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Michael P. O'Connell

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CITIZEN SUITS AGAINST TRIBAL GOVERNMENTS AND TRIBAL OFFICIALS UNDER FEDERAL ENVIRONMENTAL LAWS*

Michael P. O'Connell**

I. INTRODUCTION

Congress has enacted many environmental laws authorizing direct implementation and enforcement by federal, state and tribal governments. Some, but not all, federal environmental laws also authorize enforcement in citizen suits against any "person" alleged to be in violation of those federal environmental laws.¹ In addition to awarding declaratory and injunctive relief upon finding a violation of these federal environmental laws, citizen suit statutes typically authorize courts to award attorneys fees and other costs to the prevailing party. Congressionally authorized fees to private attorneys in citizen suit cases, which may range into six and seven figures, are intended to and do act as incentives to citizen suits.

Congressional authority to enact federal environmental laws derives primarily from the Commerce Clause of the United States Constitution.² Acting pursuant to this and other delegated constitutional powers, and subject to constitutional limitations on the exercise of federal governmental powers, Congress may impose substantive and procedural obligations of federal environmental statutes on private persons and entities, on federal, state, and tribal

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**The views set forth in this paper are those of the author in his private capacity and not necessarily those of Steel Rives LLP or any of its clients.

1. Federal environmental laws which authorize citizen suits include the Toxic Substances Control Act, 15 U.S.C. § 2620 (1994); Endangered Species Act, 16 U.S.C. § 1640(g) (1994); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (1994); Clean Water Act, 33 U.S.C. § 1365 (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1994); Noise Control Act, 42 U.S.C. § 4911 (1994); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (1994); Clean Air Act, 42 U.S.C. § 7604 (1994); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9659 (1994); and Community Planning and Right-To-Know Act, 42 U.S.C. § 11046(a)(1) (1994). Federal environmental laws that do not authorize citizen suits include the National Environmental Policy Act, 42 U.S.C. § 4321 (1994); and Coastal Zone Management Act, 16 U.S.C. § 1451 (1994). Some federal environmental laws do not authorize citizen suits as such but do create liability to public and private entities for various public and private harms. The Oil Pollution Act is an example. 33 U.S.C. §§ 2702, 2706, and 2707 (1994). Independent of citizen suits, the Federal Administrative Procedure Act, 5 U.S.C. § 706 (1994), provides means for seeking judicial review of federal agency action.

2. U.S. Const. art. I, § 8, cl. 3.

government officials, and on federal, state, and tribal governments themselves. Whether and to what extent Congress intended to or may authorize citizen suits against federal, state, and tribal governments involves difficult questions of statutory construction and constitutional law, application of principles of federalism and of federal Indian law, and Congressional protection of the federal pursue, not to mention liberal doses of politics.

The citizen suit provisions of federal environmental laws are quite similar. The Clean Water Act ("CWA") citizen suit section is illustrative. Although section 502 of the CWA expressly defines "person" to include states and political subdivisions of states,³ the citizen suit section of the CWA states, in part, that "any citizen may commence a civil action on his own behalf—(1) against any person (including (i) the United States, and (ii) any other governmental entity or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation" of certain provisions of the Act.⁴ The reference to governmental entities protected by the Eleventh Amendment obviously refers to states, already defined in the CWA as a "person."⁵ Notable about the authorization for citizen suits in the CWA and other federal environmental laws are the painfully explicit efforts by Congress to include both the United States, which is not defined as a "person" in section 502, and states (and political subdivisions of states), which are each defined as a "person" in section 502, within the section 505 definition of a "person" who may be sued.⁶ This separate and distinct definition of "person" clearly and unambiguously waives the sovereign immunity: (1) of the United States, and (2) of states and political subdivisions of states to the extent permitted by the Eleventh Amendment.⁷ Notably absent from this second definition of "person" in the CWA citizen suit section, and other citizen suit provisions of other federal environmental laws, is any reference to another aggregation of sovereign entities which is neither the United States nor states or political subdivisions of states; in short, Indian tribes.

In three cases, federal courts have held that citizen suits or vaguely analogous employee whistle blower protection administrative complaints may be brought against tribal governments under three separate federal environmental statutes.⁸ None of these cases adequately considered whether Congress' general

3. 33 U.S.C. § 1362(5). "The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State or interstate body." *Id.*

4. 33 U.S.C. § 1365(a).

