



21st ANNUAL CLIENT SERVICE SEMINAR FOR TRIBAL LEADERS, TRIBAL ENVIRONMENTAL PROGRAM MANAGERS & RESERVATION ATTORNEYS

An Interactive Virtual Program

***Protecting the Reservation Homeland:
Exercising Tribal Sovereignty During the Biden Administration***

Presented by

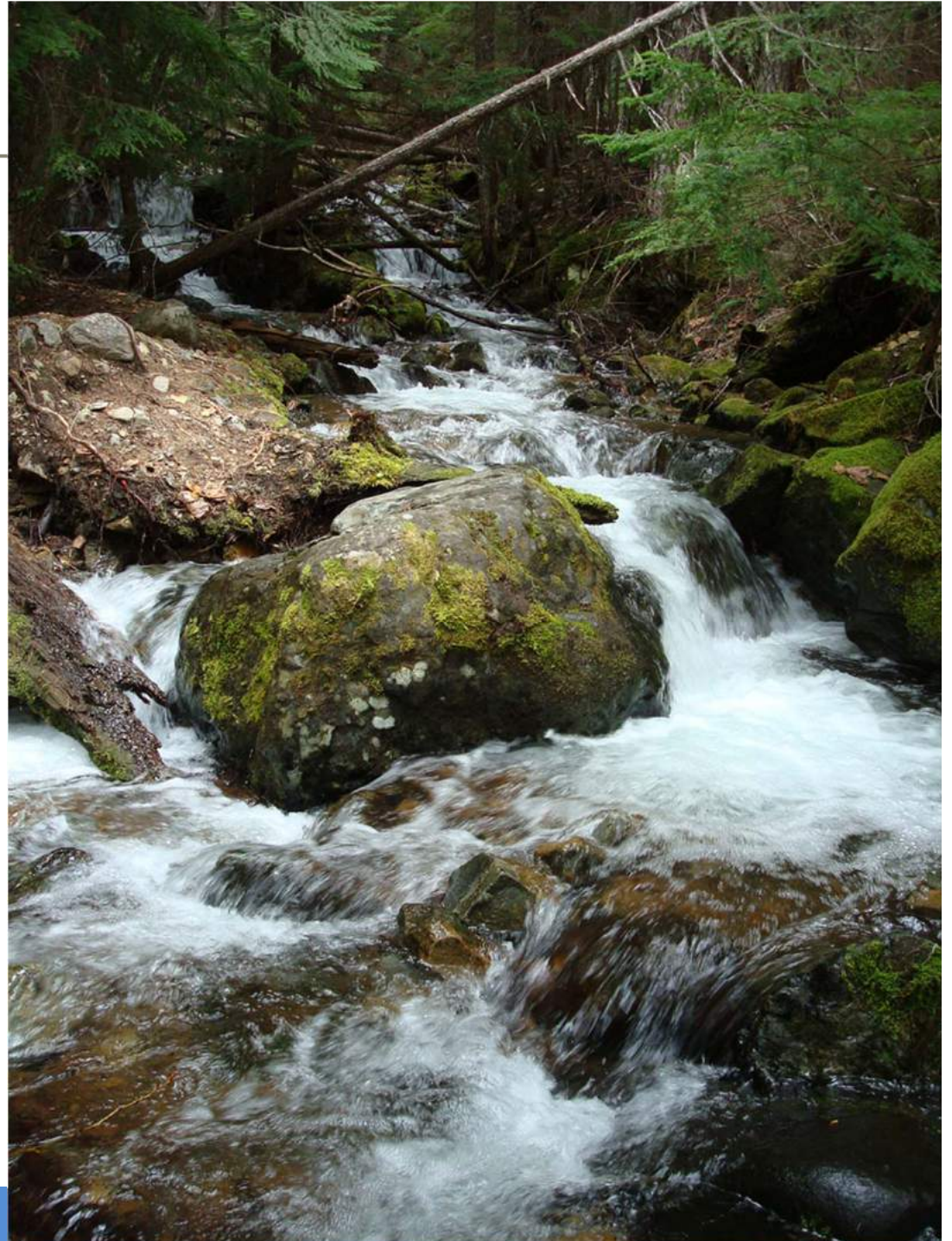
OGDEN MURPHY WALLACE PLLC
Tribal Practice Group

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



***“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)***





AGENDA

-
- 9:00 CT / 7:00 PT **Greeting & Welcome Prayer**
- 9:15 CT / 7:15 PT **Tribal Environmental Talking Circle (All)**
- Achievements in 2020
 - Challenges in 2021
- 10:30 CT / 8:30 PT **Effective Tribal Consultation: What should Tribes expect under the Biden Administration?** *[Andrew Fuller]*
- 11:15 CT / 9:15 PT **Break**
- 11:30 CT / 9:30 PT **The Recognition and Enforcement of Tribal Reservation Homeland Treaty and Executive Order Rights** *[Richard Du Bey]*
- Working Lunch**
- 12:15 CT / 10:15 PT - **Overview of recent cases and rulemaking activities that impact Tribal interests** *[Eliza Whitworth]*
- 1:00 CT / 11:00 PT **NEPA in 2021: Protecting Mother Earth against major Federal actions** *[Jennifer Sanscrainte]*
- 1:45 CT / 11:45 PT **Staying vigilant and using Federal and State administrative laws to protect the health of the Reservation Population and the quality of the Reservation Environment** *[Aaron Riensche]*
- 2:15 CT / 12:15 PT **Break**
- 2:30 CT / 12:30 PT **Update on the Columbia River Boundary Waters Treaty negotiations between the U.S. and Canada** *[DR Michel]*
- 3:45 CT / 1:45 PT **Protecting the Tribe's vision for the Reservation Homeland – Planning Land Use and Brownfield Redevelopment** *[Ben Benoit (invited) / Richard Du Bey]*
- 4:30 CT / 2:30 PT **Closing Circle (All)**
- 5:00 CT / 3:00 PT **Adjourn**



Talking Circle:

