



22nd ANNUAL CLIENT SERVICE SEMINAR FOR TRIBAL LEADERS, TRIBAL ENVIRONMENTAL and HEALTHCARE PROGRAM MANAGERS & RESERVATION ATTORNEYS

An Interactive Virtual Program

Building Back Sovereignty in 2022 and Beyond

Presented by

OGDEN MURPHY WALLACE PLLC
Tribal Practice Group

Richard Du Bey, Jennifer Sanscrainte, Nicholas Thomas, Geoff Bridgeman, Andrew Fuller, Aaron Riensche, Eliza Whitworth, Drew Pollom, Cortney Sage and Melody Wasley

Healthcare Practice Group

David Schoolcraft, Casey Moriarty, Lee Kuo, Teresa Bystrom, Kelsie Hoit



***“All men were made by the
same Great Spirit Chief.
They are all brothers.
The earth is the mother of all
people, and all people
should have equal rights
upon it.”***

Hin-mah-too-yah-lat-kekt

Chief Joseph

(On a visit to Washington, D.C., 1879)





Day One: Tribal Environmental Law

- 9:00 CT / 7:00 PT **Greeting & Welcome Prayer**
- 9:25 CT / 7:25 PT **Tribal Environmental Talking Circle (All)**
- Achievements in 2021
 - Challenges in 2022
- 11:00 CT / 9:00 PT **What is the Biden Administration Doing to Comply with Treaty Rights and Enforce Environmental Justice Within Indian Country?** *(Andrew Fuller)*
- 11:45 CT / 9:45 PT **Break (10 minutes)**
- 11:55 CT / 9:55 PT **Tribal Environmental Law Part I: Inherent Sovereignty in 2022** *(Drew Pollom)*
- 12:25 CT / 10:25 PT **Tribal Environmental Law Part II: Water Quality Protection Under the Clean Water Act.** *(Jennifer Sanscrainte)*
- 1:00 CT / 11:00 PT **Working Lunch Presentation: Protecting Tribal Communities and Environmental Interests Against the Threat of LNG Bomb Trains** *(Nicholas Thomas)*
- 1:40 CT / 11:40 PT **How the McGirt v. Oklahoma Decision is Redefining Federally Delegated Programs Within Indian Country** *(Eliza Whitworth)*
- 2:15 CT / 12:15 PT **Tribal Land Reacquisition: A New Direction in Tribal Brownfield Program Enforcement** *(Ben Benoit / Richard Du Bey – Conservation Easement)*
- 3:00 CT / 1:00 PT **Break (15 minutes)**
- 3:15 CT / 1:15 PT **How Tribes Can Use Federal Courts to Further Their Collective Interests: The Role of Tribes as Amicus Curiae (Friends of the Court)** *(Aaron Riensche)*
- 4:00 CT / 2:00 PT **Implementing Treaty Rights and Enforcing Tribal Sovereignty to Protect Reservation Homelands** *(Richard Du Bey)*
- 4:45 CT / 2:45 PT **Review of Day Two Agenda (All)**



Talking Circle:

- Achievements in 2021
- Challenges in 2022



BREAK

11:45 a.m. – 11:55 a.m. CT / 9:45 a.m. – 9:55 a.m. PT



BREAK

3:00 p.m. – 3:15 p.m. CT / 1:00 pm – 1:15 p.m. PT



Day Two: Tribal Healthcare Law

- 9:00 CT / 7:00 PT **Greeting / Overview of Day Two** *(Jennifer Sanscrainte)*
- 9:15 CT / 7:15 PT **Tribal Healthcare Talking Circle (All)** *(Jennifer Sanscrainte / David Schoolcraft)*
- Achievements in 2021
 - Challenges in 2022
- 10:00 CT / 8:00 PT **Tribal Healthcare Facilities and Cybersecurity** *(Casey Moriarty / Lee Kuo)*
- 10:45 CT / 8:45 PT **Lessons Learned: Providing Tribal Healthcare in a Post Pandemic World** *(David Schoolcraft)*
- 11:30 CT / 9:30 PT **Final Closing Circle** *(Richard Du Bey / David Schoolcraft / Jennifer Sanscrainte)*
- 12:00 CT / 10:00 PT **Adjourn**



WORKING LUNCH

CLOSING CIRCLE



*"We did not inherit the Earth from our ancestors,
we borrow it from our children."*

ADJOURN

THANK YOU FOR ATTENDING!



What is the Biden Administration Doing to Comply with Treaty Rights and Enforce Environmental Justice Within Indian Country?

11:00-11:45 a.m. CT

March 2, 2022



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Andrew S. Fuller
Tribal Environmental Practice Group
Ogden Murphy Wallace, PLLC

Appointments

President Biden has appointed more than 52 Native Americans to positions across the federal government, including a historic number of Senate-confirmed positions. These appointees include:

- **Deb Haaland** – Secretary of the Interior
- **Charles Sams** – Director of the National Park Service
- **Bryan Newland** - Assistant Secretary for Indian Affairs, Department of the Interior
- **Michael Connor** - Assistant Secretary of the Army for Civil Works
- **Jaimie Pinkham** – Primary Deputy Secretary for Civil Works, Army Corps of Engineers
- **Janie Hipp** - General Counsel, Department of Agriculture
- **Robert Anderson** – Principal Deputy Solicitor, Department of Interior
- **Libby Washburn** - Special Assistant for Native Affairs, Domestic Policy Council
- **PaaWee Rivera** - Director of Tribal Affairs, Office of Intergovernmental Affairs.

Consultation

Presidential Biden's Memorandum re: Tribal Consultation (Jan. 26, 2021)

"It is a priority of my Administration to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy. "

"History demonstrates that we best serve Native American people when Tribal governments are empowered to lead their communities, and when Federal officials speak with and listen to Tribal leaders in formulating Federal policy that affects Tribal Nations."

Protecting Tribal Treaty Rights

- 2021 Tribal Nations Summit
- MOU Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights And Reserved Rights
- Indigenous Knowledge Statement and Establishment of Interagency Working Group on Indigenous Traditional Ecological Knowledge.

Environmental Justice

Executive Order 14008 - Tackling the Climate Crisis at Home and Abroad, January 27, 2021

Expresses the Biden administration's broad, government-wide commitment to:

- Ensuring that all federal agencies develop programs, policies, and activities
- To address the disproportionately high and adverse health, environmental, economic, climate, and other cumulative impacts
- On communities that are marginalized, underserved, and overburdened by pollution.

Environmental Justice

Justice40 Initiative “Whole-Government Approach”

The Justice40 initiative aims to deliver 40 percent of the overall benefits of climate, clean energy, affordable and sustainable housing, clean water, and other investments to underserved communities.

Interim guidance has been issued directing federal agencies to begin examining relevant programs to assess how to deliver 40% of the benefits of those programs to disadvantaged communities.

Environmental Justice

What is a “disadvantaged community”?

Community is defined as "either a group of individuals living in geographic proximity to one another, or a geographically dispersed set of individuals (such as migrant workers or Native Americans), where either type of group experiences common conditions."

The interim guidance for the Justice40 program considers a number of indicators to determine whether a community is "disadvantaged." While quite a few of these factors are common within Indian Country, the interim guidance explicitly states that "**[i]n addition to the above definition of disadvantaged communities, geographic areas within Tribal jurisdictions should be included.**"

Environmental Justice

Justice40 Programs

Programs subject to the 40% set-aside include those investing in:

- Climate change
- Clean energy and energy efficiency
- Clean transportation
- Affordable and sustainable housing
- Training and workforce development (related to climate, natural disasters, environment, clean energy, clean transportation, housing, water and wastewater infrastructure, and legacy pollution reduction, including in energy communities)
- Remediation and reduction of legacy pollution
- Critical clean water and waste infrastructure

See OMB, Interim Implementation Guidance for the Justice40 Initiative, *at* <https://www.whitehouse.gov/wp-content/uploads/2021/07/M-21-28.pdf>

Environmental Justice

Justice40 Programs already in place

Since January 27, 2021, twenty-one Justice 40 pilot programs have already been established, including:

- Flood Mitigation Assistance Program (DHS)
- Building Resilient Infrastructure and Communities Program (DHS)
- Weatherization Assistance Program (DOE)
- Brownfields Program (EPA)
- Superfund Remedial Program (EPA)
- Reducing Lead in Drinking Water (EPA)

Environmental Justice

Bolstering Tribal Homeland and Reservation Population Resilience

The infrastructure law makes investments in Tribal communities' efforts to tackle the climate crisis and boost the resilience of physical and natural systems.

Significant recent investments to Tribal communities for:

- Restoration of aquatic and riparian habitat
- Climate adaptation planning
- Ocean and coastal management planning
- Capacity building
- Relocation, managed retreat, and protect-in-place planning for climate risks
- Fish passage and salmon recovery

Environmental Justice

Biden's Fiscal Year 2022 Budget includes an increase of more than \$450 million to facilitate climate mitigation, resilience, adaptation, and environmental justice projects in Indian Country.

Environmental Justice

Addressing Legacy Pollution

Infrastructure Law includes the largest ever investment in addressing legacy pollution.

\$21 billion to clean up Superfund and brownfield sites, reclaim abandoned mine lands, and cap orphaned oil and gas wells.

\$1 billion already directed to initiate cleanup at 49 previously unfunded Superfund sites and accelerate cleanup at dozens of other sites.

State-Level Environmental Justice

Certain states are leading the way on more local applications of environmental justice, e.g.:

- Washington
 - Healthy Environmental for All (HEAL) Act
 - Climate Commitment Act
- California
 - EJ incorporated into state government, from DOJ to Air Resources Board.
- New Jersey
 - EJ law allows the denial or conditioning of permits based on the projects' EJ impacts.

Conclusions

The Biden Administration has made big promises regarding tribal treaty rights and environmental justice, and during its first year has taken significant steps to realize those goals.

The importance of having decision-makers that understand tribal issues cannot be overstated. Biden's focus on appointing tribal members to federal positions is more than just words, it helps ensure the right people are in the room.

The Justice40 initiative's focus on Environmental Justice and directing federal resources to disadvantaged communities creates a tool to be leveraged by Tribes.

The Biden Administration recognizes the importance of consultation, and the consultation process should be utilized to ensure Tribes receive their due under Justice40 programs.

Questions?

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TRIBAL ENVIRONMENTAL LAW PART I: INHERENT SOVEREIGNTY IN 2022

9:55 a.m./ 11:55 a.m. CT
March 2, 2022



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Associate
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Roadmap

Foundational cases
impact a Tribe's civil
jurisdiction

Recent case law

Key Takeaways and
Considerations

Questions



Montana v. U.S., 450 U.S. 544 (1980)

- The Crow Tribe sought to regulate hunting and fishing within its Reservation for non-members, including activity on the Big Horn River
- State of Montana asserted it had the right to regulate hunting and fishing by non-Indians on the reservation, not the tribe
- The United States, acting on behalf of the Crow Tribe, moves for declaratory judgment that the Tribe 1) had title to the river and 2) had the right to regulate non-Indians on the reservation



Montana Ruling

- “...the general proposition is that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Montana v. United States*, 450 U.S. 544, 565 (1981)
- “A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” *Montana v. United States*, 450 U.S. 544, 565 (1981)
- “A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Montana v. United States*, 450 U.S. 544, 566 (1981).

Important factors impacting *Montana* analysis from other cases

- A Tribe's regulatory jurisdiction will be the same as its adjudicatory jurisdiction. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997)
- Activity on trust lands versus non-Indian fee lands matters. *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2004)
- Abrogated treaty rights will divest a tribe of jurisdiction over non-Indians (use it or lost it). *Bourland v. South Dakota*, 508 U.S. 679 (1993)
- If the land is located in a "closed area" of the Reservation, the Tribe will be able to regulate, but if it is in an "open area" they cannot. *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989)

Elliot v. White Mountain Apache Tribal Ct. 566 F.3d 842
(9th Cir. 2009)



Elliot Facts

- Valinda Jo Elliot along with their employer drove around in a remote section of the White Mountain Apache Tribe Reservation and got lost
- Elliot and her employer split up to search for help. Employer is rescued but Elliot is not.
- Elliot spots a news helicopter reporting on a local forest fire known as the Rodeo Fire. In response, she lights a signal fire and is rescued.
- Elliot's signal fire grows into its own substantial fire known as the Chediski Fire and merges with the Rodeo fire. The Rodeo-Chediski fire burns 400,000 acres combines and causes millions of dollars in damage
- Tribe brought civil action against Elliot in Tribal Court who asserts that the Tribe doesn't have jurisdiction over her because she is non-Indian