5. 33 U.S.C. § 1362(5).

6. *See id.*

7. Despite Congress' clearly manifested intent to waive state immunity, the requisite number of Supreme Court Justices have held, at least for now, that the Eleventh Amendment is an absolute bar to suits by Indian tribes and other persons, but not to suits by the United States, against states in federal court under statutes expressly making states subject to such suits where the constitutional authority of Congress to waive state immunity rests on the Commerce Clause. *See Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000); *see also Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (Stevens, Souter, JJ., dissenting). Several members of the Supreme Court continue to dissent from this new Eleventh Amendment jurisprudence and its enduring quality remains in doubt.

8. *Osage Tribal Council v. United States Dep't of Labor*, 187 F.3d 1174 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2657 (2000) (construing the employee whistle blower provision of the Safe Drinking

definitions of "person" and redefinition of "person" in the citizen suit provisions of federal environmental statutes manifests Congress' unmistakably clear intention to waive tribal sovereign immunity. The Supreme Court recently reconfirmed that it is for Congress, not federal courts, to determine if, when, and under what circumstances tribal sovereign immunity should be waived.⁹ Even more recently, the Court held that the term "person" in federal statutes ordinarily should not be interpreted to include sovereigns where doing so would impose financial burdens on sovereigns, and therefore citizens and taxpayers of a sovereign, absent a clear intent by Congress to do so.¹⁰

This paper examines the general rule and the exceptions to tribal sovereign immunity, including suits against tribal officials in their official and individual capacities, and practical issues relating to application of citizen suit sections of federal environmental laws to suits against tribal government officials and tribal governments. The issues boil down to one: whether Congress manifested its intention in unmistakably clear statutory language to make tribal government treasuries available to pay fees of private attorneys in citizen suit actions. None of the cases considering the question of citizen suits against tribal governments have adequately addressed this question.

This paper concludes that citizen suits, including declaratory actions and suits for injunctions to compel tribal government officials (and indirectly tribal governments) to comply with applicable federal environmental laws, may be brought against tribal officials, and that tribal government officials may be personally liable for their actions in violation of federal environmental laws. This paper concludes, further, that the United States may sue tribal governments as well as tribal government officials to compel their compliance with federal environmental laws. This paper concludes finally that evidence is lacking of clear and unmistakable Congressional intent to waive tribal government sovereign immunity to citizen suits under federal environmental laws; and, absent such evidence, that federal courts lack jurisdiction over citizen suits against tribal governments.

Water Act, 42 U.S.C. § 300j-9(I)); *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) (construing the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(A)); and *Atlantic States Legal Found. v. Salt River Pima-Maricopa Indian Cmty.*, 827 F. Supp. 608 (D. Ariz. 1993) (construing the citizen suit provisions of RCRA and the Clean Water Act, 33 U.S.C. § 1365). *Backcountry Against Open Dumps v. EPA*, 100 F.3d 147 (D.C. Cir. 1996), observed in *dictum*, citing *Blue Legs*, that Indian tribes are not exempt from citizen suits under RCRA. This *dictum* was not based on any analysis of whether Congress had manifested an unmistakably clear intent to waive tribal sovereign immunity. In *Florida Parapalegic Association v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1132 (11th Cir. 1999), the Eleventh Circuit noted the Eighth Circuit's decision in *Blue Legs* but stated that RCRA was not before it and that it was not deciding whether RCRA's citizen suit section waives tribal sovereign immunity.

9. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); see also *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991).

10. *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 120 S. Ct. 1858 (2000) (Stevens, J. dissenting).

II. GENERAL RULE AND EXCEPTIONS TO TRIBAL SOVEREIGN IMMUNITY

Tribal governments are sovereigns with substantial governmental obligations.¹¹ Tribal governments provide a wide range of governmental services to persons and entities who enter reservations and other areas under tribal government control and administration, including police and fire protection, emergency medical assistance and transport, courts for resolution of commercial and other civil disputes as well as for administration of criminal laws, child welfare, education, business and economic development, environmental protection, natural resource development, public infrastructure such as roads, public services such as water for drinking, municipal, industrial and rural uses, solid waste collection and disposal, recreation facilities, and much, much more. Indian reservations are among the most impoverished communities in the nation. As a result, the financial resources with which tribal governments carry-out their responsibilities typically are much more limited on a per capita basis than what is available to neighboring state and local governments providing many of the same governmental services.

