.S.A., Inc.*, 834 F.2d at 1518 (9th Cir. 1987) (addressing CWA citizen suit for water discharges exceeding permit conditions); *Powell Duffryn*, 913 F.2d at 68-69 (same).

a new source of air pollution without required permits or in excess of permit conditions.<sup>90</sup>

For example, the Gros Ventre and Assiniboine Tribes filed a CWA citizen suit against a company responsible for water pollution from an abandoned mine located outside the Fort Belknap Indian Reservation.<sup>91</sup> The San Juan Pueblo filed suit against a metropolitan transit center for its unpermitted water pollutant discharges.<sup>92</sup>

Tribes may have other claims directly affecting polluting actors. The Quapaw Tribe's interests were affected by water discharges from abandoned mining operations. The Tribe brought suit in *parens patriae* under the common law doctrine of public trust against the successors-in-interest of the mine operator to redress the resulting contamination.<sup>93</sup>

The Puyallup Tribe and the Muckleshoot Tribe brought suit against former and current owners of a pulp and paper mill for hazardous substance releases into a marine embayment where the Tribes possess treaty rights.<sup>94</sup> Their claim was authorized by CERCLA, which designates tribes as trustees for natural resources "belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation[.]"<sup>95</sup> CERCLA also authorizes recovery of costs tribes incur in conducting removal or remedial actions for releases of hazardous substances.<sup>96</sup> The Oil Pollution Act contains similar provisions for tribal natural resource damages and cost recovery for remedial actions arising from oil spills into navigable waters or shorelines.<sup>97</sup>

These claims and citizen suits can often reach pollution generated by governmental facilities as well. Except for the Oil Pollution Act,<sup>98</sup> Congress has waived the federal government's sovereign immunity from suit in this context.<sup>99</sup> Congress also included state agencies and facilities in the citizen suit provisions, but the Court has held Congress' Commerce

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90. 42 U.S.C. § 7604(a)(3).

91. See Gros Ventre Tribe, Assiniboine Tribe, Fort Belknap Community Council, and Island Mountain Protectors Ass'n v. Pegasus Gold Corp. and Zortman Mining, No. 95-96-BLG-JDS (D. Mont.) (filed July 24, 1996).

92. Espanola Mercantile, 72 F.3d at 831.

93. Berrey, 439 F.3d. at 640.

94. Notice of Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act and the Clean Water Act, 60 Fed. Reg. 65,669-01 (Dec. 20, 1995).

95. 42 U.S.C. § 9607(f)(1).

96. 42 U.S.C. § 9607(a)(4)(A).

97. 33 U.S.C. § 2702(b)(1)(A), (2)(A).

98. *Id.* at § 2701(32) (excepting federal and state instrumentalities).

99. See, e.g., 33 U.S.C. § 1365(a)(1) (CWA); 42 U.S.C. § 9659(a)(1) (CERCLA); 42 U.S.C. § 7604(a)(1) (CAA); 42 U.S.C. § 6972(a)(1) (RCRA); 42 U.S.C. § 11046(a)(1) (EPCRA) (for specified violations); 42 U.S.C. § 300j-8(a)(1) SDWA; United States Dept. of Energy v. Ohio, 503 U.S. 607, 613 (1992) (finding waivers in RCRA and CWA).



Clause power does not include abrogating state sovereign immunity preserved by the 11th Amendment.<sup>100</sup> The Court has also said that the 11th Amendment bars suits by tribes without state consent.<sup>101</sup>

#### D. Possible Remedies

Citizen suits offer several types of relief that can serve tribal sovereignty interests. Judicial orders and private settlement agreements can halt or change ongoing actions harming tribal health or welfare interests, provide for civil monetary penalties, and award litigation costs including attorneys' fees to prevailing plaintiffs. Perhaps most significantly, though, favorable citizen suits can restore damaged tribal ecosystems, and through oversight of restoration projects, can help tribes develop regulatory capacity for later program assumptions, thus supporting tribal self-government interests.