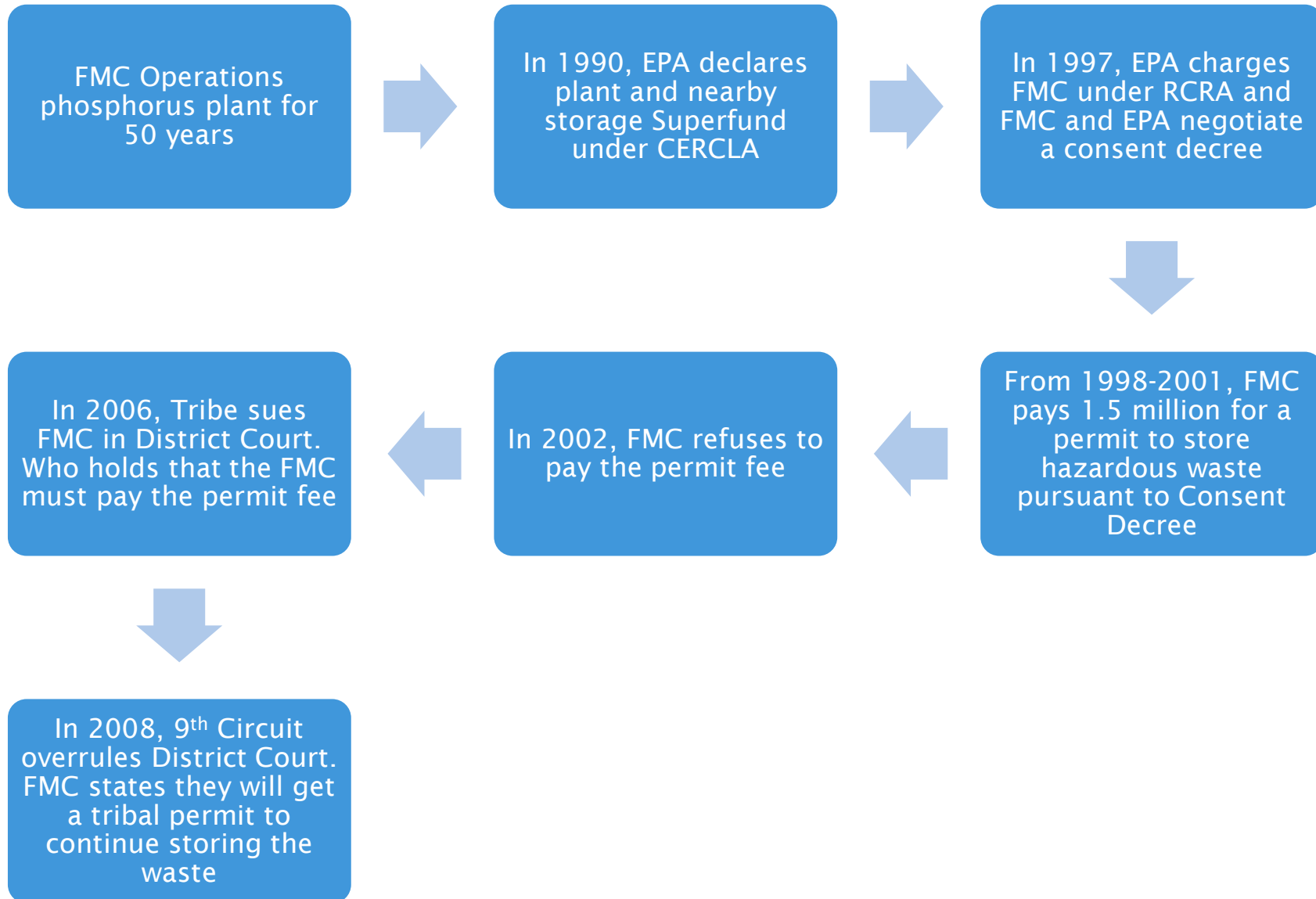
Elliot Holding

- 9th Circuit holds the Tribe does have jurisdiction
- “The tribe seeks to enforce its regulations that prohibit, among other things, trespassing onto tribal lands, setting a fire without a permit on tribal lands, and destroying natural resources on tribal lands. The Supreme Court has strongly suggested that a tribe may regulate nonmembers' conduct on tribal lands to the extent that the tribe can “ ‘assert a landowner's right to occupy and exclude.” *Elliott v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 849 (9th Cir. 2009)
- “Furthermore, the tribe makes a compelling argument that the regulations at issue are intended to secure the tribe's political and economic well-being, particularly in light of the result of the alleged violations of those regulations in this very case: the destruction of millions of dollars of the tribe's natural resources.” *Elliott v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 850 (9th Cir. 2009)

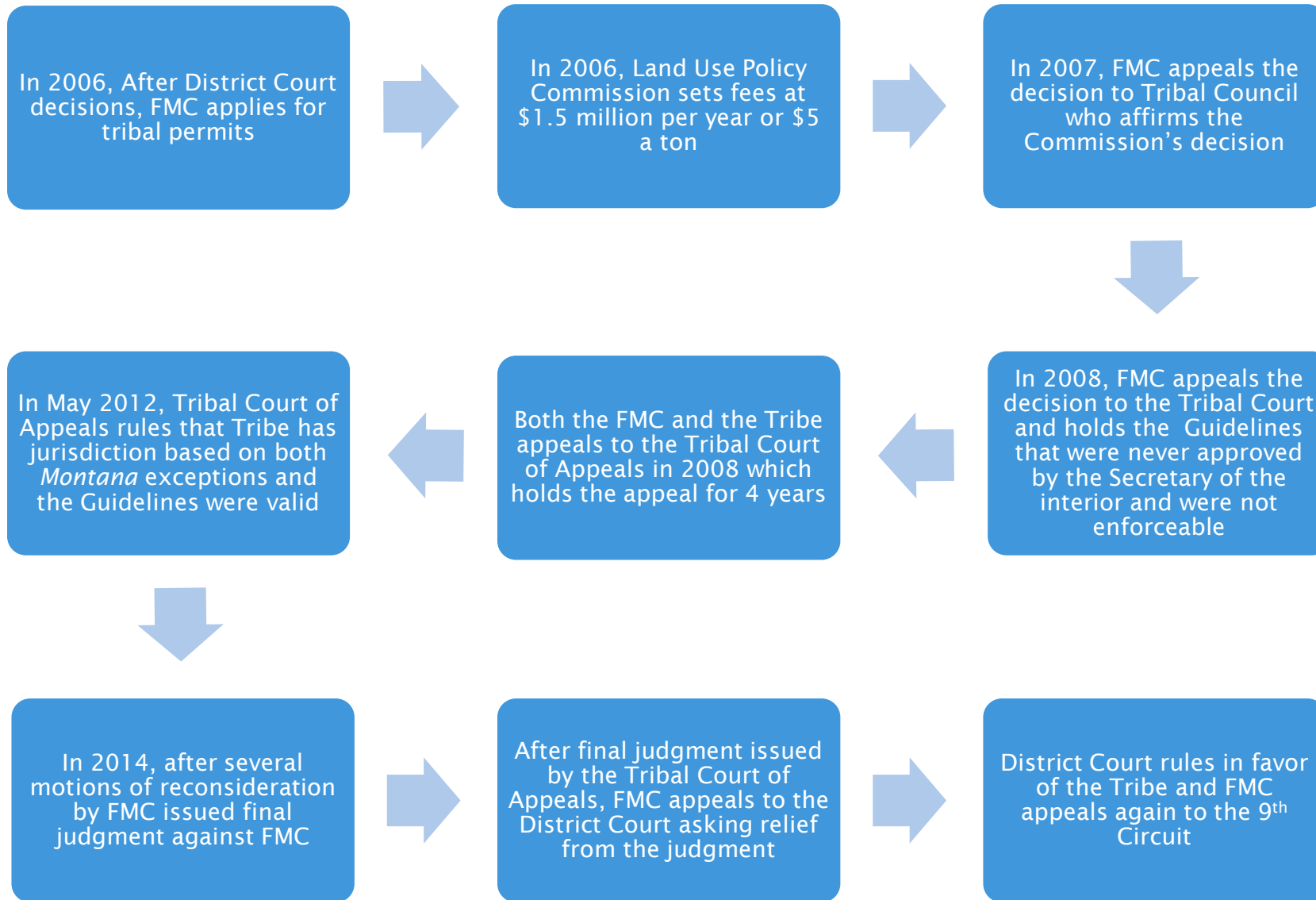
FMC Corporation v. Shoshone-Bannock Tribes, 942 F.3d 916 (9th Cir. 2019)



FMC Timeline Part 1-Federal Timeline



FMC Timeline Part 2-Tribal Court timeline



FMC Holding

- 9th Circuit issues decision conclude that the Tribe had civil regulatory jurisdiction under both *Montana* exceptions
- “FMC entered a consensual relationship with the Tribes, both expressly and through its actions, when it negotiated and entered into an permit agreement with the Tribes, requiring annual use permits and an annual \$1.5 million permit fee to store 22 million tons of hazardous waste on the Reservation.” *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 933 (9th Cir. 2019)
- Particularly, the court stated that “[W]e base our conclusion on the factual findings of the Tribal Court of Appeals, the factual findings and conclusions of the EPA, expert testimony presented in the Tribal Court of Appeals, and the record as a whole. The record contains extensive evidence of toxic, carcinogenic, and radioactive substances at the FMC site.” *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 935 (9th Cir. 2019)

United States v. Cooley, 141 S. Ct. 1638 (2021)



Cooley Facts

- Officer James Saylor of the Crow Police Department observes a pickup truck parked on the side of the road on Highway 212. Ofc. Saylor decides to investigate why the truck is stopped on the side of the ride.
- Ofc. Saylor goes over to the truck and makes contact with the driver, Joshua James Cooley, a non-Indian. Ofc. Saylor observes that Cooley has watery bloodshot eyes and two semi-automatic rifles on the front seat
- Fearing for his safety and potential violence, Ofc. Saylor orders Mr.Cooley out of the truck, searches him, and calls for backup from both tribal and county officers. Eventually, drugs are found in the vehicle and Cooley is charged in federal court for drug and gun-related charges
- Cooley brings a motion in court to suppress all evidence from search of the vehicle on the grounds that Ofc. Saylor did not have the authority to conduct the original investigation

Cooley Holding

- U.S. Supreme Court holds that the Tribe could conduct the stop under *Montana*
- “The second exception we have just quoted fits the present case, almost like a glove. The phrase speaks of the protection of the “health or welfare of the tribe.” To deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats.” *United States v. Cooley*, 141 S. Ct. 1638, 1643, (2021)

Key Takeaways for 2022

- Where is the conduct located? Trust Land? Fee Land?
- Is the non-Indian engaged with a tribal member or the tribe? Is there a relationship?
- What is the conduct of the non-Indian? How does that conduct impact the community? What, if any, threats do they impose?
- Does the present make up of the Supreme Court likely present opportunities or risks to bringing tribal cases to the court of appeals?





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22nd Annual Tribal Client Service Seminar

Tribal Environmental Law Part II: Water Quality Protection Under The Clean Water Act

March 2, 2022



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Overview

- Treatment as State
- Clean Water Act (“CWA”) 101
- EPA Office of Water Action Plan
- Potential EPA Rulemaking Actions
 - Baseline Tribal Water Quality Standards
 - Protecting Tribal Reserved Rights
- Implications for Tribes

Cooperative Federalism Framework of Environmental Laws

- Balance local level resource management decision-making with federal regulatory oversight
- Delegation Authority to States and Indian Tribes that meet statutory requirements are delegated federal authority to implement regulatory programs, such as:
 - Clean Air Act
 - Safe Drinking Water Act
 - Clean Water Act

Treatment as State (TAS)

- EPA is authorized to treat eligible Tribes in the same manner as states (TAS) for administering the certain programs.
- Applying Tribe must:
 1. be federally recognized,
 2. have a governing body carrying out substantial governmental duties and powers,
 3. have appropriate authority, and
 4. be capable of carrying out the functions of the program.

The Federal Clean Water Act (CWA)

- Regulates discharges of pollutants into waters of the US
- Makes it Illegal to discharge from a point source into navigable rivers without a permit
- Authorizes EPA to establish National Water Quality Criteria recommendations for pollutants in surface waters

CWA Delegated Authority

- States are authorized to administer the principal CWA programs. *EG* State WQS must be no less stringent than national standards.
- Tribes with TAS status may administer the principal CWA programs:
 - NPDES permits issued to on-reservation sources must obtain
 - CWA § 401 certification from the EPA-approved Tribal program
 - Establish Tribal WQS for the water bodies within the exterior boundaries of an Indian reservation

Water Quality Standards (WQS)

Purposes of WQS are to:

- Provide the specific conditions the water must meet to protect “designated uses”
- Provide a means to measure water quality of waterbodies and rivers to determine if they need restoration and protection
- Inform limits on pollutant discharges from public and private facilities

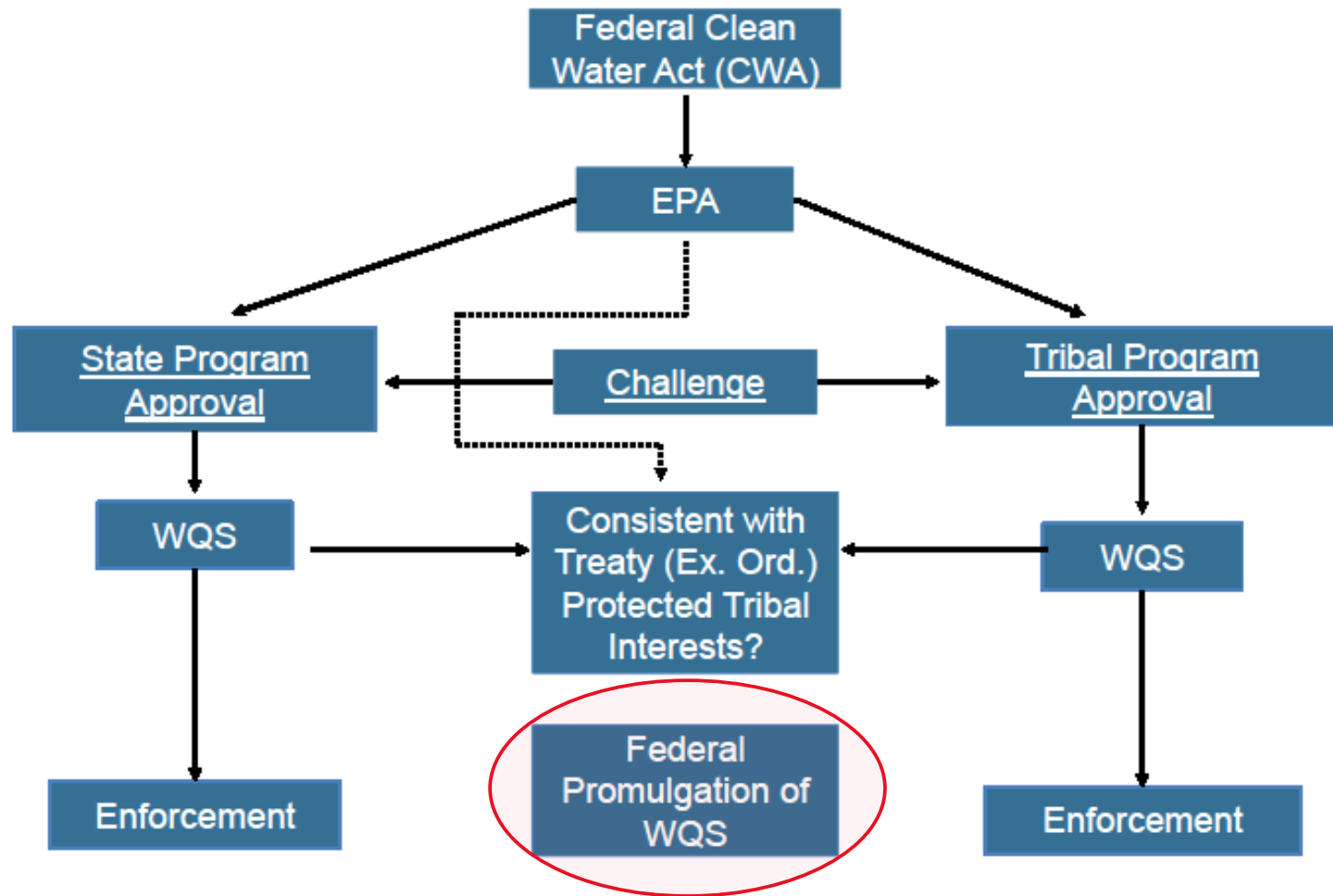
Components of WQS

- Designated Uses: narrative goals for a waterbody
 - Recreation
 - Aquaculture
 - Protection of aquatic life
- Criteria: numeric or narrative pollutant levels to protect the uses
- Antidegradation Policy: protects existing uses and high-quality waters