Tribal governments "have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."¹² In *Martinez*, the Supreme Court described more fully the rule that governs interpretation of congressional enactments when the question is whether tribal sovereign immunity, and for the most part state or federal sovereign immunity, has been waived by Congress. "This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But 'without congressional authorization,' the 'Indian Nations are exempt from suit.'"¹³

It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'... [I]n the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the [Indian Civil Rights Act] are barred by its sovereign immunity from suit.¹⁴

Tribal sovereign immunity is a matter of federal law. While Congress can alter its limits, the Court has held that Congress must do so through "explicit legislation."¹⁵ In short, the test is whether Congress by unequivocal expression of intent has waived tribal sovereign immunity. This test is strict, as it should be when resources that a sovereign needs to carry-out governmental programs are redirected at the instance of a litigant other than the United States.

That a federal law applies to a tribal government and that tribal governments and tribal government officials are obligated to conform their conduct to that federal law does not carry with it the further implication that Congress has waived

11. See *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985).

12. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (White, J., dissenting).

13. *Id.*

14. *Id.* at 58-59 (internal citations omitted).

15. *Kiowa Tribe*, 523 U.S. at 759.

tribal sovereign immunity to private suits to enforce that law in federal court. The Indian Civil Rights Act¹⁶ unquestionably applies to tribal governments and tribal government officials. Yet, *Martinez* held that Congress did not waive tribal sovereign immunity to suits in federal court to enforce that law.¹⁷

The limitations on suits against tribal governments to enforce federal laws absent a clear and explicit waiver by Congress generally do not apply to suits by the United States.¹⁸ Thus, suits by the United States against tribal governments to enforce federal environmental laws applicable to tribal governments are not precluded by tribal sovereign immunity.¹⁹

Those who call for a broad waiver of tribal sovereign immunity by Congress have claimed that tribal sovereign immunity makes it impossible to enforce federal laws against tribal governments. This claim lacks merit. Any attorney whose client has a good faith, fact-based claim that a tribal government has violated federal environmental laws can plead a claim against tribal government officials that will withstand a motion to dismiss on tribal sovereign immunity grounds.²⁰

The long-recognized exception to sovereign immunity by suit against government officials requires an allegation made competently and in good faith that a government official, purportedly acting on behalf of the government he or she serves, acted outside of lawful authority of the sovereign and therefore in his or her individual capacity in violation of a federal law or constitutional provision. The fiction that a state governmental official may be held accountable in his or her individual capacity for violating a federal law or constitutional provision without violating the sovereign's immunity was announced nearly a century ago in *Ex Parte Young*.²¹

16. 25 U.S.C. § 1301.

17. *Martinez*, 436 U.S. at 59.

18. See *Florida Parapalegic*, 166 F.3d at 1134-35; *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996); *United States v. Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 2461 (1987).

19. Whether a particular federal environmental law is applicable to tribal governments is beyond the scope of this article. Compare *Donovan v. Navajo Forest Prod. Indus.*, 692 F.2d 709 (10th Cir. 1982) (holding that Occupational Safety and Health Act ("OSHA") does not apply to Navajo Forest Products Industries) with *Donovan v. Coeur D'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) (holding that OSHA does apply to *Coeur D'Alene Tribal Farm*) and *Reich*, 95 F.3d at 174 (holding OSHA applies to tribal enterprise). See the definition of "person" in the federal Superfund law, 42 U.S.C. § 9601(21), which the Environmental Protection Agency has interpreted as not including tribal governments, because the term as defined does not include tribal governments, thereby excluding tribal governments from the universe of persons who may be liable for cleanup of a release of hazardous substances, but as including tribal government corporations chartered under section 17 of the Indian Reorganization Act, 25 U.S.C. § 477, because the definition literally includes corporations. See also *Florida Parapalegic*, 166 F.3d at 1132 (holding that Americans with Disabilities Act applies to tribal governments).

20. As noted in the text accompanying note 19, the United States can sue to enforce federal environmental laws against tribal governments. No one can claim that the United States lacks sufficient resources to prosecute any such claim as necessary to protect the environment.