##### 1. Injunctions, Civil Penalties and Litigation Costs

Of course, the point of a citizen suit is to stop action or inaction perceived as harming or threatening the plaintiff's interests. Where the plaintiff proves a statutory violation, the environmental statutes confer jurisdiction on federal courts to order EPA to discharge its mandatory duties.<sup>102</sup> Courts have directed EPA to issue regulations,<sup>103</sup> set standards,<sup>104</sup> make compliance determinations on state programs,<sup>105</sup> and replace defective state programs.<sup>106</sup> The statutes also authorize judicial orders enforcing effluent limitations or standards violated by the defendant facility.<sup>107</sup> Courts could order facilities to clean up toxic wastes illegally disposed<sup>108</sup>

100. *Seminole Tribe of Fla v. Florida*, 517 U.S. 44, 114 (1996).

101. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991).

102. *See, e.g.*, 33 U.S.C. § 1365(a) (CWA); 42 U.S.C. § 7604(a) (CAA); 42 U.S.C. § 6972(a) (RCRA); 42 U.S.C. § 9659(a) (CERCLA); 42 U.S.C. § 11046(a) (EPCRA) (for specified violations); 42 U.S.C. § 300j-8(a) (SDWA).

103. *See, e.g.*, *Town of Huntington v. Marsh*, 884 F.2d 648, 651 (2nd Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990).

104. *E.g.*, *Sierra Club v. Thomas*, 658 F.Supp. 165 (N.D. Cal. 1987) (air quality standards).

105. *E.g.*, *Scott*, 741 F.2d at 998.

106. *See, e.g.*, *Scott*, 741 F.2d at 998 (finding state inaction triggered federal duty to develop maximum water pollution loads); *Alaska Cntr. for the Env't v. Browner*, 20 F.3d 981, 987 (9th Cir. 1994) (same).

107. *See, e.g.*, 33 U.S.C. § 1365(a) (CWA); 42 U.S.C. § 7604(a) (CAA); 42 U.S.C. § 6972(a) (RCRA); 42 U.S.C. § 9659(a) (CERCLA); 42 U.S.C. § 11046(a) (EPCRA) (for specified violations); 42 U.S.C. § 300j-8(a) (SDWA).

108. *See, e.g.*, *Meghrig v. KFC Western, Inc.* 516 U.S. 479, 486 (1996) (noting RCRA's citizen suit authorizes injunctions for remediation of hazardous wastes presenting an imminent and substantial endangerment to health or the environment); *Gache v. Town of Harrison*, 813 F.Supp. 1037, 1044 (S.D.N.Y. 1993).

and refrain from future illegal activities.<sup>109</sup> But proving a violation does not mean that a permanent injunction necessarily follows.<sup>110</sup>

Citizen suit provisions commonly authorize courts to assess monetary civil penalties against regulated facilities for environmental violations.<sup>111</sup> Potential penalties are not insubstantial for repeated violations. The main regulatory statutes set a relatively modest maximum civil penalty (generally \$25,000), but the ceiling applies on a per violation per day basis.<sup>112</sup> The deterrent effect may be slight for a one-time incident, but for a facility whose regular on-going operations violate applicable standards the possible maximum penalty can be mind-boggling.<sup>113</sup> The prospect of huge penalties presumably serves a deterrence function,<sup>114</sup> and may bring defendants to the bargaining table sooner. However, courts have wide discretion in awarding penalties, and even in EPA prosecutions penalties rarely approach the authorized maximum.<sup>115</sup> Courts may not necessarily order penalties for every violation proven.<sup>116</sup> If assessed, penalties are paid to the U.S. Treasury and thus do not necessarily benefit the environment affected by the defendant's illegal activity.<sup>117</sup> And civil penalties do not apply to federal instrumentalities without Congressional

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109. *E.g.*, *Sierra Club, Lone Star Chapter v. Cedar Point Co.*, 73 F.3d 546 (5th Cir. 1996), *cert. denied*, 519 U.S. 811 (1996).

110. *See*, *Marsh*, 884 F.2d at 651.

111. *See, e.g.*, 33 U.S.C. § 1365(a) (CWA); 42 U.S.C. § 7604(a) (CAA); 42 U.S.C. § 6972(a) (RCRA); 42 U.S.C. § 9659(a) (CERCLA); 42 U.S.C. § 11046(a) (EPCRA) (for specified violations); 42 U.S.C. § 300j-8(a) (SDWA).