Tribal WQS

- Tribal and federal WQS are enforceable within Indian reservations.
- State WQS (whether or not) approved by EPA do not apply within Indian Reservations
- Tribal WQS may be more stringent than either state or federal WQS; must be approved by EPA
- Off-reservation, upstream discharge point sources must comply with Tribal WQS

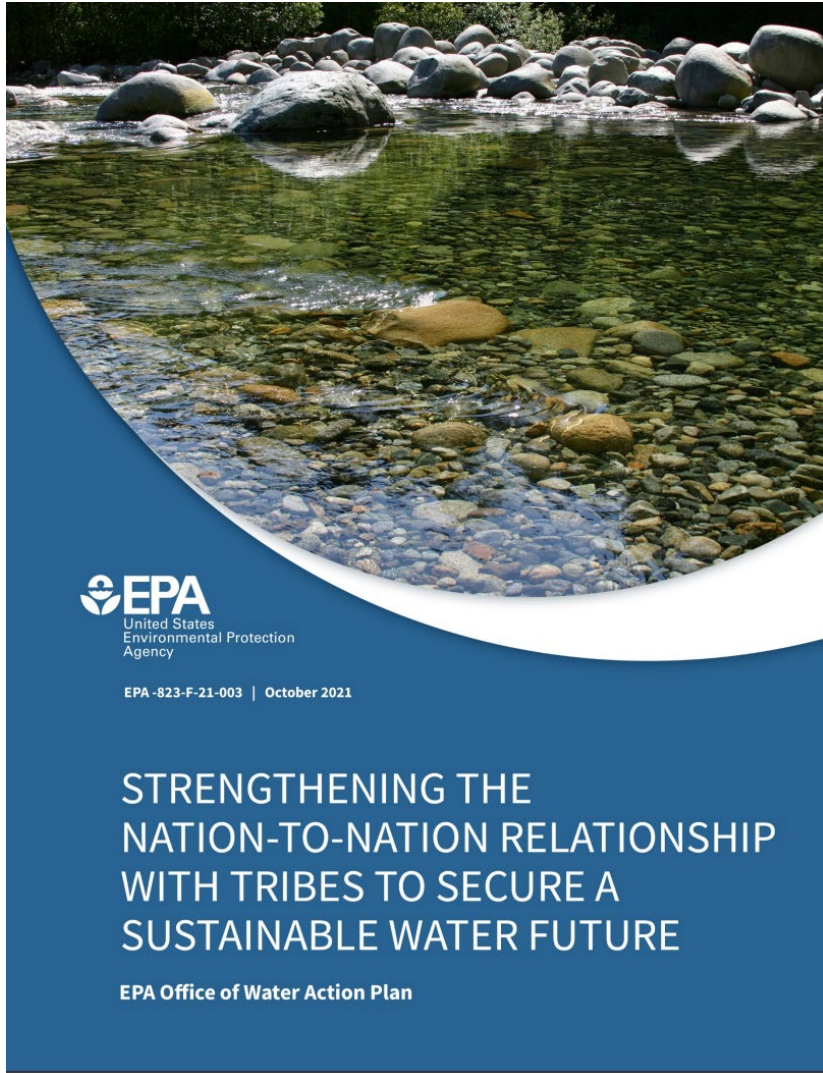
Regulatory Framework



Status of CWA TAS in Indian Country

- Only 77 Tribes have received Treatment as State status for CWA §401 certification and WQS
- No tribes have applied for TAS authority for CWA §303(d) (listing of impaired waters) and Total Maximum Daily Load (TMDL) Programs.

EPA Office of Water Action Plan



Issued October 2021

Addresses long-standing issues in Indian Country

Establishes Short and Long-term Actions for 4 Priority Focus Areas

Input from National Tribal Water Council

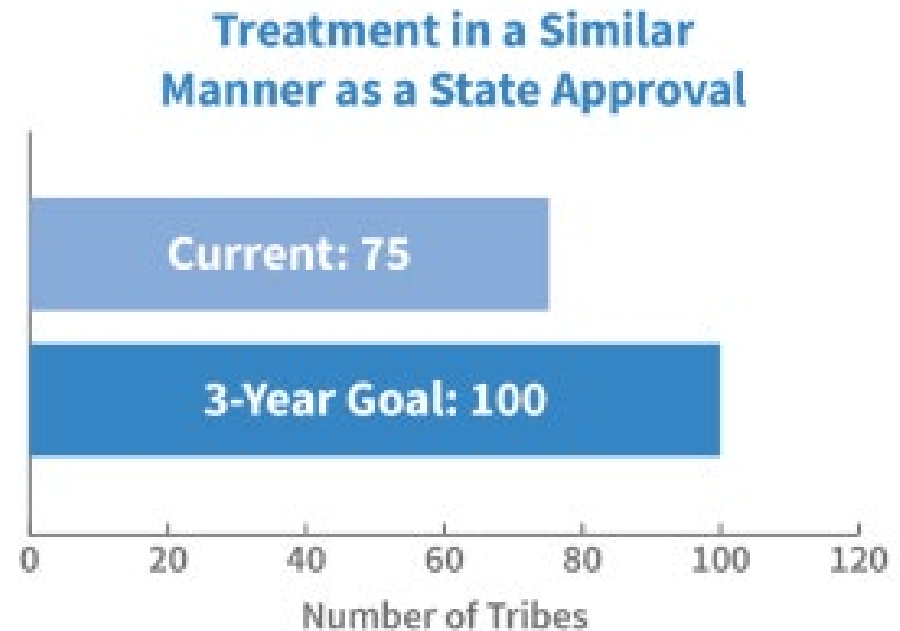
Action Plan Priority Focus Areas

1. Promote Robust Coordination and Meaningful Consultation with Tribal Nations
2. Strengthen and Expand Water Governance in Indian Country
3. Increase Infrastructure Funding and Capacity Development
4. Honor the Federal Trust Responsibility and Protect Tribal Reserved Rights Related to Water Resources

Water Quality Governance

YEAR ONE ACTIONS

Actively support federally recognized Indian tribes obtaining TAS to administer the water quality standards program. The Office of Water will work with EPA regional offices' tribal networks, such as the Regional Tribal Operations Committees, to promote TAS applications. The effort will emphasize reliance on the TAS and water quality standards tools and templates and will include technical assistance to overcome obstacles in the TAS application and approval process.



[But there are more than 120 eligible Tribes!]

Baseline Tribal WQS

STRENGTHENING THE NATION-TO-NATION RELATIONSHIP WITH TRIBES TO SECURE A SUSTAINABLE WATER FUTURE
EPA Office of Water Action Plan



Stone Mother at Pyramid Lake, a site considered sacred to the Paiute people. Source: USEPA

4

Honor the Federal Trust Responsibility and Protect Tribal Reserved Rights Related to Water Resources

*It is clear from EPA's communications with tribal governments and their representatives, and as highlighted by the National Tribal Water Council, that **obtaining "treatment in a similar manner as a state" authority to administer a water quality standards program will not be feasible for all 250 plus tribes that currently lack that authority.** Resource constraints and other impediments will continue to be a barrier for a significant number of tribes. When there is no federally approved tribal program, EPA is responsible for implementing federal environmental statutes in Indian country. Without approved Clean Water Act water quality standards, EPA's ability to protect tribal surface water resources is compromised. To address this issue, **EPA intends to promulgate federal baseline water quality standards for Indian reservations that do not currently have EPA-approved water quality standards in place.***

Proposed Rule: Baseline Tribal WQS

- Background: In past 20 years, EPA has made multiple attempts to promulgate “baseline” standards for Indian reservations, but rulemaking was never completed.
- Baseline WQS would apply to Indian reservation waters (including tribal trust and Pueblo lands) where EPA has not:
 - promulgated other federal WQS or
 - approved tribal or state WQS
- Baseline WQS would not apply to:
 - off-reservation allotments and
 - tribes that elect to “opt-out” in certain circumstances

Potential Baseline Standards

Designated Uses Could Include:

- Fish propagation, fish consumption, and recreation.
- Cultural and traditional uses of water and aquatic resources.
- Public drinking water supply use for all fresh waters.

Water Quality Criteria Could Include:

- Describing waters as needing to be “free from” certain adverse conditions in order to ensure protection of applicable designated uses
- Procedures for EPA to translate narrative criteria into numeric values
- Limited location-specific tailoring (e.g., fish consumption rates)
- Downstream protection narrative

Potential Baseline Standards

Proposed Antidegradation Requirements

Three tiers of maintenance and protection.

- Tier 1: Existing in-stream uses for all waters of the United States. Applies a minimum level of protection to all waters even when another tier is also assigned.
- Tier 2: High Quality Waters. For water bodies with water quality that is better than the levels necessary to support uses such as recreation, fish propagation, and fish consumption, a public review process would be required prior to deciding to allow a lowering of water quality.
- Tier 3: Outstanding National Resource Waters (ONRW). Would generally prohibits any lowering of water quality for designated highest quality waters.

Considerations for Baseline Tribal WQS

- Standards could include implementation flexibilities such as compliance schedules, variances, and mixing zones
- Extent of EPA engagement with Tribes in development and implementation
- Potential Opt-Out Provision
- Public engagement:
 - EPA required to provide public participation in rulemaking process
 - Significant impacts for NPDES permittees located within reservations and upstream of reservations (EPA cost benefit evaluation)

Proposed Rule: Tribal Reserved Water Rights

- Action Plan is vague; states EPA would *“Initiate proposed rulemaking to recognize and ensure protection of tribal reserved rights in the water quality standards context.”*
- August 2021 EPA Listening Session
 - EPA would propose revisions “the federal WQS regulations at 40 CFR Part 131 to explain how tribal reserved rights must be protected when states or EPA are establishing and revising WQS.”
 - Revisions would be complementary to proposed Baseline Tribal WQS rule

Potential Regulatory Revisions

- Amend WQS regulations to provided that states and EPA must not impair tribal reserved rights when establishing, revising, and approving WQS.
 - Would be informed through consultation with applicable tribes
 - Would only apply if
 - tribal reserved rights exist in waters where the WQS will apply and
 - The level of water quality necessary to protect those rights is known,
- Establish designated uses that explicitly incorporate protection of tribal reserved resources.
- Establish water quality criteria that protect tribal reserved rights in waters where those rights apply.
- Assign Tier 3 antidegradation protection (i.e., requirement to maintain and protect current and future improved water quality) in waters where tribal reserved rights apply and where current water quality is sufficient to protect those rights.

EPA's Next Steps on Proposed Rules

- Tribal consultation and coordination period concluded September 13, 2021
- EPA “may” propose on or both of rules in spring 2022.
- Tribes would have additional opportunities to provide comments once the rule(s) is/are proposed.

Tribal Regulation of Reservation Waters

- Tribal regulation of water resources is essential to protect quality of Reservation waters.
- Tribal law and ordinances should:
 - Determine Tribal WQS for all surface waters within the Reservation
 - Require use of Tribal administrative procedures and exhaustion of the Tribal administrative process
 - Provide for judicial review in Tribal Court (on the record/arbitrary and capricious standard)

Conclusions

- Currently, a Tribe's best means to protection Tribal water resources is through TAS process.
- However, TAS process program has succeeded in widespread application in Indian Country.
 - Application process for TAS status under CWA is lengthy and information-intensive
 - State/local governments cause delay.
- Potential EPA rulemaking on Baseline Tribal WQS and Reserved Tribal Water Rights may provide stopgap until a Tribe receives TAS status.



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Protecting Tribal Communities and Environmental Interests Against the Threat of LNG Bomb Trains

Nicholas G. Thomas

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ATTORNEYS

****Disclaimer****

- There is litigation concerning the subject matter of this presentation
- This presentation does not convey the views of the Puyallup Tribe of Indians and I am not speaking on the Tribe's behalf



What a “bomb train” is

- Trains shipping large quantities of highly combustible or explosive materials
- Accidents involving trains happen (fairly often)
- When the train in the accident is transporting explosive materials, the impacts can be catastrophic

Lac-Mégantic



How does LNG compare to oil?

