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## Due Process and Public Participation in Tribal Environmental Programs\*

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## I. INTRODUCTION

Environmental law as it has evolved in the United States can be described as “environmental federalism.”<sup>1</sup> Federal laws establish the basic framework for protecting and restoring air and water quality, managing wastes, dealing with hazardous materials, and a range of other subjects.<sup>2</sup> Within the framework of these federal laws, states are required to perform certain functions, and they have the option to perform other functions pursuant to delegations of authority from the federal Environmental Protection Agency (EPA).<sup>3</sup> States also have the option, through the exercise of their sovereignty, to enact and carry out laws that deal with aspects of environmental protection that are not covered by federal law.<sup>4</sup> In the modern era of environmental law, which began in 1970, a substantial amount of litigation has arisen in the context of disputes between and among the various governmental entities: state versus federal agency, state versus state (sometimes with a federal agency taking sides), federal agency versus local government, and local government versus state agency (sometimes with a federal agency taking sides).<sup>5</sup> In a federal system, such disputes are to be expected.

Over the past decade, a number of Indian tribal governments have become actively engaged in environmental federalism, largely pursuant to amendments in the relevant statutes and implementing regulations which provide that tribes can assume roles similar to those of the states.<sup>6</sup> Several of the tribes that have risen to meet the challenges of performing such roles have seen lawsuits filed by states and cities against the EPA over the agency’s decisions to approve tribal programs.<sup>7</sup> In the context of water quality, opposition to tribal

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1. See generally Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141 (1995) (exploring how responsibilities for environmental protection policies have and should be allocated among federal, state, and local governments).

2. See *id.* at 1160-65.

3. See *id.* at 1175.

4. See *id.* at 1172.

5. See *id.* at 1143-46.

6. See Dean B. Suagee, *Tribal Self-Determination and Environmental Federalism: Cultural Values as a Force for Sustainability*, 3 WIDENER SYMP. L. REV. 229, 232-33 (1998) [hereinafter Suagee, *Tribal Self-Determination and Environmental Federalism*]. See generally David F. Coursen, *Tribes as States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Law and Regulations*, 23 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,579 (Oct. 1993) (discussing how increasing numbers of Indian tribal governments have become involved in environmental federalism).

7. See, e.g., *Montana v. EPA*, 941 F. Supp. 945 (D. Mont. 1996).

authority has included efforts to rewrite the Clean Water Act<sup>8</sup> to limit the territorial authority of tribes.<sup>9</sup>

The opposition to tribal regulatory authority features an argument that is unique to Indian country, one that does not seem to arise in any other environmental-federalism context. It is the argument made by non-Indians who live within reservation boundaries, and by states on behalf of such people, that, since they have no right to representation in tribal government, they should not be subject to tribal law.<sup>10</sup> This argument has some resonance. More than just the fear of being treated unfairly by a government in which one has no voice, it is an argument that can be framed as a matter of human rights. The right to participate in government is enshrined in article 25 of the International Covenant on Civil and Political Rights.<sup>11</sup> One can also make a human rights counter argument. For example, since federal laws that opened reservations to settlement by non-Indians violated the collective right of tribes to self-determination, federal recognition of tribal authority over environmental protection for all lands within reservation boundaries is part of a contemporary remedy for the historical violation of self-determination.<sup>12</sup>

The tension between the interests of tribal governments in protecting the environment of all lands within reservations and the rights of nonmembers of tribes need not be resolved by sanctioning the intrusion of state governmental power within reservation boundaries. We may instead find ways to resolve this tension by looking into some of the details of environmental federalism and the modern practice of tribal sovereignty. When tribes assume state-like roles for purposes of carrying out federal environmental laws, they take on these roles in the context of federal regulations that provide numerous opportunities for public participation as well as safeguards for ensuring that persons whose interests are regulated by tribal governments are afforded due process.<sup>13</sup>

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8. Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. §§ 1251-1387 (1994 & Supp. III 1997).

9. See H.R. 961, 104th Cong. (1995), 141 CONG. REC. H5013 (daily ed. May 16, 1995); see also *infra* notes 19-22 and accompanying text.

10. See Phillip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1, 3-4 (1999).

11. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 25, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

12. See Dean B. Suagee, *Clean Water and Human Rights in Indian Country*, NAT. RESOURCES & ENV'T, Fall 1996, at 48-49 [hereinafter Suagee, *Clean Water and Human Rights*].

13. See, e.g., Clean Water Act §§ 501-518, 33 U.S.C. §§ 1361-1377 (1994 & Supp. III 1997) (describing Clean Water Act administrative procedure and state authority).

Part II of this Article discusses some of the reasons why public participation and due process matter for tribes that become involved in American environmental federalism. Part III takes note of some of the sources of law that impose due process requirements on tribal agencies, as well some other sources that tribal lawmakers could cite in imposing requirements on their governmental agencies. Part IV presents an overview of administrative due process in American law. This part explains the distinction between rulemaking and adjudication by administrative agencies, noting that the concept of due process really only applies in the context of adjudication and that rulemaking, with its structured opportunities for public participation, can be seen as a surrogate for lawmaking by a legislative body. Part IV also examines the kinds of interests that are protected by due process, lists the minimal requirements for administrative due process, and summarizes the balancing test that the Supreme Court has fashioned for determining whether or not due process requires more than the minimum in a given set of circumstances.

Part V examines the public participation and due process requirements that can be found in the federal environmental programs for which tribes can assume roles similar to those of states. This part looks first at the EPA's generally applicable requirements for rulemaking and for decision-making in permit programs, including opportunities for administrative appeals before the EPA's Environmental Appeals Board. This Part then looks at specific requirements under the Clean Water Act in some detail, followed by brief treatment of a few other federal statutes.

Part VI briefly looks at some ways that tribes might adopt variations in their approaches to due process and public participation in order to ensure that culturally important interests are taken into consideration. This topic likely provides fertile ground for further analysis. In this Article, however, only a few of the issues that might be explored have been raised.

## II. WHY PUBLIC PARTICIPATION AND DUE PROCESS MATTER

Due process is a basic value in American law, and public participation in government decisionmaking is a basic value in American democracy. Below are a few reasons why tribal officials should treat these as basic values in tribal government environmental protection programs.

A. *Rights and Interests of Tribal Members*

Individual tribal members have rights under tribal constitutions and customary law, as well as under the Indian Civil Rights Act.<sup>14</sup> The institutions of tribal government carry much weight in making these civil rights meaningful. In addition, individual tribal members share in the collective rights of their tribes: Tribes have the right to exercise self-government, and each tribal member is a part of the “self” of the tribe.<sup>15</sup> Some of the rights that individual Indians have as tribal members depend upon a healthy environment, for example, hunting and fishing rights and rights to carry on other cultural practices that make use of the natural world. Within the framework of federal environmental laws, environmental protection is carried out through a partnership between the federal government and the states, with much of the on-the-ground work being done by the states.<sup>16</sup> Now that tribes can choose to take on roles similar to those of states, tribal officials may find that they have little choice but to develop effective environmental programs to protect the resources on which tribal members depend in exercising treaty rights and carrying on cultural practices. Building tribal programs within the context of environmental federalism requires tribes to abide by some minimum requirements for due process and public participation.

B. *Rights and Interests of Non-Indians*

Non-Indians and nonmember Indians have numerous rights and interests that can be affected by tribal governments. Owners of fee land and lessees of trust land have property rights.<sup>17</sup> Everyone who lives on, or visits, a reservation has expectations that environmental health issues are being taken care of: that the water is safe to drink, that waste disposal practices do not threaten public health, and that fish taken from reservation streams are safe to eat. Again, the institutions of tribal government carry great weight in protecting these kinds of rights and interests.<sup>18</sup> Moreover, people do not want to simply be reassured that everything is being taken care of, they want and expect opportunities to participate in the governmental decisions

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14. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303 (1994); *see also infra* notes 31-35 and accompanying text.

15. *See generally* Dean B. Suagee & Christopher T. Sterns, *Indigenous Self-Government, Environmental Protection and the Consent of the Governed: A Tribal Environmental Review Process*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 59 (1994) (reviewing the tribal right to self-govern).

16. *See id.* at 79-80.

17. *See* 2 THOMPSON ON REAL PROPERTY § 17.07 (David A. Thomas ed., 1994).

18. *See generally* Suagee & Sterns, *supra* note 15, at 67-104.

that affect them and to vote for at least some of the officials who make those decisions.

C. *Avoiding Divestiture of Sovereignty by Congress and the Courts*

When tribes exercise their right of self-government, their governmental actions often affect people who are not tribal members, and some of those people react by going to Congress. In 1995, in the first session of the 104th Congress, the House of Representatives passed House Bill 961, a bill to amend the Clean Water Act (CWA).<sup>19</sup> That bill included some changes to CWA section 518 that had been proposed by officials of the state of Montana, changes that would have had disastrous impacts on the efforts of tribal governments to develop and carry out water-quality regulatory programs.<sup>20</sup> Montana state officials advocated these antitribal provisions as part of their response to the EPA's approval of the application of the Confederated Salish and Kootenai Tribes to be treated like a state for the purpose of setting water quality standards throughout their reservation.<sup>21</sup> Nearly half of the land within that reservation has passed out of Indian trust ownership as a result of the long-repudiated "allotment" policy.<sup>22</sup> The other part of Montana's response was to sue the EPA, a suit in which the EPA prevailed.<sup>23</sup>

In every session of Congress since then, bills have been introduced that would have interfered with the ability of tribes to carry out environmental protection programs.<sup>24</sup> Several of these bills

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19. See H.R. 961, 104th Cong. (1995), 141 CONG. REC. H5013 (daily ed. May 16, 1995); Dean B. Suagee, *Turtle's War Party: An Indian Allegory on Environmental Justice*, 9 J. ENV'T L. & LITIG. 461, 488-89 n.78 (1994) [hereinafter Suagee, *Turtle's War Party*].

20. Pursuant to the bill, a determination by the EPA that a tribe is qualified to be treated like a state for purposes of the CWA "does not authorize the Indian tribe to regulate lands owned in whole or in part by nonmembers of the tribe or the use of water resources on or appurtenant to such lands." H.R. 961, 104th Cong. § 508(b)(4) (1996), 141 CONG. REC. H4714 (daily ed. May 10, 1995). This language was added on the House floor as part of a package of *en banc* amendments. See 141 CONG. REC. H4714 (daily ed. May 10, 1995). The bill also would have authorized states to challenge an EPA determination under section 518 in federal district court and would have provided that judicial review would be on a *de novo* basis, without judicial deference to agency decisionmaking. See *id.* For a more detailed discussion, see Suagee, *Turtle's War Party*, *supra* note 19.

