

NEW OPPORTUNITIES FOR NATIVE AMERICAN TRIBES TO PURSUE ENVIRONMENTAL AND NATURAL RESOURCE CLAIMS

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ABSTRACT

Native American tribes should take advantage of recent trends in environmental law to pursue claims for damages to their natural resources and their well-being. This article considers civil actions in tribal courts, citizen suits, toxic torts, and claims under parens patriae. While tribal regulatory jurisdiction in the environmental arena has increased, tribal jurisdiction has declined. This has led to an increase in environmental citizen suits, which have enjoyed varying degrees of success. Toxic torts have emerged as an alternative to the traditional route of pursuing claims under federal statutes. Parens patriae is another unexplored method by which tribes may assume the same natural resource defense authority that is allocated to states.

I. INTRODUCTION

Today's Native American reservations are some of the most polluted areas of the country. Reservations do not share in the wealth of America's powerful industries, yet bear a disproportionate amount of its pollution.¹ Many tribes have sought legal recourse to clean up their reservations. This paper examines different legal

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1. A 1985 Environmental Protection Agency study of 25 reservations found 1200 toxic waste sites, while another study showed 46% of all Native Americans live near abandoned toxic waste dumps. See Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1483 (1994). A more recent example is that of a toxic waste dump on a Native American reservation in New York. Turtles in this area were "so full of PCBs that they [were] considered toxic hazardous waste' and [had to] be disposed of in toxic hazardous waste dumps." Neil A.F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 STAN. ENVTL. L.J. 338, 344 (1996) (examining World Council of Churches Programme to Combat Racism, Materials for United Nations Commission on Human Rights Briefing (1995)).

methods that can be used to clean up pollution on reservations, specifically through tribal courts, citizen suits, toxic torts, and *parens patriae* claims. While the federal judiciary has shown an increasing willingness to allow states to sue polluters for damages to natural resources, Native Americans have yet to follow this course. Using the model of *parens patriae* authority allocated to states, Native American tribes should take advantage of their unique autonomy to pursue toxic tort and natural resource damage claims.

II. THE ENVIRONMENTAL STATE OF NATIVE AMERICAN RESERVATIONS

In recent years, Indian Country² has increasingly become home to hazardous waste sites, including those for nuclear waste.³ Multiple factors have precipitated this condition. First, the financial situation and political disenfranchisement of Native Americans make them particularly vulnerable candidates for exploitation. Second, the environment is a relatively new concern for Native American activists. Finally, the confusion surrounding the applicability of environmental regulations to Indian reservations creates a fog in which some polluters can escape notice.

A. Exploitation

Polluters are attracted to Indian reservations for the same reason they are attracted to minority communities in the southeast—poverty, political disenfranchisement, and the resulting potential for exploitation.⁴ Because of the dire economic situation on many reservations,⁵ tribal members are not in a strong position to refuse a polluter's financial offer, no matter what the long-term health consequences may be. Tribes who do protect their environmental rights often find themselves in a weak position to politically challenge the polluter.⁶ Fur-

2. "Indian country" is a jurisdictional term of art that encompasses all lands within reservation boundaries, dependent Indian communities, and all Indian allotments. See 18 U.S.C. § 1151 (2000).

3. Nancy B. Collins & Andrea Hall, *Nuclear Waste in Indian Country: A Paradoxical Trade*, 12 LAW & INEQ. 267 (1994).

4. See generally, Hillary Gross, et al., *Environmental Justice: A Review of State Responses*, 8 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 41 (2001).

5. Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 805 (1998).

6. Richard A. Du Bey et al., *Protection of the Reservation Environment: Hazardous Waste Management on Indian Lands*, 18 ENVTL. L. 449, 450 (1988).

ther, they experience cognitive dissonance between their desires to maintain traditional environmental values and to pursue a path of self-determination with regard to economic development.⁷

Because the issue of a clean environment is often framed as being in conflict with economic success, many tribes have viewed environmental action as something beyond their reach.⁸ A tribe with high unemployment cannot afford to turn down economic opportunities, regardless of their consequences. Polluters understand this fact and seize upon it. Tribal governments welcome what they see as an opportunity for economic self-sufficiency, including full employment of tribal members and investment capital for future projects.⁹

For the tribes who seek redress against a polluter, a lack of resources adversely affects political mobilization against the offender. As one scholar noted, "The companies and even the agencies which regulate their operation have allowed such siting because communities of color are lacking in resources such as financial or political organizations to defeat them."¹⁰

B. Environmentalism as a Relatively New Concern

For advocates of Native American sovereignty, environmentalism is a relatively new concern. Native American activists in the 1960s viewed environmentalists with skepticism.¹¹ Environmentalists appeared to be promoting issues that essentially detracted from what

7. In a letter to the members of the Mescalero Apache tribe, Wendell Chino, tribal president for the past three decades, said the tribal council believed that income from the repository "could provide an opportunity for long-term independence and prosperity for our tribe that we would be negligent to ignore or reject." Matthew L. Wald, *Tribe on Path to Nuclear Waste Site*, N.Y. TIMES, Aug. 6, 1993, at A12. Another Mescalero tribe member had a different view: "We are once again . . . put in that position of being guinea pigs for the U.S. government and I don't like it. . . . If it was so safe, why don't they put it in their backyard instead of trying to shove it off on us?" *All Things Considered: New Mexico Considers Nuclear Waste Site Nearby* (NAT'L PUB. RADIO broadcast, Aug. 29, 1993) (quoting tribal member Donna Lynn Torres). See also Louis G. Leonard, Comment *Sovereignty, Self-Determination, and Environmental Justice in the Mescalero Apache's Decision to Store Nuclear Waste*, 24 B.C. ENVTL. AFF. L. REV. 651, 681 (1997); Sandi B. Zellmer, *Article, Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D. L. REV. 381 (1998) (discussing conflict between tribal priorities and the Endangered Species Act).

8. Russel Lawrence Barsh, *The Challenge Of Indigenous Self-Determination*, 26 U. MICH. J.L. REFORM 277, 311 (1993).

9. Foster, *supra* note 6, at 805.

10. Joseph Hill, *Human Rights, Environment, & Community: A Workshop held at Buffalo Law School*, 4 BUFF. ENVTL. L.J. 117 (1998).

11. Peter M. Manus, *The Owl, The Indian, The Feminist, And The Brother: Environmentalism Encounters The Social Justice Movements*, 23 B.C. ENVTL. AFF. L. REV. 249 (1996).

was considered the real issue for Native Americans: the white man's racism and the resulting paternalism of the state.¹² These Native-American advocates resisted efforts to force their struggles into a narrow distributive paradigm of environmental racism, focusing instead on their tribes' ability to exercise their unique sovereignty.¹³ They viewed the positions advocated by environmentalists as a manifestation of their lack of sovereignty problem, and not as a solution to an impending health crisis.¹⁴

One example of this line of thinking is seen in the Campo Band of Mission Indians' 1994 initiative to locate a large waste facility on their reservation.¹⁵ Faced with environmental protests and pressure from outside advocacy groups, the tribal leaders refused to allow environmentalists to prevent the siting. They were intent upon defeating the "paternalistic" and "racist" assumption that "if an Indian community decides to accept such a project, it either does not understand the potential consequences or has been bamboozled by an unprincipled waste company."¹⁶ These Native Americans rejected the thought pattern of environmental groups that "that Indians lack the intelligence to balance and protect adequately their own economic and environmental interests."¹⁷ Environmental advocacy was yet another example of the white man's paternalistic attitude which had all but eradicated Native Americans over the years.¹⁸ The tribe's victory in obtaining the siting reflects the failure of the environmental movement to adequately consider the element of sovereignty in environmental justice.

C. Confusion Surrounding Environmental Regulatory Authority

Indian reservations hold a unique place in American federalism. The federal and state governments have had difficulty trying to balance public policy goals with the sovereignty promised to Native Americans.¹⁹ In the spirit of granting tribes more control over their

12. *Id.*

13. Foster, *supra* note 6, at 805.

14. *Id.* at 806.

15. Ken Gover & Jane L. Walker, *Escaping Environmental Paternalism: One Tribe's Approach to Developing a Commercial Waste Disposal Project in Indian Country*, 63 U. COLO. L. REV. 933, 938 (1992) (quoting the tribe's General Council).

16. *Id.*

17. *Id.*

18. *Id.*

19. Heather A. Weckbaugh, *Tenth Circuit Surveys: Federal Indian Law*, 76 DENV. U. L. REV. 845, 875 (1999).

land, the EPA developed a policy²⁰ in 1984 by which tribes have authority over “reservation lands” and the “reservation populace.” Congress followed suit, amending many of the major environmental acts to allow tribes to receive state treatment.²¹ Unlike states, however, areas considered Indian Country encompass relatively small pieces of land enclosed within states.²² The existence of a separate Indian sovereignty in environmental regulation is problematic, as the actions within the small area affect the non-tribal members outside the reservation (and vice-versa).²³ While in some cases, more strict Indian regulations have been the source of discord between tribes and states, it is more often the case that Indian laws are less strict.²⁴ Companies have seized upon these variances to take advantage of the most lax law in a given area.²⁵ The federal government has also been a culprit both in causing inadequate protections on reservations, and in taking advantage of the more lax standards.²⁶

20. Environmental Protection Agency, Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984), *available at* <http://www.epa.gov/indian/1984>; *see also* Washington Dep't of Ecology v. EPA, 752 F.2d 1465, 1471 (4th Cir. 1985).