- Achievements in 2020
- Challenges in 2021



BREAK

11:15 a.m. – 11:30 a.m. CT /

9:15 a.m. – 9:30 a.m. PT



EFFECTIVE TRIBAL CONSULTATION – A
CONVERSATION BETWEEN SOVEREIGN
GOVERNMENTS

10:30-11:15 AM CT
APRIL 21, 2020

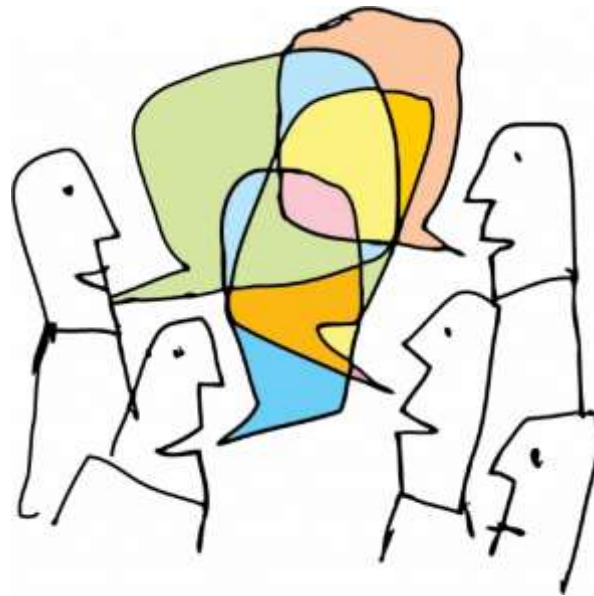
History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy towards Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.

-President Obama, *Tribal Consultation Memorandum for the Heads of Executive Departments and Agencies* (Nov. 5, 2009)



What is Consultation?

The process of meaningful government-to-government communication and coordination among federal, state, tribal, or local officials. To be meaningful, consultation must take place prior to any decisions or actions that may affect tribal interests.



Initially focused on matters with a federal component, the practice of government-to-government consultation with Indian tribes is expanding as state and local governments develop and adopt consultation policies. Examples of non-federal consultation requirements include:

- Statewide consultation policies
- State-agency consultation policies
- Municipal consultation policies

Federal Agency Consultation requirements are set forth in:

- [Executive Order 13175 \(2000\)](#)
 - Biden Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, Jan. 26, 2021
- [Statutes](#)
 - American Indian Religious Freedom Act (16 U.S.C. 1996)
 - Archeological Resources Protection Act (16 U.S.C. 470aa-mm)
 - National Historic Preservation Act (16 U.S.C. 470 *et seq.*)
 - Native American Graves Protection and Repatriation Act (25 U.S.C. 3001, *et seq.*)

Federal Agency Consultation requirements are set forth in:

- [Agency Regulations](#)
 - National Environmental Policy Act
 - Indian Self-Determination and Education Assistance Act Implementing Regulations
- [Agency Policies](#)
 - [EPA Region 5](#)
 - [EPA Region 10](#)

Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments* (2000)

- Requires each federal agency to have an accountable process to ensure timely and meaningful input by tribal officials in the development of regulatory policies that have tribal implications.
- Expressly does not create a cause of action under which a party may sue the United States for an agency's failure to comply with the requirements set forth in the EO. In other words, a tribe cannot sue a government agency solely for its failure to comply with the requirements of the Executive Order. However, a legal cause of action may arise if the consultation requirements set forth by statute or within agency regulations are not met.

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

During his first week in office, President Biden issued a memorandum to the heads of Executive Departments and Agencies expressing his intention to make robust consultation with Tribal Nations a priority, noting:

"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."

“Tribal Implications” that trigger consultation:

Executive Order 13175 defines policies with tribal implications as those “regulations, legislative comments or proposed legislations, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.”

Consultation Process:

Informal consultation is conducted in five phases:

- Education/Awareness
- Identification
- Notification
- Input
- Follow-up



Factors for Success

Successful consultation is predicated on:

- Mutual respect and goodwill
- Proper timing
- Well managed expectations
- Addressing the specific needs of the parties involved

Proper Timing

Consultation must occur prior to any decision to implement a proposed action. It should occur before a decision to make a decision occurs. The impacts on Tribal interests must be identified and presented to the agency early enough to allow for meaningful discussion and timely resolution of Tribal concerns.



Expectations

Expect to have to educate...

Expectations for the interactions must be appropriately set to ensure the consulting parties are prepared and authorized to engage in a productive discussion.

Needs of the Parties

Consultation cannot be successful unless the expectations and specific requests of the parties involved are communicated, understood, and addressed.



Key Points:

- The Biden Administration has quickly taken actions signaling support for Tribal and environmental interests.
- To capitalize on the potential opportunities in the near-term, Tribes need to make efforts to engage and build relationships.

Key Points:

- Consultation is triggered by a specific action but can be more effective if groundwork is laid prior to such actions.
- Start communicating before conflicts arise!

Take Aways, cont.

- As sovereigns, both parties to consultation must work to educate each other prior to and during the process.
- Proper timing is paramount. Engaging too early prevents full consideration of all information, too late results in input after decision has crystallized.

Take Aways, cont.

- Realistic expectations are fed by early and open communication.
- Use all avenues available – use tools of community organizing to develop and deliver consistent messaging and amplify concerns within and outside of the tribal community.

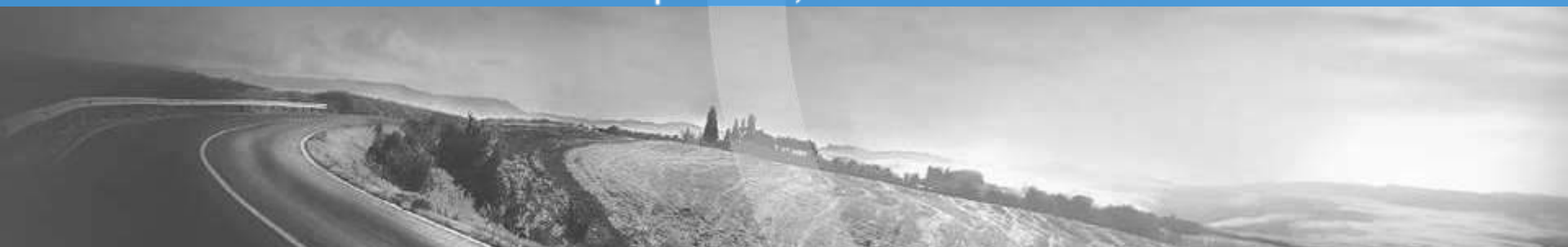
Questions?