21. See *Montana v. EPA*, 941 F. Supp. 945, 946-47 (D. Mont. 1996); 141 CONG. REC. H4714 (daily ed. May 10, 1995).

22. See *Montana v. EPA*, 941 F. Supp. at 947-48.

23. See *id.* at 945.

24. See Dean B. Suagee, *The Indian Country Environmental Justice Clinic: From Vision to Reality*, 23 VT. L. REV. 567, 595 & n.111 (1999) [hereinafter Suagee, *The Indian Country Environmental Justice Clinic*] (discussing the uncertain future of tribal immunity).

have been sponsored by a prominent member of the Senate who is engaged in a campaign to divest tribes of their sovereign immunity.<sup>25</sup>

Readers unfamiliar with the doctrines of federal Indian law may wonder how it is that Congress can take away aspects of tribal sovereignty without the consent of affected tribes. The answer is the “plenary power” of Congress, a doctrine under which Congress has broad, and arguably extra-constitutional, power over Indian affairs, based in part on the federal trust obligations the United States owes to Indian tribes.<sup>26</sup> Over the last two decades, a new and virulent variation of this doctrine has emerged, which some scholars have labeled the “judicial plenary power.”<sup>27</sup> As Professor David Getches has shown, the Supreme Court’s Indian law jurisprudence has shifted from the application of principles to result-oriented decisions reflecting what the members of the Court believe the law ought to be.<sup>28</sup> Many of these recent decisions apply a rule that the Supreme Court invented in a 1978 decision, a rule now known as “implicit divestiture,” which holds that tribes can be divested of aspects of their inherent authority without explicit language in a treaty or an act of

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25. For several years, Senator Slade Gorton (R-Wash.) has waged a campaign to strip tribes of their sovereign immunity. For example, in 1996, the Senate’s Interior Appropriations Bill for Fiscal Year 1997, as reported to the full Appropriations Committee by the Interior Appropriations Subcommittee (of which Senator Gorton was the Chair), included a provision, designated section 329, which would have waived tribal sovereign immunity in a broad range of cases, including those in which “the actions or proposed actions of an Indian tribe or its agents impact, or threaten to impact, the ownership or use of private property of another person or entity.” *Tribal Rights in Private Property Cases: Before the Sept. 24, 1996 Hearing on the Sovereign Immunity of Tribal Governments*, 104th Cong. 1 (1996) (statement of Senator Daniel K. Inouye, Vice Chairman, Committee on Indian Affairs). Section 329 would have vested both federal and state courts with jurisdiction over such complaints. *See id.*

26. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 207-12 (1982); *see also* Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 213-14 (1984) (explaining how the Supreme Court, in *United States v. Kagama*, 118 U.S. 375 (1886), did not find a constitutional basis for the Major Crimes Act but nevertheless held the statute to be constitutional).

27. *See* N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353, 381 (1994); *see also* Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 477 (1999) [hereinafter Pommersheim, *Coyote Paradox*]; (explaining the recent emergence of the judicial plenary power doctrine as a means of divesting tribal sovereignty).

28. *See generally* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996) (explaining how, in its emerging jurisprudence of the last two decades, the United States Supreme Court has arrogated to itself the role of determining the limits of tribal sovereignty, a subject on which it had previously deferred to the political branches of government).

Congress.<sup>29</sup> This judicial plenary power makes it increasingly difficult for tribes to exercise their inherent sovereign powers.

#### D. *Public Perceptions of Tribal Government*

Public perceptions of tribal governments are probably more important, pragmatically, than many tribal leaders and tribal attorneys would like to acknowledge. With Congress and the courts acting on the assumption that tribal sovereignty is subject to complete defeasance by Congress, what Congress says when it enacts legislation is very important.<sup>30</sup> Public perceptions of tribal governments affect what Congress does. We believe that Congress should recognize the permanent status of tribal governments in legislation that is, at least, morally irrevocable, but this is more likely to happen if at least some significant segments of the larger public become our advocates. This in turn is more likely to happen if tribes are perceived as having effective and responsive governments.

### III. SOURCES OF LAW FOR DUE PROCESS BEFORE TRIBAL AGENCIES

Tribal legislatures, agencies, and courts can draw upon a variety of sources in determining when due process is required and, when it is, what process is due. Some of these sources of law are discussed in this part.

#### A. *Indian Civil Rights Act*

Congress enacted the Indian Civil Rights Act (ICRA)<sup>31</sup> in 1968, in recognition that the Supreme Court had long since ruled that Indian tribes are not subject to the limitations that the United States Constitution imposes on the federal government and the states.<sup>32</sup> ICRA provides that: “No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the

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29. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) (“[T]he tribes’ retained powers are not such that they are limited only by specific restrictions or congressional enactments. . . . Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers ‘inconsistent with their status.’”) (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976) (alteration in original)).

30. See *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (noting that the inherent sovereignty that tribes have retained “exists only at the sufferance of Congress and is subject to complete defeasance”).

31. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1994).

32. See *Talton v. Mayes*, 163 U.S. 376 (1896). For the historical background and legislative history of ICRA, see Donald L. Burnett, Jr., *An Historical Analysis of the 1968 “Indian Civil Rights” Act*, 9 HARV. J. ON LEGIS. 557 (1972).

equal protection of its laws or deprive any person of liberty or property without due process of law.”<sup>33</sup> ICRA provides for a right of action in federal court only in the context of *habeas corpus*, which generally does not apply to the actions of administrative agencies.<sup>34</sup> Accordingly, the judicial interpretation of due process under ICRA is left to the tribal courts.<sup>35</sup>

### B. *Indian Self-Determination Act 1994 Amendments*

Section 108 of the Indian Self-Determination Act, as amended, requires that each self-determination contract “contain, or incorporate by reference, the provisions of the model agreement” set out in that section.<sup>36</sup> Section 1(b)(13) of the model agreement provides:

Pursuant to the Indian Civil Rights Act of 1968 (25 U.S.C. [§] 1301 et seq.), the laws, policies, and procedures of the Contractor shall provide for administrative due process (or the equivalent of administrative due process) with respect to programs, services, functions, and activities that are provided by the Contractor pursuant to this Contract.<sup>37</sup>

Section 1(c)(5) of the model agreement rephrases this requirement somewhat: “The Contractor shall provide services under this Contract in a fair and uniform manner and shall provide access to an administrative or judicial body empowered to adjudicate or otherwise resolve complaints, claims, and grievances brought by program beneficiaries against the Contractor arising out of the performance of the Contract.”<sup>38</sup>

These two provisions leave tribes to determine what process is due, within limits. The requirement in section 1(b)(13) that tribes provide due process or its “equivalent” suggests that a tribe’s idea of due process need not exactly mirror the idea in American jurisprudence. Use of the word “equivalent,” however, does indicate congressional intent that the tribal interpretation should be similar. The basic elements Congress requires in section 1(c)(5) are that treatment of contract beneficiaries be “fair and uniform” and that

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33. 25 U.S.C. § 1302 (1994).

34. *See id.* § 1303; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 66-67 (1978).

35. *See id.* *See generally* Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465 (1998) (discussing tribal court case law construing the meaning of due process under ICRA).

36. 25 U.S.C. § 450l(a)(1) (1994). A “self-determination contract” is a contract “between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law.” *Id.* § 450b(j).

37. *Id.* § 450l(c).

38. *Id.*

beneficiaries have “access” to a decisionmaking body when bringing complaints against the tribe.<sup>39</sup>

Both of these provisions apply solely to the tribal administration of self-determination contracts which involve only programs funded by the Department of the Interior or the Department of Health and Human Services.<sup>40</sup> Thus, the provisions have no direct application to environmental programs. Nevertheless, tribes may wish to extend the due process required for self-determination contracts to persons affected by tribal environmental programs.

### C. *Federal Environmental Statutes and Regulations*

Some requirements for tribal environmental programs may be found in federal environmental statutes, regulations, and funding agreements.<sup>41</sup> Some of these sources are discussed in Part V of this Article.

### D. *Tribal Law*

Requirements for due process and public participation may be found in tribal constitutions or tribal common law. Although some comments are offered in Part VI, discussion of these sources is generally beyond the scope of this Article. Tribal statutory law and the rules issued by tribal government agencies may establish procedural requirements. To the extent that other sources of law do not make it clear what the requirements are for due process or public participation, clarifying the requirements through tribal statutes or rules can make it easier for the affected public, and for the staffs of tribal government agencies and tribal courts, to know just what the requirements are.

### E. *American Jurisprudence*

American jurisprudence offers a rich source of due process ideals for tribes to draw on. American courts have wrestled with due process since the term appeared in the federal constitution.<sup>42</sup> Of course, much of this debate is culture-specific and its relevance or application to particular indigenous American societies is a matter for

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39. *Id.* (section 1(c)(5) of the model agreement).

40. *See id.* § 450(a)-(b); *see also* FGS Constructors, Inc. v. Carlow, 823 F. Supp. 1508, 1515 (D.S.D. 1993).

41. *See, e.g.*, Clean Water Act § 518(e)-(f), 33 U.S.C. § 1377(e)-(f) (1994) (discussing some of the requirements applicable to tribal environmental programs).

42. *See* U.S. CONST. amend. V.

tribes to decide. It is well-trod ground in American courts, however, and elemental due process notions are well articulated there. Some American due process jurisprudence is discussed in Part IV.

#### F. *International Human Rights Law*

Tribal officials and attorneys who want to look beyond federal law for standards to be applied in tribal law might look to international human rights law. Three articles in the International Covenant on Civil and Political Rights (ICCPR) may have particular relevance for public participation and due process in tribal environmental programs.<sup>43</sup> Article 14 provides that “[a]ll persons shall be equal before the courts and tribunals” and that any person whose rights and obligations are to be determined in a “suit at law . . . shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>44</sup> The quoted language appears in the first paragraph of article 14, the remaining six paragraphs of the article deal with criminal proceedings, and even this quoted language speaks expressly of suits at law, a term that does not necessarily include administrative proceedings.<sup>45</sup> In the event that exhaustion of administrative review is a prerequisite to judicial review, then one could argue that this human rights-based requirement for an impartial tribunal extends to administrative proceedings.

Article 25 provides that every citizen shall have the right and opportunity “[t]o take part in the conduct of public affairs, directly or through freely chosen representatives.”<sup>46</sup> Nonmembers of a tribe, whether Indian or non-Indian, are not tribal “citizens.” If a tribe asserts regulatory jurisdiction over them, can such nonmembers nevertheless argue the human rights principles expressed in ICCPR article 25 to justify their participation in tribal government? The federal Indian law doctrine of the plenary power of Congress over the tribes appears to provide tribal officials with a counter-argument: Nonmembers have the right to vote for representatives in Congress, and since Congress has power over the tribes, the lack of a right for nonmembers to participate directly in tribal government does not violate article 25.<sup>47</sup> Despite the logic of this argument, the assertion

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43. See ICCPR, *supra* note 11, arts. 14, 25-26.

44. *Id.* art. 14(1).

45. See *id.* art. 14(2)-(7).

46. *Id.* art. 25(a).

47. See Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365, 386 (1989) (arguing that the plenary power of Congress “gives democratic legitimacy to tribal jurisdiction over non-Indians”).

of tribal sovereign authority over nonmembers may ultimately be more successful if tribal officials fashion ways for nonmembers to participate in government rather than leaving nonmembers to take their complaints to Congress. Accordingly, Professor Frank Pommersheim has noted that some tribes are considering ways for nonmembers to participate in tribal government through a kind of tribal citizenship that is different from tribal membership.<sup>48</sup> He suggests that it may be possible “to take the concept of the reservation as a place of ‘measured separatism’ and recast it as a place of ‘measured togetherness.’”<sup>49</sup>

ICCPR article 26, the “equal protection” clause of the Covenant, provides, in part: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”<sup>50</sup> As quoted earlier, the Indian Civil Rights Act also includes an “equal protection” clause.<sup>51</sup> In determining what equal protection means in the context of tribal government, tribal officials and courts could draw upon international human rights law as well as upon American jurisprudence.

The draft Declaration on the Rights of Indigenous Peoples provides another source of international human rights law to which tribal officials and attorneys might look for standards regarding due process and public participation.<sup>52</sup> For example, article 34 provides: “Indigenous peoples have the collective right to determine the responsibilities of individuals to their communities.”<sup>53</sup> The draft United Nations (UN) Declaration has not yet been adopted and is currently under consideration by the UN Human Rights Commission.<sup>54</sup> However, as the product of a deliberative process spanning more than a decade, it does carry some force as the

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48. See Pommersheim, *Coyote Paradox*, *supra* note 27, at 472-75; see also Frank Pommersheim, *Democracy, Citizenship, and Indian Law Literacy: Some Initial Thoughts*, 14 T.M. COOLEY L. REV. 457, 463-67 (1997) [hereinafter Pommersheim, *Initial Thoughts*].