21. The Safe Drinking Water Act (SDWA) § 1451, Pub. L. No. 99- 339, 100 Stat. 665 (passed in 1986, codified as amended at 42 U.S.C. § 300j-11 (2000)). The Clean Water Act (CWA) § 518, Pub. L. No. 100- 4, 101 Stat. 76 (passed in 1987, codified as amended at 33 U.S.C. § 1377 (2000)). The Clean Air Act (CAA) § 164, Pub. L. No. 101- 549, 104 Stat. 2399 (amended in 1990 to allow tribal regulation of air quality on reservations, codified as amended at 42 U.S.C. § 7474 (2000)). The CWA, the SDWA, and the CAA all authorize EPA to promulgate regulations specifying how the EPA will treat tribes in the same manner in which it treats states.

22. *See* 18 U.S.C. § 1151 (2000).

23. Janet K. Baker, *Tribal Water Quality Standards: Are There Any Limits?*, 7 DUKE ENVTL. L. & POL'Y F. 367, 367 (Spring 1997).

24. Bill Lambrecht, *Illegal Dumpers Scar Indian Land . . . Indifference Endangers Reservations*, ST. LOUIS POST-DISPATCH 11A (Nov. 17, 1991) (detailing how a member of the Onondaga Tribe let a sandblaster deposit tons of granular lead-filled material on his land for \$50 when the sandblaster would otherwise have had to pay \$25,000 to properly bury the waste in a landfill); Larry B. Stammer and Louis Sahagun, *Profits vs. Toxics; Indian Land Opening to City Wastes*, L.A. TIMES 1 (Sept. 26, 1987) (describing a garbage hauler in California who dumped twenty tons of waste on a tribal reservation for only \$75, but would have had to pay \$1,600 to deposit it at a state-regulated dump); Ralph Frammolino and Amy Wallace, *Landfill Lease on Indian Land Has Substandard Controls*, L.A. TIMES B1 (April 14, 1991) (describing how a Pittsburgh waste disposal company negotiated with a California tribe to build a dump on the tribe's land that the state would have denied outside of the reservation).

25. *See, e.g.,* Montana v. EPA, 137 F.3d 1135 (9th Cir.), *cert. denied*, 525 U.S. 921 (1998) (non-Indian industries were discharging pollutants from non-Indian fee land that affected the Kootenai and Salish Tribes of the Flathead Indian Reservation).

26. While the EPA has a policy of “promot[ing] an enhanced role for tribal government in relevant decisionmaking and implementation of Federal environmental programs on Indian reservations,” EPA Policy for Program Implementation on Indian Lands (Dec. 19, 1980), quoted in State of Washington, Dep't of Ecology v. EPA, 752 F.2d 1465, 1471 (9th Cir. 1985), the agency recognizes that “[i]n general, EPA programs have not been effectively applied on Indian reser-

Confusion also stems from the fact that different environmental laws accord the tribes with different degrees of power. While the Clean Water Act (CWA), the Safe Drinking Water Act (SDWA), and the Clean Air Act (CAA) treat tribes as states for environmental regulatory purposes, the CWA²⁷ and SDWA²⁸ have not been considered “delegations” of federal authority whereby a tribe could extend its authority to non-members.²⁹ The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),³⁰ on the other hand, does *not* treat tribes as states, although they are given many of the same powers.³¹ CERCLA treats tribes differently than states by waiving, for remedial actions on tribal lands, requirements that apply to such actions within states.³² However, tribes are not assured of having at least one site within their jurisdiction included on

uations.” Department of Housing and Urban Development, and Certain Independent Agencies Appropriations for Fiscal Year 1987: Hearings Before the Subcomm. on HUD-Independent Agencies of the Senate Comm. on Appropriations, Part 2, 99th Cong., 2d Sess. 806 (1986) at 815. In some occasions, the EPA has been unwilling to request adequate funding for Indian programs. *See, e.g.*, Department of Housing and Urban Development-Independent Agencies Appropriations for 1988: Hearings Before the Subcomm. on HUD-Independent Agencies of the House Comm. on Appropriations, 100th Cong., 1st Sess. 675 (1987) (EPA failed to request the funds necessary to conduct surveys of reservation pollution problems as called for in statutes). *See* Nancy B. Collins & Andrea Hall, *Article, Nuclear Waste in Indian Country: A Paradoxical Trade*, 12 LAW & INEQ. 267, 297 (1994) (discussing the federal government’s nuclear development scheme and performed pursuant to leases entered into by the Bureau of Indian Affairs: “In exchange for the income generated by the tribe’s natural resources, Native Americans received a legacy of cancer, death, and pollution.”)

27. *See, e.g.*, 54 Fed. Reg. 39101 (1989) (Water Quality Standards (WQS) proposal stating that “Clean Water Act authorizes use of existing tribal authority . . . but it does not grant additional authority to Tribes.”).

28. *See* 52 Fed. Reg. 28111, 28113 (1987) (proposal for SDWA Indian regulations, stating that a tribe must have its own authorities to operate the program: “EPA does not delegate its own authority. Nothing in this proposal is intended to alter any pre-existing authority or immunity any Indian tribe may have by way of third parties.”).

29. Nevertheless, if a tribe can demonstrate inherent authority over on-reservation water resources for waters that lie within the reservation’s exterior borders, under the guidelines established in *Montana v. United States*, 450 U.S. 544 (1981), it acts under federal authority. *See* WILLIAM P. YELLOWTAIL, REGIONAL ADMINISTRATOR FOR EPA REGION 8, DECISION DOCUMENT: APPROVAL OF CONFEDERATED SALISH AND KOOTENAI TRIBES APPLICATION FOR TREATMENT AS A STATE UNDER SECTION 303 OF THE CLEAN WATER ACT (Feb. 27, 1995). *But see* *Yankton Sioux Tribe v. S. Miss. Waste Mgmt. Dist.* 890 F. Supp. 878, 879 (D.S.D. 1995) (holding that although Yankton Sioux Reservation was not diminished by 1892 agreement providing for sale of surplus lands, the tribe nevertheless failed to establish jurisdiction over solid waste landfill under the *Montana* test).

30. CERCLA § 126, 42 U.S.C. § 9626 (2000).

31. CERCLA § 126, 42 U.S.C. § 9626 (2000).

32. These requirements involve payment of a share of the costs of remedial actions, assurance of future maintenance of a remedy, and assurance that a suitable facility is available for disposing of the wastes at the site. CERCLA § 104(c)(3), 42 U.S.C. § 9604(c)(3) (2000).

the national priorities list for remedial action.³³ Further, under the Resource Conservation and Recovery Act (RCRA), which sets minimum guidelines and standards for the disposal of hazardous and solid wastes, there is no provision for solid waste regulation on Indian lands that do not exercise independent means and regulate themselves.³⁴

III. CURRENT LEGAL METHODS IN ADDRESSING POLLUTED RESERVATIONS

There are three dominant methods that can be used in court to address pollution on reservations. Claims may be brought in tribal courts, in federal courts under the citizen suit provisions of federal environmental regulations, or as toxic tort actions.

A. Indian Court Jurisdiction

While in recent years federal environmental acts have expanded the power of tribes to control natural resources and pollution within their boundaries,³⁵ federal jurisprudence has narrowed the tribal judicial power necessary to make tribal authority a reality. In theory, a tribal court controls where there is personal jurisdiction over the litigants (based on the tribal constitution), territorial jurisdiction (based on the relation of the events of the case to Indian Country), and subject matter jurisdiction (which may be exclusive or concurrent with the state or the federal courts).³⁶ In the last 50 years, however, tribal court authority has significantly eroded. First, tribes are less likely to have jurisdiction over a case.³⁷ Second, litigants are often not required to exhaust their remedies in a tribal court system before proceeding to a state or federal court.³⁸ Third, there is no prescribed method by

33. 42 U.S.C. § 9626 (2000).

34. Foster, *supra* note 6, at 805, n.123. See also *Backcountry Against Dumps v. EPA*, 100 F.3d 147 (D.C. Cir. 1996) (holding that Native American tribes are not states under RCRA).

35. Environmental Protection Agency, Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984), available at <http://www.epa.gov/indian/1984>; see also *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465, 1471 (4th Cir. 1985).

36. An example of tribal-state concurrent jurisdiction is a divorce proceeding in which one spouse is a tribal member domiciled on the reservation and the other spouse is domiciled off the reservation. Either the state or the tribal court could hear such a matter. Nancy Thorington, *Article, Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments*, 31 MCGEORGE L. REV. 973, 989 (2000).

37. *Id.* at 1036.

38. *Id.* at 1035.

which state or federal courts must honor a tribal judgment.³⁹ This is typically left to the discretion of the state, which may or may not have legislation in place to recognize these judgments.⁴⁰

1. Jurisdiction

*Montana v. United States*⁴¹ severely restricted tribal jurisdiction, establishing a presumption against the tribal regulation of non-Indians in the absence of some factor that would directly affect the health and welfare of the tribe.⁴² In *Strate v. A-1 Contractors*,⁴³ the Supreme Court held that tribal courts could not exercise jurisdiction over a non-member where an accident occurred on a public highway maintained by the State pursuant to a federally granted right-of-way over Indian reservation land.⁴⁴ These cases suggest a presumption against tribal authority over non-Indian activities. In *Atkinson Trading Co. v. Shirley*⁴⁵ and *Nevada v. Hicks*,⁴⁶ the Supreme Court made clear that tribal jurisdiction over non-Indians exists only in very limited contexts. The sum of the two cases appears to be that tribes can be certain of such jurisdiction only when non-Indians enter into consensual relationships with tribes.