“I have heard talk and talk but nothing is done. Good words do not last long unless they amount to something.”

*Hin-mah-too-yah-lat-kekt Chief Joseph
(On a visit to Washington, D.C., 1879)*

21st Annual Tribal Client Service Seminar *The Recognition and Enforcement of Tribal* *Reservation Homeland Treaty and Executive* *Order Rights*

11:30 a.m. – 12:15 p.m. CT
April 21, 2021



OGDEN
MURPHY
WALLACE
ATTORNEYS

Richard A. Du Bey
Chair, Tribal Government Practice Group
Ogden Murphy Wallace, PLLC
Seattle, Washington
rdubey@omwlaw.com

Overview

- 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 Homeland.
- Tribes are entitled to their protected rights to the use of on and off Reservation natural resource.

Overview, *cont.*

- 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
- The protection of Tribal natural resources necessarily includes protecting the on and off Reservation habitat of such resources.

Challenges

- Indian Tribes have been disproportionately burdened by both on-reservation environmental risks as well as environmental and development related risks to Treaty protected off-reservation resources.
- The often lengthy administrative process is the enemy of timely action to protect Tribal natural resources and the quality of the Reservation environment.
- You can help change this picture – contribute to a new vision of the role of Tribes in today's imperfect world.

The Goal

- A clean and productive Tribal Homeland—that sustains current and future generations, honoring its Forever Promise – should be the federal government’s primary obligation when implementing environmental cleanup and regulatory permit programs on Tribal reservations.
- To achieve this goal, federal and state regulatory agencies must:
 - ✓ Recognize the inherent sovereignty of Tribal governments and the applicability of Tribal Law and environmental programs;
 - ✓ Honor Tribal Treaty Rights; and
 - ✓ Comply with EPA approved Tribal water quality and
 - ✓ air quality standards.

- Federal and state agencies should develop rules that confirm their legal obligation to consider and incorporate applicable Treaty rights into their regulatory programs.
 - Not a box to check
 - A matter of compliance
- Those regulations should require timely inter-governmental consultation with relevant Tribes as a component of the environmental programs that an agency either directly administers or delegates to states.
- The Federal consultation obligation does not go away with State program delegation.

The Legal Status of Treaties

- Treaties to which the U.S. is a party are equivalent in status to federal legislation.
- Under the U.S. Constitution, treaties like federal statutes, are “the Supreme law of the Land.”
(U.S. Const. art. VI, cl 2).
- Under the Clean Water Act, treaty requirements under federal law are comparable to federal regulations. (40 CFR §§ 131.4(c), 131.10–13).

The Culverts Case

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

- A unanimous panel of 9th Circuit Court of Appeals rejects the State's arguments and 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.
 - Sustain the Reservation Population
 - Tribal communities are growing the available harvest needs to accommodate the population

Supreme Court Decision

- In 2018, the U.S. Supreme Court* affirmed the 9th Circuit Court, which stated that:
 - “[in] sum, we conclude that in 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
 - Gather

Or, 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 such actions.

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 belief 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 right as a tool to protect the quiet enjoyment of their reservation environment 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 Yalatkan (Joseph):

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

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

OMW

Richard A. Du Bey
rdubey@omwlaw.com

OGDEN MURPHY WALLACE
OMWLAW.COM



WORKING LUNCH

CURRENT EVENTS

IN TRIBAL AND ENVIRONMENTAL LAW

Eliza Whitworth



OGDEN
MURPHY
WALLACE
ATTORNEYS

INTRODUCTION

This session is intended to be an open discussion about current events in tribal and environmental law.

After each slide and section, the group will have an opportunity to weigh in and provide any comments or ask any questions.

This session is intended to be a safe space for an open exchange of ideas, impressions, and responses.

Let's get started!

New Executive Branch

The 2020 Election and its Effect on Tribal
and Environmental Policy

OMW



Executive Orders

1. Executive Order 13990 on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (Public Health and the Environment EO)
2. Executive Order 14008 on Tackling the Climate Crisis at Home and Abroad

Immediate effects include:

- Recission of the 2019 draft greenhouse guidance issued by CEQ per a President Trump EO which prevented consideration of impacts deemed “remote or speculative,” in analyses required by the National Environmental Policy Act (NEPA).
- A moratorium on new oil and gas lease permits on federal lands and waters.

Deb Haaland: Secretary of the Interior



“A voice like mine has never been a Cabinet secretary or at the head of the Department of Interior,” . . . “Growing up in my mother’s Pueblo household made me fierce. I’ll be fierce for all of us, our planet, and all of our protected land.”

Secretary Haaland, a member of the Laguna Pueblo who identifies herself as a 35th-generation New Mexican, is the first Native American woman to serve in the cabinet.

Ms. Haaland will assume control of the Bureau of Indian Affairs and the Bureau of Indian Education. She is expected to quickly halt new drilling, reinstate wildlife conservation rules, rapidly expand wind and solar power on public lands and waters, and place the Interior Department at the center of Mr. Biden’s climate agenda.

First Secretarial Orders

SO 3399:

Establishes a Climate Task Force, to accelerate renewable energy development and identifying actions to foster investments in energy communities. The order also:

1. improves transparency and public engagement in the Department's decision-making process; and
2. provides policy instruction to ensure climate change is appropriately analyzed, and that Tribes and environmental justice communities are appropriately engaged.

SO 3398:

Revokes a series of Secretarial Orders issued in recent years that are inconsistent with the Department's commitment to protect public health; conserve land, water, and wildlife; and elevate science.

The new Order does not impact the Interior Department's ongoing review of proposals for oil, gas, coal, and renewable energy development on public lands and waters.

OTHER DOI NEWS:

Reversal of the “M–Opinion”

The “M–Opinion,” was issued by former Solicitor Daniel Jorjani of the DOI in May 2020. In this decision, the DOI had found that the site where the riverbed flows through the Fort Berthold Indian Reservation in North Dakota belonged to the state rather than the MHA nation.