49. Pommersheim, *Coyote Paradox*, *supra* note 27, at 474. Credit for coining the term “measured separateness” goes to Professor Charles Wilkinson. See CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 14-19 (1987).

50. ICCPR, *supra* note 11, art. 26.

51. See 25 U.S.C. § 1302(8) (1994); see also *supra* text accompanying note 33 (quoting section 1302(8)).

52. *United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Subcommission on the Prevention of Discrimination and Protection of Minorities, 11th Sess., at 105, U.N. Doc. E/CN.4/Sub.2/1994/56 (1994) [hereinafter *Draft UN Declaration*], reprinted in S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 207-16 (1996).

53. *Id.* art. 34.

54. See ANAYA, *supra* note 52, at 109-12; Dean B. Suagee, *Human Rights of Indigenous Peoples: Will the United States Rise to the Occasion?* 21 AM. INDIAN L. REV. 365, 368-74 (1997) [hereinafter Suagee, *Human Rights of Indigenous Peoples*].

collective opinion of many experts on the standards needed to render existing human-rights norms meaningful in the context of indigenous peoples.<sup>55</sup>

#### IV. PRINCIPLES OF ADMINISTRATIVE DUE PROCESS

This Part presents an overview of administrative due process drawn from American jurisprudence. It is not suggested that Indian tribal governments are necessarily bound by these notions of due process. Rather, what is suggested is that if tribes choose to conform their administrative procedures to the standards of American jurisprudence, they can arm themselves with strong arguments against challenges to the fairness of tribal administrative agencies.

##### A. *Distinction Between Rulemaking and Adjudication*

Administrative agencies act in two different contexts; they carry out two types of processes. The terms “rulemaking” and “adjudication” are often used to describe these processes.<sup>56</sup> One basic distinction between these two processes is that adjudication concerns individuals whose interests are affected by government action, while rulemaking affects the rights of classes, and therefore affects individuals because they are members of a class.<sup>57</sup> Like many legal distinctions, many kinds of agency action clearly fit one or the other, but sometimes one kind of process overlaps into the other.<sup>58</sup> Tribal environmental regulatory programs should be designed so that both kinds of processes can be performed.

##### 1. Rulemaking

Rulemaking is a legislative or law-making process carried out by an administrative agency pursuant to a delegation of authority from a legislative body.<sup>59</sup> Rulemaking is typically used to fill in the details and clarify the ambiguities in laws enacted by legislative bodies.<sup>60</sup> Rulemaking is particularly appropriate to the field of environmental law because of the nature of environmental problems. For example, a legislative body may decide that an environmental problem raises

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55. See ANAYA, *supra* note 52, at 109-12; Suagee, *Human Rights of Indigenous Peoples*, *supra* note 54, at 368-74.

56. See KENNETH C. DAVIS & RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE 225, 377 (3d ed. 1994).

57. See *id.* at 227.

58. See *id.* at 377.

59. See *id.* at 227-28.

60. See *id.* at 228-29.

such complex scientific and technical issues that it should be dealt with by an agency staffed by people with expertise in a variety of disciplines. So the legislative body delegates authority to an administrative agency to develop and adopt policies—to issue rules—within the framework of a mandate set out in legislation.<sup>61</sup> Most federal and state environmental laws are carried out through rules issued by administrative agencies, and the use of this practice is becoming increasingly common among tribal governments as well.<sup>62</sup>

Rulemaking can be seen as a surrogate for the political process.<sup>63</sup> Legislative bodies are directly accountable to the public, while agency officials typically are only indirectly accountable to the public.<sup>64</sup> Agency officials are typically appointed by elected executive branch officials, and, except with regard to independent agencies, they are accountable to these elected officials.<sup>65</sup> Agency officials also are accountable to the legislative bodies that have given them their mandates and that provide their funding.<sup>66</sup> To make administrative agencies more directly accountable to the public, legislative bodies prescribe the procedures that agencies must follow when they carry out rulemaking.<sup>67</sup> For federal agencies, these procedures are set out in the Administrative Procedure Act (APA).<sup>68</sup> About two-thirds of the states have enacted administrative procedure acts, most of which are based on the revised 1961 Uniform Law Commissioners' Model State Administrative Procedure Act.<sup>69</sup>

Quite a few tribes have enacted administrative procedure acts, but comprehensive information on the extent of enactment of such tribal laws is not available. While state and federal administrative law can be looked to in fashioning tribal administrative law, some principles of federal or state law may not apply. For example, under federal law, a "legislative veto" of agency rules is unconstitutional as contrary to the principle of separation of powers.<sup>70</sup> Whether a

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61. See *id.* at 233-34.

62. For example, the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994 & Supp. III 1997), is an environmental statute carried out by the rulemaking of the EPA.

63. See 1 DAVIS & PIERCE, *supra* note 56, at 261-62; see also RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 425 (2d ed. 1992) (discussing the benefits of rulemaking).

64. See 1 DAVIS & PIERCE, *supra* note 56, at 262.

65. See *id.* at 30.

66. See *id.*

67. See *id.*; see also *infra* notes 68-69 and accompanying text.

68. 5 U.S.C. §§ 551-559, 701-706 (1994 & Supp. IV 1998).

69. 15 U.L.A. 137-553 (1990); see also 1981 UNIF. LAW COMM'RS' MODEL STATE ADMIN. PROCEDURE ACT, 15 U.L.A. 1-136 (1990); ARTHUR EARL BONFIELD & MICHAEL ASIMOW, STATE AND FEDERAL ADMINISTRATIVE LAW 4-5 (1989).

70. See *INS v. Chadha*, 462 U.S. 919, 944-59 (1983).

legislative veto of tribal agency rules would be permissible should be a matter of tribal law. In some tribes, in fact, agencies develop “regulations” that are presented to tribal legislative bodies for approval, not just as an opportunity for legislative disapproval or “veto.”<sup>71</sup> Such “regulations” are not regulations at all, but rather are legislation.

## 2. Adjudication

When agencies make decisions that affect individuals, they are said to engage in adjudication.<sup>72</sup> The use of this term does not necessarily mean that the agency acts like a court, although in some cases it might.<sup>73</sup> Rather, the critical factor is that the agency “makes a decision that uniquely affects an individual on grounds that are particularized to the individual.”<sup>74</sup> Thus adjudication includes agency actions such as acting on permit applications and issuing consultation or certification letters that are required before another agency can act on a permit application.<sup>75</sup> Administrative enforcement actions against persons who violate environmental laws also fit the adjudication category.<sup>76</sup>

When agencies act in this way they are treated as subject to the constraints of due process. Federal agencies are subject to the Due Process Clause of the United States Constitution; state agencies are subject to the federal Due Process Clause and to corresponding clauses in state constitutions.<sup>77</sup> The procedures that agencies must follow when making rules are intended to make agencies accountable

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71. See Suagee & Sterns, *supra* note 15, at 91-103.

72. Cf. STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 467 (2d ed. 1985) (“Adjudication consists of determining the legal consequences of past events in a particular controversy between specific parties.”); see also Dean B. Suagee & Patrick A. Parenteau, *Fashioning a Comprehensive Environmental Review Code for Tribal Governments: Institutions and Processes*, 21 *AM. INDIAN L. REV.* 197, 313 (1997).

73. See 5 U.S.C. §§ 554-557 (1994) (providing for formal and informal agency adjudication). Section 554(a) requires a formal, trial-type procedure only in an “adjudication required by statute to be determined on the record after opportunity for agency hearing.” *Id.* § 554(a); see also *infra* notes 103-114 and accompanying text; KENNETH C. DAVIS & RICHARD J. PIERCE, 2 *ADMINISTRATIVE LAW TREATISE* 378-89 (3d ed. 1994).

74. 2 DAVIS & PIERCE, *supra* note 73, at 123 (Supp. 1999).

75. See, e.g., Clean Water Act § 404, 33 U.S.C. § 1344 (1994); see also Suagee & Parenteau, *supra* note 72, at 317-27 (reviewing the permit process for controlling development activities).

76. See 42 U.S.C. § 7420(5) (1994) (hearing to assess noncompliance penalty under section 120 of the Clean Air Act); see also 15 U.S.C. § 2615(a)(2)(A) (1994) (hearing to assess civil penalty under section 16(a) of Toxic Substances Control Act).

77. See 2 DAVIS & PIERCE, *supra* note 73, at 1-11.

and to provide fair treatment by allowing for public participation.<sup>78</sup> The concept of due process, however, simply does not apply to rulemaking.<sup>79</sup>

*B. Interests Protected by Due Process*

Administrative due process protects liberty and property interests.<sup>80</sup> The ICRA due process clause provides that “[n]o Indian tribe in exercising powers of self-government shall . . . deprive any person of liberty or property without due process of law.”<sup>81</sup> Although the ICRA clause does not include “life” in the list of protected interests, it is substantively identical to the Due Process Clause in the Fifth Amendment to the United States Constitution; its failure to list “life” as a protected interest is irrelevant because administrative agencies do not decide matters of life and death, at least not directly.<sup>82</sup> Accordingly, tribal agencies and tribal courts might draw on the vast body of federal and state law to determine just what kinds of interests amount to “liberty” or “property” and as such are covered by due process.<sup>83</sup> Unfortunately, this is a murky body of law in which the Supreme Court’s decisions “are not linked by a consistent set of principles or by a consistent analytical approach.”<sup>84</sup> Professors Davis and Pierce join a host of others in recommending a much simpler approach: “Any government decision that has a significant adverse impact on an individual should be protected by due process.”<sup>85</sup>

*C. What Process Is Due?*

Once due process has been determined to apply to an individualized agency decision, the next question to answer is what procedures are necessary to satisfy due process. This issue should be addressed in drafting tribal legislation that delegates authority to an administrative agency and in developing rules by which tribal agencies conduct their adjudicative functions. It also might be addressed by tribal courts reviewing the actions of tribal agencies.

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78. *See id.*

79. *See id.*

80. *See id.* at 21.

81. 25 U.S.C. § 1302(8) (1994).

82. *See id.*; *see also* U.S. CONST. amend. V.

83. *See* 2 DAVIS & PIERCE, *supra* note 73, at 21-43.

84. *Id.* at 42.

85. *Id.* at 43.

In *Mathews v. Eldridge*, the Supreme Court made it clear that a full-blown, trial-type hearing is not usually required by due process.<sup>86</sup> Rather, the Court said that the kinds of procedural safeguards required by due process in a given case depend upon the consideration of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>87</sup>

In formulating this analytical framework, the Court implicitly accepted much of the reasoning put forward by Judge Friendly in an article published in 1975.<sup>88</sup> As summarized by Professors Davis and Pierce, Judge Friendly said that there are four procedural safeguards that are essential to fairness in administrative adjudication: "(1) notice of the proposed action and the grounds asserted for it, (2) an opportunity to present reasons why the action should not be taken, (3) an unbiased tribunal, and (4) a statement of reasons."<sup>89</sup>

These essential procedural safeguards do not include certain rights that are normally part of a trial-type hearing, such as the right to call witnesses, the right to cross-examine adverse witnesses, and the right to counsel.<sup>90</sup> Whether such additional safeguards are required by due process depends upon the consideration of the three factors in the *Mathews* formula. These three factors are difficult to quantify and any application of the *Mathews* test is at least somewhat subjective, but this formula, nevertheless, might be useful to tribal officials trying to determine how much process is due.