2. Exhaustion

Additionally, exhaustion is not necessary when federal courts have jurisdiction via a federal question. This occurs when a federal environmental law is involved, such as RCRA⁴⁷ or the Price Anderson Act.⁴⁸ Such was the case in *El Paso Natural Gas Co. v. Neztosie*, in which the U.S. Supreme Court unanimously reversed a Ninth Circuit ruling that required the non-Native American defendants in two radiation exposure suits to first pursue all remedies in Navajo Nation tribal courts before their case could advance to the federal court system.⁴⁹

39. *Id.* at 1036.

40. *Id.*

41. 450 U.S. 544 (1981).

42. *See id.* at 563-565.

43. 520 U.S. 438 (1997).

44. *Id.* at 459.

45. 532 U.S. 645 (2001).

46. 533 U.S. 353 (2001).

47. *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1098 (8th Cir. 1989).

48. *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473 (1999).

49. *Id.*

3. Credit

Indian court judgments have been given credit in some courts under principles of comity⁵⁰ or by analogy to state judgments under the Full Faith and Credit Clause.⁵¹ Many courts, however, have viewed the question of enforceability as a federal question that must be reviewed by a federal court.⁵² The Supreme Court's willingness to uphold decisions that nullify the final judgment of an Indian tribe's highest courts (based on subject matter jurisdiction)⁵³ suggests that an Indian court judgment can be relatively easily displaced.

B. Environmental Citizen Suits

Rather than pursuing environmental action in tribal courts, most environmentalists and concerned Native American groups have turned to federal courts.⁵⁴ While there are a variety of methods under which to pursue action, citizen suits are among the most effective. Twelve federal environmental acts enable private action in the form of citizen suits.⁵⁵ There are two basic kinds of "citizen suits" in envi-

50. See, e.g., *Wilson v. Marchington*, 127 F.3d 805 (9th Cir.1998). States that practice comity with Indian judgments include Arizona (*Brown v. Babbitt Ford, Inc.*, 571 P.2d 689 (Ariz. Ct. App. 1977)), Minnesota (*Desjarlait v. Desjarlait*, 379 N.W.2d 139 (Minn. Ct. App. 1985)), Montana (*Wippert v. Blackfeet Tribe*, 654 P.2d 512 (Mont. 1982)), North Dakota (*Fredericks v. Eide Kirschmann Ford*, 462 N.W. 2d 164 (N.D. 1990)), South Dakota (*One Feather v. O.S.T. Pub. Safety Comm'n*, 482 N.W.2d 48 (S.D. 1992)), Oregon (*In re Matter of Red Fox*, 542 P.2d 918 (Or. Ct. App. 1975)), and Wisconsin (*Sengstock v. San Carlos Apache Tribe*, 477 N.W.2d 310 (Wis. Ct. App. 1991)). Interestingly, North Dakota is listed as a state that practices "comity" with Tribal Court judgments, yet has a statute that is closer to Full Faith and Credit. See generally, N.D. Cent. Code § 27-01-09 (1995).

51. See *Iron Crow v. Ogallala Sioux Tribe*, 129 F. Supp. 15, 21 (W.D. S.D. 1955).

52. See also *Swift Transp. Inc. v. John*, 546 F. Supp. 1185 (D. Ariz. 1982) (granting defendant declaratory and injunctive relief against Indian officials who asserted jurisdiction over a claim arising from an automobile accident on a U.S. highway that passed through the Navajo Indian Reservation; in addition, holding that whether the Navajo Indian Tribal Court had jurisdiction over the non-Indian plaintiff presented a federal question within the ambit of 28 U.S.C. 1331); *United Nuclear Corp. v. Clark*, 584 F. Supp. 107 (D. D.C. 1984); *UNC Res., Inc. v. Benally*, 514 F. Supp. 358, 359-61 (D. N.M. 1981) (granting federal question jurisdiction; "[t]he power to try and to assess civil penalties is the power to invade other liberties which the United States has an interest in protecting for its citizens against 'unwarranted intrusions' was a consideration reserved for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians." [Internal quotations deleted.]

53. See e.g., *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

54. *City of Albuquerque v. Browner*, 865 F. Supp. 733 (D. N.M. 1993); *Atl. States Legal Found., Inc. v. Hamelin*, 182 F. Supp. 2d 235 (N.D. N.Y. 2001); *Miccosukee Tribe of Indians of Florida v. United States*, 105 F.3d 599 (11th Cir. 1997).

55. Citizen suits appear in at least 12 separate environmental laws: CAA § 304, 42 U.S.C. § 7604 (2000), the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1365 (2000), the Marine Protection, Research, and Sanctuaries Act (MPRSA), 33 U.S.C. § 1415(g) (2000), the

ronmental law: (1) suits by private citizens against other private citizens alleged to be violating a federal environmental law, and (2) suits by private citizens against the executive branch of the federal government, usually the EPA, alleging that the government has not carried out a mandatory duty in implementing an environmental law.

Citizen suits involving Native Americans seem to arise most frequently under the CWA. One example is *City of Albuquerque v. Browner*,⁵⁶ in which the Isleta Pueblo successfully petitioned the EPA for challenging “treatment as a state” under the CWA. The city of Albuquerque filed suit, claiming that the high water quality standards set by the Pueblo would cost the upstream Albuquerque \$250 million to upgrade its water treatment facilities. The federal district court rejected the city’s challenge and acknowledged the Native Americans’ right to control their natural resources.⁵⁷

Not all cases have been so easy, however, giving the complex legal schema in which tribes share with cities and states the power to implement environmental controls. In *Atlantic States Legal Foundation, Inc. v. Hamelin*,⁵⁸ environmental groups and a Native American community organization brought a citizen suit alleging that the landowner violated the CWA by discharging dirt and gravel into a thriving wetland on the Native American Reservation. The district court held that the organizations had standing⁵⁹ but that plaintiffs could not claim civil penalties because the Native American tribe had already taken action against the polluter.⁶⁰ Since the EPA had refrained from taking action (allowing the tribe to proceed with its counsel), the court found that the tribe was acting like a “state.” This constituted “diligent prosecution” for purposes of CWA section barring citizen suits.⁶¹ However, even though the civil penalties claim was dismissed, plaintiffs’ claims for injunctive and declaratory relief were not dismissed on the same basis.⁶²

Noise Control Act (NCA), § 12, 42 U.S.C. § 4911 (2000), the Endangered Species Act (ESA), § 11(g), 16 U.S.C. § 1540(g) (2000), the DPA, 33 U.S.C. § 1515 (2000), RCRA § 7002, 42 U.S.C. § 6972 (2000), SDWA § 1449, 42 U.S.C. § 300j-8 (2000), the Surface Mining Control and Reclamation Act (SMCRA), § 520, 30 U.S.C. § 1270 (2000), CERCLA, 42 U.S.C. § 9659 (2000), the Emergency Planning and Community Right-to-Know Act (EPCRA), § 326, 42 U.S.C. § 11046 (2000), and the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1349(a) (2000).

56. *Browner*, 865 F. Supp. 733.

57. *Id.* at 742.

58. *Hamelin*, 182 F. Supp. 2d. 235.

59. *Id.* at 240.

60. *Id.* at 247.

61. *Id.*

62. *Id.* at 248.

In *Miccosukee Tribe of Indians of Florida v. United States*,⁶³ the tribe alleged that the EPA failed to comply with its duties under the CWA by not reviewing Florida's water quality standards that had recently been adopted in the Everglades Forever Act (EFA). The standards allegedly violated the anti-degradation requirements imposed by the CWA. The district court dismissed the tribe's suit for lack of subject matter jurisdiction, ruling that the Administrator had no duty to review Florida's water quality standards under the EFA because Florida never submitted these standards to the Administrator for review.⁶⁴ The Eleventh Circuit reversed, holding that the district court inappropriately relied on Florida's representations that the EFA did not change Florida's water quality standards.⁶⁵ The court further noted that, regardless of whether a state fails to submit new or revised standards, an actual change in its water quality standards could invoke the mandatory duty imposed on the Administrator of the EPA to review such new or revised standards.⁶⁶ The court concluded by stating that the CWA citizen suit jurisdiction depended on whether the EFA actually changed Florida's water quality standards.⁶⁷ The tribe's claim was remanded for determination of that issue.

Tribal action under CERCLA has become more common since amendments to that statute have added Indian tribes as authorized trustees.⁶⁸ The prominence of CERCLA and RCRA actions may increase as tribes deal with waste facilities that have been sited on their land. This issue becomes complicated, however, when members of the tribe itself are responsible for the waste facility. *Blue Legs v. United States Environmental Protection Agency*,⁶⁹ involving the solid waste provisions of RCRA, illustrates this situation. The Ogallala Sioux tribe operated several open dumps on the Pine Ridge Reservation. The plaintiffs, who were members of the tribe, brought suit under RCRA's citizens' suit provisions against the tribe, the Bureau of In-

63. 105 F.3d 599 (11th Cir. 1997).

64. See *Miccosukee Tribe of Indians of Fl. v. United States*, No. 95-0533 (S.D. Fla. 1997).

65. *Miccosukee Tribe of Indians of Fl.*, 105 F.3d at 602.

66. *Id.* at 602.

67. *Id.* at 603.

68. Trustees representing an Indian tribe are appointed in order to sue polluters to recover damages for "injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." 42 U.S.C. § 9607(a)(C); 42 U.S.C. § 9607(f)(1). See also 42 U.S.C. 9626 (1994) (providing that a tribal government "shall be afforded substantially the same treatment as a State" including notification of releases, consultation on remedial actions, access to information, roles and responsibilities under the national contingency plan, and submittal of priorities for remedial action).