The M–Opinion was directly in conflict with over a century of precedent, including through the 1825 and 1851 Treaties, subsequent Executive Orders, a clear, binding decision by Interior’s Board of Land Appeals in 1979, and Solicitor legal opinions in 1936 and 2017. In reversing the decision, an Interior spokesperson acknowledges this history, saying:

“The previous administration’s M-Opinion overturned decades of existing precedent holding that the Missouri riverbed belonged to the Mandan, Hidatsa, and Arikara (MHA) Nation. Today’s action will allow us to review the matter and ensure the Interior Department is upholding its trust and treaty obligations in accordance with the law.”

The EPA: Environmental Justice



New Environmental Protection Agency chief Michael Regan has directed the agency to put focus on environmental justice.

As Mr. Regan said in a message to all agency staff: “Too many communities whose residents are predominantly of color, Indigenous, or low-income continue to suffer from disproportionately high pollution levels and the resulting adverse health and environmental impacts.”

“We must do better. This will be one of my top priorities as Administrator, and I expect it to be one of yours as well.”

This statement and the remainder of the policy set by Regan coincides with the Biden/Harris is a clear directive to all federal agencies to embed equity into their programs and services.

UPDATES FROM CONGRESS

OMW



2021 Stimulus Bill

In August 2020, the CDC published findings that in nearly half the states Native Americans were disproportionately affected by the virus. The 2020 Cares act was found to be insufficient to meet these needs.

In response, this bill has sought to provide far more substantive relief to the [Tribes](#).

The \$1.9 trillion stimulus package contains more than \$31 billion for tribal governments and other federal programs to help Native populations.

The new legislation allocates:

- \$20 billion to tribal governments.
- \$6 billion for the Indian Health Service and other Native American health systems, including a \$20 million fund for Native Hawaiians.
- \$1.2 billion for housing.
- \$1.1 billion for primary, secondary and higher education programs.

Pending and Proposed Legislation

As we await information on the promised infrastructure bill, I recommend checking out the National Indian Law Library and Congress.gov to see all of the proposed legislation for this term,

There are some interesting proposed bills coming out of the Senate that I hope can go the distance, including the Western Tribal Water Infrastructure Act of 2021, the Native American Education Opportunity Act, etc.



FEDERAL COURT RULINGS

OMW



Updates on the Dakota Access Pipeline Operations

Shutting Down Operations and Ruling on Tribal Motions

Following a two-month stay, the Dakota Access pipeline that's been at the center of a years-long battle between oil companies and the Standing Rock Sioux tribe won't be forced to shut down while federal regulators conduct a new environmental analysis.

To the disappointment of Tribal and environmental opponents, the Biden administration appeared in court without having made a final decision on whether to intervene in the continued development of the Pipeline. The administration merely stated the Army Corps of Engineers is "in a continuous process of evaluating" and gathering information.

Judge James E. Boasberg, expressing disappointment in this delay, gave Dakota Access 10 days to file updated legal declarations addressing the impacts of a shutdown. That hearing is rescheduled for the end of this month.

Montana and Wyoming v. Washington

Denial of Water Permit as violation of Commerce Clause

As state in the complaint, Montana and Wyoming challenge Washington's Department of Ecology decision to deny "with prejudice" a Section 401 Water Quality permit for the Millennium Bulk Terminal in Cowlitz County.

While Montana and Wyoming raised a few claims, the main arguments revolve around the Commerce Clause. Montana and Wyoming ask the Supreme Court to "*prohibit[] coastal states from blocking landlocked states from accessing ports based on the coastal states' economic protectionism, political machinations, and extraterritorial environmental objectives.*"

On October 05, 2020, all briefing was filed and the case was sent to the Acting Solicitor General to file a brief expressing the views of the United States.

District Court Rulings

- *Pakootas v. Teck Cominco Metals, Ltd.*, 632 F. Supp. 2d 1029, 1032–33 (E.D. Wash. 2009). CERCLA liability cannot be imposed on Indian tribes per the terms of the statute.
- *United States on Behalf of the Pueblos of Jemez, Santa Ana and Zia v. Abouseiman*, ___F.3d___, Case No. 18–2164 (10th Cir. Sept. 29, 2020). Holding Jemez River Pueblo Indian tribes water rights were not extinguished by the colonial Spanish crown finding the actions of Spain were not “so clear an affirmative act as to extinguish” aboriginal water rights.
- *Hawkins v. Haaland*, No. 20–5074, 2021 WL 1044979 (D.C. Cir. Mar. 19, 2021). Affirming Tribal Water Rights as not being an improper delegation of Federal Jurisdiction.
- *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 931 (9th Cir. 2019), cert. denied, 141 S. Ct. 1046, 208 L. Ed. 2d 519 (2021). Affirming Tribe’s regulatory and adjudicatory jurisdiction to impose and enforce the permit fees and hold that the final judgment of the Shoshone–Bannock Tribal Court of Appeals is entitled to recognition and enforcement under principles of comity under Montana exceptions.

ANY ADDITIONAL QUESTIONS, COMMENTS, NEWS?