112. *See, e.g.*, 33 U.S.C. 1319(d) (CWA); 42 U.S.C. § 7413(b) (CAA); 42 U.S.C. § 6928(g) (RCRA); 42 U.S.C. § 11045(a) (EPCRA) (for specified violations); 42 U.S.C. § 300h-2(b)(1) (SDWA) (specified civil penalties).

113. *E.g.*, *Sierra Club v. Pub. Serv. Co. Colo.*, 894 F.Supp. 1455, 1456 (D. Colo. 1995) (19,000 alleged violations over a 5-year period, triggering a potential maximum penalty of \$475 million).

114. *See Laidlaw Envt'l Servs.*, 528 U.S. at 187.

115. *See, e.g.*, *United States v. Roll Coater*, 21 *Env'tl. L. Rep. (BNA)* 21,073, 21,074 (C.S.D. Ind. 1991) (approximately 37% of maximum penalty); *United States v. Smithfield Foods, Inc.*, 972 F.Supp. 338 (E.D.Va. 1997) (approximately 7% of maximum penalty).

116. *See, e.g.*, *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1354 (9th Cir. 1990) (approving consent decree settling a CWA citizen suit although it did not provide for a civil penalty to be paid to the Treasury); *Hawaii's Thousand Friends v. City and County of Honolulu*, 149 F.R.D. 614, 617 (D. Hawaii 1993).

117. *E.g.*, *Powell Duffryn Terminals*, 913 F.2d 64 (holding defendants' monetary payments, which a court-approved settlement agreement labeled as penalties, could only be paid to the U.S. Treasury).

waiver.<sup>118</sup> They also do not apply to suits against EPA for failure to perform non-discretionary duties.<sup>119</sup>

Recouping litigation expenses offers a more direct benefit to tribal citizen suit plaintiffs than penalties assessed on defendants. The statutes commonly authorize courts to award "costs of litigation (including reasonable attorneys' fees and expert witness fees)."<sup>120</sup> Such costs might include costs incurred in the course of administrative proceedings pertinent to the case.<sup>121</sup> Some statutes authorize cost awards to the prevailing or substantially prevailing parties,<sup>122</sup> and others allow awards to any party for which the court feels an award would be appropriate.<sup>123</sup> The standard probably differs for parties who prevail as defendants or interveners. The Tulalip Tribes prevailed as a defendant in a RCRA citizen suit but the court rejected their claim for attorneys' fees because the plaintiff's claims were not frivolous, unreasonable, or without foundation.<sup>124</sup> The Pyramid Lake Paiute Tribe prevailed as an intervening defendant in an Endangered Species Act citizen suit, but the court denied its claim for attorney fees, finding other parties had energetically litigated the same issue raised by the Tribe.<sup>125</sup> The Pueblo of San Juan also prevailed as an intervener in a citizen suit, but its failure to provide the plaintiff with required advance notice precluded its attorneys' fees claim.<sup>126</sup>

## 2. Supplemental Environmental Projects

The primary remedy sought in citizen suits against operating facilities is usually an injunction constraining future violations. Such an order helps avert the direct harm caused by continued illegal releases, but may not address harm already caused, nor its relation to an ecosystem's health in light of other pollution sources. Those issues can be targeted, however,

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118. Cf. *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607 (1992) (holding the CWA's and RCRA's provisions for federal compliance were not unequivocal waivers for civil penalties designed to punish the government for past violations), *with* *Fed. Facility Compliance Act of 1992*, Pub. L. No. 102-386, § 102(a), 106 Stat. 1505, 1506 (1992) (amending 42 U.S.C. § 6961(a) to waive federal immunity from civil penalties under RCRA).

119. See, e.g., 42 U.S.C. § 7604(a) (CAA).

120. See, e.g., 33 U.S.C. 1365(d) (CWA); 42 U.S.C. § 7604(d) (CAA); 42 U.S.C. § 6972(e) (RCRA); 42 U.S.C. § 9659(f) (CERCLA); 42 U.S.C. § 11046(f) (EPCRA) (for specified violations); 42 U.S.C. § 300j-8(d) (SDWA).

121. *E.g.*, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986) (CAA).