69. 668 F. Supp. 1329 (D. S.D. 1987).

dian Affairs (BIA), the Indian Health Service (IHS), and EPA for violations of RCRA's open dump prohibitions.

The federal district court noted that EPA's authority under RCRA was not the same for hazardous as for solid waste.⁷⁰ While the statute gave EPA direct regulatory authority over hazardous waste, it merely authorized the agency to provide technical and management assistance to states for the development of management plans for solid waste. Therefore, the court granted EPA's motion for summary judgment.⁷¹ On the other hand, the court held that the tribe has the responsibility, stemming from its inherent sovereignty, to regulate, operate, and maintain landfills on the reservation.⁷² Accordingly, the tribe was ordered to bring the dumps into compliance with RCRA. The BIA and the IHS were also made subject to the court's order, because the two agencies were using the tribe's open dumps for solid waste generated by them and their personnel.⁷³

By taking advantage of environmental citizen suit provisions in federal acts, Native American plaintiffs in these cases were able to assert authority in the environmental arena. Thus, citizen suits were a good way to enhance tribal environmental authority already based in the same federal acts. This authority appears to be much stronger than that based on more traditional theories of liability such as sovereignty or treaties.

However, there are two drawbacks of citizen suits that have limited complete recovery in these and other situations. The first is the difficulty in obtaining standing to sue. A plaintiff must demonstrate actual or likely harm to the plaintiff or the environment—speculative or possible harm is not enough. The alleged injury must be both “certain and great,” not merely “serious and substantial.”⁷⁴ A serious threat of injury may be sufficient, but the danger must also be imminent. Recent Supreme Court cases suggest that there is a high bar for asserting that one is affected by a given environmental injury.⁷⁵ Second, citizen suits do not include toxic tort actions for personal injury

70. *Id.* at 1339.

71. *Id.* at 1340-1341.

72. *Id.* at 1341.

73. *Id.*

74. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001).

75. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167 (2000) (Scalia, J., dissenting). *See also In re Southdown, Inc.*, Litig. No. C-3-93-270, 2000 U.S. Dist. LEXIS 6220 (S.D. Ohio Mar. 13, 2000).

or property damage. They also do not include private suits for the personal losses suffered when public resources are damaged.⁷⁶

C. Toxic Torts

Toxic torts are environmental claims brought under traditional common law theories such as nuisance and trespass. They are a relatively under-pursued way to address environmental problems in Indian country.⁷⁷ Not only are there abundant cases of environmental damages to be remedied, there are a number of common law theories that could be used to address them. Compared to tribal courts and citizens suits, toxic torts are a more effective way to sue for environmental damages to property and person because complex environmental issues can be simplified under a toxic tort claim, making for more effective litigation.

Toxic tort litigation has evolved since its debut in the late 1970s with the accidents at Love Canal and the Three Mile Island nuclear plant. Courts have addressed the problems of statutes of limitations,⁷⁸ causation,⁷⁹ and case management.⁸⁰ Public law models have begun to impact private law toxic tort cases, especially civil procedure and evidence law. Toxic tort class actions offer an attractive method for ad-

76. Fishers can sue for damages in private action, e.g., *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974) (suit by commercial fishermen against oil companies for damages allegedly sustained as a result of an oil spill); *Louisiana ex rel. Guste v. M/V Testbank*, 524 F. Supp. 1170 (E.D. La. 1981) (suit by commercial fishermen to recover damages for closing of fishing grounds due to contamination by PCB after collision of ships), and they may also sue under the CWA pursuant to *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981):

[C]itizen-suit provisions apply . . . [to] both plaintiffs seeking to enforce these statutes as private attorneys general, whose injuries are "non-economic" and probably non-compensable, and persons like respondents who assert that they have suffered tangible economic injuries because of statutory violations.

However, citizen suits do not allow for private individuals to collect personal damages (in contrast to *qui tam* "whistle blower" suits). Rather, they allow recovery of costs for the suit, e.g., Clean Water Act § 505(d), 33 U.S.C. § 1365(d) (providing for the recovery of attorney's fees and costs to "any prevailing or substantially prevailing party, whenever the court determines such award is appropriate"), and the application of civil penalties to public projects, e.g. Section 304(g)(2) of the Clean Air Act specifically allows up to \$ 100,000 of any civil penalty to be used in "beneficial mitigation projects." 42 U.S.C. § 7604(g)(2).

77. A quick search of Lexis or Westlaw shows that, relative to the number of suits that are pursued as citizen suits, the extent to which toxic torts are brought for pollution and natural resource damage in Indian Country is very small.

78. See e.g., *Jones v. Chemetron Corp.*, 212 F.3d 199 (3d Cir. 2000).

79. See e.g., *DiPetrillo v. Dow Chem. Co.*, 729 A.2d 677 (R.I. 1999).

80. See Francis McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595 (1997).

dressing a circumstance in which many people are damaged.⁸¹ They also provide a method for addressing the delayed manifestation of an injury for large groups of people via medical monitoring or compensation for increased risk of disease.⁸²

The most popular causes of action in toxic tort cases include strict liability, negligence/failure to warn, emotional distress, medical monitoring, nuisance, trespass, and breach of contract.

1. Strict liability

Strict liability remains the default choice in many toxic tort cases. Strict liability describes a set of legal concepts which hold one party responsible for damages caused to another without any showing that the liable party is "at fault" in causing the damages.⁸³ The most relevant applications for Native Americans may be non-natural and hazardous uses of land. This arises when a landowner or occupier brings on the land something that is not a matter of natural usage and that escapes, causing injury to the land, person or property of his neighbor. The party is strictly liable, irrespective of all acts of due care.⁸⁴ A similar theory that might apply in the case of toxic waste that has leached into the water of Indian Country is strict liability for abnormally dangerous activities (as provided for in the Second Restatement).⁸⁵ Given the risks involved with toxic wastes or transporting oil, harm to Native Americans in the adjacent areas could be foreseeable (a necessary element of strict liability).⁸⁶

81. See e.g., *Butler v. Carolina Nat'l Transp. Co.*, No. 00-3095, 2001 U.S. Dist. LEXIS 1445 (E.D. La. Feb. 7, 2001); *Valencia v. Sung M. Lee*, 123 F. Supp. 2d 666 (E.D. N.Y. 2000).

82. See *Foust v. SEPTA*, 756 A.2d 112 (Pa. Commw. Ct. 2000).

83. Similar to a cause of action in negligence, the injured party must prove that the defendant proximately caused an injury. See e.g., *Sterling v. Velsicol Chem. Corp.*, No. 86-6087, 1988 U.S. App. LEXIS 6957 (6th Cir. May 24, 1988).

84. Many states have applied strict liability to hazardous waste that causes injury to surrounding property. *Cities Serv. Co. v. State*, 312 So. 2d 799 (Fla. Ct. App. 1975). See *Ashland Oil, Inc. v. Miller Oil Purchasing Co.*, 678 F.2d 1293, 1308 (5th Cir. 1982); *State Dep't of Env'tl. Prot. v. Ventron Corp.*, 468 A.2d 150 (N.J.1983); *Bridgeton v. B.P. Oil, Inc.*, 369 A.2d 49 (N.J. Super. 1976); *McLane v. Northwest Natural Gas Co.*, 467 P.2d 635 (Or. 1970); *Langan v. Valicopters, Inc.*, 567 P.2d 218 (Wash. 1977). See also *Schwartzman, Inc. v. Atchison, T. & S.F. Ry.*, 842 F. Supp. 475, 479 (D.N.M. 1993):

The common law of strict liability has changed in response to changing conditions in American society. The storage and disposal of toxic chemical waste poses the same threat to health and welfare today as the detonation of dynamite and impoundment of waters posed in years past. The Court finds that strict liability in New Mexico is not confined to blasting, and that Plaintiff has alleged sufficient facts supporting a characterization of Defendant's hazardous waste activities as abnormally dangerous.

85. RESTATEMENT (SECOND) OF TORTS §§ 519-520 (1977).

86. See, e.g., *James v. Bessemer Processing Co.*, 714 A.2d 898 (N.J. 1998).

An interesting case that has arisen in the context of radiation involves Native Americans damaged by releases from the federally-owned Hanford Nuclear Facility in south central Washington State. At least one hundred and fifty individual Native Americans from five tribes living in the vicinity are suing several federal government agencies and contractors for damages resulting from wrongful human radiation experimentation based on intentional and unintentional releases of harmful radioactive materials from the various research projects conducted at Hanford.⁸⁷

Attorneys for the plaintiffs filed a class action complaint in the U.S. District Court for the Western District of Washington on April 2, 2003 for violations of the constitutional rights of the indigenous group under 42 U.S.C. Section 1983, for infliction of radiological injuries compensable under 42 U.S.C. § 2210 (Price Anderson Act), civil conspiracy, battery, strict liability, negligence and other torts.⁸⁸ Plaintiffs allege that the defendants have released radioactive substances into the environment since the opening of Hanford in 1943 as a nuclear weapons research facility and reprocessing plant.⁸⁹

Plaintiffs seek damages not only for the potential harm from external exposure, but also the harm to their traditional culture, diet, and lifestyle. The risk of health damage is relatively higher for Native Americans in the area, as they digest greater quantities of native vegetation, fish and game than other Americans.⁹⁰ Already, thousands of residents from the region for many years have experienced symptoms related to ingestion and exposure to radioactive byproducts.