21. 209 U.S. 123 (1908). See also *Alden v. Maine*, 527 U.S. 706, 747 (1999) (Souter, J., dissenting) ("the exception to our sovereign immunity doctrine recognized in *Ex Parte Young*, is based on the premise that sovereign immunity bars relief against States and their officers in both state and federal courts, and that certain suits for declaratory and injunctive relief against state officers must be

On more than one occasion, the Supreme Court has held under *Ex Parte Young* analysis that tribal sovereign immunity does not protect tribal government officials allegedly acting in their individual capacities from suit for violation of applicable federal laws.²² The relief that may be granted against a governmental official based on *Ex Parte Young* includes both injunctive (mandatory and prohibitory) and declaratory relief.²³ Because a government, whether tribal, state or federal, can only act through its officials, an injunction has the very practical if not the technical legal effect of forcing the government on whose behalf the officer acts to comply with applicable provisions of law. By this means, therefore, tribal governments may be forced to comply with or at least not violate applicable provisions of federal environmental laws even where the sovereign immunity of a tribal government would preclude a direct action against the tribal government.

A tribal government official sued and found liable in his or her individual capacity for violation of federal environmental laws in turn has no immunity from attorneys fees, costs, or penalties which may be awarded in such an action.²⁴ The reality of course is that most governmental officials, whether tribal, state or federal, lack personal resources to pay attorneys fees which may run into the six or seven figure range in some citizen suits. The tribal government served by such an officer would not be obligated to pay attorneys fees awarded against an officer in his or her individual capacity for violations of federal environmental laws in litigation where the tribal government itself was not a party. In many, though not all cases, the officer found liable in his or her individual capacity may be covered in effect through errors and omissions insurance coverage obtained by the tribal government. But in such case the tribal treasury and other tribal assets needed for essential governmental services would not be obligated to pay the private attorney fees awarded to a prevailing plaintiff.

Because tribal governments generally have extremely limited financial resources on per capita basis to pay for essential governmental services, compared to federal, state and local governments, and because Indian reservations generally suffer higher rates of poverty than surrounding areas, the issue of whether tribal sovereign immunity must be waived and tribal government resources and taxpayers exposed to the burden of private attorneys fees in citizen suit

permitted if the Constitution is to remain the supreme law of the land") (internal citations omitted). See also *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("an official-capacity suit [by contrast] is, in all respects other than name, to be treated as a suit against the entity" which must be dismissed absent a valid waiver of immunity either by Congress or the sovereign being sued); *Williams v. Board of County Commissioners of San Juan County*, 963 P.2d 522 (N.M. App. 1998), *cert. denied* (discussing the distinction between official capacity and individual capacity suits against government officials).

22. See, e.g., *Oklahoma Tax Comm'n v. Citizen Band of the Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991); *Martinez*, 436 U.S. at 59.

23. See *Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 954 (9th Cir. 2000) (drawing distinction between an action that may proceed against tribal government officials under *Ex Parte Young* and an action seeking direct relief against the tribal government that is barred by tribal sovereign immunity).

24. Likewise, a suit against a state official in his or her individual capacity does not violate a state's immunity so long as the relief sought would not create liability against the state treasury. *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974).

environmental litigation is one that involves important policy choices that Congress should explicitly make, taking into account among other factors the federal government's trust relationship to tribal governments.²⁵ One of the issues that should not drive this choice, however, is whether federal environmental laws will be enforced on Indian reservations or against tribal governments. The United States can always bring appropriate actions to enforce federal environmental laws against both tribal officials and tribal governments, tribal sovereign immunity notwithstanding.²⁶ And citizen suits may be brought against tribal officials to compel compliance with federal environmental law where it is alleged that the tribal official through whom the tribal government acts is acting without or in excess of lawful tribal authority, tribal sovereign immunity notwithstanding.

III. THREE CASES—PARTIAL AND INADEQUATE SEARCH FOR CONGRESSIONAL INTENT

A. *Blue Legs*

The first case to consider whether citizen suits may be brought against tribal governments under federal environmental laws was *Blue Legs v. United States Bureau of Indian Affairs*.²⁷ *Blue Legs* construed the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA").²⁸ While interesting, the facts of *Blue Legs* are not important to the legal question of whether Congress explicitly waived the sovereign immunity of tribal governments when it enacted the citizen suit section of RCRA.