122. See, e.g., 33 U.S.C. § 1365(d) (CWA); 42 U.S.C. § 6972(e) (RCRA).

123. See, e.g., 42 U.S.C. § 7604(d) (CAA); 42 U.S.C. 300j-8(d) (SDWA).

124. *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 240-41 (9th Cir. 1995).

125. *Carson-Truckee Water Conservation District v. Secretary of the Interior*, 748 F.2d 523, 526 (9th Cir. 1984).

126. *Espanola Mercantile*, 72 F.3d at 833 (rejecting Pueblo's claim despite notice given by a co-plaintiff).

through the remedy of a supplemental environmental project (SEP). A SEP is a beneficial environmental project supplemental to the defendant's regulatory obligations. Well-designed SEPs offer potentially significant benefits to tribal health and welfare and self-government interests.

Unlike civil penalties that are paid into the U.S. Treasury,<sup>127</sup> supplemental environmental projects focus on the environment affected by the illegal action. Their primary function is to improve, protect, or reduce risks to public health or the environment at large.<sup>128</sup> EPA categorizes acceptable SEPs under the labels Public Health, Pollution Prevention, Pollution Reduction, Environmental Restoration and Protection, Facility Audits, Industry Compliance Training, and Emergency Preparedness.<sup>129</sup> Relevant to tribal suits, EPA posits environmental justice as a goal overarching all categories of SEPs, and particularly encourages SEPs in communities where environmental justice may be an issue.<sup>130</sup>

Courts approve SEPs in settlement agreements if they are reasonable, equitable and do not violate law or public policy.<sup>131</sup> A SEP must have an adequate nexus with the harm caused by the illegal actions.<sup>132</sup> Settlements may require the defendant finance SEPs undertaken by the citizen suit plaintiff or other non-federal entities.<sup>133</sup>

The wide variety of SEPs can have important benefits for tribal health and welfare interests. Common SEPs seek restoration of damaged areas,<sup>134</sup> or replacement where restoration is impracticable.<sup>135</sup> SEPs

127. The 1990 amendments to the CAA specify that penalties received from citizen suits are to be dedicated for air compliance and enforcement activities. 42 U.S.C. § 7604(g)(1). Up to \$100,000 may be paid in lieu of penalties for SEPs. *Id.* at § 7604(g)(2).

128. Interim Revised EPA Supplemental Env'tl. Projects Policy, 60 Fed. Reg. 24,856, 24,857 (May 10, 1995) [*hereinafter* SEP Policy].

129. *Id.* at 24,858-59.

130. *Id.* at 24,857, 24,861.

131. *E.g.*, *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990). Only the CAA specifically authorizes courts to order SEPs, *see* 42 U.S.C. § 7604(g)(2), but courts routinely approve settlement agreements containing SEPs.

132. *See, e.g.*, *United States v. Roll Coater, Inc.*, 21 Env'tl. L. Rep. (BNA) 21073, 21077-78 (S.D. Ind. 1991) (finding sufficient nexus); *Pennsylvania Env'tl. Def. Found. v. Bellefonte Borough*, 718 F. Supp. 431, 437 (M.D. Pa. 1989) (finding insufficient nexus).

133. *See, e.g.*, *Atl. States Legal Found., Inc. v. Minnesota Mining and Mfg.*, 18 Env't Rep. (BNA) 2395, 2396 (D. Minn. 1988) (reaching such a settlement under the CWA); *Atl. States Legal Found., Inc. v. Simco Leather Corp.*, 755 F. Supp. 59, 61 (N.D.N.Y. 1991) (reaching such a settlement under the CWA).

134. *See, e.g.*, *N.W. Env'tl. Def. Ctr. v. Unified Sewerage Agency of Wash. County*, 21 Env'tl. L. Rep. 20,676 (D. Or. 1990) (approving settlement establishing \$900,000 restoration fund for affected river); *Connecticut Fund for the Env't v. Upjohn Co.*, 21 Env't Rep. (BNA) 9 (D. Conn. 1990) (reporting settlement establishing \$1.2 million trust fund for river cleanup).