87. *Native American Class Action Lawsuit Filed Against U.S. Government and Contractors For Human Radiation Experimentation At Hanford Nuclear Facility*, at http://www.ncai.org/main/pages/issues/natural_resources/documents/NWradex.htm (last visited June 15, 2003) (hereinafter *Hanford Lawsuit*).

88. The class of injured persons could grow to tens of thousands of people. At this time, the plaintiffs are tribal members from the Colville, Nez Perce, Umatilla, Warm Springs, and Yakama Indian Reservations. In addition to the Department of Energy and its predecessor agencies, and the Department of Defense, defendants include Battelle Pacific Northwest Laboratories, Westinghouse, General Electric, Rockwell International, DuPont, and University of Washington. *Id.*

89. The Hanford Site is home to nine production reactors and four chemical separation plants. *Id.*

90. *Id.* See also *NRDC v. EPA*, 16 F.3d 1395 (4th Cir. 1993) (in which the court deferred to the EPA's approval of Maryland and Virginia's water quality criteria for dioxin that were based on scientifically defensible methods, despite the fact that the criteria were less protective than the EPA's recommended criterion and despite the appellants argument that "the risk is especially high for the Mattaponi and Native American people who live near a major paper mill in Virginia and who, it is argued, consume higher-than-average amounts of fish.").

Health maladies include thyroid and bone cancers, arthritis, diabetes, blood and reproductive disorders, and autoimmune disorders.⁹¹

2. Negligence/Failure to Warn

In general, an individual is held liable in negligence for failing to act as a reasonable and prudent person would act under the same or similar circumstances. In the area of environmental torts, the following duties may be recognized:

- (i) Duties to manage, store, protect, and isolate hazardous or toxic materials in a reasonable manner,
- (ii) Duties to truthfully advise, inform, and warn of dangers associated with the hazardous materials, and
- (iii) Duties of non-negligent supervision of an independent contractor handling, storing, treating, or disposing of hazardous materials.⁹²

Breach of the duty to warn is probably the standard of care relied upon most frequently in toxic tort cases. It is common to the theories of negligence, warranty, strict liability, and misrepresentation.⁹³ This line of reasoning is particularly appropriate for actions in which Native Americans as a group have been exposed to dangerous conditions without being warned, as in the *Hanford* case above.⁹⁴

3. Emotional Distress

Negligent infliction of emotional distress is a new concept in toxic tort cases, and has yet to gain acceptance in most jurisdictions.⁹⁵ In those jurisdictions that do allow compensation for negligent inflic-

91. *Hanford Lawsuit*, *supra* note 87.

92. RESTATEMENT (SECOND) OF TORTS §§ 413, 416, 427, 427a, 427b (1965).

93. According to the Second Restatement of Torts, liability for failure to warn arises when the manufacturer or supplier (i) knew or had reason to know that the product is or is likely to be dangerous for the use for which it is intended, (ii) had no reason to believe that those who use the product would have realized its dangerous condition, and (iii) failed to exercise reasonable care to inform the user of its dangerous condition or of the facts, which made it likely to be dangerous. RESTATEMENT (SECOND) OF TORTS § 388 (1965).

94. A similar instance involves a study of the effect of uranium radiation exposure on the health of miners, conducted by the Public Health Service in 1949. The majority of the miners who participated in the study were Native American. The miners were never warned of the dangers inherent in radiation exposure. Further, despite their voluntary participation in the study, no safety measures were instituted. See Medora Marisseau, *Seeing Through The Fallout: Radiation and The Discretionary Function Exception*, 22 ENVTL. L. 1509 (1992).

95. See *McClenathan v. Rhone-Poulenc Inc.*, 926 F. Supp. 1272, 1276 (S.D. W.Va. 1996) (suggesting that plaintiffs could prevail on a theory of intentional infliction of emotional distress but not on negligence).

tion, usually some physical injury or threat of serious physical injury must accompany the emotional distress.⁹⁶ “Where no physical injury has manifested, it is not clear whether subclinical and subcellular levels of changes constitute physical injury to which emotional distress damages may attach.”⁹⁷ In one toxic tort case, damage to the immune system caused by a change to the bone marrow was deemed to constitute physical harm sufficient to support a cause of action for personal injury.⁹⁸ Some courts do allow for recovery in the absence of injury if the plaintiff demonstrates sufficient evidence of a non-physical injury, such as fear of acquiring cancer.⁹⁹

In *Collier v. Simpson Paper Co.*,¹⁰⁰ the Ninth Circuit provided a guideline for such a claim. To establish tortious inducement of fear of contracting cancer given the absence of physical injury or illness, appellants may only recover for fear of contracting cancer if:

- (i) Due to appellee’s negligence, appellants were exposed to a toxic, cancer-causing substance; and
- (ii) Appellants fear cancer based on the knowledge, corroborated by reliable medical or scientific opinion, that it is

96. *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993); *Robinson v. United States*, 175 F. Supp. 2d 1215, 1228 (E.D. Cal. 2001).

97. Conrad G. Tuohey & Ferdinand V. Gonzalez, *Emotional Distress Issues Raised by the Release of Toxic and Other Hazardous Materials*, 41 SANTA CLARA L. REV. 661, 697 (2001). See *Firestone*, 863 P.2d at 809 n.10 (Cal. 1993) (“No California cases address whether impairment of the immune system response and cellular damage constitute “physical injury” sufficient to allow recovery for parasitic emotional distress.”).

98. *Duarte v. Zachariah*, 22 Cal. App. 4th 1652 (Cal. App. 3d Dist. 1994) (finding that overdose of negligently prescribed medication impaired ability of bone marrow to produce blood platelets; platelets are the component of blood that causes the blood to clot in response to a wound or cut), cited in Tuohey, *supra* note 97, at 696-98.

99. See, e.g., *Herber v. Johns-Manville Corp.*, 785 F.2d 79 (3d Cir. 1986) (plaintiff’s “greater than average risk” of contracting cancer, while not sufficient to constitute enhanced risk claim, was highly probative on its claim for fear of cancer and costs of medical monitoring). *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129 (5th Cir. 1985) (plaintiff permitted to recover for fear of cancer in asbestosis case when he presented evidence that he had a greater than 50% risk); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir. 1986) (same). In *Collier v. Simpson Paper Co.*, the Ninth Circuit provides a guideline for such a claim:

To establish tortious inducement of fear of contracting cancer given the absence of physical injury or illness, appellants may only recover for fear of contracting cancer if: 1) due to appellee’s negligence, appellants were exposed to a toxic, cancer-causing substance; and 2) appellants fear cancer based on the knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the appellants will develop cancer in the future due to the toxic exposure.

No. 97-15101, 1997 U.S. App. LEXIS 36334, at *11 (9th Cir. Dec. 24, 1997).

100. No. 97-15101, 1997 U.S. App. LEXIS 36334 (9th Cir. Dec. 24, 1997).

more likely than not that the appellants will develop cancer in the future due to the toxic exposure.¹⁰¹

Oregon law is particularly generous, allowing recovery of “consequential damages such as mental anguish when these damages are caused by an ongoing interference with the use and enjoyment of the plaintiff’s property.”¹⁰² This line of reasoning should be applied to any migration of nuclear waste that may be detected around, on, or near the hunting and fishing grounds of the Native American hunters and gatherers, or under or near the homes of downwinders, so that an action for damages for mental anguish would lie.¹⁰³

Where emotional distress stems from a threat to traditional religious practices, a civil rights action based on freedom of religion may be possible.¹⁰⁴ For example, in *Lyng v. Northwest Indian Cemetery Protective Association*,¹⁰⁵ an association of Native Americans and the state of California sued the United States Forest Service and the United States Department of Agriculture to contest plans to permit timber harvesting and to construct a road in a national forest. The Ninth Circuit affirmed the portion of the trial court’s order that held that actions to construct a road and a timber-harvesting business on Indian religious grounds violated the Free Exercise Clause.¹⁰⁶ However, the Supreme Court reversed the appellate court’s decision and remanded the case, finding that the First Amendment did not preclude petitioners from completing a road or from permitting timber harvesting on Indian religious grounds because those religious practices “must yield to some higher consideration.”¹⁰⁷ The situation may be more drastic at the Department of Energy’s Hanford site in eastern Washington, where soil and groundwater contamination put Native Americans at risk in their subsistence and religious use of parts of the site. Given that physical damage is evident, this is a situation

101. *Id.* at *11. *See also* *Abuan v. General Elec. Co.*, 3 F.3d 329 (9th Cir. 1993) (affirming summary judgment against class in toxic tort case where members did not present medical and scientific evidence that accidental exposure to toxic chemicals increased risk of future injury or disease or that they were presently injured).

102. *City of LaGrande v. Union Pac. R.R.*, No. 96-115-ST, 1997 U.S. Dist. LEXIS 23939, (D. Or. July 18, 1997).

103. *See id.*

104. 485 U.S. 439 (1988).

105. *Id.*

106. *See* *Northwest Indian Cemetery Protective Ass’n v. Peterson*, 764 F.2d 581, 585-86 (9th Cir. 1985).