Professors Davis and Pierce believe that courts "should acquiesce in any decisionmaking procedure chosen by a legislature or by an agency as long as that procedure seems to represent a reasonable, good faith application of the *Mathews* cost-benefit analysis."<sup>91</sup> Whether federal courts, or tribal courts, will defer to decisions made by tribal legislatures or agencies is an open question. Attorneys who advise tribal legislatures and agencies should be

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86. 424 U.S. 319, 333-49 (1976).

87. *Mathews*, 424 U.S. at 335.

88. See Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975).

89. 2 DAVIS & PIERCE, *supra* note 73, at 48.

90. See *id.*

91. *Id.* at 67.

aware, however, that scholarly opinion can be drawn upon if the *Mathews* formula has been applied.

In applying the *Mathews* test, it can be useful to draw a distinction between adjudicative facts—facts that concern the immediate parties in a decision, the kinds of questions that would go to a jury—and legislative facts—facts that are more general in nature, the kind of information that a legislative body might rely on in making a policy decision.<sup>92</sup> If an agency decision turns on legislative facts, a trial-type hearing is not much use, but a legislative-type hearing might be.<sup>93</sup>

With respect to the third *Mathews* factor, the costs of additional procedural requirements can be seen to include costs on the regulated public, since the more formal an agency's procedures are, the more it costs the regulated public to participate in these procedures and the longer it takes for any given case to come to a conclusion.<sup>94</sup> In other words, the regulated public may share with government the benefits of using informal procedures.

#### D. *An Unbiased or Neutral Decisionmaker*

American jurisprudence regards an unbiased or neutral decisionmaker as a core requirement of due process in administrative adjudication.<sup>95</sup> Bias is a concept with several different meanings. In the context of environmental programs, one aspect of the unbiased decisionmaker principle is particularly important: The decisionmaker should not have a stake in the outcome of the decision.<sup>96</sup> For example, under the Clean Water Act, water quality standards are enforced by including conditions in permits that are issued to dischargers of point source pollution and by giving the appropriate state or tribal agency the opportunity to certify whether or not a permitted discharge would comply with water quality standards.<sup>97</sup> If the agency issuing the permit or doing the certification, or performing both functions, also owns a facility that is subject to the permit requirement, the agency would not be neutral. The EPA has raised the issue of tribal agency neutrality in several of its rulemaking

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92. *See id.* at 55.

93. *See id.*

94. *See id.* at 57.

95. *See id.* at 67.

96. *See id.* at 67-91.

97. *See* Clean Water Act § 303(c), 33 U.S.C. § 1313(c) (1994).

documents for treating tribes similar to states under federal environmental laws.<sup>98</sup>

Tribes can deal with this issue in different ways, one of which is to use one subdivision of tribal government to perform environmental regulatory functions and to use other subdivisions to perform functions that are subject to regulation. For example, if a tribal utilities department operates a wastewater treatment plant, a different governmental subdivision could be used to certify compliance with water quality standards, and to issue the permit if the tribe chooses to take over that function from the EPA.<sup>99</sup> Many variations of this approach can be fashioned, including the establishment of an environmental regulatory agency as an “independent” agency, governed by a board of commissioners appointed for fixed terms.<sup>100</sup>

#### *E. Separation of Functions*

In carrying out adjudicatory decisionmaking, environmental agencies typically perform several different kinds of roles, such as investigating possible violations of law, prosecuting alleged violators, rendering decisions, and imposing sanctions. In the American criminal justice system, the police or other law enforcement agencies investigate crimes, a government attorney prosecutes, and the court renders decisions and imposes sanctions. In other words, the functions are performed by different government agencies. Due process does not require such a separation of functions for administrative adjudication.<sup>101</sup> Dividing functions among separate administrative agencies adds costs and takes time, and may not result in better decisions, especially when the interests of the agency and those of the affected individuals are not adverse to each other.<sup>102</sup>

In certain contexts, fairness does require some separation of functions. In “formal adjudication” under the federal APA, when the

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98. See, e.g., Safe Drinking Water Act—National Drinking Water Regulations, 53 Fed. Reg. 37,396, 37,401 (1988) (discussing the EPA’s belief that regulatory independence is necessary in the context of the Safe Drinking Water Act in order to ensure fair and effective administration of public water systems); Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,876-82 (1991) (discussing regulatory independence in the context of water quality standards and National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act).

99. See Suagee & Parenteau, *supra* note 72, at 312.

100. See *id.* at 310-12 (discussing the independent agency idea); see also Suagee & Sterns, *supra* note 15, at 91-103.

101. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975) (informal hearing required by due process prior to suspension from school, but principal could act as investigator, prosecutor and decisionmaker).

102. See 2 DAVIS & PIERCE, *supra* note 73, at 92-94.

relevant federal statute provides for a hearing “on the record” pursuant to APA section 554,<sup>103</sup> hearings are usually conducted by Administrative Law Judges (ALJs), who are nearly as independent from the agencies they serve as are federal district court judges.<sup>104</sup> Agency staff performs the investigative and “prosecutorial” roles.<sup>105</sup> The ALJ who hears a case issues an “initial” or “recommended” decision, which the head of the agency may adopt as the agency’s final action in the case.<sup>106</sup>

In “informal adjudication” under the federal APA, an agency staff member who is not an ALJ may be assigned to serve as a hearing officer to render a decision.<sup>107</sup> Informal adjudications proceed under APA section 555.<sup>108</sup> This class of adjudications includes the vast array of agency actions that are not subjected to formal adjudication under either APA section 554 or the authorizing statute.<sup>109</sup> Informal adjudications greatly relax due process requirements to include only (1) the right to attorney or other representation, (2) the right to obtain a copy of any evidence provided, and (3) the right to a brief statement of the grounds for denial of the party’s application or petition.<sup>110</sup>

Whether adjudication is “formal” or “informal,” the separation of functions need not be complete to satisfy due process.<sup>111</sup> The Supreme Court has held it permissible for ALJs to both prosecute and judge<sup>112</sup> or both investigate and judge.<sup>113</sup> The Court has upheld such combinations at the state and local level as well.<sup>114</sup>

Tribal legislative bodies and administrative agencies can take a similar approach and authorize the use of hearing officers or ALJs to conduct hearings.<sup>115</sup> This can be seen as an exercise of the *Mathews* cost-benefit test. One approach that tribes might use to find a balance would be to conduct most adjudicatory proceedings in an informal manner, but to confer on affected persons a right to petition for a more

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103. 5 U.S.C. § 554 (1994).

104. See 1 DAVIS & PIERCE, *supra* note 56, at 378-80.

105. See *id.*

106. See *id.*

107. See *id.*

108. 5 U.S.C. § 555 (1994).

109. See *id.* § 555(a); see also 1 DAVIS & PIERCE, *supra* note 56, at 378-80.

110. See 5 U.S.C. § 555(b)-(e) (1994); see also 1 DAVIS & PIERCE, *supra* note 56, at 378-80.

111. See 2 DAVIS & PIERCE, *supra* note 73, at 92-100.

112. See *Marcello v. Bonds*, 349 U.S. 302, 311 (1955).

113. See *Richardson v. Perales*, 402 U.S. 389, 399-410 (1971).

114. See *Winthrow v. Larkin*, 421 U.S. 35, 46-54 (1975); see also *Hortonville Sch. Dist. No. 1 v. Hortonville Educ. Ass’n*, 426 U.S. 482, 492-96 (1976) (allowing Wisconsin School Board to take on dual role of both investigator and judge in disciplinary hearings).

115. See *Suagee & Parenteau*, *supra* note 72, at 313-14.

formal hearing. In certain circumstances, such a hearing might be granted as a matter of right, and in others as a matter of discretion.<sup>116</sup>

*F. Additional Requirements Imposed by Statutes or Rules*

Regardless of how much process is required to satisfy due process in a constitutional sense, if a legislative body decides by statute, or if an agency decides by rulemaking, to follow procedures that go beyond the minimal requirements, due process requires the agency to comply with the additional requirements.<sup>117</sup> For tribes this principle can cut both ways. A tribal legislature or agency can reduce the likelihood that agency decisions will be overturned by specifically requiring certain procedures that it believes satisfy due process.<sup>118</sup> Practical benefits can be realized by adopting formal procedures, such as letting tribal agency staffs know just what their responsibilities are and helping the regulated public to understand how the agency works. On the other hand, if the agency then fails to follow those procedures it may leave itself open to challenge on due process grounds that otherwise might not have applied.

*G. Judicial Review of Agency Action*

Judicial review of agency action serves several functions. It promotes accountability beyond that provided by the political process.<sup>119</sup> Judicial review also promotes better reasoned findings and determinations by agencies because they know their decisions may be subject to review by an independent judicial body.<sup>120</sup> Access to judicial review is thus an integral part of due process for individuals requiring agency action.

In federal administrative law, there are several prerequisites for judicial review. First, review is only available when an agency has made a final decision on a particular issue.<sup>121</sup> In other words, an individual must have exhausted administrative remedies before

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116. See, e.g., 5 U.S.C. § 554(a) (providing when a formal hearing might be granted).

117. See *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); see also *Service v. Dulles*, 354 U.S. 363, 382-89 (1957) (holding that due process requires the State Department to comply with specific State Department regulations that go beyond minimal due process requirements).

118. For a list of procedural safeguards provided in judicial hearings, see 2 DAVIS & PIERCE, *supra* note 73, at 47.

119. See generally KENNETH C. DAVIS & RICHARD J. PIERCE, 3 ADMINISTRATIVE LAW TREATISE 97-116 (3d ed. 1994) (discussing judicial review of agency actions).

120. See generally ALFRED C. AMAN & WILLIAM T. MAYTON, ADMINISTRATIVE LAW § 13.1 (1993) (noting positive functions of judicial review).

121. See 5 U.S.C. § 704 (1994).

appealing to a court.<sup>122</sup> This ensures that an agency has a full opportunity to determine a matter and that the judicial branch does not meddle in matters that are best left to administrative expertise.<sup>123</sup> Second, the individual must have standing to appeal the matter.<sup>124</sup> Standing jurisprudence requires (1) injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) that the injury be redressable by the court.<sup>125</sup> Courts also require a plaintiff to assert (1) its own legal rights, (2) a particularized grievance, and (3) a claim that falls within the zone of interests that the statute aims to protect or regulate.<sup>126</sup>

Tribal legislators and the attorneys who advise them can draw upon this body of law in developing legislation that provides for judicial review of tribal agency actions in tribal courts. Alternatively, tribal legislation might establish a more generous right to judicial review in tribal court, but limit the burdens that would thus be created for tribal courts by measures such as limiting the grounds on which tribal courts can set aside tribal agency actions and by limiting judicial review to the administrative record.

#### H. Sovereign Immunity

Tribes, like states and the federal government, enjoy immunity from suit.<sup>127</sup> A citizen suit against any of these governments, federal, state, or tribal, is permitted only to the extent immunity has been waived.<sup>128</sup> A waiver of tribal sovereign immunity is required for a court to have jurisdiction over an action against a tribal agency.<sup>129</sup> Federal courts have jurisdiction over certain environmental matters by virtue of citizen suit provisions in environmental statutes.<sup>130</sup> The federal APA also provides jurisdiction for persons aggrieved by federal agency actions.<sup>131</sup> These provisions are limited waivers of sovereign immunity.

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122. See AMAN & MAYTON, *supra* note 120, § 12.9.

123. See *id.*

124. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

125. See *id.*

126. See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 474-75 (1982).

127. See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754-60 (1998); see also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (“Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.”).