25. In *Alden*, 527 U.S. at 755, the Supreme Court observed that congressional action subjecting sovereigns, in that case states, to suits by private parties and thereby to attorneys fees or money damages may impose "staggering burdens" on states and threaten their "financial integrity," including possibly "levy on its treasury or perhaps even governmental buildings or property which the State administers on the public's behalf." Tribal governments which have much more limited resources than any state would all the more be threatened if they were forced to pay fees to private attorneys in private suits. That Congress knows how to address sovereign immunity issues affecting tribal governments in many ways, in some cases without congressional waiver of sovereign immunity, is demonstrated by its enactment of the Indian Tribal Economic Development and Contracts Encouragement Act of 2000, Public Law 106-179, codified at 25 U.S.C. § 81. This recent congressional enactment does not waive tribal sovereign immunity. However, for certain contracts requiring approval by the Secretary of the Interior, the Act requires that tribal governments provide notice to parties with whom they contract of remedies available in case of a breach of the contract, reference to a tribal code section, ordinance or tribal court decision disclosing that the tribal government may raise sovereign immunity as a defense in a suit against the tribal government, or an express waiver of the tribal government's immunity to suit. Ultimately, the sovereign immunity doctrine reflects a "societal decision," *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 781 (D.C. Cir. 1986), about who should make decisions allocating limited governmental resources. Absent clear and express waiver of sovereign immunity by Congress within the limits of its constitutional authority, those decisions should be made by governmental officials charged with that responsibility.

26. Despite sovereign immunity, tribal governments, like states, may be sued by "in the name of United States by those who are entrusted with the constitutional duty to 'take Care that the Laws be faithfully executed.'" U. S. Const., art. II, § 3, [which] differs in kind from a suit by an individual." *Alden*, 527 U.S. at 755. The Court added in *Alden* that "[s]uits brought by the United States itself require the exercise of political responsibility . . . which is absent from a broad delegation" of litigation authority to private persons. *Id.* at 756.

27. 867 F.2d 1094 (8th Cir. 1989).

28. 42 U.S.C. § 6972(a)(1)(A)(1994).

RCRA's citizen suit section provides in part that "any person may commence a civil action on his own behalf—(1)(a) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation" of certain provisions of RCRA.²⁹ The *full* extent of the Eighth Circuit's analysis of whether congressional enactment of this provision waives tribal sovereign immunity is set forth below:

Under the RCRA, citizens are permitted to bring compliance suits "against any person (including (a) the United States, and (b) any other governmental instrumentality or agency . . .) who is alleged to be in violation . . ." "Person" is subsequently defined to include municipalities. Municipalities include "an Indian tribe or authorized tribal organization . . ." It thus seems clear that the text and history of the RCRA clearly indicates congressional intent to abrogate the Tribe's sovereign immunity with respect to violations of the RCRA.³⁰

While it is true that RCRA's definition of "person" includes "municipality" and that RCRA's definition of "municipality" includes "Indian tribes," that linear, syllogistic analysis does not answer the question, other than by *ipse dixit*, whether Congress explicitly waived tribal sovereign immunity. Given that Congress went to great trouble to explicitly include the United States and states (to the extent permitted by the Eleventh Amendment) in those "persons" who could be subject to citizen suits, despite the fact that "person" already was defined to include states, Congress' failure to specifically include tribal governments (vested with common-law sovereign immunity) among those "person[s]" who may be sued makes the issue more difficult than the Eighth Circuit's analysis suggests. The fact that Congress may not have thought about tribal governments when it drafted the citizen suit provision of RCRA does not argue in favor of implying a waiver of sovereign immunity since constitutional authority to waive tribal sovereign immunity rests with Congress and tribal governments, not federal courts.