Eliza Whitworth

ewhitworth@omwlaw.com

Ogden Murphy Wallace



OGDEN
MURPHY
WALLACE
ATTORNEYS

Protecting Tribal Rights through Administrative Process

11:45 – 12:15 PT

Aaron Riensche
Ogden Murphy Wallace PLLC



OGDEN
MURPHY
WALLACE
ATTORNEYS

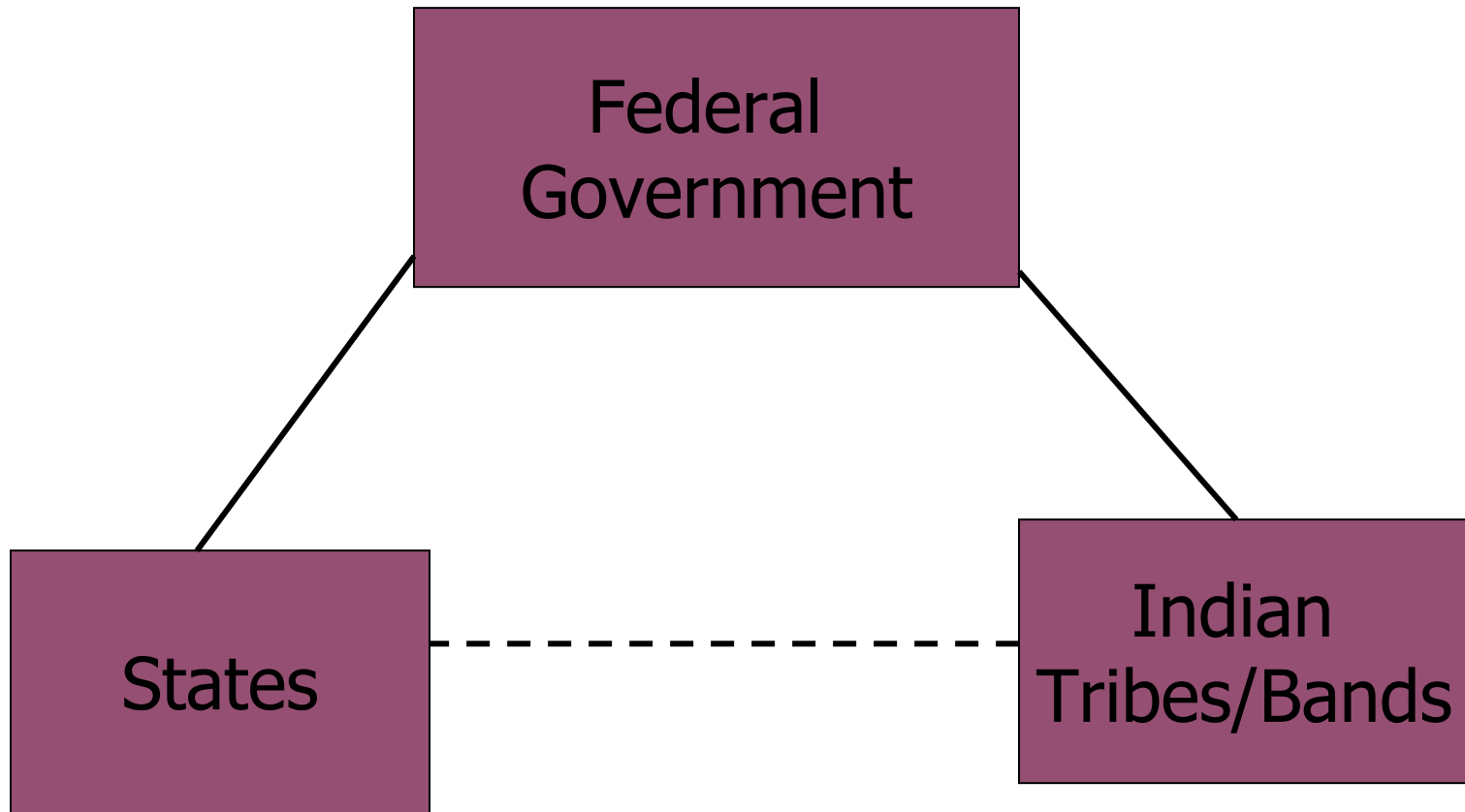
Roadmap

- Jurisdictional Basics
- What is administrative process?
 - Two types of proceedings:
 - rulemaking (legislative)
 - adjudication (court-like)
- An example of each in the context of tribal environmental challenges.

The Tension between Tribal Rights and Economic Development

Economic Development	Resource Protection
Develop tribal economy	Highest and best use of land and resources
Create jobs	Protect and improve reservation environment
Community Services	Protect cultural resources

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.

Many Ways for Tribes to Vindicate Rights

- Citizen Suits
- Tribal Regulatory Authority
- Federal and State Administrative Challenges
- Federal Court Actions

Federal and State Administrative Challenges

- In federal and state systems, +90% of environmental law is administered by administrative agencies.
- Usually, when courts are involved, they are reviewing agency action.

Two Main Types of Regulatory Proceeding

- Rulemaking
 - Acting like a legislature
 - Making regulations
 - Future force and effect
- Adjudication
 - Acting like a court
 - Looking backwards
 - Existing dispute

Two Main Types of Regulatory Proceeding (cont'd)

- Tribes can establish their own rulemaking and adjudication procedures
 - Tribal counsel can pass administrative laws and delegate a portion of its authority to tribal agencies
 - Develop regulations and procedures for implementing and enforcing tribal laws

What is Rulemaking?

- Statutes vs. regulations
- Congress/State Legislature/Tribal Council passes statutes.
- Sometimes a statute empowers an administrative agency to make rules.
- We call those rules “regulations.”

Procedural Requirements for Rulemaking

Generally

- Public notice.
 - Some agencies are required to consult with affected tribal governments.
- Opportunity for public comment.
- Publish final rule.



What happens if you don't like the rule?

Generally

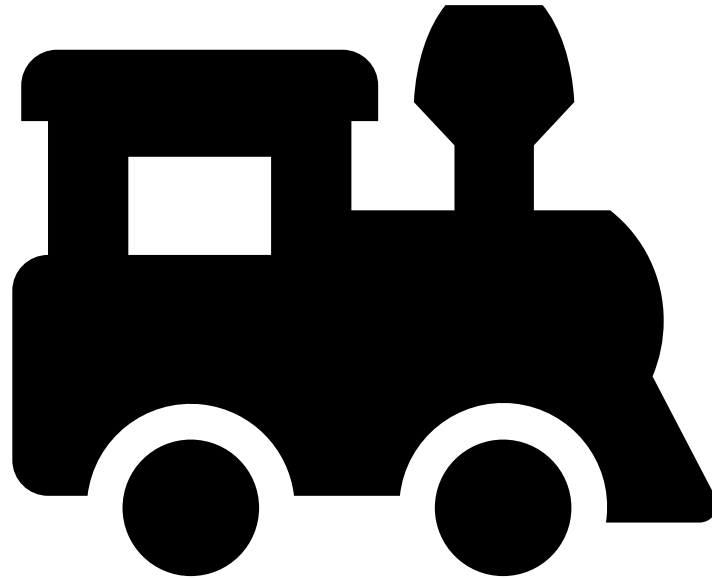
- Federal agency: petition for review filed either in federal district court or in Circuit Court of Appeals
- State agency: petition for review typically filed in Superior Court

Jurisdiction (cont'd)

Questions about jurisdiction?