128. See *Kiowa Tribe of Oklahoma*, 523 U.S. at 754.

129. See *id.*

130. See *infra* notes 200-01 and accompanying text.

131. See 5 U.S.C. § 702 (1994).

In an effort to resolve regulatory disputes, tribes can enact limited immunity waivers.<sup>132</sup> Such waivers should be crafted to allow due process for those adversely affected by tribal agency actions and to ensure that the available remedies, while proportionate to the harm, do not unduly burden tribes. For instance, a tribe might elect to waive its immunity to allow suit for injunctive relief by persons adversely affected by tribal agency action.<sup>133</sup> Under such a waiver, the class of persons who may bring suit could include persons who claim injury by tribal agency action, with tribal courts authorized to determine the adequacy of the claim.<sup>134</sup> Such tribal legislation can impose presumptions in favor of persons who participate in administrative proceedings and strong presumptions against persons who do not.<sup>135</sup>

Sovereign immunity should be understood in current context. Both tribes and states have fought hard to maintain their respective immunity.<sup>136</sup> In the context of state sovereign immunity, the United States Supreme Court recently struck down an express congressional waiver of state sovereign immunity as contrary to the Eleventh Amendment,<sup>137</sup> and, in so doing, overruled another recent Supreme Court decision that upheld the waiver of state sovereign immunity in the citizen suit provision of a federal environmental statute.<sup>138</sup> Unlike states, however, tribes are facing an increasingly hostile federal judiciary<sup>139</sup> and Congress.<sup>140</sup> Given that both of these branches operate on the assumption that tribal immunity is defeasible by Congress, the future of tribes' authority to dictate the terms of their

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132. See Suagee & Parenteau, *supra* note 72, at 314.

133. See *id.* A waiver of immunity could be modeled after the APA. See 5 U.S.C. § 702 (1994).

134. See Suagee & Parenteau, *supra* note 72, at 314. For examples of citizen suit provisions, see the Clean Water Act § 505, 33 U.S.C. § 1365 (1994), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 310, 42 U.S.C. § 9659 (1994).

135. See Suagee & Parenteau, *supra* note 72, at 313-14.

136. For a discussion of tribal immunity, see *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), and *Florida Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126 (11th Cir. 1999). For a discussion of state immunity, see *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

137. See *Seminole Tribe of Florida*, 517 U.S. at 54-73.

138. See *id.* at 72-73 (overruling *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), which had upheld the citizen suit provision of CERCLA with respect to suits against states); ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 370-74 (2d ed. 1998).

139. See *Kiowa Tribe of Oklahoma*, 523 U.S. at 755-58 (describing the basis for tribal immunity as tenuous and inviting Congress to weigh in on the "important judgment" regarding the suggested "need" to abrogate tribal immunity).

140. See *supra* notes 24-25.

own sovereign immunity is not secure.<sup>141</sup> Tribes rightly remain vigilant in defending the borders of their sovereignty.<sup>142</sup> By judiciously waiving sovereign immunity to allow actions against tribal agencies, however, tribes may achieve the dual goals of providing due process and demonstrating to the non-Indian public, including the federal judiciary and Congress, that tribal governments are committed to providing due process. This second goal is important in the current context of sovereign immunity because, as discussed in Part II, public perceptions of tribes are reflected in congressional actions.<sup>143</sup> Tribes can benefit by working to change the perception of a significant portion of the American public that tribal sovereign immunity is an “anachronism” unfairly shielding tribes from suit.

## V. PROCEDURAL REQUIREMENTS OF FEDERAL ENVIRONMENTAL PROGRAMS

### A. *The EPA’s Generally Applicable Procedural Requirements*

Some of the procedural requirements that apply to state and tribal environmental programs can be found in regulations issued by the EPA, as the agency administers most federal environmental laws.<sup>144</sup> These procedural requirements may apply to either rulemaking or adjudication.<sup>145</sup> This Part of the Article looks at the generally applicable procedural requirements set out in EPA regulations. Section B then provides a detailed analysis of the procedural requirements for programs under the Clean Water Act. A similar analysis of other EPA statutory programs could be developed but is beyond the scope of this Article.

#### 1. Public Participation in Rulemaking and Permitting

EPA regulations codified in Part 25 of Title 40 of the Code of Federal Regulations (the “Part 25 regulations”) govern public

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141. See Suagee, *The Indian Country Environmental Justice Clinic*, *supra* note 24, at 574-75, 591-96.

142. See, e.g., *id.* at 595 (noting that tribal leaders have become vigilant in monitoring and opposing legislation that interferes with tribal sovereignty).

143. See *supra* Part II.D.

144. For an overview of EPA regulations focusing on how Indian tribes can be treated as states, see Coursen, *supra* note 6, at 10,582.

145. See *id.* In the EPA context, “adjudication” primarily means the granting or denial of permit applications. See Luran B. Fechter, *Upholding Tribal Rights to Exercise Civil Regulatory Authority Over Non-Indian Lands on Reservations: An Analysis of Montana v. EPA*, 5 ENVTL. LAWYER 871, 880-85 (1999).

participation in programs under three of the main statutes administered by the EPA: (1) the Clean Water Act (CWA), (2) the Safe Drinking Water Act (SDWA), and (3) the Resource Conservation and Recovery Act (RCRA).<sup>146</sup> The Part 25 regulations apply to certain kinds of actions taken by the EPA and by states under these three statutes.<sup>147</sup> Although Part 25 does not expressly cover actions by Indian tribes, other provisions in EPA regulations render Part 25 applicable to tribes.<sup>148</sup> For instance, rulemaking is done by the EPA under the three statutes, and by states only under the CWA and RCRA.<sup>149</sup> However, EPA regulations on the adoption by states of water quality standards render Part 25 expressly applicable to the adoption and review of water quality standards by tribes, which is a rulemaking process.<sup>150</sup>

The EPA issues, modifies, and enforces permits under the three statutes. In addition, the agency may approve four types of state permit programs: (1) National Pollutant Discharge Elimination System (NPDES) permit programs under section 402 of the CWA, (2) dredge and fill programs under section 404 of the CWA, (3) underground injection control programs under the SDWA, and (4) hazardous waste programs under RCRA Subtitle C.<sup>151</sup> The Part 25 regulations require each nonfederal agency that administers a permit program to establish procedures through which it can receive information from the public for use in permit enforcement.<sup>152</sup>

a. Information, Notice, and Consultation

Part 25 prescribes certain requirements for providing notice to the public and sharing information.<sup>153</sup> Some of these requirements include: (1) a proactive program to provide information to the public, including making documents and summaries of complex documents available, establishing central and convenient collections points for

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146. See 40 C.F.R. § 25.1 (1999); see also Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994 & Supp. III 1997); Safe Water Drinking Act, 42 U.S.C. §§ 300f to 300j-26 (1994 & Supp. III 1997); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (1994 & Supp. 1997). All EPA regulations are codified in Title 40 of the Code of Federal Regulations. In this Article the designation "Title 40" has generally been omitted.

147. See 40 C.F.R. § 25.2 (1999).

148. See, e.g., *id.* § 131.20 (rendering 40 C.F.R. Part 25 applicable to tribes).

149. See *id.* § 25.2(a)(1).

150. See *id.* § 131.20(b).

151. See *id.* § 25.1-.2.

152. See *id.* § 25.9. Once a state has obtained EPA approval for its permit program, public participation is governed by 40 C.F.R. Part 123, which embodies the substantive requirements of Part 25. See *id.* § 25.10(b).

153. See *id.* § 25.4.

documents, and maintaining an “interested persons” list for any activity covered by Part 25;<sup>154</sup> (2) notice of public hearings and meetings, generally no less than thirty days before public meetings and forty-five days before public hearings;<sup>155</sup> and (3) public consultation, which may include public hearings or meetings, the establishment of advisory groups, or several other less formal kinds of consultation, such as review groups, *ad hoc* committees, task forces, workshops, seminars, and informal personal communication.<sup>156</sup> Regardless of the methods employed, agencies must “provide for early and continuing public consultation in any significant action covered by this part. Merely conferring with the public after an agency decision does not meet this requirement.”<sup>157</sup>

b. Requirements for Public Hearings

Part 25 also defines the requirements for any nonadjudicatory hearing under the CWA, SDWA, or RCRA.<sup>158</sup> The requirements apply whether the hearing is mandatory or discretionary.<sup>159</sup> Notice of the hearing must be given at least forty-five days prior to the hearing, and the relevant documents must be made available at least thirty days prior to the hearing.<sup>160</sup> If the agency determines that there are no complex or controversial matters to be addressed and no substantial documents to be made available for public review, the notice can be shortened to thirty days.<sup>161</sup>

The agency conducting the hearing must inform the public of (1) issues surrounding the agency’s forthcoming decision, (2) the factors that the agency is considering, (3) the agency’s tentative determinations, and (4) the information that the agency particularly wants to solicit from the public.<sup>162</sup> In other words, a hearing must have some structure in order to provide a meaningful opportunity for the public to be heard. If numerous witnesses have asked to testify, the time available can be allocated to make sure that all who wish to speak have an opportunity, provided that some time is reserved for unscheduled testimony.<sup>163</sup> Question and answer sessions are

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154. *See id.* § 25.4(b)(2)-(5).

155. *See id.* § 25.5-.6.

156. *See id.* § 25.4(d).

157. *Id.*

158. *See id.* § 25.5(a).

159. *See id.*

160. *See id.* § 25.5(b)

161. *See id.*

162. *See id.* § 25.5(e).

163. *See id.* § 25.5(d).

permissible.<sup>164</sup> Agencies are encouraged not to inhibit free expression of views, which might happen if, for example, all witnesses were required to submit an onerous written statement.<sup>165</sup>

The agency also must prepare a record of the hearing, which may be a transcript or a recording.<sup>166</sup> The record must be made available for public review and copies provided to those who request them at no more than the cost of reproduction.<sup>167</sup>

### c. Public Meetings

A public meeting is less formal than a public hearing. A public meeting requires notice, but does not require a formal presentation or a record of the meeting.<sup>168</sup> A tribe might choose to conduct one or more public meetings in addition to a hearing if a hearing is required, or in lieu of a hearing if one is not strictly required. Meetings provide the regulatory agency a chance to explain its proposed actions to the affected public in a setting that encourages informal discussion. This may be particularly useful if the agency is planning an action that is complex, but which may prove to be relatively noncontroversial if adequately explained to the affected public.

### d. Advisory Groups

Part 25 provides some rather detailed guidance on the establishment of advisory groups and the role of advisory groups in agency decisionmaking.<sup>169</sup> A tribal agency whose regulatory policies affect substantial numbers of nonmember Indians or non-Indians may find the use of advisory groups an effective way to provide such affected parties with meaningful opportunities to participate in agency decisionmaking and, by doing so, to take some of the controversy out of the agency's work.

### e. Responsiveness Summaries

Each agency that is subject to Part 25 regulations is required to prepare a "responsiveness summary" at specific decision points, as specified in program regulations or in an EPA-approved work plan.<sup>170</sup>

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164. *See id.* § 25.5(e).

165. *See id.*

166. *See id.* § 25.5(f).

167. *See id.*

168. *See id.* § 25.6.

169. *See id.* § 25.7.

170. *See id.* § 25.8.

The preamble to every final rule or interim rule must include a “responsiveness summary.”<sup>171</sup> The “responsiveness summary” (1) identifies the activities that have been conducted to encourage public participation; (2) describes the matters on which public input was sought; (3) summarizes the views received from the public, including comments, criticisms, and suggestions; and (4) details the agency’s response to those comments, including any changes made in the proposed action or reasons why a proposal received from the public was rejected.<sup>172</sup>

f. Rulemaking

State rulemaking for the CWA and RCRA must comply with the rulemaking requirements of Part 25 or with the state’s administrative procedure act, if one exists.<sup>173</sup> If the requirements of the state’s administrative procedure act conflict with those of Part 25, the state act controls.<sup>174</sup>

Tribes that are treated like states for purposes of setting water quality standards are covered by Part 25.<sup>175</sup> More specifically, tribes setting water quality standards must comply with Part 25 rulemaking requirements.<sup>176</sup> Presumably, if a tribe has enacted its own administrative procedure act, the requirements of that act would prevail if conflicts arose between the tribal statute and Part 25 requirements.