- LNG is methane gas that is chilled to (at least) -260 degrees to change it from a gas to a liquid
- Because it is condensed in a liquid state, a rail car of LNG has much more energy than a rail car of oil – hence, LNG explosions have the ability to be much larger than what occurred in Lac-Mégantic
- LNG pool fires burn hotter and cannot be extinguished (the fire needs to burn itself out)
- Cryogenic nature of LNG presents risks of asphyxiation if changes back to a (very cold) gas after an accident
- Cryogenic nature of LNG presents structural issues to rail cars (cold temperatures make for cold, brittle metal)

LNG by rail is now legal

- With a few exceptions, LNG could NOT be transported via rail
 - Exceptions: a few short routes where it was allowed prior July 2020; those are also controversial and being challenged
- In July 2020, the United States Department of Transportation issued a new rule that authorized the transportation of LNG by rail throughout the U.S. with very few restrictions
- The decision was highly controversial
 - No limits on number of cars containing LNG
 - No limits on speed
 - The most modern braking system not required
 - The safety and environmental implications were not adequately studied
 - No formal government-to-government consultation with Tribes

Key Issues Presented by LNG bomb trains

- Safety
- Climate Change
 - Fracking
 - Methane is a potent greenhouse gas (over 80 times the global warming potential as CO₂)
 - Making LNG pollutes and has safety issues
- How we meet our energy needs

How does LNG by rail impact Tribes?

- Many Reservations have rail lines
- Proximity to sellers and buyers of LNG enhance the risk posed by rail lines
- Impacts to Reservation environment from climate change
 - Sea level rises (impacting coastal Tribes)
 - Extreme weather
 - Increase in fires
 - Change in habitat
 - Decreasing ground water and surface water

Puyallup Tribe, States and Environmental Groups sue

- United States did not adequately assess or address the safety and environmental risks posed by its decision
- USDOT did not consider the environmental justice impacts of the LNG by rail rule
- The United States failed to consult with the Puyallup Tribe of Indians

Biden Administration changes course ... maybe

- In his confirmation hearing, Secretary Buttigieg indicates the USDOT may repeal the LNG by rail rule (in response to questions from Senator Cruz)
- Early 2021, the Department of Justice requests the lawsuit be halted while the United States re-visits the LNG by rail rule (and the Court puts the case in abeyance)
- Summer 2021, USDOT signals two new rules
 - First rule would suspend the Trump-era authorization of LNG by rail
 - Second “companion” rule has not been clarified

The Suspension Rule

- Proposed rule issued in late 2021 would suspend the Trump-era rule, meaning LNG could not be transported by rail.
- PHMSA admitted that the Trump-era rule was based on a flawed and incomplete safety assessment
- PHMSA also seems to have acknowledged that the Trump-era rule failed to adequately assess environmental impacts
- Comments were submitted for and against suspending the Trump-era rule
 - Railroad companies and conservative members of Congress opposed suspension
 - Many states, environmental groups, and unions supported suspending the rule
- Awaiting a decision
- As written, the rule would only suspend the Trump-era rule until June 30, 2024
 - Not a repeal

Possibly not enough time to adequately assess safety and environmental impacts

The “companion rule”

- USDOT has alluded to a “companion rule” in connection with the suspension rule
- USDOT’s plans are unknown
- The “companion rule” will almost certainly be controversial
 - There is a concern that USDOT will attempt to fix the problems with the Trump-era rule but ultimately still allow for LNG to be transported by rail
 - On the other hand, energy and rail companies will likely challenge the companion rule if it turns out to be a ban on LNG shipments by rail
- A proposed rule is likely before June 30, 2024

What can Tribes do?

- Make sure federal agency decisionmakers are aware of the issues the Tribe cares about
 - Consider enacting Tribal resolutions to present to agency decisionmakers
 - Utilize representatives in Congress as a means of providing and obtaining information
 - Consider requesting consultation with the Office of the Secretary of the Interior

Demand government-to-government consultation

- The relevant agencies have an affirmative obligation to consult with Tribes
 - Section 106 of the National Historic Preservation Act
 - Executive Order 13175
 - USDOT Policies
- Cooperative Tribal task force
 - Consider working with other concerned Tribes to stay informed
- Stay engaged and involved
 - Track agency actions to stay informed
 - FOIA requests
 - Consider using the FOI to monitor agency actions
 - Keep Tribal leadership informed



OGDEN MURPHY WALLACE
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McGirt v. Oklahoma

Updates and Developments

March 02, 2022



OGDEN
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ATTORNEYS

Eliza Whitworth
Attorney
Ogden Murphy Wallace, PLLC

Case Summary

Issue:

The Plaintiff, Jimcy McGirt, a member of the Muscogee (Creek) Nation was charged and convicted under state law by the state of Oklahoma within the historical Creek Nation boundaries. He argued that Oklahoma could not exercise jurisdiction over him because under the Indian Major Crimes Act, any crime involving a Native American victim or perpetrator, or occurring within recognized reservation boundaries, is subject to federal jurisdiction, not state jurisdiction.

Holding:

Land reserved for the Creek Nation since the 19th century remains “Indian country” under the Major Crimes Act (MCA), which grants the federal government exclusive jurisdiction to try certain major crimes committed by enrolled members of a tribe on reservation land.

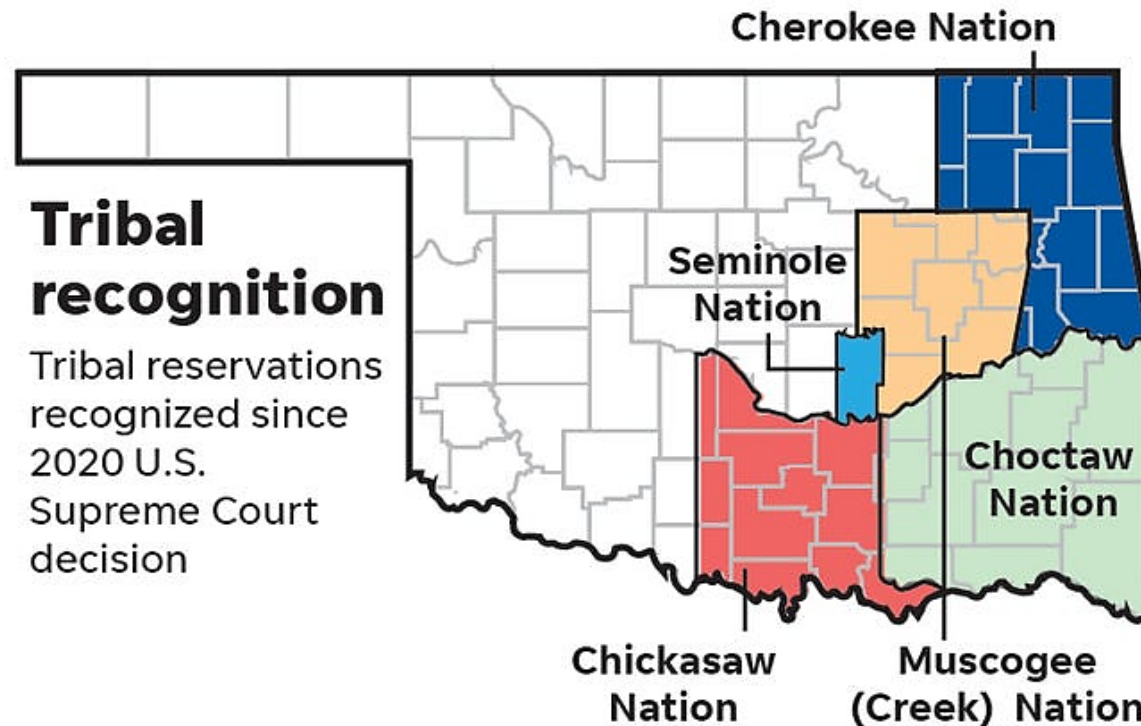
Decision

Congress alone unquestionably has the raw power to disregard those promises and destroy the reservation. However, the court would not “lightly infer such a breach.”

“States have no authority to reduce federal reservations lying within their borders”; giving States that power “would ... leave tribal rights in the hands of the very neighbors who might be least inclined to respect them.”

Because Congress has not adopted any single statute that explicitly terminates that status, the reservation stands.

Reservation Lands Established



Through its holding in *McGirt*, the U.S. Supreme Court confirmed the existence of the reservation lands for five Oklahoma tribes with nearly identical treaties, including: the Muscogee (Creek), Seminole, Cherokee, Chickasaw, and Choctaw tribes.

Acknowledging the largest tract of reservation lands in the country, an area of about 19 million acres that encompasses most of the eastern half of Oklahoma.

Effects

Major Crimes Act and Criminal Law

As expected, this change in jurisdiction resulted in a new influx of cases brought and handled by the Tribal courts and Federal courts. In Response, each tribe has taken steps to expand as necessary its criminal justice system to accommodate the influx of cases by *adding attorneys, judges, clerical staff, and courthouses to meet the new demand.*

In October 2021, **Judges for Muscogee Creek Nation and Cherokee Nation District Courts in Oklahoma** expressed that the tribe did not experience the “catastrophic effects” the state expected as a result of the ruling.

They also expressed cooperation with the State, saying, despite “antagonism toward the tribes” from politicians at the highest level of the state, out in the field the State and the tribe are “very cooperative.”

Funding

Efforts to help the Tribes meet these obligations

Many of the affected tribes have already spent significant sums responding to the thousands more cases falling within tribal jurisdiction as a result of the McGirt decision.

Members of Oklahoma's congressional delegation have requested \$308 million in federal money to help tribes in the state meet the law enforcement and judiciary obligations resulting from the affirmation of their reservations.

This request is now in the hands of Congress after the Biden administration failed to include this request in its budget. Debates on what amount, if any, will be allocated continue.

Limitations and Clarifications

Lower Court Decisions

Immediately after the ruling, thousands of appeals were filed seeking to overturn prior tribal members convictions by the State of Oklahoma.

In August 2021, The Oklahoma Court of Criminal Appeals ruled *McGirt* could not be applied retroactively. Thus, only cases decided after the U.S. Supreme Court ruling in *McGirt* on July 9, 2020, are eligible for a re-hearing.

In January 2022, the Oklahoma Court of Appeals decision was affirmed by the U.S. Supreme Court.

Decisions on the Horizon

Supreme Court Review

For the 2022 Supreme Court Session, Oklahoma officials flooded the Court with over 30 petitions asking to have the McGirt ruling overturned entirely or to have the scope of the decision narrowed.

In January 2022, the justices agreed to hear argument on only the first question presented by the State's petition, which relates to the application of McGirt to bar state prosecutions of non-Native defendants who commit crimes against Native Americans in "Indian country."

The court set the case for argument in its April 2022 argument session, with a decision to follow this summer.

Does the ruling go beyond the Major Crimes Act?

The Department of Interior thinks so...

The federal Office of Surface Mining Reclamation and Enforcement, or OSMRE, told the Oklahoma Department of Mines and the Oklahoma Conservation Commission on April 2, 2021, that the McGirt decision required the OSMRE to assert federal jurisdiction within the established reservation lands. The OSMRE declared the State of Oklahoma "may no longer exercise regulatory jurisdiction" on the reservation lands.

Whether DOI is correct in this assumption is yet to be decided. To follow the outcome, see *State of Oklahoma et al. v. U.S. Department of the Interior*, case number 5:21-cv-00719, in the U.S. District Court for the Western District of Oklahoma.

Continued...

And from the EPA

In a separate administrative action, the EPA has issued a Notice of reconsideration of its October 2020 approval of environmental regulatory programs delegated to the State of Oklahoma over certain areas of Indian country.

While the EPA's original approval came after the McGirt decision, the EPA explained it has since renewed consultation with the Tribes and acknowledged the Tribes specific environmental issues of concern and strong interest in the administration of the environmental programs on their reservation lands.

The EPA accepted comments on the reconsideration through January 2022. A decision has not yet been reached. The State's program authority remains in place until a decision is reached.

Conclusion

So what does this all mean?

1. The Tribes and Federal Government currently have exclusive criminal jurisdiction in reservation lands. Whether this includes non-natives that commit crimes on reservations lands is still to be determined.
2. The Tribes continue to seek additional federal funding from Congress. Most don't expect to see any funding until 2023.
3. The current administration has demonstrated a push to return regulatory control to the tribes. What happens to such decisions upon administration change is also unknown.



Name of Presenter
-----@omwlaw.com

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Tribal Land Reacquisition: A New Direction in Tribal Enforcement Brownfield Program

2:15 p.m. – 3:00 p.m. CT
March 2, 2022



OGDEN
MURPHY
WALLACE
ATTORNEYS

*Ben Benoit, Director
Environmental Programs,
Leech Lake Band of Ojibwe
And
Richard A. Du Bey
Chair, Tribal Government Practice Group
Ogden Murphy Wallace, PLLC*

Overview

- Indian Tribes are disproportionately burdened by Superfund and Brownfield Sites located on-reservation and within Treaty protected off-reservation areas.
- The United States and EPA should Take Action to:
 - ✓ Recognize Tribal governmental sovereignty;
 - ✓ Honor Tribal Treaty Rights; and
 - ✓ Provide adequate funding so that Tribes can implement and enforce Tribal air, water, and hazardous substances clean up laws.

- The CERCLA process should be revised to provide for contemporaneous consideration of remedial action and planning for Brownfield redevelopment.
- A clean and productive Tribal Homeland, that sustains future generations should be EPA's primary goal for implementing Superfund on Tribal reservations and within Treaty protected areas.