107. *Lyng*, 485 U.S. at 457.

where emotional distress could comprise a significant portion of the suit.¹⁰⁸

4. Medical Monitoring

Medical monitoring is a form of damages that realistically, consistently and adequately addresses the needs of toxic tort victims.¹⁰⁹ The method involves collecting and disbursing funds that enable individual plaintiffs to receive ongoing diagnostic evaluations.¹¹⁰ These evaluations are designed to detect the presence of an exposure-related disease at an early stage in its development, in order to reduce substantive treatment costs and better preservation of the victims' health.¹¹¹ Some courts enthusiastically support medical monitoring, while others have rejected it.¹¹² Increased risk alone is usually not enough to warrant medical monitoring.¹¹³ Those courts that do not require plaintiffs to establish that future injury is reasonably certain to occur may call for a showing that that clinical examination is medically appropriate.¹¹⁴

Under CERCLA itself, there is no private remedy of medical monitoring.¹¹⁵ However, this does not always defeat a separate tort cause of action. For example, the court in *In re Paoli Railroad Yard PCB Litigation*¹¹⁶ recognized a common law cause of action for medical monitoring costs under Pennsylvania law.¹¹⁷

In *Pritikin v. Department of Energy*,¹¹⁸ plaintiff filed a citizen suit against the Department of Energy (DOE), seeking a declaration that, under CERCLA, DOE was required to fund a medical monitoring

108. See, e.g., *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1202 (6th Cir. 1988) (awarding damages for post-traumatic stress disorder and emotional suffering as a major item of damages).

109. See Lisa Heinzerling & Cameron Powers Hoffman, *Toxic Torts: Issues of Mass Litigation, Case Management, and Ethics Articles*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 67, 74 (2001).

110. *Ayers v. Jackson Tp.*, 525 A.2d 287, 311 (N.J. 1987)

111. *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 821 (Cal. 1993).

112. See, e.g., *In re Rezulin Prod. Liab. Litig.*, 210 F.R.D. 61 (S.D. N.Y. 2002); cf. *Hinton ex rel. Hinton v. Monsanto Co.*, 813 So. 2d 827 (Ala. 2001).

113. See *Plummer v. Abbott Labs.*, 568 F. Supp. 920 (D.R.I. 1983); *Betts v. Manville Injury Pers. Trust*, 588 N.E.2d 1193, 1218 (Ill. 1992); *Morrissy v. Eli Lilly & Co.*, 394 N.E.2d 1369, 1376 (Ill. 1979).

114. See, e.g., *Miranda v. Shell Oil Co.*, 7 Cal. Rptr. 2d 623, 626 (Cal. Ct. App. 1992); *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 851 (3d Cir. 1990); *Werlein v. United States*, 746 F. Supp. 887 (D. Minn. 1990), *vacated in part by* 793 F. Supp. 898, 904-05 (1992).

115. *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533-35 (10th Cir. 1992).

116. 916 F.2d 829, 851 (3d Cir. 1990).

117. *Id.*

118. 254 F.3d 791 (9th Cir. 2001).

program to screen the population near the Hanford Nuclear Reservation. While the claim was cognizable, the court determined that it lacked jurisdiction because plaintiff did not have constitutional standing to compel defendant to make budget requests and to reprogram existing funds for the medical monitoring program.¹¹⁹ Plaintiff needed to show that defendant's failure to do so was the cause of the injury she sought to redress.¹²⁰

5. Nuisance

Nuisance, an annoyance which is offensive or endangers one's health or life or disallows the reasonable use and enjoyment of property,¹²¹ has long been an ideal route to pursue a claim against a polluter. Its relation to both negligence and strict liability expand the opportunities for damage recovery.¹²² Violations of applicable environmental statutes may be a nuisance *per se*.¹²³ The nuisance *per se* doctrine is particularly applicable to claims in Indian Country, since Congress has power similar to that of the states as to the regulation and suppression of nuisances with respect to Indian territory under its control.¹²⁴ For example, federal statutes provide for a covenant in leases of certain Indian reservation land that the lessee will not commit or permit on leased land any act which causes a nuisance.¹²⁵

6. Trespass

Trespass¹²⁶ is another common law tool that has traditionally been used both by environmentalists against polluters¹²⁷ and by Native

119. *Id.*

120. *Id.* at 801.

121. *See, e.g.,* Northern P. R. Co. v. Whalen, 149 U.S. 157 (1893); May v. Brueshaber, 466 S.E.2d 196 (Ga. 1995). To constitute nuisance, the interference with the plaintiff's use of its property must be both substantial and unreasonable due to the nature, duration, or extent of interference with the plaintiff's use and enjoyment of land. *See, e.g.,* Gussack Realty Co. v. Xerox Corp., 224 F.3d 85, 93 (2d Cir. 2000).

122. It may be an intentional invasion of the plaintiff's interest; a negligent invasion of the plaintiff's interest; or an invasion in which negligence was not involved, thus it is a strict liability nuisance. RESTATEMENT (SECOND) OF TORTS §822 (1977).

123. *See* Branch v. W. Petrol., Inc., 657 P.2d 267, 276 (1982) (pollution of underground waters in violation of statute is nuisance *per se*; "nuisance *per se* is in reality just another term for strict liability").

124. *See* 25 U.S.C. § 415 (2000).

125. *See id.* § 416a (2000).

126. A trespass is a direct physical invasion of another's property. One is subject to liability for trespass regardless of whether harm resulted to another's legally protected interest if one intentionally enters another's land or causes a thing or third person to do so, remains on another's land, or fails to remove from land a thing which he is under a duty to remove. RESTATEMENT (SECOND) OF TORTS §158 (1977).

Americans against invasions of their territory.¹²⁸ Trespass is distinguishable from nuisance as it is an invasion of an interest in land resulting from possession or entry onto the land. Nuisance does not require a direct physical invasion of land to be actionable as long as an interference with the use or enjoyment of the land occurs.¹²⁹ A defendant may be liable for both trespass and nuisance resulting from the same conduct.¹³⁰ In environmental litigation, a trespass action has the advantage of broad applicability, covering subsurface trespass¹³¹ as well as air space trespass.¹³²

The common-law right of Native Americans against trespassers on their land is well established.¹³³ There are also federal statutes forbidding trespass on Indian lands.¹³⁴ Recent private actions have also had success. For example, in *United States v. Pend Oreille Public Util. District No. 1*, the court found that a FERC (Federal Energy Regulatory Commission) project license did not authorize the flooding of an

127. See, e.g., *Hartman v. Texaco, Inc.* 937 P.2d 979 (N.M. App. 1997) (allowing damages for a subterranean trespass to an oil well from waterflood operations in another zone); *Maddy v. Vulcan Materials, Co.*, 737 F. Supp. 1528 (D. Kan. 1990) (action for trespass for airborne pollution where plaintiff proved actual and substantial physical harm to his property); *Nieman v. NLO, Inc.*, 108 F.3d 1546 (6th Cir. 1997) (landowner brought an action against the former operator of a nuclear processing facility for continuing trespass).

128. Under federal common law, Indians can enforce their aboriginal land rights. See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 235 (1985). Unextinguished aboriginal title is good against third parties, if not against the Government. Thus, a tribe may sue for trespass or sue to eject non-Indian possessors. See *United States v. Southern Pac. Transp. Co.*, 543 F.2d 676, 699 (9th Cir. 1976) (declaring railroad right of way invalid after ninety years). See *Mescalero Apache Tribe v. Burgett Floral Co.*, 503 F.2d 336, 337-38 (10th Cir. 1974) (finding right to sue in trespass is itself possessory right, and refusing to draw distinction between ejection and trespass actions). The United States may sue state entities on behalf of tribes to seek ejection of those entities from federally protected tribal lands and to recover damages for trespass. *U.S. v. University of New Mexico*, 731 F.2d 703 (10th Cir. 1984).

129. RESTATEMENT (SECOND) OF TORTS §821(d), cmt. d (1977).

130. RESTATEMENT (SECOND) OF TORTS §821(d), cmt. d (1977).

131. See, e.g., *Hartman v. Texaco, Inc.* 937 P.2d 979, 983 (N.M. App. 1997) (allowing damages for a subterranean trespass to an oil well from waterflood operations in another zone).

132. *Maddy v. Vulcan Materials, Co.*, 737 F. Supp. 1528 (D. Kan. 1990) (airborne trespass is recoverable with proof of injury).

133. *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941). See also *Fellows v. Blacksmith*, 19 How. 366, 15 L.Ed. 684 (1857) (upholding trespass action on Indian land); *Inupiat Cmty. of the Arctic Slope v. United States*, 680 F.2d 122, 128, 129 (right to sue for trespass is one of rights of Indian title); *United States v. Southern Pac. Transp. Co.*, 543 F.2d 676 (CA9 1976) (damages available against railroad that failed to acquire lawful easement or right of way over Indian reservation); *Edwardsen v. Morton*, 369 F. Supp. 1359, 1371 (D. Alaska 1973) (upholding trespass action based on aboriginal title). See also F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 523 (1982 ed.) (“The right to protection of tribal possession through actions of ejection, trespass, or other similar possessory suits was affirmed early in the nation’s history”).

134. 28 U.S.C. §§ 2415, 2416 (2000).