Unlike the Eighth Circuit, the EPA analyzed RCRA's legislative history and what Congress was seeking to accomplish when it included "Indian tribes" in the definition of "municipality" and in turn in the definition of "person." The EPA examined RCRA's legislative history in these terms:

RCRA does not explicitly define a role for Tribes under Sections 4005 and 4010 and reflects an undeniable ambiguity in Congressional intent. Indeed, the only mention of Indian Tribes anywhere in RCRA is in Section 1004(13), a part of the "Definitions" of key terms in RCRA. Section 1004(13) defines the term "municipality" to mean:

29. *Id.*

30. *Blue Legs*, 867 F.2d at 1097 (internal citations omitted). The Ninth Circuit's holding in *State of Washington Dep't of Ecology v. E.P.A.*, 752 F.2d 1465, 1469-71 (9th Cir. 1985), actually is that the Environmental Protection Agency ("EPA") did not violate RCRA when it retained RCRA jurisdiction over Indian reservations, despite Washington's request for delegation of the Subtitle C hazardous waste program. The author of this article was one of the attorneys representing the amici tribes whose briefs the Ninth Circuit cited and relied upon in part in *State of Washington Dep't of Ecology v. E.P.A.* The holding and issues involved in that case did not in any way address the question of whether Congress waived the sovereign immunity of Indian tribes.

“A city, town, borough, county, parish, district or other public body created by or pursuant to State law, with responsibility for the planning or administration or solid waste management, or any Indian tribe or authorized tribal organization or Alaska Native village or organization[.]”

The term “municipality”, in turn, is used in Sections 4003(c)(1)(C), 4008(a)(2), and 4009(a) of RCRA with reference to the availability of certain Federal funds and technical assistance for solid waste planning and management activities by municipalities. Section 4003(c)(1)(C) specifies that States are to use Subtitle D grant funds to, among others, assist municipalities in developing municipal waste programs; Sections 4008(a)(2) and 4008(d)(3) authorizes EPA to provide financial and technical assistance to municipalities on solid waste management; Section 4009(a) authorizes EPA to make grants to States to provide financial assistance to small municipalities. Thus, Congress apparently intended to make explicit that Indian Tribes could receive funds and assistance when available in the same manner as municipal governments. However, Congress did not explicitly recognize any other role for Tribes under other provisions. There is no accompanying legislative history which explains why Indian Tribes were included in Section 1004(13) and nowhere else.

EPA does not believe that Congress, by including Indian Tribes in Section 1004(13), intended to prohibit EPA from allowing Tribes to apply for an adequacy determination under Subtitle D. First of all, it is clear that Indian Tribes are not “municipalities” in the traditional sense. Indian Tribes are not “public bodies created by or pursuant to State law.” Indeed, Indian Tribes are not subject to State law except in very limited circumstances. Indian Tribes are sovereign governments. There is no indication in the legislative history that Congress intended to abrogate any sovereign Tribal authority by defining them as “municipalities” under RCRA, i.e., that Congress intended Section 1004(13) to subject Indian Tribes to State law for RCRA purposes. Moreover, it is a well-established principle of statutory construction that Federal statutes which might arguably abridge Tribal powers of self-government must be construed narrowly in favor of retaining Tribal rights.

EPA believes that inclusion of Indian Tribes in Section 1004(13) was a definitional expedient, to avoid having to include the phrase “and Indian tribes or tribal organizations or Alaska Native villages or organizations” wherever the term “municipality” appeared, not to change the sovereign status of Tribes for RCRA purposes. In particular, the references in Sections 4003(c) and 4009(a) to state “assistance” to municipalities does not suggest that Congress intended Indian Tribes to be subject to State governmental control. Furthermore, given the limited number of times the term “municipality” appears in RCRA, it does not appear that Congress was attempting to define a role for Tribes for all potential statutory purposes.³¹

31. Proposed Rule, Subtitle D Regulated Facilities: State/Tribal Permit Program Determination of Adequacy; State/Tribal Implementation Rule, 61 Federal Register 2584, 2588-2589 (January 26, 1996) (internal citations omitted). *See also* Proposed Rule, Authorization of Indian Tribe's Hazardous Waste Program Subtitle C, 61 Federal Register 30472, 30473-30474 (June 14, 1996) (similar analysis). Despite these proposed rulemaking notices, the EPA has not enacted rules providing for delegation of the Subtitle C or D programs to tribal governments. *See Backcountry Against Open Dumps v. EPA*,

The legislative history analyzed by the EPA is critical. Congress was not seeking by use of unmistakably clear language to waive tribal sovereign immunity under the citizen suit section of RCRA. Congress was seeking to ensure that tribal governments would be eligible for grants. That does not equate to an intent to waive tribal sovereign immunity.