What is Needed to Correct this Imbalance?

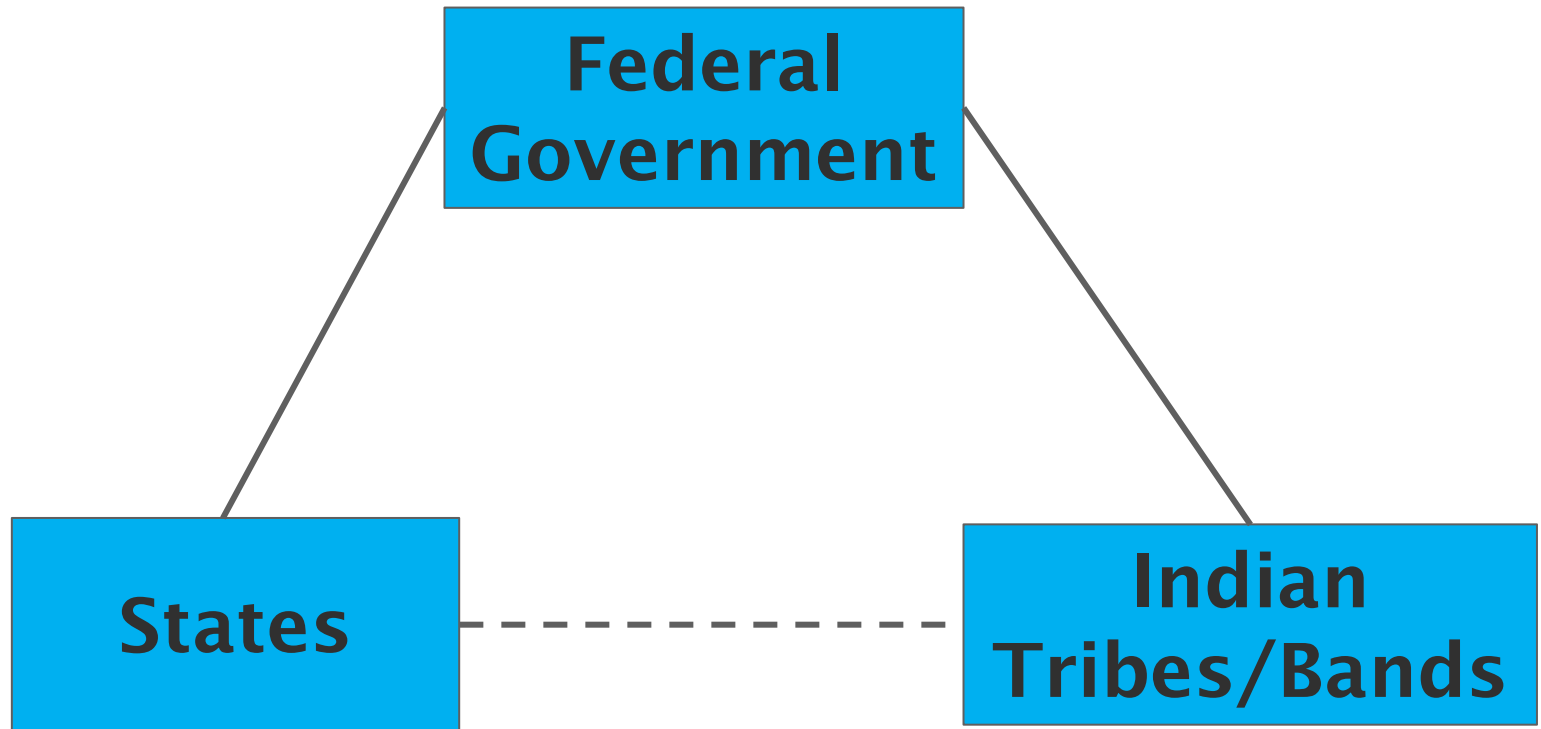
- Substance must control procedure – The remedial timeframe must improve.
- Treaty Rights must be respected and understood by EPA–Tribes need to educate EPA.
- Tribes must play a direct role in implementing the CERCLA remedial and Brownfield process.
- EPA should work with Tribes and the BIA to develop rules to incorporate Treaty right obligations into all aspects of the CERCLA process.

Sources of on-Reservation Tribal Authority

- All rights Associated with Property Ownership
- Additional Powers Conferred by Congress through statute, treaty or Executive Order
- Retained Inherent Sovereignty as Tribal Governments

Atkinson Trading Co., Inc. v. Shirley, 121 S.Ct. 1825 (May 29, 2001).

Civil Regulatory Authority: The Three Sovereigns



Tribal Authority to Protect Lands

- In the exercise of its inherent sovereignty, the tribe has standing to challenge actions that affect the health of its members, the reservation environment, or its off-reservation rights and interests.
- Under their constitutions and bylaws, a fundamental obligation of tribal governments is to protect members' health and welfare.

The Tribal Legal and Regulatory Framework

- Enhances a Tribe's credibility: inherent sovereignty and legal authority.
- Demonstrates its laws and ordinances are fair, impartial and comparable to similar laws.
- Mitigates against attempts by landowners to circumvent Tribal law.

Tribal Government Land Acquisition and Planning Policies

- Applicable to all lands (fee and trust) within the exterior boundaries of the Reservation (the “Reservation Environment”).
- Establish a Tribal policy goal – and a clean up goal – that the Reservation Environment must comply with Tribal Environmental Law.

- Facilitates expansion of the Tribe's land base and establishes a land use policy goal.
- The BIA's acceptance of land into trust status requires compliance with applicable Federal and Tribal law.
- Defines the Tribal concept of Institutional Controls (ICs).

Tribal Environmental Management

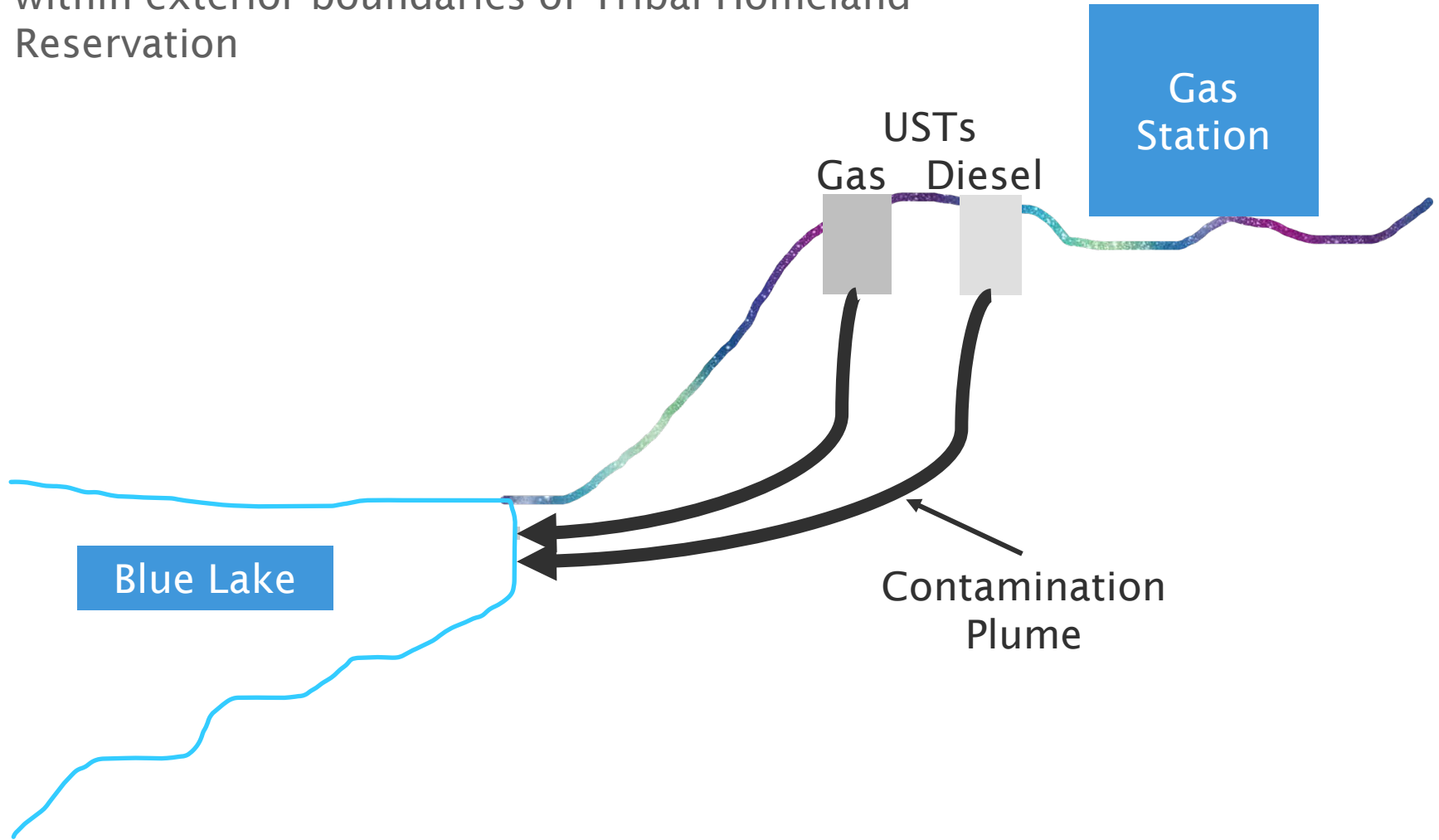
- Tribal Laws are enacted to reflect Tribal values and priorities.
- Tribal Laws define Tribal agency powers and duties.
- The Tribal Reservation Homeland Plan includes all lands, sensitive habitat, surface and ground waters and natural resources and within the Reservation Environment.

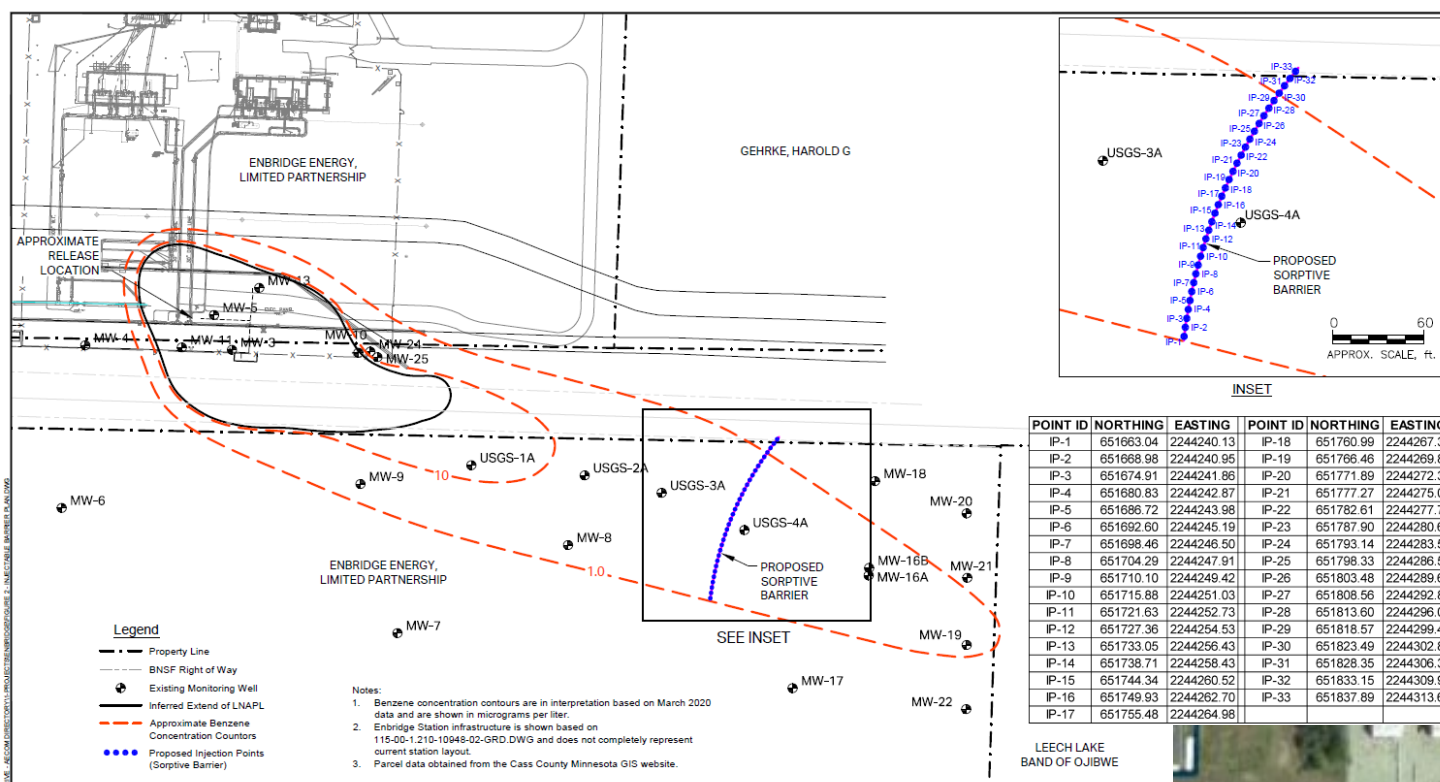
- Tribal Laws require compliance with Tribal administrative procedures and the due process hearing process (exhaustion) before a party can seek judicial review in Tribal Court.
- The Tribal Agency's decision is subject to judicial review in Tribal Court (on the record/arbitrary and capricious standard).

Case Study #1: Adding Contaminated Property to the Tribal Landbase

- Why take the risk?
- What are the benefits?
- The Story: Still a work in progress so we will use hypothetical.