135. *See, e.g.*, *Sierra Club, Inc. v. Port Townsend Paper Corp.*, 19 Env't Rep. (BNA) 1434, 1434-35 (W.D. Wash. 1987) (reporting settlement requiring payment of \$137,500 to the Nature Conservancy to buy replacement wetlands); *Sierra Club v. Pub. Serv. Co. Colo.*,

sometimes address damaged areas by seeking to decrease other sources of pollution affecting the damaged area,<sup>136</sup> and increase related enforcement.<sup>137</sup>

SEPs may also indirectly benefit tribal self-government interests. Development of effective tribal health and environmental programs requires reliable data. SEPs can offer an opportunity to collect and assemble important baseline data on human health<sup>138</sup> and environmental quality in formats usable for later program development and operation.<sup>139</sup> The data needs of the Gros Ventre and Assiniboine Tribes benefited significantly from a CWA citizen suit against the owner of an off-reservation abandoned mine. The Tribes' settlement included SEP provisions for two multi-year studies expected to cost over \$500,000.<sup>140</sup> One would focus on the pathways by which Reservation residents were exposed to contaminants and the impacts of that exposure. The other study would assess the health of the Reservation's aquatic ecosystem, specifically for the purpose of establishing trends in water and sediment quality.

Tribal governmental infrastructure and capacity can also be served by SEPs.<sup>141</sup> The Gros Ventre SEP provided for over \$1.5 million of improvements to drinking water systems for several Fort Peck Reservation communities and housing developments.<sup>142</sup> It also involved tribal staff and tribal college students in the aquatic study, potentially increasing tribal environmental management capability. In a similar vein, a citizen suit in

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Inc., No. 93-B-1749 (D. Colo. May 5, 1996) (consent decree lodged) (\$2,000,000 for purchase of lands and/or conservation easements to protect and enhance air quality and related values).

136. E.g., Pub. Serv. Co. Colo., No. 93-B-1749 (\$250,000 for conversion of vehicles and wood stoves in the area to natural gas).

137. E.g., N.W. Envtl. Def. Ctr., 21 Env't L. Rep. 20,676 (reporting settlement that included \$100,000 payment to the State to fund additional CWA enforcement actions).

138. EPA's SEP policy envisions SEPs that provide diagnostic, preventative and/or remedial human health care related to the violation, including analyzing epidemiological data and conducting medical examinations of persons affected. SEP Policy, 60 Fed. Reg. at 24,858. Additionally, tribes can seek TAS status for conducting health assessments on releases of hazardous substances covered by CERCLA. See 42 U.S.C. § 9626(a) (stating that EPA may treat tribes as states for purposes of section 104(i) regarding health authorities); 42 U.S.C. § 9604(i)(15) (allowing health assessments by states that show capacity).

139. See, e.g., Minnesota Mining and Mfg., 18 Env't Rep. (BNA) at 2396 (reporting settlement including development of water quality computer database); Simco Leather Corp., 755 F. Supp. at 61 (reporting settlement including study of water pollution sources).

140. E.g., Gros Ventre Tribe, No. 95-96-BLG-JDS at 40-45.

141. Although not technically a SEP, the institutional capacity of the Oglala Sioux Tribe benefited from a settlement agreement promising additional EPA support for the Tribe's water quality management efforts. Tripp Baltz, *Agency to Assist South Dakota Tribe With Contamination Problems in River*, 30 ENV'T. REP. 986 (1999) (describing settlement of the Tribe's CWA suit against EPA for failing to require the State of South Dakota to identify water quality-impaired waters).

142. Gros Ventre Tribe, No. 95-96-BLG-JDS at 45-47.

Alaska included as a SEP college scholarships for Alaska Natives studying natural resource management.<sup>143</sup> SEPs might also assist tribal governments in developing emergency preparedness capacity,<sup>144</sup> and educating the tribal community on pollution prevention.<sup>145</sup>

### III. TRIBAL CITIZEN SUITS AS SOVEREIGN ACTIONS

Violations of federal environmental laws can threaten important tribal health and welfare interests inside and adjacent to Indian country. Reactive tribal suits seeking compliance are narrower in scope than prospective regulatory programs, but they can stop further illegal injuries, avoid future harm, and restore damaged ecosystems. Thus, like programmatic actions, tribal citizen suits help discharge the tribe's public trust responsibility for maintaining interests important to tribal welfare.<sup>146</sup> In this sense, prosecution of tribal citizen suits can be understood as an exercise of inherent tribal sovereignty.