2. Permit Program Decisionmaking Procedures

EPA procedures for making decisions on permits are set out in Part 124 of Title 40 of the Code of Federal Regulations.<sup>177</sup> The procedures in this part cover permits issued by the EPA under RCRA Subtitle C, the SWDA underground injection control (UIC) program, the Clean Air Act prevention of significant deterioration (PSD) program, and the NPDES program.<sup>178</sup> Some of these procedures also apply to state-administered programs and programs administered by tribes that choose to be treated like states.<sup>179</sup> In order to gain EPA

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171. *See id.* § 25.10(a).

172. *See id.*

173. *See id.* § 25.10(b).

174. *See id.*

175. *See* 33 U.S.C. § 1377 (1994); *see also* 40 C.F.R. § 131.20(b) (1999).

176. *See* 40 C.F.R. § 25.10(b) (1999).

177. *See id.* § 124.

178. *See id.* § 124.1. Part 124 of 40 C.F.R. defines specific procedures for NPDES permits. *See id.* §§ 124.51-.66. These procedures are discussed in Part V.B.1.b.

179. *See* 40 C.F.R. § 124.1(e) (1999).

approval, a state or tribal program must adopt certain procedures specified in Part 124.<sup>180</sup> Some of the provisions of Part 124 are highlighted below.

a. General Program Requirements

Once an application is complete, the “Director,” as the official charged with making the decision, makes a tentative decision whether or not to issue the permit.<sup>181</sup> Preparation of a draft permit generally occurs following a tentative decision to issue the permit, whereas a notice of intent to deny is issued following a tentative decision to deny the permit.<sup>182</sup> The Director then gives public notice of the tentative decision, allowing a minimum of forty-five days or more for public comment on RCRA permits and thirty days for public comment on other types of permits.<sup>183</sup> Any interested person may submit written comments and may request a public hearing if the Director has not already scheduled one, provided that any such request is in writing and states the nature of the issues that would be raised in a hearing.<sup>184</sup> It is within the Director’s judgment and discretion to decide whether to hold a hearing, except with regard to permits for hazardous waste facilities, in which case the Director must hold a hearing if any person files a notice of opposition to a draft permit and a request for a hearing.<sup>185</sup> After the public comment period ends, the agency—federal, state, or tribal—issues a final decision, including a response to all comments received.<sup>186</sup>

b. Administrative Appeals

Final decisions regarding RCRA, UIC, or PSD permits may be appealed by filing a petition with the EPA’s Environmental Appeals Board (EAB).<sup>187</sup> Any person who filed comments on a draft permit or participated in a public hearing may file a petition.<sup>188</sup> The EAB’s

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180. *See id.*

181. *See id.* § 124.6(a). “Director” is defined as the state or tribal program director or the EPA Administrator. *See id.* § 124.2.

182. *See id.* § 124.6 (b)-(c). A draft permit is not prepared following a tentative decision to issue a CWA section 404 dredge and fill permit. *See id.* § 124.6(a).

183. *See id.* § 124.10 (a)-(b).

184. *See id.* § 124.11.

185. *See id.* § 124.12 (a)(1)-(3).

186. *See id.*

187. *See id.* § 124.19 (a).

188. *See id.* A person who did not file comments or participate in a public hearing may file a petition solely seeking review of any changes made between the draft permit stage and the final permit. *See id.*

decision, including a decision not to grant review, constitutes a final agency action for purposes of judicial review, unless the EAB decides to remand the matter to an EPA Regional Administrator.<sup>189</sup>

The EAB is the final decisionmaker for administrative appeals arising under EPA-administered statutes.<sup>190</sup> The EAB hears permit appeals concerning federally issued permits.<sup>191</sup> It also has authority to hear appeals concerning state-issued permits, which were issued under an EPA-delegated state program.<sup>192</sup> The EAB, however, does not have authority over permits issued under an EPA-authorized state program.<sup>193</sup> State agencies assume control of some EPA-authorized programs, thus, state courts review state agency action under these programs.<sup>194</sup>

Analogizing to the tribal context, the EAB could hear appeals over permits issued by a tribal agency under an EPA-delegated program, but it would not have jurisdiction over tribal permits issued under an EPA-authorized program. To ensure due process, individuals aggrieved by a final action of the tribal agency under an EPA-authorized program should have recourse in tribal court.<sup>195</sup>

### 3. Judicial Review

The EPA-administered statutes include specific provisions for judicial review of EPA actions. For example, section 509 of the CWA authorizes judicial review of several kinds of EPA decisions,

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189. See *id.* § 124.19(f). For background on the EAB, see Nancy B. Firestone, *The Environmental Protection Agency's Environmental Appeals Board*, 1 ENVTL. LAWYER 1 (1994)(discussing general procedures applicable to permit appeals and specific procedures for NPDES permit appeals).

The EPA published revised "Consolidated Rules of Practice" on July 23, 1999, expanding its procedural rules to include permit revocation, termination, and suspension actions, among other items. See 64 Fed. Reg. 40,138 (1999).

190. See 40 C.F.R. § 1.25(e) (1999).

191. See Firestone, *supra* note 189, at 1.

192. See *id.* at 5.

193. See *Great Lakes Chemical Corp.*, 5 E.A.B. 395 (1994).

194. See, e.g., 33 U.S.C. § 1341(b) (1994) (authorizing state permit programs under the NPDES program); 42 U.S.C. § 6946 (1994) (authorizing state solid waste management plans under RCRA). In some state programs that have received authorization from EPA, a permit may include conditions that are required by federal law and conditions that are required by state law. In such cases, the EAB has held that the federally required conditions are subject to appeal to the EAB, but state-required conditions are subject to whatever administrative and judicial review exists under state law. See *In re LCP Chemicals—New York*, RCRA Appeal No. 92-25, 1993 WL 208894, at \*4 (EAB May 5, 1993) (citing *Vulcan Materials Co.*, RCRA Appeal No. 87-1, at 1-2 (Sept. 8, 1988), for the rule that "issues relating to state-issued portion of permit are subject to state, not federal, review").

195. Of course, through express statutory language, Congress could authorize EAB review for permits issued by tribes in authorized, as well as in delegated, programs.

including issuance of NPDES permits.<sup>196</sup> Judicial review of agency action in federal court is available under certain EPA-delegated programs.<sup>197</sup> For instance, an EPA veto of a state-issued NPDES permit is reviewable in federal court under the “hard look” review doctrine.<sup>198</sup> The EPA’s refusal or failure to veto a state-issued permit, however, is probably not reviewable since EPA inaction is within the discretion of the agency.<sup>199</sup> Aside from citizen suits, however, there is no statutory provision for federal judicial review of state agency actions under EPA-authorized programs, such as section 401 of the CWA.

#### 4. Citizen Suits

Most of the statutes that the EPA administers include sections granting citizen suit jurisdiction in federal district court against any person, including the federal government and any state, who is alleged to be in violation of certain provisions of the particular statute.<sup>200</sup> At least two federal courts have ruled that such statutory provisions waive tribal sovereign immunity.<sup>201</sup>

##### *B. Requirements Based on Particular Statutes*

This Part provides a detailed analysis of the procedural requirements for programs under the CWA. Requirements for programs under a few other statutes are then briefly noted.

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196. See 33 U.S.C. § 1369(b)(1)(F) (1994).

197. See Firestone, *supra* note 189, at 17.

198. See WILLIAM H. RODGERS, ENVIRONMENTAL LAW 370 (2d ed. 1994).

199. See *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1290-94 (5th Cir. 1977); see also *Chesapeake Bay Foundation, Inc. v. United States*, 445 F. Supp 1349, 1353 (E.D. Va. 1978) (holding that the EPA’s failure to act is within the agency’s discretion).

200. See, e.g., 33 U.S.C. § 1365 (1994); 42 U.S.C. §§ 300j-8, 6972(a)(1)(a), 7604, 9659 (1994 & Supp. III 1997). After *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the validity of citizen suit provisions in federal environmental statutes with respect to actions against state agencies and officials is uncertain. See *supra* note 138 and accompanying text.

201. See *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1096-98 (8th Cir. 1989) (finding congressional intent in the text of RCRA to abrogate tribal sovereign immunity); see also *Atlantic States Legal Found. v. Salt River Pima-Maricopa Indian Community*, 827 F. Supp. 608, 609-10 (D. Ariz. 1993) (finding no tribal sovereign immunity in a citizen suit brought pursuant to the CWA and RCRA because the term “person,” as used in relevant portions of the two statutes, encompassed Indian tribes). But see *Florida Paraplegic Ass’n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1132-33 (11th Cir. 1999) (questioning whether *Blue Legs* is still good law).

## 1. Clean Water Act

The CWA is a complex statute that includes several interrelated regulatory programs. Section 301 makes it unlawful to discharge pollutants into surface waters except in accordance with the statute.<sup>202</sup> Section 303 requires states to adopt water quality standards.<sup>203</sup> Section 402 authorizes the EPA to issue NPDES permits for “point sources” of water pollution, which must include conditions to ensure compliance with water quality standards.<sup>204</sup> Section 402 also authorizes states to take over the role of issuing NPDES permits, and the majority of states have done so.<sup>205</sup> Section 401 makes state certification of compliance with water quality standards a prerequisite for any federal permit or license that results in a discharge of pollutants to surface waters.<sup>206</sup> Section 404 authorizes the United States Army Corps of Engineers (the Corps) to issue permits to discharge dredged or fill material into wetlands, which are generally treated as surface waters for purposes of the CWA.<sup>207</sup> States have the option of taking over this program, but very few have done so.<sup>208</sup> Whether the Corps or a state administers the section 404 program, the EPA can veto a permit in certain circumstances.<sup>209</sup> Section 319 of the CWA encourages states, but does not require them, to develop programs to control “nonpoint sources” of water pollution.<sup>210</sup> Section 518 authorizes the EPA to treat Indian tribes as states for a number of purposes under the statute, including sections 303, 319, 401, 402, and 404.<sup>211</sup>

### a. Water Quality Standards

States are required to establish water quality standards (WQSs) for surface waters.<sup>212</sup> Tribes have the option of adopting WQSs, pursuant to 1987 CWA amendments, as implemented by final rules

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202. See 33 U.S.C. § 1311(a) (1994).

203. See *id.* § 1313(a)(3)(A).

204. See *id.* § 1342(a).

205. See *id.* § 1342(a)-(b).

206. See *id.* § 1341.

207. See *id.* § 1344(a)-(d).

208. See *id.* § 1344(g).

209. See *id.* § 1344(c).

210. See generally *id.* § 1329 (encouraging states to adopt programs to control nonpoint source pollution).

211. See *id.* § 1377(e). See generally James Grijalva, *Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters*, 71 N.D. L. REV. 433 (1995) (discussing when the EPA may treat tribes as states under the Clean Water Act); Jane Marx et al., *Tribal Jurisdiction over Reservation Water Quality and Quantity*, 43 S.D. L. REV. 315, 327-28 (1998)(same).