Gas station on Fee Land, owned by non-members
within exterior boundaries of Tribal Homeland
Reservation





ENBRIDGE ENERGY, LIMITED PARTNERSHIP
FIGURE 1: INJECTABLE BARRIER PLAN

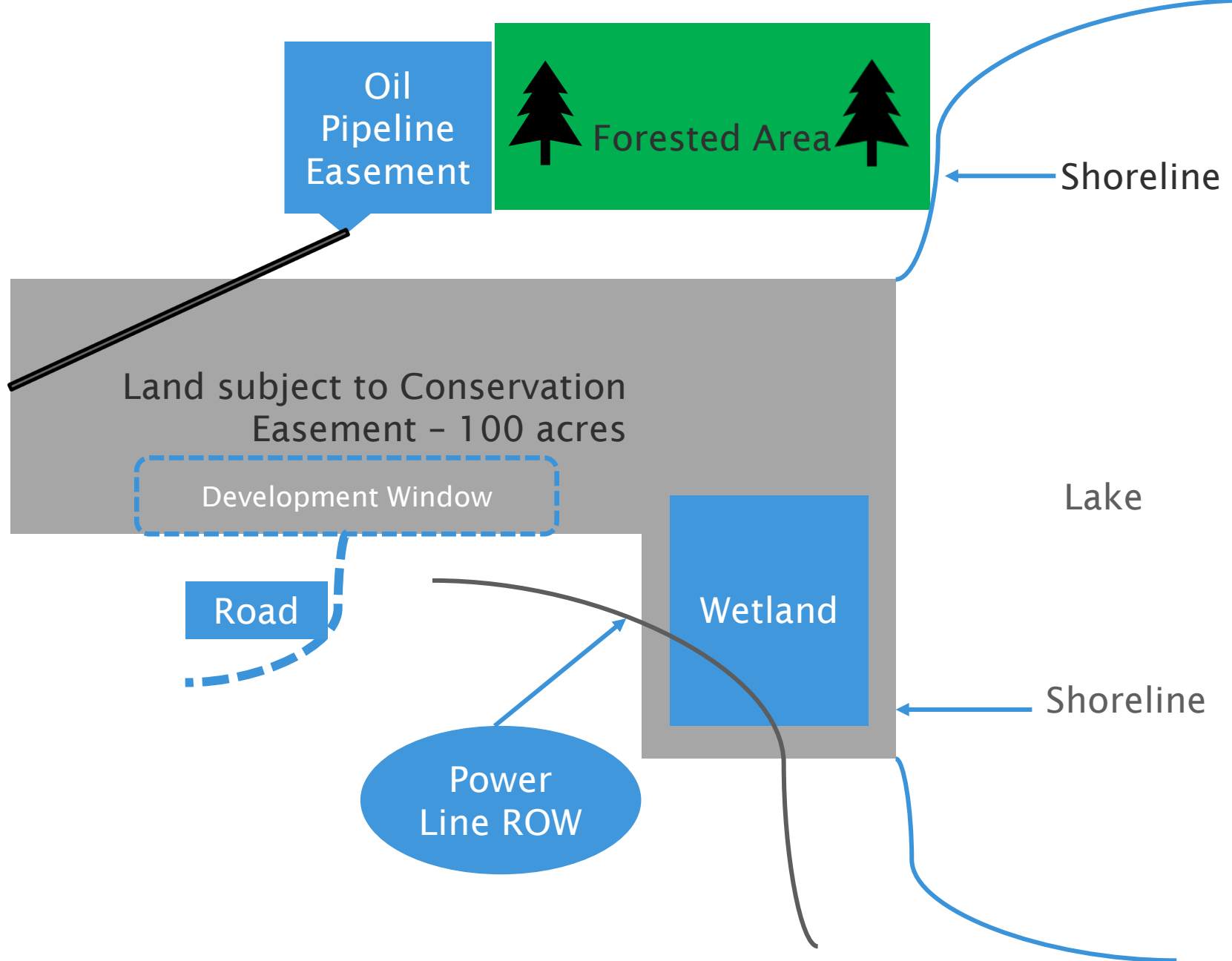


How can Tribes manage the risk?

- Application of tribal law – provides for prospective purchaser protection.
- Creation of Tribal entity to serve as holder of the fee property.

Case Study #2: Controlling Fee Lands, as Part of an NRD Settlement, with a Conservation Easement

- Settlement includes fee land water-front lands with habitat value.
- Lands will be restricted to protect restoration values per Settlement Agreement.
- A Conservation Easement will be used to enforce restoration goals / objectives.



- The tribe will serve as the “holder” of the Conservation Easement.
- Provide for dispute resolution to minimize possibility of litigation with owners of land and third-party beneficiaries.
- How does the tribe benefit?
- What does the future hold?

The Tribal Homeland

- The *U.S. v. Washington* decision supports the conclusion that EPA actions under the Superfund statute, whether implemented at the Superfund site or at a Brownfield site, must be consistent with Tribal treaty rights.
- The *U.S. v. Washington* decision provides support for legal position that protection of Treaty rights must be considered by EPA as the minimum legal clean up standard or ARAR under the Superfund.

Summary

- Nowhere is the protection of the environment or the creation of jobs more important than on Indian Reservations.
- The negative economic consequences and health impacts of contaminated Reservation Homelands have long been ignored.
- Indian Reservations were created to serve as a permanent Homeland environment.
- The Treaty homeland right should drive the remedial process and promote timely Brownfield redevelopment.

Conclusion

All Roads Lead to the Exercise of Tribal Sovereignty

A Tribe is acting in its sovereign or governmental capacity when it asserts its civil regulatory authority to enforce a Tribal hazardous substance cleanup law, seek TAS approval, to implement Tribal WQS, or implementing a Tribal Brownfield redevelopment plan.

Tribal sovereignty is the tool that empowers Tribes to protect and preserve the Tribal Homeland and the natural resources, foods and lifeways of the Tribe.

At the End of the Day

- ❑ Good intentions are not enforceable.
- ❑ The Federal Government trust obligation is inconsistently implemented and unreliable.
- ❑ States will continue to protect their own interests.
- ❑ The Federal Government must be constantly reminded that the promise of a Tribal Homeland was a forever promise.
- ❑ It is Tribal law, policy and legal action, when necessary, that will enable Tribal governments to protect the health of their Reservation Populations and the quality of their Reservation Environments.

The words of Nez Perce Chief Hinmaton
Yalatkan (Joseph) continue to guide us:

**The Earth and myself are of one
mind.**

**The measure of the land and the
measure of our bodies are the
same.**



Richard A. Du Bey
rdubey@omwlaw.com

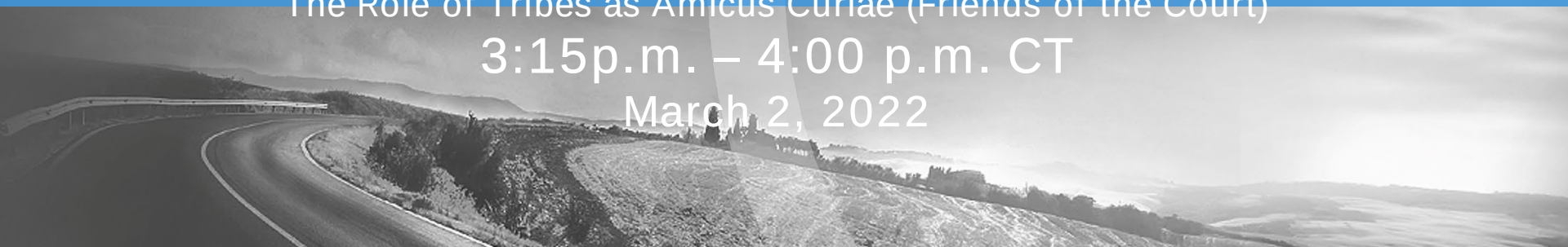
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How Tribes Can Use Federal Courts to Further Their Collective Interests

The Role of Tribes as Amicus Curiae (Friends of the Court)

3:15p.m. – 4:00 p.m. CT

March 2, 2022



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Aaron Riensche
Member
Ogden Murphy Wallace, PLLC

Amicus Advocacy: An important tool in a tribe's legal toolbox.

McGirt v. Oklahoma, 140 S. Ct. 2452, 207 L. Ed. 2d 985 (2020)

- Muscogee (Creek) Nation
 - Not a party
 - 47-page brief
 - Its attorney argued for 20 minutes
 - Supreme Court cited Nation's arguments in its opinion.
- Result: Supreme Court held Creek Reservation was never disestablished.
- Nation had this influence because it appeared as amicus curiae.

Am I saying it right?

- Short answer: It doesn't matter.
- Long answer:
 - Pronunciation: /uh-MEE-kuhs KYOOR-ee-I/
 - Plural: *amici curiae*
 - Plural pronunciation: /uh-MEE-kee/
- Source: Brian Garner, Law Prose Lesson No. 259

What is an amicus curiae?

- “Friend of the Court”
- “Someone who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.”

AMICUS CURIAE, Black's Law Dictionary (11th ed. 2019)

Why would we want to do this?

- Avoid decisions that make it harder to litigate related issues later.
- Cost:
 - Lower investment than being a party litigant
 - Flat fee

What is an amicus curiae's role?

Amicus's role is to help the court reach the right decision:

- By augmenting the discussion of complex issues; or
- By providing factual information that may help the court understand the issues or their impacts.

A Court's Description of Amicus's Role

An amicus curiae is “one who, ‘not as parties, . . . but, just as any stranger might,’ . . . ‘for the assistance of the court gives information of some matter of law in regard to which the court is doubtful or mistaken,’ . . . rather than one who gives a highly partisan . . . account of the facts.”

New England Patriots Football Club, Inc. v. Univ. of Colorado, 592 F.2d 1196, 1198 (1st Cir. 1979)

Put another way: amicus curiae's job is more to inform than to argue.

What are the right issues for amicus advocacy?

- “As one clerk noted, ‘Ninety percent of the time amicus briefs do not help very much, but you never know where that ten percent is.’”

Kelly J. Lynch, Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs, 20 J.L. & Pol. 33, 72 (2004)

In what types of cases are amicus briefs most helpful?

- **Most helpful:** Highly technical cases; statutory cases; obscure areas of law
- **Also can be helpful:** Cases with bad legal representation/merits briefs; cases with a medical or scientific focus

Kelly J. Lynch, Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs, 20 J.L. & Pol. 33, 43 (2004)

Former Supreme Court clerks mention Native American law as one of the best areas of law for amicus advocacy.

“Some of the most frequently mentioned types of cases were those involving tax, patent, and trademark law, as well as cases relating to the Employment Retirement Income Security Act (‘ERISA’). Other noteworthy areas of law included: railroad preemption, water rights, marine labor, immigration and ***Native American law***. One clerk explained that, generally speaking, there existed a positive correlation between legal obscurity of subject matter and helpfulness of amicus briefs.”

Kelly J. Lynch, Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs, 20 J.L. & Pol. 33, 41 (2004).

Why Native American law is one of the best areas to practice amicus advocacy.

- Native American law is mostly created by common law or judge-made law.
- Individual cases can have a profound impact on the fabric of Indian law.
- A case involving one tribe can affect the rights of tribes across the country.

What kinds of arguments are helpful?

An effective amicus brief must bring something new and interesting to the case

- Better research,
- An explanation of the connection between the case in question and other pending cases,
- An explanation of the impact of the case on segments of society apart from the immediate parties.

A Judge's Perspective

“Courts have found the participation of an amicus especially proper where the amicus will ensure ‘complete and plenary presentation of difficult issues so that the court may reach a proper decision,’ ... or where an issue of general public interest is at stake”

Liberty Res., Inc. v. Philadelphia Hous. Auth., 395 F. Supp. 2d 206, 209 (E.D. Pa. 2005)

Another Judge's Perspective

Helpful briefs point the court “to considerations germane to our decision of the appeal that the parties for one reason or another have not brought to our attention.”

Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1064 (7th Cir. 1997)

The Supreme Court's Perspective

- “An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored.”

U.S. Supreme Court Rule 37(1)

When is amicus briefing not going to be effective?

We try to avoid amicus curiae briefing that:

- Merely agrees with one side or the other.
- Simply repackages or rephrases arguments already made by one of the parties.
- Fails to directly address the issues (addresses issues that are of interest to the amicus, rather than to the court).

An Anecdote

My Ambulatory Surgery Center (ASC) case.

- Political reasons not to raise a helpful fact.
- That fact was raised by amicus curiae.

An example

“Certain historians have argued, for example, that the loss of Creek land ownership was accelerated by the discovery of oil in the region during the period at issue here. A number of the federal officials charged with implementing the laws of Congress were apparently openly conflicted, holding shares or board positions in the very oil companies who sought to deprive Indians of their lands. ... And for a time Oklahoma's courts appear to have entertained sham competency and guardianship proceedings that divested Tribe members of oil rich allotments.”

McGirt v. Oklahoma, 140 S. Ct. 2452, 2473, 207 L. Ed. 2d 985 (2020) (citing Brief of Amici Curiae Historians, Legal Scholars, and Cherokee Nation in Support of Petitioner).

More from McGirt

“But neither is it unheard of for significant non-Indian populations to live successfully in or near reservations today. See, e.g., Brief for National Congress of American Indians Fund as Amicus Curiae 26–28 (describing success of Tacoma, Washington, and Mount Pleasant, Michigan).”

McGirt v. Oklahoma, 140 S. Ct. 2452, 2479, 207 L. Ed. 2d 985 (2020)

Another Example

- “So as Michigan forthrightly acknowledges, ‘a party dealing with a tribe in contract negotiations has the power to protect itself by refusing to deal absent the tribe's waiver of sovereign immunity from suit.’ Brief for Michigan 40. **And many States have taken that path. See Brief for Seminole Tribe of Florida et al. as *Amici Curiae* 12–22** (listing compacts with waivers of tribal immunity).”

Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 796–97, 134 S. Ct. 2024, 2035, 188 L. Ed. 2d 1071 (2014) (emphasis added)

Current Supreme Court Case

Brackeen v. Haaland

- U.S. Supreme Court accepted review on February 28, 2022.
- States and non-Indian adoptive parents challenge preferences favoring Indian families in child-placement proceedings involving Indian children, under Indian Child Welfare Act.
- US, Navajo Nation, and Cherokee Nation opposed.
- A good amicus brief might, for example:
 - Overview of a tribe's history with separating children from cultural roots;
 - Cultural impacts;
 - Tribe's experience under this legislation.

How to go about it?

Be aware of litigation involving issues that may affect your tribe's interests.

- (Make sure you're on OMW's mailing list.)
- Contact your attorneys early.
- There are deadlines.

Mechanics

- Ask parties for consent.
- If no consent, need a motion. Supreme Court Rules 37(2), 37(3); Fed. R. App. Pro. 29(a)(2).
- Motion and proposed brief are filed together. Supreme Court Rules 37(2)(b), 37(3)(b); Fed. R. App. Pro. 29(a)(3).
- Motion explains the amicus's interest and why a brief is desirable. Supreme Court Rules 37(2)(b), 37(3)(b); Fed. R. App. Pro. 29(a)(3).
- Usually involvement is just briefing.

U.S. Supreme Court Deadlines

- In support of certiorari: 30 days after case is placed on the docket.
- In opposition to certiorari: same as the deadline for a response brief.
- On a case that has been set for oral argument: 7 days after the brief of the party it supports.
(Brackeen v. Haaland amicus briefing due in May)

U.S. Supreme Court Rule 37

Federal Circuit Courts

- Federal Circuit Courts
 - Federal Rule: 7 days after filing of the brief of the party being supported. Fed. R. App. Pro. 29(a)(6), 29(b)(5).
 - Some individual circuits vary this.
 - E.g., 9th Circuit Rule 29-2(e).

Various State Supreme Court Deadlines

- Washington Supreme Court
 - 45 days before oral argument. Wash. Rule 10.2(f)(1).
- Michigan Supreme Court
 - 21 days after appellee's brief. Mich. Rule 7.312(H)(3).
- Minnesota Supreme Court
 - Must request leave to participate 14 days after order granting review. Minn. Rule 129.01(b).
- Arizona Supreme Court
 - 10 days after deadline for supplemental briefs. Arizona Rule 16(d)(2).

Conclusion

- Be aware of litigation that may affect your tribe's interests.
- Amicus briefing is most helpful when the tribe has important information that has not been called to the court's attention by the parties.
- Contact your attorneys early.



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OGDEN MURPHY WALLACE
OMWLAW.COM

22nd Annual Tribal Client Service Seminar

Implementing Treaty Rights and Enforcing Tribal Sovereignty to Protect Reservation Homelands

4:00 p.m. – 4:45 p.m. CT
March 2, 2022



OGDEN
MURPHY
WALLACE
ATTORNEYS

Richard A. Du Bey
Chair, Tribal Government Practice Group
Ogden Murphy Wallace, PLLC
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The Fundamentals

- Indian Reservations are the remaining homeland of Indian Tribes and the glue that binds the Tribal Community.
- Tribes and their members are entitled to the use and quiet enjoyment of their Reservation Homelands.
- Inherent Sovereignty is the fundamental source of Tribal governmental power.
- Tribal treaty rights can be used to protect on and off reservation natural resources.

Applying Tribal Law

- The protection of Tribal natural resources necessarily includes protecting the on and off Reservation habitat of such resources.
- The exercise of Tribal natural resource rights has significant cultural, as well as subsistence and economic value to the Tribe and its members.
 - ✓ Fish, shellfish and game
 - ✓ Maple syrup and wild rice
 - ✓ Plants for food and medicine
- Tribal laws need to be consistently implemented and uniformly enforced within the Reservation Environment.

A History of Neglect

- Indian Tribes have been disproportionately burdened by:
 - On-reservation environmental risks;
 - Delayed environmental program development; and
 - Unacknowledged risks to Treaty protected off reservation resources.
- The lengthy federal administrative process is the enemy of timely action to protect:
 - The health of the Reservation Population; and
 - The quality of the Reservation Environment.
- Tribal staff and leadership can change this picture – contribute to a new vision of the role of Tribes in today's imperfect world.

The Goals

- Clean and productive tribal homelands that sustain current and future generations.
- A federal government that honors its Forever Promise made to tribes through Treaties and Executive Orders.

Objectives

- To achieve these goals, federal and state regulatory agencies must:
 - ✓ Recognize the inherent sovereignty of Tribal governments;
 - ✓ The applicability of Tribal Law and environmental programs; and
 - ✓ Protect Tribal Environmental Treaty rights.

Implementation Tools

- Federal agencies should promulgate rules that confirm their legal and fiduciary obligations to Tribes by incorporating applicable Treaty obligations into their regulatory programs.
 - Not a box to check
 - A matter of compliance

Those regulations should also require, as a matter of law, the initiation of timely inter-governmental consultation with relevant Tribes.

Implementation Tools

- The federal government's obligations should be a component of any environmental or resource management program federal agencies administer directly.
- And an obligation that states or tribes assume and are obligated to enforce through their acceptance of delegated federal programs like the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Surface Mining Control of Reclamation Act.
- In other words, the Federal agency's legal obligations to tribes does not go away once the program is delegated to a state or tribe.

The Power of Treaties

- Treaties to which the U.S. is a party are equivalent in status to federal legislation.
- Under the U.S. Constitution, like federal statutes, Treaties are “the Supreme law of the Land.” (U.S. Const. art. VI cl 2).
- Tribal environmental laws can be developed to implement and make enforceable more general Treaty based rights and entitlements.

The Culverts Case

U.S. v. Washington, 853 F.3d 946 (9th Cir. 2017)

- A unanimous panel of 9th Circuit Court of Appeals holds that the State has an obligation to refrain from building and maintaining barrier culverts that interfere with Treaty rights by contributing to the decline in salmon populations.
- The “Court rejected the State’s contention that the purpose of the Treaties was to open the region to settlement.”

- The 9th Circuit Court recognized the powerful connection between the Tribes and the natural resources they relied upon and stated that salmon were – in the words of the 1905 Supreme Court –
“not much less necessary to the existence of the [tribes] than the atmosphere they breathed.”
- The 9th Circuit Court went on to reason that the right to protect and preserve fish habitats precluded the State from acting to “crowd the Indians out of any meaningful use of their accustomed places to fish.”
(emphasis in original).

- The 9th Circuit Court relied in part on two cases that expanded the federal common law to include Treaty implied Tribal rights:

Wisters v. U.S., 207 U.S. 564 (1908) and U.S. v. Adair, 723 F.2d 1394 (9th Cir. 1983).

- Taken together, these foundational water rights cases hold that Tribal reserved water rights were necessary to allow the Tribal members to irrigate their lands to raise food and to sustain their Treaty-reserved on-reservation hunting and fishing rights.

Key Issue Presented to the U.S. Supreme Court

- Whether a treaty right to take fish at usual and accustomed stations guaranteed that number of fish would always be sufficient to provide moderate living for Tribes.
 - To sustain the current Reservation Population; and
 - To provide for future Tribal communities; the available harvest needs to accommodate the increasing population.

Supreme Court Decision

- In 2018, the U.S. Supreme Court* affirmed the 9th Circuit Court, which stated that:
 - “[i]n building and maintain barrier culverts Washington has violated and continues to violate, its obligations to the Tribes under the fishing clause of the Treaties.”
 - “all fisherman, not just Tribal fisherman, will benefit from the increased production of salmon . . . And [t]he general public will also benefit from the environmental benefits and salmon habitat restoration.”

*By an equally divided Court. (Justice Kennedy recused himself). (584 U.S. _____ (2018) per curiam)).

Treaty Rights are Enforceable Against 3rd Parties

By affirming the decision of the 9th Circuit in Washington v. U.S., the U.S. Supreme Court recognized the enforceable right of Tribes to protect fish habitat as a component of their treaty fishing rights.

- **The Treaty is an enforceable environmental quality right.**

United States v. Washington, 853 F.3d 946 (9th Cir. 2017), cert. granted, 138 S. Ct. 735 (2018).

What Does this Right Confirm?

- The Purpose of Treaties and Executive Orders are to Establish Permanent Homelands.

When interpreting Indian treaties, even where the treaty does not provide an explicit promise to provide water, or access to water, the courts have found an implied promise to do so reasoning, that without water the (fulfill the purpose of the treaty – a permanent homeland – would have been meaningless).

- **This is a “treaty Homeland Right.”**

U.S. v. Washington, 853 F.3d 946, 964-65 (9th Cir. 2017) (*emphasis added*).

The Courts have Led the Way Toward Establishing the Homeland Treaty Right

- If a Tribe can establish that a past or proposed state or federal action has or may adversely impact or limit its treaty protected right to:
 - Hunt
 - Fish
 - GatherOr, simply enjoy the safety of its permanent Tribal Homeland.
- Where does this go?
- In my view, the *U.S. v. Washington* decision, provides the Tribe with an enforceable right to enjoin actions that adversely impact Tribal treaty rights.

Why Were Indian Reservations Created?

- Indian Reservations were created to serve as permanent safe and sustainable Homeland environments.
- Nowhere is the protection of the environmental or the cultural and spiritual well-being of the reservation population more important than on Tribal Homelands.
- It is my believe that in addition to food and water, the Treaty Homeland right entitles the Tribe to the quiet enjoyment of its Reservation.

Is the Tribal Homeland Treaty Rights Enforceable?

- The contamination or diminishment of off-reservation Treaty protected resources diminishes the Tribe's right to a food source necessary to support the Tribe's right to a Permanent Homeland.
– **This right is now enforceable.**
- Health impacts resulting from contaminated on-Reservation lands diminish the Tribes right to the quiet enjoyment of its Permanent Homeland. - This potential claim has not yet been presented to a Court.

Conclusion

The Culvert Decision Expands Tribal Treaty Rights

- Treaty guaranteed rights to the use of natural resources now include a reserved environmental quality right.
- Tribes can use the reserved environment quality right to control both past and future proposed actions that may impair the habitat and/or lifecycle of treaty guaranteed off-reservation rights.
- Tribes now have more authority to influence CERCLA remedial actions, CWA permits and other state and federal regulatory decisions.

Conclusion

- Treaty based environmental quality rights now need to be considered as a part of the NEPA and SEPA decision making process.
- Tribes may be able to use the reserved environmental quality as a tool to protect the quiet enjoyment of their reservation environmental and their use of on-reservation natural resources.
- Tribal reserved environmental quality rights likely expand the reach of Tribal authority to protect the on-reservation health of Tribal members and the quality of the Reservation Homeland environment.

The eloquent words of Nez Perce
Chief Hinmaton Yalatkit (Joseph):

**The Earth and myself are of one
mind.**

**The measure of the land and the
measure of our bodies are the
same.**



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Tribal Healthcare Facilities and Cybersecurity

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ATTORNEYS

Today's Agenda

- Why Cybersecurity is Important for Tribal Healthcare Facilities
- Trends in Data Breach, Ransomware and Cyber Liability
- Ways to Reduce Risk of a Data Breach
- Ways to Prepare for the Possibility of a Data Breach
- Ways to Mitigate the Effects of a Data Breach

Why Cybersecurity is Important for Tribal Healthcare Facilities

THE WALL STREET JOURNAL.

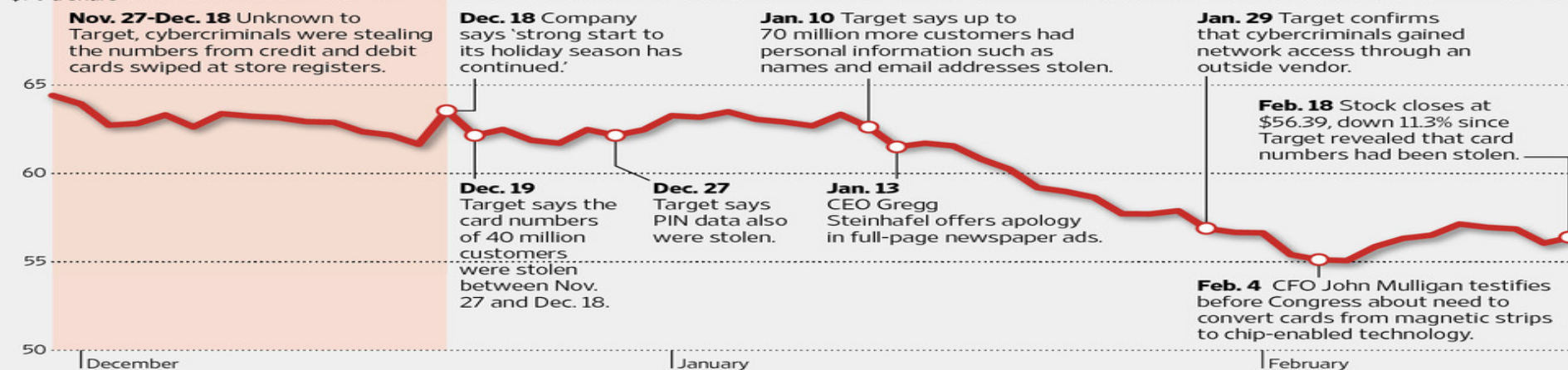
Target Earnings Slide 46% After Data Breach



Trying Times

Target's discovery that cybercriminals had stolen the credit and debit card numbers of about 40 million customers led to a series of difficult decisions.