Of course, a tribe's ability to use the citizen suit tool originates in federal not tribal law. But governmental sovereignty is not limited to one's legislatively enacted value judgments. The Court long ago rejected the view that a government seeking to benefit from associating with another thereby waives its inherent sovereignty.<sup>147</sup> The treaty era contains hundreds of examples of tribes making sovereign decisions whether and under what terms to ally with the United States and thereby benefit (on occasion) from federal law. More recently, tribes have elected in several hundred tribal TAS applications to amplify their environmental value judgments through incorporation with federal command and control regulatory programs.

Perhaps more relevant here are the many times state governments have invoked federal law to protect their environmental interests. No one would suggest a state somehow waives its sovereignty by seeking a federal common law remedy against interstate pollution,<sup>148</sup> using federal

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143. NRDC v. ARCO Alaska, Inc., 24 Env't Rep. (BNA) 12 (D. Alaska 1993).

144. See SEP Policy, 60 Fed. Reg. at 24,859 (SEP could provide equipment and/or training to emergency response or planning entities (including tribes) charged by the Emergency Planning and Community Right-to-Know Act with assessing the dangers of hazardous chemicals present at facilities within their jurisdiction, developing emergency response plans, and training emergency response personnel to better respond to chemical spills).

145. Minnesota Mining and Mfg., 18 Env't Rep. at 2396.

146. See, e.g., Berrey, 439 F.3d at 640 n.1 (tribal claims in *parens patriae* under public trust doctrine against the owner of an abandoned mine for contamination of tribal fee lands).

147. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

148. E.g., Illinois v. Milwaukee, 406 U.S. 91, 103-04 (1972) (noting judicial power to fashion federal common law remedies for a state's claim against pollution originating in another state, unless preempted by Congress).

restrictions on interstate pollution to challenge another state's program<sup>149</sup> or proposed permit.<sup>150</sup> The same seems true for citizen suits filed by states<sup>151</sup> and their subdivisions.<sup>152</sup>

Likewise, a tribe's decision to invoke federal citizen suit provisions implicates sovereign concerns at multiple levels. Absent an unusual citizen referendum, the tribe's legislative body undertakes that decision as the people's chosen representative. An immediate sovereignty question arises as to whether the tribe's citizens delegated to that governmental body a general health and welfare power. The scope of any such delegated power, and the principles guiding its valid exercises, are relevant sovereignty issues.

These questions raise the same human health and general welfare considerations inherent in developing and administering environmental regulatory programs: identifying known or anticipated negative impacts from the proposed activity; evaluating the relation of those impacts to legitimate tribal health and welfare interests; comparing the efficacy of alternatives for mitigating or avoiding significant harms; assessing available financial and other resources necessary to take action; and determining the relative priority of these concerns among other important tribal interests.

These governmental deliberations take place in a broader context that reflects their sovereign nature. For some tribes, one alternative to a citizen suit may be to use existing tribal regulatory programs, developed and administered as sovereign control mechanisms. The majority of tribes, however, lack existing regulatory infrastructure. For them, a citizen suit is a rudimentary tribal environmental program of sorts; the tribe steps into a temporary regulatory-like role administered on a site-specific or facility-specific basis. The tribe does not set the initial requirements, but it does influence whether and how they are enforced, and those decisions stem from the tribe's assessment of risks to self-government interests.

Tribal citizen suits can also help build institutional capacity for later program assumptions. Preparing and prosecuting the case will likely expand tribal experience with federal environmental law and policy, and the complex science behind them. Negotiations with defendants, EPA and state agencies open lines of communication important for effective tribal

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149. *E.g.*, *Air Pollution Control Dist. of Jefferson County, Kentucky v. EPA*, 739 F.2d 1071 (6th Cir. 1984) (seeking EPA order for reduction of emissions by Indiana power plant); *New York v. EPA*, 710 F.2d 1200 (6th Cir. 1983) (challenging EPA's approval of Tennessee's anti-pollution plan); *State of Connecticut v. EPA*, 696 F.2d 147 (2nd Cir. 1982) (challenging EPA's approval of New York's anti-pollution program).