212. See 33 U.S.C. § 1313 (1994).

published in 1991.<sup>213</sup> While WQSs are set through state or tribal law, the Supreme Court has stated that, once approved by the EPA, they become federal regulations.<sup>214</sup>

WQSs are comprised of two components: “designated uses” and “water quality criteria.”<sup>215</sup> A “designated use” is the basic policy decision concerning the kinds of uses a waterbody, or a portion of a waterbody, should support.<sup>216</sup> The CWA establishes a federal “minimum” goal for states and tribes that all surface waters be fishable and swimmable.<sup>217</sup> “Water quality criteria” are chemical, physical, and biological characteristics of WQSs, designed to ensure that surface waters support their designated uses.<sup>218</sup>

Although WQSs are used to carry out CWA regulatory programs, states and tribes adopt WQSs through a rulemaking process rather than through adjudication.<sup>219</sup> The CWA and EPA regulations establish some minimum requirements for public participation.<sup>220</sup> CWA section 303(c) requires states to hold public hearings at least once every three years to review their WQSs.<sup>221</sup> This statutory requirement is incorporated into WQSs regulations and is fulfilled through compliance with Part 25 of Title 40 of the Code of Federal Regulations.<sup>222</sup>

Tribes may choose to go beyond the minimum requirements and employ optional procedures for facilitating public participation. There are two primary reasons to consider optional procedures. First, enforcement of WQSs will require less money and a smaller staff if the affected people voluntarily comply, and those affected are more likely to voluntarily comply if they understand the regulatory program and feel that it serves their interests. Second, non-Indians who are affected by a tribe’s WQSs may be less likely to challenge the tribe’s authority if they feel that they had real opportunities for input during

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213. See Amendments to the Water Quality Standards Regulation, 56 Fed. Reg. 64,876, 64894-96; see also 40 C.F.R. § 131 (1999) (rules for adopting and revising WQSs).

214. See *Arkansas v. Oklahoma*, 503 U.S. 91, 104-110 (1992).

215. See 40 C.F.R. § 131.10-.11 (1999).

216. See *id.* § 131.10.

217. See *id.* § 130.3 (“Water Quality Standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water . . .”). Except for toxic pollutants, EPA-issued guidance on WQSs is not mandatory. See *Arkansas v. Oklahoma*, 503 U.S. at 101; 33 U.S.C. § 1317 (1994).

218. See 40 C.F.R. § 131.11-.12 (1999).

219. See *id.* §§ 130.0, 131.4, 131.8.

220. See, e.g., 33 U.S.C. §§ 1313(c)(1), 1314(a)(1), 1314(m)(2) (1994); see also 40 C.F.R. §§ 124.10-.13.

221. See 33 U.S.C. § 1313(c)(1) (1994); see also 40 C.F.R. § 131.20(a) (1999).

222. See 40 C.F.R. § 131.20(b) (1999).

the standard-setting process. For these reasons, tribes may want to fashion their own options for public participation. For example, negotiated rulemaking under tribal law might be a viable option for some reservations. In negotiated rulemaking, as practiced under federal law, an agency establishes a committee with representatives from the different groups of stakeholders, including the government, and the committee develops a draft set of rules for the agency to consider adopting as the proposed rules to be published for public review and comment.<sup>223</sup> In some cases the agency may promise that, if the committee can produce a consensus draft, the agency will publish the consensus draft as the proposed rules.<sup>224</sup>

Section 518 of the CWA requires the EPA to fashion a mechanism for resolving disputes that arise between tribes and states over differing WQSs for shared waterbodies.<sup>225</sup> The current mechanism features mediation or arbitration where the parties to the dispute so agree.<sup>226</sup> Apparently, the process has not yet been used, as states have chosen to litigate their opposition to tribal WQSs.<sup>227</sup>

#### b. NPDES Permits

Whether the EPA issues a NPDES permit, or a state or tribe issues a permit pursuant to a delegated program, EPA regulations establish many of the ground rules for permit issuance and for resolving disputes between parties affected by permit decisions.

As discussed earlier, prior to permit issuance, EPA regulations require (1) public notice of permit applications, (2) opportunities for the affected public to comment on draft permits, and (3) opportunities to request an evidentiary hearing.<sup>228</sup> Once a tribe's WQSs have been approved by the EPA, conflicts between a tribe and a state, or between a tribe and another tribe, may be resolved through the same

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223. See Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561-583 (1994 & Supp. IV 1998). See generally 1 DAVIS & PIERCE, *supra* note 56, at 373-75 (defining negotiated rulemaking as "a process through which policy raised by a rulemaking proposal are resolved through a negotiating process").

224. See 5 U.S.C. § 563(a)(7) (1994).

225. See 33 U.S.C. § 1377 (1994).

226. See 40 C.F.R. § 131.7(f)(1)-(2) (1999).

227. See *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996) (upholding EPA approval of water quality standards adopted by the Pueblo of Isleta), *cert. denied*, 522 U.S. 965 (1997); *Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998) (upholding EPA determination that the Confederated Salish and Kootenai Tribes possess sufficient inherent sovereignty to set WQSs for waters within reservation boundaries), *cert. denied*, 525 U.S. 921 (1998).

228. See 40 C.F.R. §§ 124.10-.13 (1999).

procedures that are used to resolve conflicts between states.<sup>229</sup> In the case of a NPDES permit issued by the EPA, such conflicts are resolved in the context of CWA section 401 certification, discussed below.<sup>230</sup> If a state or tribe issues the NPDES permit, 401 certification does not apply unless there is another federal permit or license.<sup>231</sup> However, a prohibition on violating downstream WQSs applies,<sup>232</sup> and CWA section 402(b)(5) requires, as a condition of EPA approval, that each state or tribal NPDES permit program must include procedures for seeking written recommendations from any affected state prior to issuing a NPDES permit.<sup>233</sup> If a permit-issuing state does not accept the recommendations of a downstream affected state, and the EPA finds that the reasons for rejecting such recommendations are inadequate, the EPA may object to the permit.<sup>234</sup> If the EPA does object, the state or any interested person may request a hearing, which is automatically granted if requested by the permit-issuing authority and otherwise granted at the discretion of the EPA Regional Administrator.<sup>235</sup>

NPDES permit decisions cannot be appealed directly to the EAB. Rather, a person wanting to appeal a NPDES permit decision must first request an evidentiary hearing before an ALJ.<sup>236</sup> If the hearing is granted, the resultant decision can be appealed to the EAB; if the hearing is denied, the denial can be appealed to the EAB.<sup>237</sup> Judicial review of EPA NPDES permit decisions is authorized by CWA section 509, once administrative remedies have been exhausted.<sup>238</sup>

### c. Section 401 Certification

In reviewing any permit application, if the EPA determines that “there is reason to believe that a discharge may affect the quality of waters of any State or States other than the State in which the

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229. EPA regulations prohibit the issuance of a NPDES permit if the discharge would result in a violation of the WQSs of any affected state or tribe. *See id.* § 122.4(d); *see also* *Arkansas v. Oklahoma*, 503 U.S. 91, 104-107 (1992) (upholding this prohibition in the EPA regulations).

230. *See* 33 U.S.C. § 1341 (1994).

231. *See id.* § 1341(a)(1).

232. *See* 40 C.F.R. § 123.25 (1999).

233. *See* 33 U.S.C. § 1342(b)(5) (1994).

234. *See id.*; *see also* 40 C.F.R. § 123.44(c) (1999).

235. *See* 40 C.F.R. §§ 124.7, 123.44(d), 123.44(f) (1999).

236. *See id.* § 124.71-.91.

237. *See id.* § 124.91.

238. *See* 33 U.S.C. § 1369(b)(1)-(2) (1994). The case of *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), arose in this context.

discharge originates,” the federal agency must provide notice and documentation to any such affected state or tribe.<sup>239</sup> CWA section 401 provides that for any federal permit or license which may result in a discharge to surface waters, the state in which the discharge would occur must certify that the discharge will not result in a violation of the state’s WQSs.<sup>240</sup> When providing such certification, the state agency may request the imposition of any conditions that it determines to be necessary to ensure compliance with WQSs, but if the state seeks conditions more stringent than those contained in the draft permit, each such condition must be justified under the CWA or state law.<sup>241</sup> If the state refuses to certify the discharge, in effect, it has vetoed the federal permit or license.<sup>242</sup>

An Indian tribe that has qualified for treatment as a state for purposes of setting WQSs is likewise qualified to be treated as a state for purposes of certification under section 401 of the CWA.<sup>243</sup> As with states, when providing certification the tribal agency can request the imposition of any conditions that it determines to be necessary to ensure compliance with WQSs, but if the tribe asks for conditions more stringent than those contained in the draft permit, each such condition must be justified under the CWA or tribal law.<sup>244</sup>

A NPDES permit issued by the EPA is one kind of federal permit that requires section 401 certification.<sup>245</sup> Thus, if the EPA is the permit-issuing agency, disputes regarding the affect of a NPDES permit on downstream states or tribes can be raised through section 401 certification.<sup>246</sup> If a downstream state or tribe objects, the EPA will not issue the permit if the agency determines that the permit would result in a violation of downstream WQSs and that conditions cannot be included that would avoid such a violation.<sup>247</sup> When the federal license or permit is issued by an agency other than the EPA, and the issuing agency holds a hearing to consider objections of affected states or tribes, the EPA must evaluate the objections and

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239. 40 C.F.R. § 121.13, 121.14 (1999).

240. *See* 33 U.S.C. § 1341(a)(1) (1994); *see also* 40 C.F.R. § 124.53(a) (1999).

241. *See* 40 C.F.R. § 124.53(e) (1999).

242. *See* 33 U.S.C. § 1369(b)(1)(F) (1994).

243. *See* 40 C.F.R. § 124.51(c) (1999) (cross-referencing 40 C.F.R. § 131.4).

244. *See id.* § 124.53(e).

245. *See id.* § 124.53(a).

246. *See id.* § 121.1-.30.

247. *See id.* An evidentiary hearing is available to challenge the EPA’s determination. *See id.* §§ 124.11, 124.71-125.91; *see also* *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (holding that the EPA’s determination is entitled to deference by reviewing courts).

provide recommendations as to whether the permit should be issued and the conditions that should be included.<sup>248</sup>

If a dispute arises concerning section 401 certification and the matter does not involve objections by downstream states or tribes, the scope and availability of administrative review and judicial review generally are determined by state law.<sup>249</sup> The EAB will not review NPDES permit decisions that are “attributable to State certification.”<sup>250</sup> However, the Supreme Court recently ruled on the scope of section 401 certification, holding that the state agency could include minimum stream flows as a condition in a federal hydropower permit in order to protect the designated use of the stream, an anadromous fishery.<sup>251</sup> In the aforementioned case the Supreme Court granted *certiorari* for the purpose of resolving a conflict among state courts of last resort that had interpreted section 401 of the CWA.<sup>252</sup> Except for such discretionary review in the Supreme Court, state law governs the resolution of intrastate disputes involving section 401.

The federal policy of treating tribes like states suggests that tribal law should determine the availability and scope of review of tribal 401 certification decisions, although there is no corresponding authorization for discretionary federal court review. This is an important issue that deserves serious consideration by tribal officials and their legal counsel.<sup>253</sup>

## 2. Landfill Permit Programs Under RCRA

Although RCRA does not expressly authorize the EPA to treat tribes like states, the EPA, in 1996, announced a policy decision to

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248. See 40 C.F.R. § 121.15 (1999).

249. See *id.* § 124.55(e).

250. *Id.* § 124.55(e); see also Firestone, *supra* note 189, at 15-16.