Example of Rulemaking Challenge

Puyallup Tribe v. PHMSA



Example of Rulemaking Challenge cont'd

- Filed last year.
- Liquefied natural gas (LNG) transported by rail car.
- LNG facility being built on border of Puyallup reservation.
- Tribe concerned about safety and increased rail traffic.

Example of Rulemaking Challenge cont'd

- PHMSA was required by law to engage in government-to-government consultation with Tribe (Exec. Order 13175).
 - Meeting occurred, but late in the process.
 - PHMSA said Tribe's concerns were "inapposite."
- Issued rule without preparing Environmental Impact Statement

Example of Rulemaking Challenge cont'd

- 60 days to bring judicial challenge.
- Filed in federal circuit court
- Either D.C. Circuit or circuit where tribe is located
 - Several states/environmental groups filed suit in D.C. Circuit.
 - Puyallup Tribe filed in 9th Circuit.
 - Tribe's petition transferred to D.C. Circuit.
- Abeyance
 - Biden administration evaluating rule for effects on climate change.
 - Status reports every 90 days.

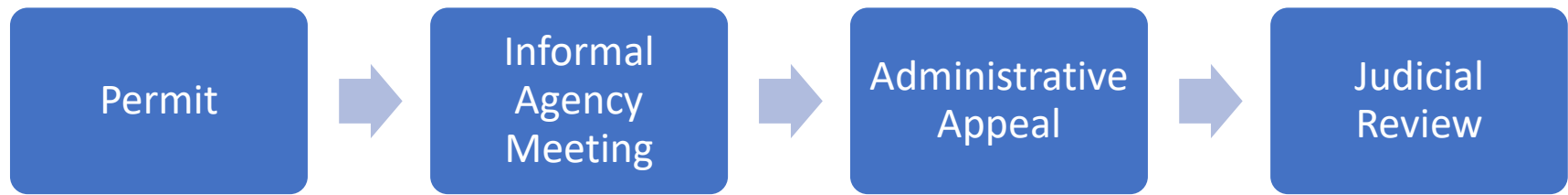
Rulemaking (cont'd)

Questions about rulemaking?

What is an adjudicative proceeding?

- Specific action affecting a specific person or group.
- Required to “exhaust administrative remedies” before going to court.
- Missing administrative deadlines may cost you your day in court.

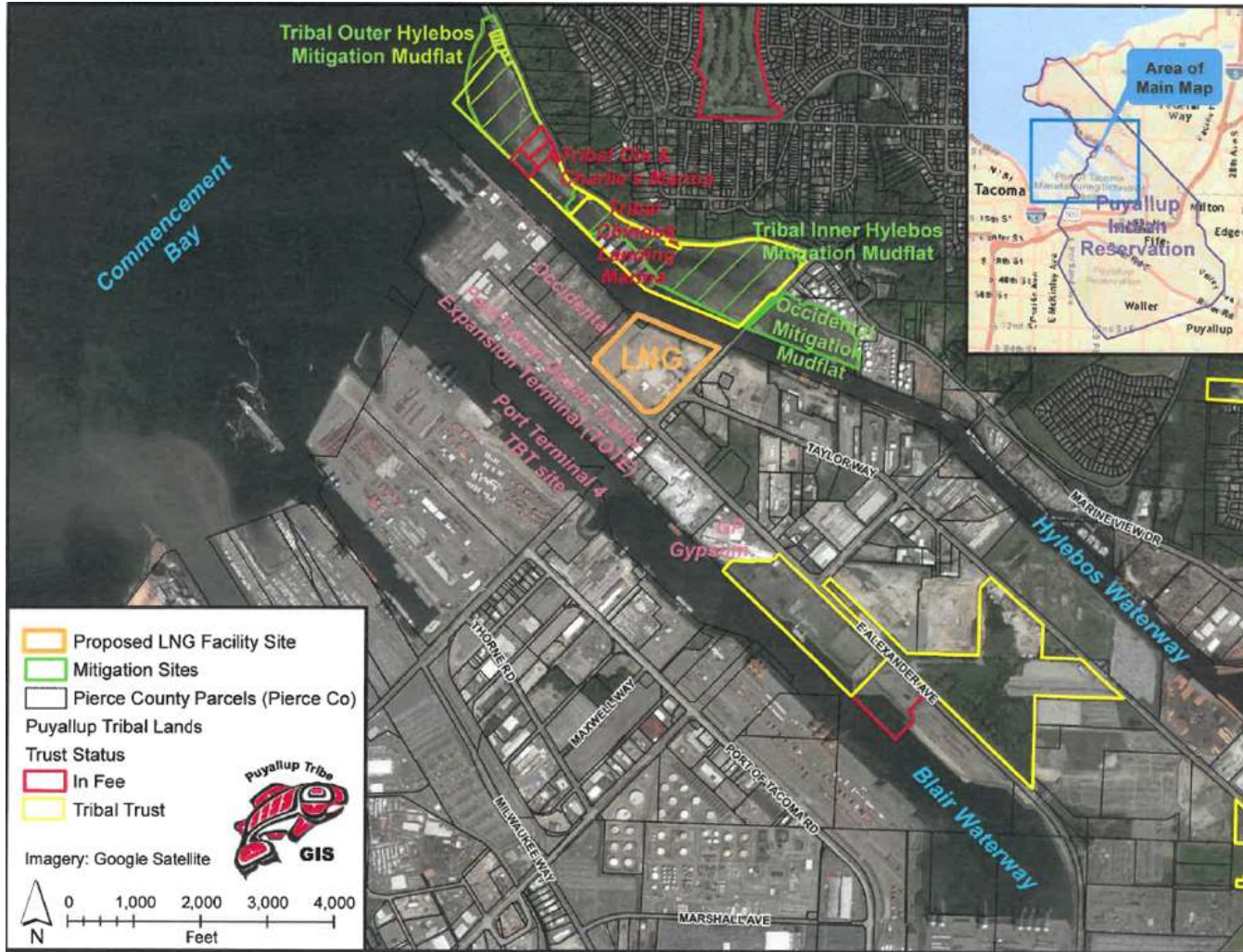
Adjudicative Proceedings – the Typical Format



Example of Adjudicative Proceeding

- Puyallup Tribe v. Puget Sound Energy
- LNG facility built on Tribe's western border.
- Tribe questions science behind permit.
 - Questionable calculations behind determination that facility will not be a "major source" of air pollution.
 - Faulty assumptions about net reduction in fossil-fuel consumption.