Indian reservation and that the utility did not comply with conditions for the taking of reservation land through inverse condemnation; thus flooding of the land was a trespass.¹³⁵ Also, in *Hammond v. County of Madera*, Native Americans successfully argued that the defendant county's trespass resulted in increased noise, danger, pollution, and destruction of plants used by the owners in practicing the Native American traditions.¹³⁶

7. Breach of Contract

Where toxic damages result from defendant's breach of a contract with the plaintiffs, plaintiffs may be awarded the full cost of restoration.¹³⁷ The case of *Mailman's Steam Carpet Cleaning Corp. v. Lizotte*¹³⁸ discusses the rationale for an award of restoration of damages in a breach of contract case involving hazardous wastes. Plaintiff sued for breach of warranty after purchasing property that contained hazardous wastes that had leaked from underground storage tanks. In addressing the measure of damages, the court held:

When property has been damaged by oil or hazardous waste and the cost of restoration exceeds the value of the property, diminution in market value is not always a satisfactory measure of tort damages. In appropriate cases, a test of reasonableness may be imposed to determine if restoration of the property is a fair and reasonable remedy in the circumstances. Although these principles of tort damages are instructive, we are presented here with a breach of contract. The contamination of Mailman's property caused by leaks in the oil tanks was clearly the natural consequence of the breach of warranty. Lizotte could reasonably have contemplated that he would be liable to Mailman for all costs related to cleanup of the oil leakage as a probable result of the breach and that all costs would likely exceed the fair market value of the property. Thus, even under the reasonableness test described above, the cost of restoring the property to its warranted condition is an appropriate measure of damages.¹³⁹

To the extent that many tribes have contracted to dispose of waste on their land, the *Lizotte* principles may come into action. Knowing that tribes are in difficult economic situations, the federal government has used the concept of tribal sovereignty as an excuse

135. *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544 (9th Cir.1994).

136. *Hammond v. County of Madera*, 859 F.2d 797 (9th Cir. 1988).

137. 616 N.E.2d 85 (Mass. 1993). For more on the topic, *see also* *Bell v. First Columbus Nat'l Bank*, 493 So. 2d 964 (Miss. 1986); *Union Oil Co. v. Bishop*, 236 So. 2d 434 (Miss. 1970).

138. *Lizotte*, 616 N.E.2d 85.

139. *Id.* at 88.

for allowing nuclear waste to gravitate toward tribal reservations.¹⁴⁰ First, through the Nuclear Waste Policy Act Amendments of 1987 (NWPA), Congress facilitated the siting of waste on reservation lands.¹⁴¹ Today Congress is content to let the market direct waste siting; this policy naturally has led the market to the inexpensive and politically weak lands owned by tribes.¹⁴²

Title 25 U.S. Code Section 81¹⁴³ requires the Secretary of the Interior and the Commissioner of Indian Affairs to approve certain contracts between tribes and third parties relative to their lands, or to any claims regarding Indian monies. The statute was enacted to protect tribes from “improvident and unconscionable” contracts.¹⁴⁴ As a result, any contract or agreement that does not comply with this section cannot be upheld.¹⁴⁵ Courts have broadly applied Section 81 and found it to apply to contracts that do not directly pertain to tribal land.¹⁴⁶

In addition to contract approval, Title 25 U.S. Code Section 415 governs leasing of Indian land.¹⁴⁷ Pursuant to this statute, the Secretary of the Interior is required to review and decide whether to approve leases of trust or restricted land, whether tribally or individually owned, for public, religious, educational, recreational, residential or business purposes, including the development or utilization of natural resources.¹⁴⁸

Title 25 U.S. Code Chapter 12 details other provisions that require the Secretary of the Interior to review and decide whether to

140. See Charles K. Johnson, *A Sovereignty of Convenience: Native American Sovereignty and the United States Government's Plan for Radioactive Waste on Indian Land*, 9 ST. JOHN'S J. LEGAL COMMENT 589, 596 (1994).

141. 42 U.S.C. §§ 10,101, 10,226 (2000).

142. Louis G. Leonard, Comment *Sovereignty, Self-Determination, and Environmental Justice in the Mescalero Apache's Decision to Store Nuclear Waste*, 24 B.C. ENVTL. AFF. L. REV. 651, 659 (1997).

143. 25 U.S.C. § 81 (2000).

144. *In re Sanborn*, 148 U.S. 222 (1893).

145. *Green v. Menominee Tribe of Indians*, 47 Ct. Cl. 281 (1912), *aff'd*, 233 U.S. 558 (1914) (holding contracts not approved by the DOI are void). Federal approval of contracts and leases on trust property, however, are not required for tribes doing business as a corporation chartered under 25 U.S.C. § 477 as long as the term does not exceed 25 years. 25 U.S.C. § 477 (2000).

146. See *Naragansett Indian Tribe v. Ribo Inc.*, 686 F. Supp. 48 (D. R.I. 1988) (holding DOI contract approval applies to promissory notes and real estate mortgages between tribes and lenders); *Barona Group of Capitan Grande Band of Mission Indians v. Am. Mgmt. & Amusement, Inc.* 840 F.2d 1394 (9th Cir.1987) (holding bingo management contract relative to Indian lands, and thus void because it did not bear the BIA's or DOI's approval).

147. 25 U.S.C. § 415 (2000).

148. *Id.* § 415(a).

approve contracts or leases for mining, farming, grazing, oil and gas exploration, and timber harvesting.¹⁴⁹ These provisions effectively allow tribes to put an end to polluting operations on their land that were never approved by the federal government. Because the BIA acts as a fiduciary in approving agreements,¹⁵⁰ it is also possible to bring an action for breach of fiduciary duty if the agency negligently approves a lease.¹⁵¹

IV. METHOD OF PURSUING CLAIMS AS A STATE

Whether its claim is based on a federal environmental statute or a common law tort, a state may sue companies directly for damages to their natural resources. The common law doctrine of *parens patriae* is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, and the general economy of the state.¹⁵² This doctrine allows the government to bring suit if it can articulate an interest apart from the interests of particular private parties.¹⁵³ Where a government is able to assert a valid quasi-sovereign interest in a damaged resource, whether publicly or privately owned, it can pursue suit for natural resource damages under the *parens patriae* doctrine.¹⁵⁴

The doctrine can be used in instances where private individuals cannot bring suits for natural resource damages against the owners of privately-held lands. This is the case in CERCLA, where a state or federal trustee is the only entity that can bring actions on behalf of the state and its citizens.¹⁵⁵

149. See *id.* §§ 396-401 (governing leases for farming, grazing, oil and gas exploration, and mining); *id.* §§ 406-407 (governing lease for timber harvesting).

150. See *Coomes v. Adkinson*, 414 F. Supp. 975 (D. S.D. 1976) (holding that the BIA would be held to fiduciary standards when the court reviewed the BIA's decision to reject lease bids on six grazing units).

151. See *Cheyenne Arapaho Tribes of Ok. v. United States*, 966 F.2d 583 (10th Cir. 1992) (where BIA had approved oil and gas leases on tribal lands, the Tenth Circuit held that the BIA breached its fiduciary duty, as a representative of the DOI, because prevailing market and economic conditions were not examined before approving the lease).

152. BLACK'S LAW DICTIONARY 1114 (6th ed. 1991).

153. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 607 (1982). See also *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 396 (1938).

154. See, e.g., *Maine v. M/V Tamano*, 357 F. Supp. 1097 (D. Me. 1973); *Puerto Rico v. S.S. Zoe Colocotroni*, 456 F. Supp. 1327 (D. P.R. 1978); *Idaho v. S. Refrig. Transp. Inc.*, No. 88-1279, 1991 U.S. Dist. LEXIS 1869 (D. Idaho 1991) (holding that Idaho had standing under CERCLA to bring a natural resources damages claim since it had standing under traditional *parens patriae* doctrine).

155. See CERCLA, 42 U.S.C. § 9607(f)(1) (2000).

“To obtain natural resource damages under CERCLA a trustee must demonstrate a sufficient nexus between the *parens patriae* doctrine and the land involved.”¹⁵⁶ A trustee must show that the state can meet all of the common law requirements of *parens patriae*.¹⁵⁷ While traditionally *parens patriae* was used only as a basis for states seeking injunctive relief, it now appears that states may recover money damages in their capacity as *parens patriae*.¹⁵⁸

A line of cases has allowed *parens patriae* suits for natural resource damages (NRDs) by states.¹⁵⁹ The public trust may be defined broadly to encompass “natural resources . . . belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by “state government.”¹⁶⁰

In *Idaho v. Southern Refrigerated Transport*,¹⁶¹ the State sought various remedies against defendants for damages caused by a chemical spill. The court found that the State was the proper party to assert both CERCLA claims and a *parens patriae* claim for negligence. The court determined that Idaho had quasi-sovereign interest in the subject matter of the litigation and an articulable interest in the well-being of its populace, something more than allegations that it is a nominal party, for example, in abating public nuisances, conserving natural resources or in protection of its economy.¹⁶² The court stated:

Idaho is the trustee on behalf of the citizens of Idaho of all Idaho's wildlife and has technical ownership of the fish that were lost as a result of the spill. Idaho Code § 36-103(a). All the members of the public are damaged by losses of Idaho's wildlife. Therefore, Idaho

156. Michael A. Walker, *CERCLA'S Natural Resource Damage Provisions: A Loophole for Private Landowners?*, 9 ADMIN. L.J. AM. U. 425, 452 (1995).

157. *Id.*

158. *M/V Tamano*, 357 F. Supp. at 1098-1099.

159. *See, e.g.*, *Idaho v. S. Refrigerated Transp.*, No. 88-1279, 1991 U.S. Dist LEXIS 1869, at *13 - *14 (allowing state *parens patriae* negligence action as alternative to CERCLA claim for damages to fish); *Maine v. M/V Tamano*, 357 F. Supp. 1097 (damages for harm to coastal waters and marine life caused by oil spill); Romualdo P. Eclavea, Annotation, *States Standing to Sue on Behalf of Citizens*, 42 A.L.R. FED. 23, § 6(a) (1979) (Overview of authority relating to *parens patriae* suits for natural resource damage arising from discharge of oil and other pollutants into state waters); *cf.*, *Feather River Lumber Co. v. United States*, 30 F.2d 642, 644 (9th Cir. 1929) (cost of replanting recoverable from negligent starter of fire which destroyed young growth in public forest); *Spokane Int'l Ry. Co. v. United States*, 72 F.2d 440,443 (9th Cir. 1934) (allowing action against railway company for fire damage to forest).