B. *Atlantic States*

The second case to consider citizen suits against tribal governments was *Atlantic States Legal Foundation v. Salt River Pima-Maricopa Indian Community*.³² This case included claims under RCRA and the CWA. The parties conceded and the district court assumed, all quite correctly, that citizen suit sections of these statutes are identical for tribal sovereign immunity waiver analysis purposes.³³ The district court held that both of these statutes waive tribal sovereign immunity to citizen suits.³⁴

In reaching this result, the district court relied on the Eighth Circuit's analysis in *Blue Legs*, quoting in full that portion of the Eighth Circuit's opinion already set forth in section III.A of this article.³⁵ Although the district court acknowledged other arguments raised by the Salt River-Pima Maricopa Indian Community in support of sovereign immunity, including the rule that a congressional waiver of sovereign immunity must be "unequivocal," the district court swept these arguments aside claiming that the tribal defendant "does not point out, however, that the term 'person' in the relevant sections of the CWA and RCRA unequivocally includes Indian tribes as 'persons.'"³⁶ In short, the district court in *Atlantic States* relied on no evidence beyond the general definitions of "person" in RCRA and CWA that Congress unmistakably and clearly intended to waive tribal sovereign immunity. Therefore, *Atlantic States* does not add anything new to the problem of deciphering congressional intent.

C. *Osage Tribal Council*

The third case to consider the issue of tribal sovereign immunity under the citizen suit sections of federal environmental laws, *Osage Tribal Council v. United States Department of Labor*,³⁷ arose under the employee whistle blower protection section of the Safe Drinking Water Act ("SDWA").³⁸ This section allows any covered employee who believes he or she has been discharged or discriminated

100 F.3d 147 (D.C. Cir. 1996) (holding that EPA could not delegate RCRA's solid waste management program to tribal governments). Although *Backcountry* cites *Blue Legs* for the proposition that Indian tribes are subject to citizen suits under RCRA, that citation was in *obiter dictum* and without any analysis of Congressional intent on the question of congressional waiver of tribal immunity.

32. 827 F. Supp. 608 (D. Ariz. 1993).

33. *Id.* at 609 n.1.

34. *Id.* at 609.

35. *Id.*

36. *Id.* at 610.

37. *Osage Tribal Council*, 187 F.3d 1174.

38. 42 U.S.C. § 300j-9(I)(1)(C)(1994).

against in violation of the whistle blower protection section of the SDWA to file an administrative complaint with the Secretary of the Department of Labor against any "person" in violation of that section. Like RCRA and the CWA, the SDWA defines "person" to include "municipality" which in turn is defined to include "an Indian tribe."³⁹ The Tenth Circuit cited nothing in the SDWA's legislative history to show that Congress intended through the two-step definition of "person" to waive tribal sovereign immunity to citizen suits.⁴⁰ While the Tenth Circuit discussed the rule that waivers of sovereign immunity must be express, and conceded "that Congress *could* have been more clear," a telling concession, the court of appeals held this definition to be an unambiguous waiver of tribal sovereign immunity, citing *Blue Legs* and *Atlantic States*.⁴¹

Osage Tribal Council's discussion of this point as it applies to waiver of tribal sovereign to citizen suits is *dictum*. The case arose from a complaint filed by an aggrieved employee with the Department of Labor.⁴² It was the Department, however, which instituted a federal administrative proceeding to determine whether the employee had been discharged in violation of the SDWA.⁴³ Indeed, the Department issued a decision that the employee's rights had been violated. It was that decision by the United States which the Osage Tribal Council, not the employee, brought directly to the Tenth Circuit for review. Although the employee intervened in the court of appeals, the action before the court of appeals was brought by the Osage Tribal Council for review of the Department's decision; it was not a citizen suit.⁴⁴ Whether or not this case properly is viewed as a citizen suit case, as opposed to an administrative case brought by the United States, its analysis does not establish that Congress clearly and unequivocally waived sovereign immunity of tribal governments to citizen suits by defining "person" to include "municipality" and defining "municipality" to include "an Indian tribe."