251. See PUD No. 1 v. Washington Dep't of Ecology, 511 U.S. 700, 710-23 (1994).

252. See *id.* at 711-13.

253. Professor Robert Clinton has recommended amending the statute that authorizes Supreme Court review on *certiorari*, 28 U.S.C. § 1257, so that it would include federal questions arising in decisions rendered by the highest courts of Indian tribal governments. Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 893 & n.126 (1990). In the absence of an express authorization for federal court review, the only avenue for such review is to argue that the tribe has been implicitly divested of inherent sovereignty over the subject matter—that there is federal question jurisdiction and that the federal question is whether the tribe has been divested of its sovereignty. See National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 852-53 & n.14 (1985); see also Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089, 1092 (1995).

afford tribes such treatment.<sup>254</sup> Under the new policy, tribal permit programs regulating municipal solid waste landfills (MSWLFs) would have been required to include formal procedures for public review of permit determinations in order to obtain EPA approval.<sup>255</sup> This policy, however, was derailed by the decision of the District of Columbia Circuit in *Backcountry Against Dumps v. EPA*.<sup>256</sup> The continuing failure of Congress to amend RCRA to authorize tribes to be treated like states makes regulation of MSWLFs on tribal lands problematic. State MSWLF permit programs are “authorized” by the EPA; they are not “delegated” programs.<sup>257</sup> Accordingly, when amending RCRA to authorize tribes to be treated like states, tribal representatives and Congress should give careful consideration to whether tribal permit decisions should be subject to review by the EAB and, after such appeals, to review by federal courts.

### 3. National Environmental Policy Act

The National Environmental Policy Act (NEPA) is the basic federal law that provides for public participation in federal agency decisions that affect the environment.<sup>258</sup> The NEPA process is governed by regulations issued by the Council on Environmental Quality (CEQ)<sup>259</sup> and by implementing procedures issued by each agency.<sup>260</sup> Development projects on tribal lands often include transactions involving Indian trust property, and such transactions generally require approval by the Bureau of Indian Affairs (BIA), which renders NEPA applicable.<sup>261</sup>

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254. See Subtitle D Regulated Facilities; State/Tribal Permit Program Determination of Adequacy; State/Tribal Implementation Rule (STIR), 61 Fed. Reg. 2584 (1996) (proposed Jan. 26, 1996).

255. See *id.* at 2603 (to be codified at 40 C.F.R. § 239.6).

256. 100 F.3d 147, 151 (D.C. Cir. 1996) (holding RCRA is not ambiguous with respect to Indian tribes and that EPA approval of a tribal permit program, in effect treating the tribe like a state, was improper).

257. See *id.* at 150-51.

258. 42 U.S.C. §§ 4321-4370e (1994 & Supp. III 1997).

259. See 40 C.F.R. pts. 1500-1508 (1999).

260. Implementing procedures for bureaus and offices within the Department of the Interior are published in the Departmental Manual. U.S. DEP'T OF THE INTERIOR, 516 DEPARTMENTAL MANUAL 1-6 [hereinafter 516 D.M.]. Procedures specific to the Bureau of Indian Affairs (BIA) are published as an appendix to the Departmental Manual, 516 D.M., *supra*, at 6, app. 4. See generally, Dean B. Suagee, *The Application of the National Environmental Policy Act to “Development” in Indian Country*, 16 AM. INDIAN L. REV. 377 (1991) [hereinafter Suagee, *The Application of NEPA*]. The BIA recently published revisions to its NEPA implementing procedures. See Bureau of Indian Affairs, National Environmental Policy Act: Implementing Procedures (516 DM 6, Appendix 4), 61 Fed. Reg. 67,845 (1996).

261. See 516 D.M., *supra* note 260, at 6, app. 4, §§ 4.3, 4.4; 61 Fed. Reg. 67,845, 67,847-48 (1996).

NEPA can facilitate public involvement in federal agency decisionmaking, but, with regard to tribes, this potential has gone largely unfulfilled, in part because the BIA has never made its guidance on the preparation of environmental assessments (EAs) readily accessible, although the responsibility for preparing EAs generally falls upon people outside the BIA.<sup>262</sup> BIA and tribal staff, as well as the proponents of development projects, commonly treat NEPA as a compliance requirement rather than a decisionmaking tool, thereby further contributing to NEPA's failure to fulfill its potential for facilitating public involvement.<sup>263</sup>

#### 4. National Historic Preservation Act

As amended in 1992, the National Historic Preservation Act (NHPA)<sup>264</sup> includes several provisions concerning the authority of tribes, as sovereign governments, to establish and control their own historic preservation programs.<sup>265</sup> Any federally recognized Indian tribe may assume "all or any part of the functions of a State Historic Preservation Officer . . . with respect to tribal lands, as such responsibilities may be modified for tribal programs through regulations issued by the Secretary."<sup>266</sup> This corresponds to congressional amendments, enacted in the last decade, to several of the major federal environmental statutes, amendments authorizing the EPA to treat Indian tribes as states.<sup>267</sup>

One of the roles that tribes can assume is to serve as a consulting party in the consultation process established by section 106 of the NHPA, which is carried out in accordance with regulations issued and recently revised by the Advisory Council on Historic Preservation.<sup>268</sup> Under the revised regulations, interested individuals and organizations

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262. See Suagee, *The Application of NEPA*, *supra* note 260, at 420-26, 464-95.

263. See Suagee, *The Indian Country Environmental Justice Clinic*, *supra* note 24, at 587-89.

264. 16 U.S.C. §§ 470 to 470x-6 (1994 & Supp. III 1997).

265. See *id.* § 470a(d). See generally Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145 (1996).

266. 16 U.S.C. § 470a(d)(2) (1994).

267. See, e.g., Clean Water Act § 518(a), (e)-(f), 33 U.S.C. § 1377(a), (e)-(f) (1994), Clean Air Act § 110(o), 42 U.S.C. § 7410(o) (1994); 40 C.F.R. § 131.20(b) (1999) (EPA regulations on state adoption of WQSS applicable to tribes); *id.* § 124.51(c) (tribes are to be treated as states for certification purposes under section 401 of the CWA); see also Coursen, *supra* note 6, at 10,579.

268. The Advisory Council on Historic Preservation Published revised final regulations on May 18, 1999. See Protection of Historic Properties, 64 Fed. Reg. 27,044, 27,074-84 (1999) (codified at 36 C.F.R. § 800.3(f)(3)).

can ask to participate as consulting parties.<sup>269</sup> The responsible federal agency makes the decision on such requests, after consulting with the State Historic Preservation Officer (SHPO) or the Tribal Historic Preservation Officer for lands within a reservation if the tribe has taken over SHPO functions.<sup>270</sup>

The NHPA, as amended, includes statutory language addressing the interests of non-Indian landowners within reservation boundaries.<sup>271</sup> Any tribe that seeks to assume some or all of the functions of an SHPO will be required to submit a plan to the Secretary of the Interior.<sup>272</sup> NHPA section 101(d)(2) provides that, before approving a tribe's plan, the Secretary must determine that the plan allows the SHPO, "in addition to the tribal preservation official, [to] exercise the historic preservation responsibilities" of a SHPO "with respect to properties neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe."<sup>273</sup> The "historic preservation responsibilities" of a SHPO are specified in NHPA sections 101(b)(2) and (3), and include participation in the section 106 consultation process.<sup>274</sup>

How this provision will affect actual practice remains to be seen. To date, the Secretary has approved twenty tribes for assuming SHPO functions, but these programs are very new.<sup>275</sup> The significance of the statutory language should not be overlooked, however, since it does reflect a congressional affirmation of tribal authority over the activities of non-Indians on privately owned land within reservation boundaries.

## VI. TRIBAL VARIATIONS ON DUE PROCESS AND PUBLIC PARTICIPATION

Thus far, this Article has discussed the concepts of due process and public participation and has explored some of the provisions of federal statutes and regulations that render these concepts applicable to tribal governments. This Article should not, however, be read as a

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269. See 36 C.F.R. § 800.3(e), (f) (1999).

270. See *id.* § 800.3(f)(3). Tribes can take over SHPO functions for "tribal lands," a term that is defined to include all lands within reservation boundaries. See 16 U.S.C. § 470w(14) (1994). Even if a tribe has not taken over SHPO functions, the federal agency must still consult with the tribe before reaching a decision regarding requests from individuals and organizations to become consulting parties for proposed federal undertakings that would affect Indian reservations. See 36 C.F.R. § 800.3(f)(3) (1999).

271. See *id.* § 800.3(c)(1).

272. See 16 U.S.C. § 470a(d)(2)(C) (1994).

273. *Id.* § 470a(d)(2)(D)(iii).

274. See *id.* § 470a(b)(2)-(3).

275. Telephone Interview with Bryan Mitchell, Chief, Preservation Initiatives, United States National Park Service (Nov. 1999).

recommendation that tribes uncritically adopt these concepts from the American legal system in their entirety. Rather, tribal cultural values must be drawn upon in determining the form that due process and public participation will assume in any given tribal community.

A. *Procedures to Protect Culturally Important Interests*

When considering tribal legislation or rules for due process and public participation, tribal officials and legal counsel should consider fashioning procedures to ensure that culturally important interests are taken into consideration. Many tribal cultures treat certain kinds of interests as being very important, things such as the welfare of future generations, the final resting places of ancestors, the welfare of wildlife and other living things, sacred places, and spiritual beings. Procedural rules could be fashioned with these interests in mind. For example, culturally important kinds of wildlife or sacred places might be given standing in their own right to participate in administrative proceedings or to challenge decisions in tribal court. Tribal government agencies with relevant expertise or established groups within a tribal community might be authorized to act as guardian ad litem for such interests. Additionally, special procedures could be established to protect the confidentiality of certain kinds of information, such as simply deferring to the judgment of a tribal religious society on certain kinds of issues. Many different approaches can be imagined.

B. *Balancing Community and Individual Interests*

Tribal cultures often treat the rights of individuals somewhat differently than does the larger American society. In the dominant society, the rights of individuals are widely regarded as sacrosanct: Individuals have rights that the government cannot take away.<sup>276</sup> The tension between the powers of government and rights of individuals is often seen as two-sided, but in tribal communities, a third side can be seen: the web of relationships with and responsibilities to other people in the community.<sup>277</sup> Tribal procedures to provide for due process and public participation could be shaped with this web of relationships and responsibilities in mind.

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276. See FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 116-17 (1995).

277. See *id.* at 116-17.

C. *Roles of Tribal Courts in Defining Due Process*

In the event that federal agencies or federal courts are called upon to review tribal agency or tribal court decisions, they are likely to consider the case law of the dominant society's courts in determining the adequacy of tribal procedures. Tribal agencies and courts should be aware of this. To the extent that these principles serve tribal interests, tribal court judges may want to make use of American case law in their reasoning.

If the decisions of tribal court judges regarding due process cases differ greatly from the way such cases would be resolved in the dominant society, the judges should articulate their reasoning clearly so that their opinions are respected in both the larger society and the tribal community. Legal scholars, as well as some tribal courts, have suggested that tribal courts draw on tribal cultural traditions rather than on Anglo-American law in fashioning due process jurisprudence. For example, Professor Frank Pommersheim, in his book *Braid of Feathers*, quotes the following passage from a decision by the Supreme Court of the Oglala Sioux Tribe:

"It should not have to be for the Congress of the United States or the Federal Court of Appeals to tell us when to give due process. Due process is a concept that has always been with us. Although it is a legal phrase and has legal meaning, due process means nothing more than being fair and honest in our dealings with each other. We are allowed to disagree. . . . What must be remembered is that we must allow the other side the opportunity to be heard."<sup>278</sup>

## VII. CONCLUSION

By establishing procedures to provide for due process and public participation in their environmental regulatory programs, tribal officials can ensure that the institutions of tribal government are fair and honest in their dealings with the people whose lives they affect. In addition, tribal officials can demonstrate to the larger society that modern tribal governments endorse the basic notions of due process and the ability of people to participate in governmental decisions that affect them. By endorsing these concepts, and making them work in practice, tribal officials can help build support among the larger American public for a genuine commitment to the permanence of tribal governments as a third type of sovereign in our federal system.

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278. *Id.* at 135 (quoting *Bloomberg v. Dreamer*, Oglala Sioux Civ. Ap. 90-348, at 5-6 (1991)).