160. *See, e.g.*, *Artesian Water Co. v. New Castle County*, 851 F.2d 643, 650 (3d Cir. 1988) (allowing public trustee action for damage to aquifer underlying private property).

161. *S. Refrigerated Transp.*, 1991 U.S. Dist LEXIS 1869 at *13 - *14.

162. *Id.* at *5.

may properly bring a *parens patriae* action on behalf of the citizens of Idaho based on negligence.¹⁶³

With respect to valuation of damages under CERCLA, the court recognized three valuations: commercial, existence, and recreational.¹⁶⁴ “Existence value of a natural resource is the value the public places on the continuing existence of that natural resource, whether or not they will ever use the resource.”¹⁶⁵ The State offered a surveying technique, which the court found to be too speculative.¹⁶⁶ The commercial value was defined as the market price or exchange value of the resource.¹⁶⁷ Finally, the court determined that recreational value is the value the consumer places on the use of that natural resource, for example, the value placed on a hunting trip.¹⁶⁸

In *Maine v. M/V Tamano*,¹⁶⁹ the State and a state agency (Board of Environmental Protection) sought to recover damages in three categories as a result of defendant’s discharge of 100,000 gallons of oil into the waters of one of its bays: (1) the State, in its proprietary capacity sought damage to property, such as state parks, which the State itself owns, including the land under the waters of the marginal seas of the State; (2) the Board, by virtue of the authority granted it by the Maine Oil Discharge Prevention and Pollution Control Act,¹⁷⁰ sued to recover all sums expended or to be expended by it in payment of third-party damage claims and clean up costs; and (3) the State in its *parens patriae* capacity “as owner and/or trustee for the citizens of the State of Maine of all of the natural resources lying in, on, over, under and adjacent to” its coastal waters sought to recover for damage to such waters and the marine life therein.¹⁷¹ The defendant disputed the validity only of the third cause of action. The court upheld the State’s ability to bring its *parens patriae* cause of action, citing Supreme Court cases recognizing the right of a State to sue as *parens patriae* to protect its proprietary interest as well as to protect its “quasi-sovereign” interests on behalf of its citizens.¹⁷² Finding Maine had an

163. *Id.*

164. *Id.* at *18.

165. *Id.*

166. *Id.*

167. *Id.* *19.

168. *Id.*

169. *Maine v. M/V Tamano*, 357 F. Supp. 1097 (D. Me. 1973).

170. 38 M.R.S.A. § 541 et seq. (1972 Supp.).

171. *M/V Tamano*, 357 F. Supp. at 1098-1099.

172. *Id.* at 1099-1100. The court stated, “A quasi-sovereign interest must be an interest of the State independent of and behind the titles of its citizens; that is, in order to maintain a *par-*

independent interest in the quality and condition of its coastal waters, marine life and other natural resources, which are separate and distinct from the interests of its individual citizens, the court denied the defense motion to dismiss.¹⁷³

V. NATIVE AMERICANS AND NRD AUTHORITY

Native American tribes most likely have the authority to file similar claims, and in the interest of seeking justice for the damage to their environment, they ought to do so. The sovereignty of Native Americans has long been recognized. It is not inconsistent with this traditional sovereignty for a tribe to claim authority over its natural resources. Native Americans possess “the right. . .to make their own laws and be ruled by them.”¹⁷⁴

As do other sovereigns, Native American tribes have regulatory and judicial power over their people, which includes the rights to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice. Tribes have great control over child custody,¹⁷⁵ hunting and fishing,¹⁷⁶ gaming on the reservations,¹⁷⁷ health services,¹⁷⁸ human remains and other sacred and funerary objects,¹⁷⁹ language use,¹⁸⁰ educational programs,¹⁸¹ and other governmental powers.¹⁸²

ens patriae suit, the State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest.” [Internal citations and quotations omitted.]. *Id.* at 1100.

173. *Id.* The Court did not address defendant’s argument that in order to maintain a *parens patriae* action, a State must also show damage to its coastal waters has an adverse effect upon a substantial part of its citizens because the court found that Maine clearly demonstrated this. *Id.* at 1101. The court further determined that defendant’s arguments regarding speculative damages of the State were a problem of proof to be addressed at trial. *Id.*

174. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

175. *See* Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (2000); *Fisher v. District Court*, 424 U.S. 382, 386-88 (1976) (finding that tribes retained exclusive jurisdiction to determine custody of a child when all parties were members and lived on the reservation).

176. *See, e.g., Settler v. Lameer*, 507 F.2d 231, 239 (9th Cir. 1974); *United States v. Michigan*, 471 F. Supp. 192, 280 (W.D. Mich. 1979) (finding that fishing rights are exercised by members of the plaintiff tribes under extensive tribal regulation).

177. *See* Indian Gaming Regulatory Act, 25 U.S.C.A. §§ 2701-2721 (2000).

178. *See* Indian Self Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat 2203.

179. *See* Native American Graves and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2000).

180. *See* Native American Language Act, 25 U.S.C. §§ 2901-2906 (2000).

The Federal Government's higher position in the hierarchy of the federal system should not bar tribal *parens patriae* standing, given that the Supreme Court has held that States have *parens patriae* standing despite their relative status to the Federal Government.¹⁸³ Even if tribes do not have the same *parens patriae* status accorded to states, they may still have this status by virtue of being independent sovereigns. This is consistent with the view that tribal sovereign rights are retained from pre-contact.¹⁸⁴ In cases where foreign countries have brought this action in American courts,¹⁸⁵ the state has obtained standing by showing that its claim transcends its proprietary interests,¹⁸⁶ as well as its citizens' individual interests.¹⁸⁷

Unfortunately, many courts have upheld a higher standard for tribal *parens patriae* than that which other sovereigns have enjoyed. District courts have refused *parens patriae* in cases such as *Assiniboine & Sioux Tribes v. Montana*¹⁸⁸ and *Kickapoo Tribe of Oklahoma v. Lujan*.¹⁸⁹ In addition, *Alabama & Coushatta Tribes of Texas v. Trustees of the Big Sandy Independent School District*¹⁹⁰ never reached the question of tribes' quasi-sovereign interests, since standing was barred because the litigation was not brought on behalf of the entire tribal memberships. By comparison, in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*,¹⁹¹ the Supreme Court noted that Puerto Rico had *parens patriae* standing because it was "similarly situated to a State," as "it has a claim to represent its quasi-sovereign interests in federal court

181. See Indian Self Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203; Tribally Controlled Schools Act of 1988, Pub. L. No. 100-297, 102 Stat. 130; Johnson-O'Malley Act of 1934, 25 U.S.C. § 452-57 (1994).

182. See Cami Fraser, Note, *Protecting Native Americans: The Tribe as Parens Patriae*, 5 MICH. J. RACE & L. 665, 677 (2000).

183. See *id.*

184. *United States v. Wheeler*, 435 U.S. 313, 324 (1978).

185. *E.g.*, *Coordination Council for N. Am. Affairs v. Northwest Airlines Inc.*, 891 F. Supp. 4, 7 n.3 (D.D.C. 1995) ("foreign sovereigns are equally entitled to protect their citizens and may claim *parens patriae* standing to the same extent as a state.")

186. See *Republic of Guatemala v. Tobacco Inst., Inc. (In re Tobacco/Gov'tl Health Care Costs Litig.)*, 83 F. Supp. 2d 125, 134 (D. D.C. 1999) (deciding that Guatemala cannot obtain *parens patriae* standing because it is only seeking to recover damages to its own treasury, which is a proprietary interest).

187. See *id.* (stating that *parens patriae* should not be used when a more appropriate party than the state is capable of bringing suit).

188. *Assiniboine & Sioux Tribes v. Montana*, 568 F. Supp. 269 (D. Mont. 1983).

189. *Kickapoo Tribe of Ok. v. Lujan*, 728 F. Supp. 791 (D. D.C. 1990).

190. *Alabama & Coushatta Tribes of Tex. v. Tr. of the Big Sandy Ind. Sch. Dist.*, 817 F. Supp. 1319 (E.D. Tex. 1993).

191. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982).

at least as strong as that of any State.”¹⁹² Applying this rationale to Tribes, the question is therefore whether a Tribe has “at least as strong” of “a claim to represent its quasi-sovereign interests” as States.¹⁹³ As in *Snapp*, tribes should have a quasi-sovereign interest in ensuring its citizens are not discriminatorily denied the benefits of the federal system.

VI. CONCLUSION

Environmental action in Indian Country has traditionally lagged behind that of the rest of the United States, owing largely to a financial and political situation that has made Native Americans vulnerable candidates for exploitation. But as environmental conditions in Indian Country have worsened, courts have evolved to recognize the interest of tribes in protecting their natural resources. Although action in tribal courts is limited, tribes may pursue the same actions in federal and state courts. Further, tribes are entitled to bring citizen suits under federal environmental law. To the extent that these actions provide inadequate economic compensation to a group that has been exploited for centuries, private actions may fill in the gaps. If the courts recognize a state’s authority to sue for NRD (Natural Resources Damages), then it follows that the same rights extend to Native American tribes, if for no other reason than their similarity to states. The right to pursue toxic torts under *parens patriae* is an incredible opportunity for Native American tribes to take action against their many polluters as well as receive monetary compensation that can aid in their struggle for self-determination.

192. *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 608 n.15.

193. See Fraser, *supra* note 182.