Example of Adjudicative Proceeding cont'd



Example of Adjudicative Proceeding cont'd

- Permit issued by Puget Sound Clean Air Agency
- Tribe appealed to State Pollution Control Hearings Board
- Discovery, depositions, expert reports, etc.
- Trial with right to appeal in state court.
- Result: TBD

Adjudication (cont'd)

Questions about adjudication?

Conclusion

- Vigilance is important.
- Know what the states and the federal government are up to.
 - Ask to be included in the permit application mailing list.
 - Develop contacts with the agency.
 - Regulatory consultation/communication.
- Be aware of deadlines for challenging their actions.
- Tribes can set up their own administrative agencies and procedures.

OMW

Aaron Riensche
ariensche@omwlaw.com

OGDEN MURPHY WALLACE
OMWLAW.COM



BREAK

**2:15 p.m. – 2:30 p.m. CT /
12:15 p.m. – 12:30 p.m. PT**

Upper Columbia United Tribes: Update on Columbia River Treaty and Fish Passage Efforts

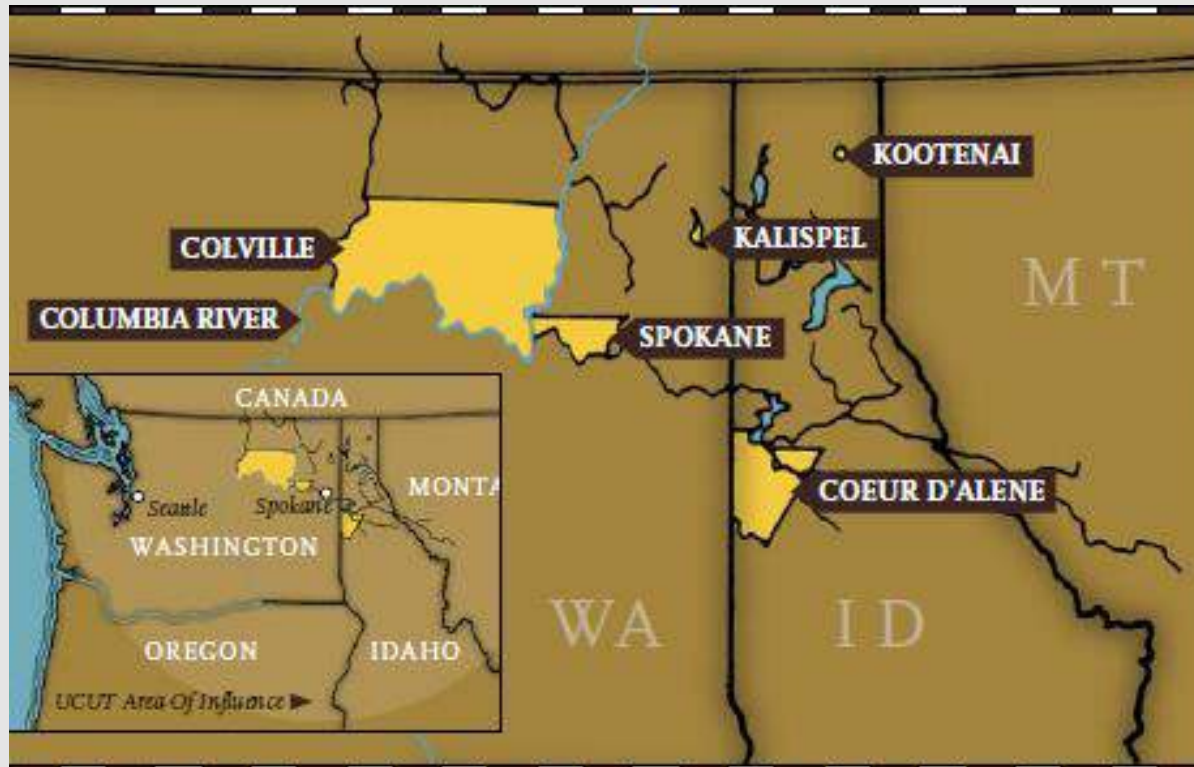
2021 Virtual Tribal Environmental Seminar
April 21, 2021

DR Michel

Executive Director



Upper Columbia United Tribes



- **Coeur d'Alene Tribe**
 - *2,188 Members*
 - *Reservation (Idaho): 334,500 acres*
- **Confederated Tribes of the Colville Reservation**
 - *9,353 Members*
 - *Reservation (Washington): 1.4 million acres*
- **Kalispel Tribe of Indians**
 - *409 Members*
 - *Reservation (Washington): 4,700 acres*
- **Kootenai Tribe of Idaho**
 - *145 Members*
 - *Reservation (Idaho): 2,200 acres*
- **Spokane Tribe of Indians**
 - *2,621 Members*
 - *Reservation (Washington): 156,000 acres*



UCUT's Mission

To unite Upper Columbia River Tribes for the protection, preservation, and enhancement of Treaty/Executive Order Rights, sovereignty, culture, fish, water, wildlife, habitat and other interests and issues of common concern in our respective territories through a structured process of cooperation and coordination for the benefit of all people.