D. Presumption That "Person" Does Not Include Sovereigns

There is a "longstanding interpretive presumption that 'person' [when used in federal legislation] does not include the sovereign."⁴⁵ *Vermont Agency of Natural Resources v. United States ex rel. Stevens* arose under the *qui tam* suit provision of the False Claims Act,⁴⁶ which subjects to liability "any person" who presents false claims for payment or approval to the United States.⁴⁷ The False Claims Act does not define "person." Nonetheless, the Court's discussion of its interpretive presumption that "person" when used in federal legislation has some weight in construing the definition of "person" in the citizen suit sections of

39. *Id.*

40. *Osage Tribal Council*, 187 F.3d 1174.

41. *Id.* at 1182.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Stevens*, 120 S. Ct. at 1866.

46. 31 U.S.C. § 3729(a)(1994).

47. *Id.*

federal environmental statutes. The Court said:

The presumption is “particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before.” The presumption is, of course, not a “hard and fast rule of exclusion,” but it may be disregarded only upon some affirmative showing of statutory intent to the contrary.⁴⁸

The citizen suit provisions of RCRA, CWA, and SDWA modify the general definition of “person” elsewhere defined in these statutes. The general definition of “person” in these statutes does not include the United States but the citizen suit provision expressly redefines “person” subject to citizen suits to include the United States. The general definition of “person” in these statutes already includes a “State, municipality, commission, or political subdivision of a State, or any interstate body.” Despite this general definition, the citizen suit sections redefine “person” subject to such suits as states and any other governmental instrumentality to the extent permitted by the Eleventh Amendment. This description of governmental entities Congress intended to subject to citizen suits indicates the universe of governments whose sovereign immunity Congress sought to waive in clear and express terms; and that universe does not include tribal governments. This redefinition of “person” to include states was superfluous and unnecessary if the general definition of “person” was sufficient itself to waive state sovereign immunity, or so the reasoning of *Blue Legs*, *Atlantic States*, and *Osage Tribal Council* would indicate. That approach to statutory construction, however, is inconsistent with ordinary rules of statutory construction. Applying the ordinary rules of statutory construction and the presumption that “person” does not include sovereigns unless there is an “affirmative showing of statutory intent to the contrary,”⁴⁹ what is striking about the redefinitions of “person” in the citizen suit provisions of federal environmental statutes is the absence of any indication that Congress clearly and expressly intended to waive tribal sovereign immunity.

III. CONCLUSION

Suits may be brought against tribal governments and tribal government officials by the United States to enforce federal environmental laws. Citizen suits may be brought against tribal officials in their individual capacities under *Ex Parte Young* to control the actions of tribal officials in accordance with federal environmental laws. In such actions, tribal officials are liable for attorneys’ fees and costs as appropriate.

Only three cases have considered whether citizen suits under federal environmental laws may be brought against tribal governments. These cases have concluded that such actions may be brought by looking at the general definitions of “person” and “municipality” in RCRA, CWA, and SWDA. None of these

48. 120 S. Ct. at 1866-67 (internal citations omitted).

49. *Id.* at 1867.

cases have considered whether the textual organization of the citizen suit sections redefine those persons subject to citizen suits. None of these three cases consider the presumption that “person,” as redefined in the citizen suit section of these statutes, does not include a sovereign absent a clear and express expression of congressional intent. None of the cases considering the issue have pointed to any clear and unambiguous congressional intent that the limited resources of tribal governments and tribal taxpayers be obligated to pay fees to private attorneys in citizen suit litigation. Lacking evidence of clear and unmistakable congressional intent to waive tribal sovereign immunity to citizen suits under federal environmental laws, federal courts lack jurisdiction over citizen suits against tribal governments. If tribal sovereign immunity to citizen suits is to be waived, it is for Congress by use of clear and unambiguous legislation to do so. Thus far, Congress has not done so.

As this article makes clear, the fact that Congress has not waived tribal sovereign immunity to citizen suits under federal environmental laws does not mean that federal environmental laws will not or cannot be enforced on Indian reservations or against tribal governments. The United States may sue tribal governments and tribal government officials and can be expected to use that degree of political judgment committed to federal officials which is appropriate to the task. And apart from what the United States may do, citizens may take action they deem appropriate and in their own interest to sue tribal officials to conform their conduct to federal environmental laws. However, tribal treasuries and other resources of the most impoverished communities in this nation may not be diverted to pay private attorneys in such cases without “explicit” congressional authorization, which Congress has not yet provided, or with the consent of tribal governments themselves.