\$70 a share



Examples

- **Native American Rehabilitation Association of the Northwest, Inc., (NARA):** Hackers accessed email accounts of staff members through malware that had infiltrated network systems. Over 25,000 individuals affected.
- **Washoe Tribe of Nevada and California:** Victim of a ransomware attack that encrypted several servers. 100 gigabytes of sensitive data was posted to the dark web.
- **Eastern Band of Cherokee Indians:** Cyberattack shut down tribal systems and triggered a state of emergency. Affected systems include 911 dispatch and the tribe's financial networks.

Price for Stolen Data



Spotify Account
\$2.75



Hulu Account
\$2.75



Netflix Account
\$1.00 - \$3.00



PayPal Credentials
\$1.50



Social Security Number
\$1.00



Driver's License
\$20.00



Credit Card
\$8.00 - \$22.00



Email Address & Password
\$0.70 - \$2.30



Medical Record from
Large Scale Attack
\$1.50 - \$10.00



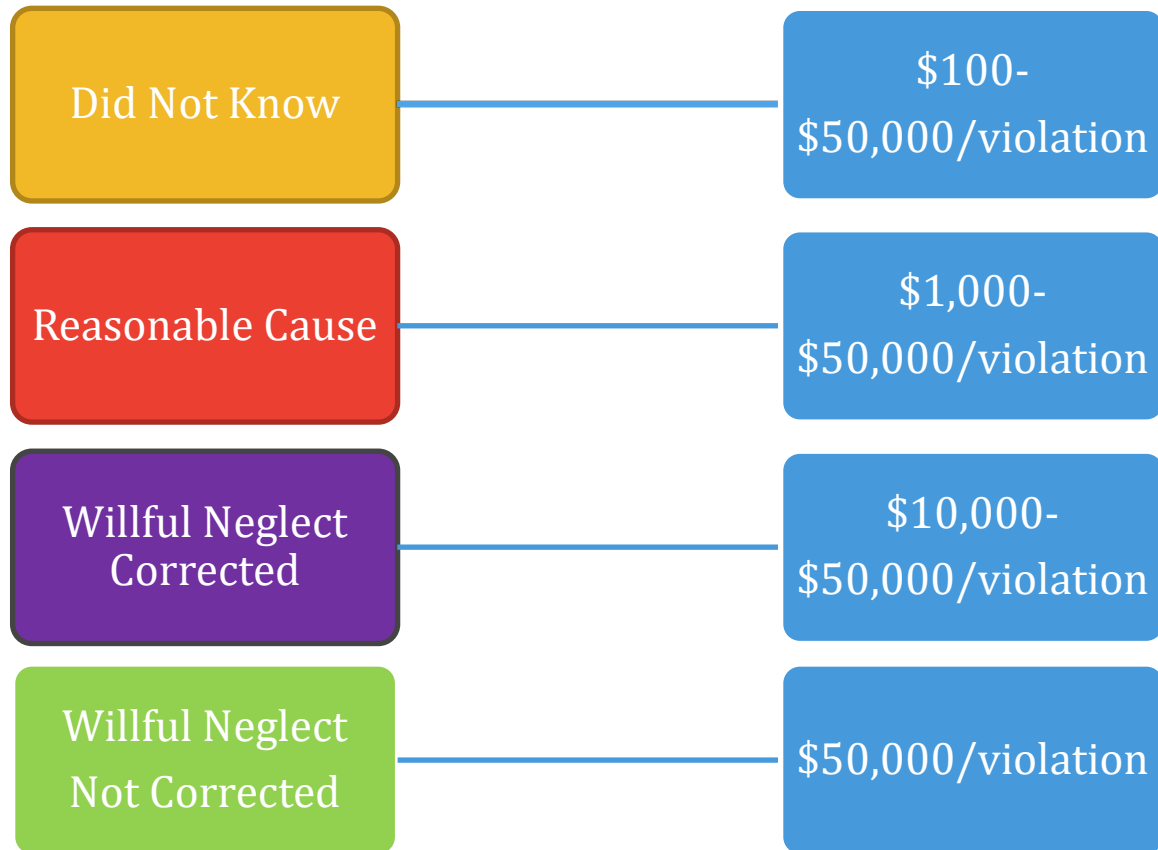
Complete Medical Record
Up to \$1000.00

Source: <https://www.keepersecurity.com/how-much-is-my-information-worth-to-hacker-dark-web.html>

What's At Stake – HIPAA Penalties

- Potential criminal liability
- \$1.5 M maximum/calendar year for violations of an identical provision
- Covered entity liability for business associate misconduct
- 5 factors considered in penalty determination:
 1. Nature & extent of violation
 2. Nature & extent of the harm
 3. Prior compliance with HIPAA
 4. Financial condition of violator
 5. “Such other matters as justice may require”

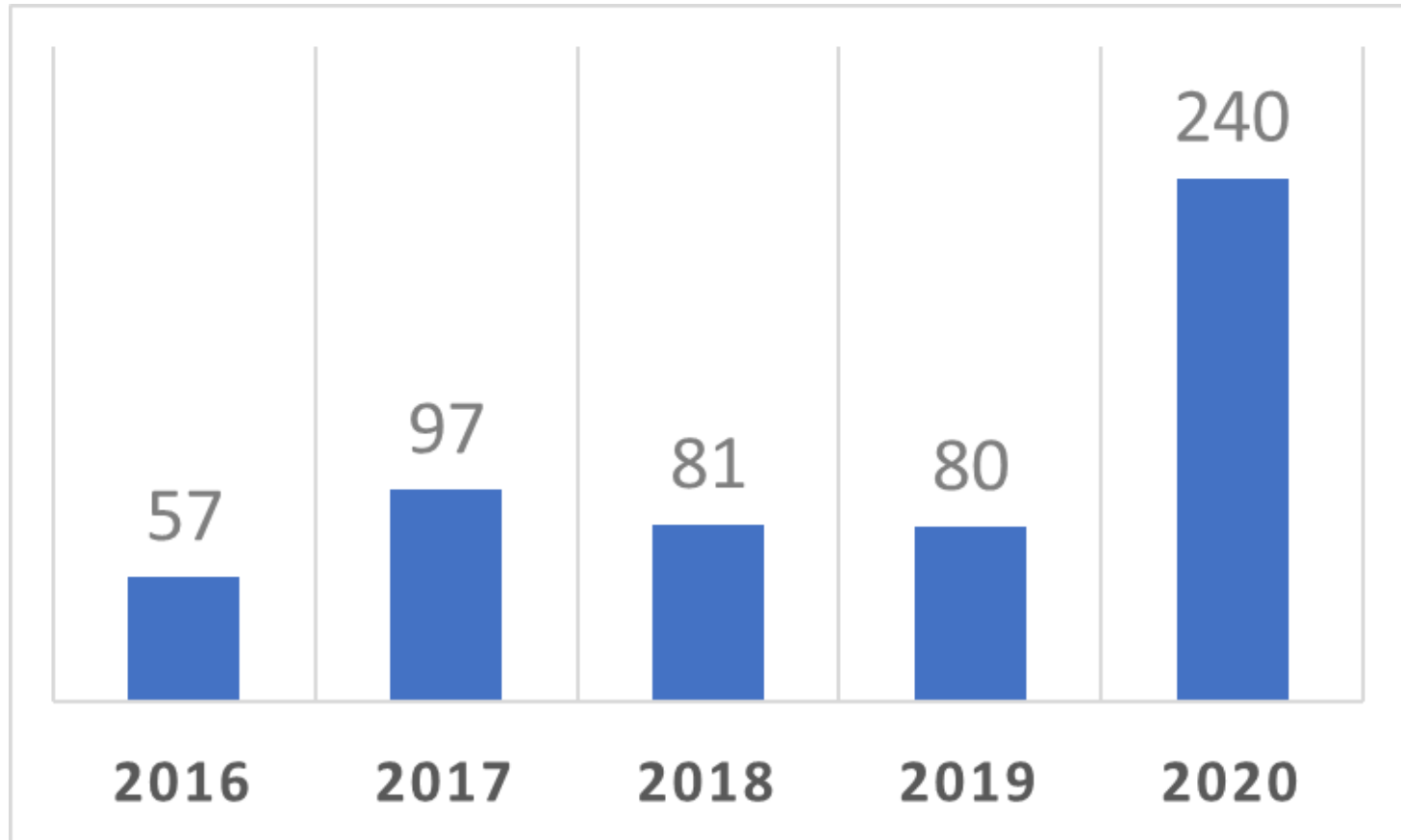
Enforcement: Civil Monetary Penalties



Trends in Data Breach, Ransomware and Cyber Liability

Trends in Cyber Risk

Data Breaches Reported - Washington State Attorney General



Trends in Cyber Risk

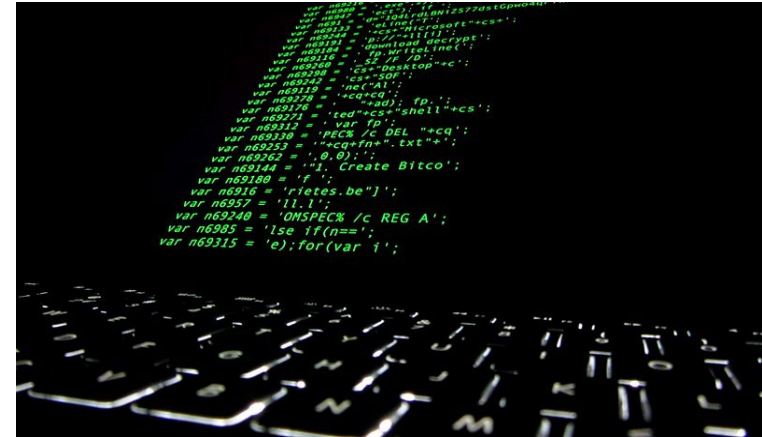
Who are the Hackers? 5 Types of Threat Actors:

	Nuisance	Theft of Data / IP	Theft of Money	Hacktivism	Destructive Attack
Objective	Access and Propagation	Economic or Political	Economic	Defamation, Attract Press	Disrupt Operations
Example	Botnet, Spam, Zoom Interruption	Advanced Persistent Threat Groups	Credit Card Theft, Online Banking Theft	Website Defacement	Delete Data
Targeted?	No	Yes	Yes	Yes	Yes
Character	Often Automated	Persistent, Organized	Opportunistic, Organized	Conspicuous	Conflict Driven

Trends in Cyber Risk

Ransomware Very Common

- Ransom demands are larger
- Change in tactics:
 - Hackers “professionalized”
 - Take time to lay the “groundwork”
 - Threaten to release data
- More difficult to extract the malware from affected systems



Ways to Reduce Risk of a Data Breach

Reduce the Risk

- Create and follow information security policies and procedures that are adopted by resolution of the Tribal Council
- Schedule regular reviews and tasks on calendar
 - Software updates
 - Employee training
 - Password changes
 - Vulnerability/penetration testing
 - Simulated phishing attacks
- Make sure locations with data are secure
- Limit the list personnel with access to data

Reduce the Risk

- Two Factor authentication for network access
- Verification of changes to invoices
- Call back procedure for request for funds transfers
- Prohibit payment based solely on email
- Automatic warnings to flag external senders
- Intrusion detection to find spoofed email address
- Flag emails where “reply” is different from “from”

Ways to Prepare for the Possibility of a Data Breach

Preparing for a Breach

- Obtain cyber liability insurance
- Assign responsibilities - Breach Response Team
- Know what information is stored and where
- Make sure data recovery is part of Business Continuity Plan
- Run “table-top” exercises simulating a breach

Preparing for a Breach

- Back up data regularly
- Keep logs of access and data sharing
- Destroy or segregate outdated and unnecessary data
- Research cybersecurity funding opportunities (e.g. Tribal Homeland Security Grant Program)
- Carefully review vendors and contracts for HIPAA compliance

HIPAA Breach Requirements

- **Breach:** Improper Use or Disclosure of Protected Health Information that compromises the privacy and security of the information
- **“Compromises”:** Four factor test
 - Nature of the health information
 - Recipient
 - Was information actually viewed?
 - Was risk mitigated?
- **Notifications:** Potential notifications to patients, HHS, and the media
- **Time:** 60 day requirement for notifications

Ways to Mitigate the Effects of a Data Breach

Tips for Handling a Breach

- Contact insurance carrier
- Avoid acting too quickly before all facts are known
- Avoid Making statements that may not be accurate
- Do not reset systems before consulting with forensic investigators

Tips for Handling a Breach

- Do not ignore the problem
- Take appropriate time to investigate breach and avoid setting false deadlines
- Be careful to notify appropriate individuals
- Documenting each step of process
- Avoid assuming that you won't be liable

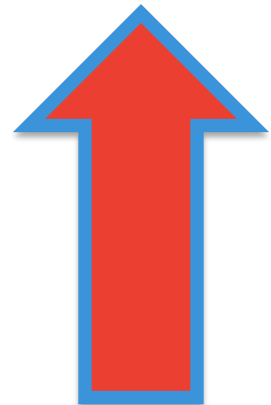
Factors and Affect the Cost of a Breach



Decreases the Cost:

- Strong Security
- Incident Response Planning
 - Established Incident Response Team
- Business Continuity Management
- CISO on staff
- Cyber Insurance

Increases the Cost:

- Lost or stolen devices (not encrypted)
 - Sophisticated Threat Actor (hacker)
 - Notification before investigation completed
 - Not knowing where or what information is stored
 - Data for individuals in multiple states or countries
- 

Example #1

Public hospital district hit by ransomware

Key takeaways:

- Failed to back up data off-site; certain data completely lost – many implications
 - Patient safety/continuity of care
 - Patient satisfaction; public image
 - Impact to payor integrity
- Class action lawsuit threatened; settled case

Example #2

Health center hit by malware

Key takeaways:

- Compromised credentials used to gain access
- Better auditing of administrator level credentials
- Protect sensitive information
- Negotiate with bad actor?



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