150. *E.g.*, *Arkansas v. Oklahoma*, 503 U.S. 91 (1992).

151. *E.g.*, *United States Dept. of Energy v. Ohio*, 503 U.S. 607 (1992).

152. *See* JACKSON B. BATTLE & MAXINE I. LIPELES, *WATER POLLUTION* 514 (1998) (discussing 14 citizen suits filed by the Milwaukee Metropolitan Sewerage District against facilities making indirect dischargers to the District's treatment works).

programs, and provide venues for increasing respect among the participants and thus perhaps decreasing the chance of challenges to future tribal program implementation.

Supplemental environmental projects may help address tribal resource limitations hindering program development. SEP studies on the impacts of violations on particular ecosystems can provide equipment and training for tribal environmental agencies useful for broader environmental issues. Conducting studies and restoration projects builds tribal administrative experience, and hence capacity, as well as demonstrating the tribe's commitment to environmental management pertinent to later TAS program applications.

These incremental steps toward fuller environmental management, and the direct health and welfare benefits they serve, support characterizing a tribe's prosecution of a citizen suit as an inherent sovereignty exercise. It also can be seen as a strategic means to protect important self-government interests without putting sovereignty at risk. Direct tribal regulation of non-Indian polluters raises several uncertain federal Indian law questions. Tribal officials and advocates are apprehensive over the shrinking scope of inherent tribal sovereignty and the diminishing size of Indian country under the Supreme Court's recent cases. Yet, other tribal interests are still vulnerable and in need of protection.

Tribal citizen suits offer a measure of environmental control without putting sovereignty at stake. The gravamen of a citizen suit is that the defendant violated federal law by failing to comply with applicable standards or requirements. An unsuccessful citizen suit merely means the defendant did not violate federal law, or the tribe did not prove the violation. Whether the tribe possesses inherent regulatory authority over the defendant is immaterial. Also unrelated is whether the defendant's activities occurred in Indian country. Hence, a tribe who initiates a citizen suit against an on-reservation polluter does not put sovereignty at risk as it may in seeking TAS program assumption.

A corollary value of citizen suits is their ability to reach areas outside Indian country. Historical pressures forced tribes to cede huge portions of their aboriginal lands to the United States. Some of those lands contain sites and resources of continuing cultural and religious significance.<sup>153</sup> In many instances, tribes' uses of these sites and resources are protected by treaty, but because they are outside Indian country, tribes may not regulate activities of non-Indians negatively affecting them. But tribal jurisdiction is not a hindrance to a citizen suit. Where compliance with federal requirements helps protect tribal interests outside Indian country, a tribal

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153. *E.g.*, *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 442-43 (1988) (three tribes filed CWA and other claims challenging timber sales in aboriginal territories).



citizen suit is an important exercise of sovereign responsibility and authority.

## CONCLUSION

The existence of any government's inherent sovereignty is premised on an expectation that the governmental body will take any and all legitimate actions perceived necessary for protecting the citizens' interests. Subject to constitutional or other tribal law constraints, tribal governments presumably assume responsibility for Indian country human health and environmental quality. Failing to consider citizen suits and other related claims as a means serving those ends might be considered an abdication of a tribe's sovereign responsibilities.

The direct compliance control over a particular facility offered by citizen suits can benefit tribal health and welfare substantially. Unpermitted or excessive pollution from operating and abandoned sources could be curbed or mitigated, health and environmental quality data useful for later program actions could be obtained, and ecosystems damaged by pollution could be restored or replaced. Knowledge and experience gained through those ventures could help build tribal infrastructure and tribal management capacity. Institutional competence is the key to creating comprehensive regulatory programs that operate prospectively across a wider range of polluting actions.

Citizen suits are retroactive, violation-specific claims. They are not programmatic approaches to achieving strategic goals. But they can act as a sort of substitute or interim program for particular violators where a regulatory gap otherwise exists. They are not hindered or threatened by judicial limitations on the extent of tribal sovereignty or Indian country. The initial investment of time and money is likely more favorable, and the suit can contribute directly to later program development. And significantly, tribal citizen suits may serve continuing tribal uses of ceded territories outside Indian country.