Work of UCUT and its Member Tribes

Regional coordination on issues and topics of importance such as:

- Reintroduction of anadromous fish above Grand Coulee and Chief Joseph dams
- Wildlife mitigation
- Predator and invasive species control
- Columbia River Treaty
- Resident fish
 - Sturgeon, Burbot, white fish



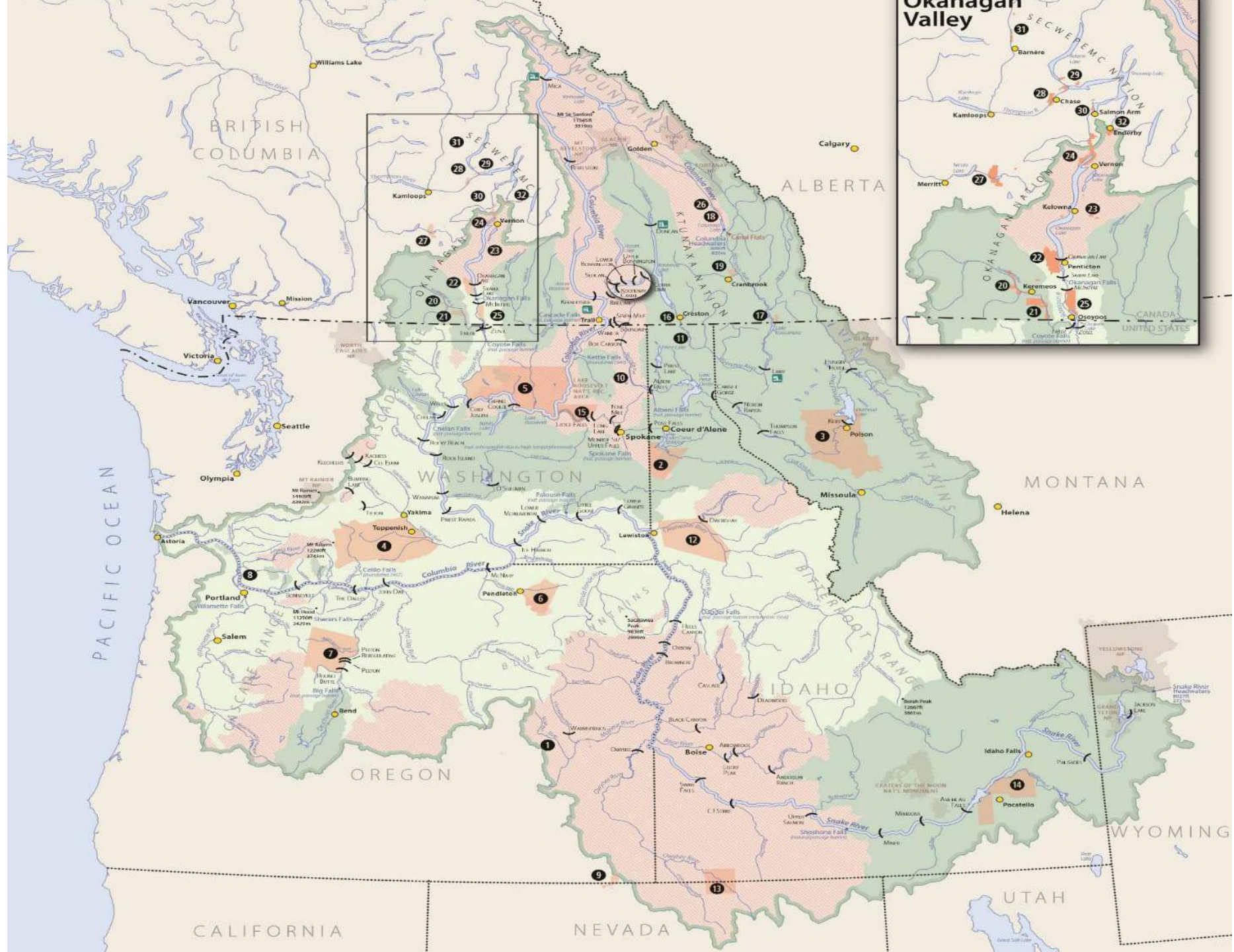
mus il'mithlm Four Chiefs

Water is Life

- Four Chiefs;
 - salmon, bear, bitterroots, service berry
- Relied heavily on that source of nourishment; physical/spiritual
- First Scientists who knew the seasons and harvested what the land provided



Indigenous Peoples of the Columbia River Basin



Columbia River System Operations – Dams & Reservoirs

- Indigenous Peoples fought to protect their waters and lands from the beginning.
- The Colville Confederated Tribes filed suit in 1936 before Grand Coulee Dam was built. It was legislatively settled in 1997.
- It blocked anadromous fish for generations; millions of salmon each year
- The Columbia River was radically modified to meet the needs of downstream without consideration of the River's health

Ceremony of Tears for Last Salmon – Kettle Falls, c. 1940

(photos courtesy of Northwest Museum of Arts and Culture)



Columbia River Treaty Adopted 1964

Originally, the Treaty addressed very little;

- **Hydropower Production**
- **Building, Operating Dams**
- **Assured Flood Storage by Canadian Dams**
- **9 MAF Assured, One time payment of \$64M**

It **did not consider ecosystem function **nor** the rights and interests of Tribal and First Nations*



1964 COLUMBIA RIVER TREATY SIGNED

THE EVANSVILLE COURIER
First News Editor

President Signs Civil Rights Bill

Pay Bill O.K. & High Court Hit

WASHINGTON, D.C. (AP) — President Lyndon B. Johnson today signed a \$3,000,000,000 pay raise bill for federal judges and a bill to limit the Supreme Court's jurisdiction over state court decisions.

Passage Gets Varied Reactions

As a Senate companion bill to the House measure passed today, the bill has a mixed reception in the Senate. Some senators are in favor of the bill, while others are opposed.

All Americans Urged To Help Curb Injustice

WASHINGTON, D.C. (AP) — President Lyndon B. Johnson today urged all Americans to help curb injustice by supporting the new civil rights bill. He said the bill would help to end discrimination against Negroes.





A massive flooding event at Vanport outside Portland, OR moves the US and Canada to push for flood control in the Columbia River Treaty

PREVENT FLOODING IN
PORTLAND



PERMANENT
FLOODING
UPRIVER



SPOKANE
RIVER ARM
THAT FEEDS
THE
COLUMBIA
RIVER WAS
LOST

Annual Reservoir Management; Tribal Lands inundated



Columbia River
Reservoir
Management for
Flood Control
continues drastically
fluctuate water levels
causing erosion and
destruction

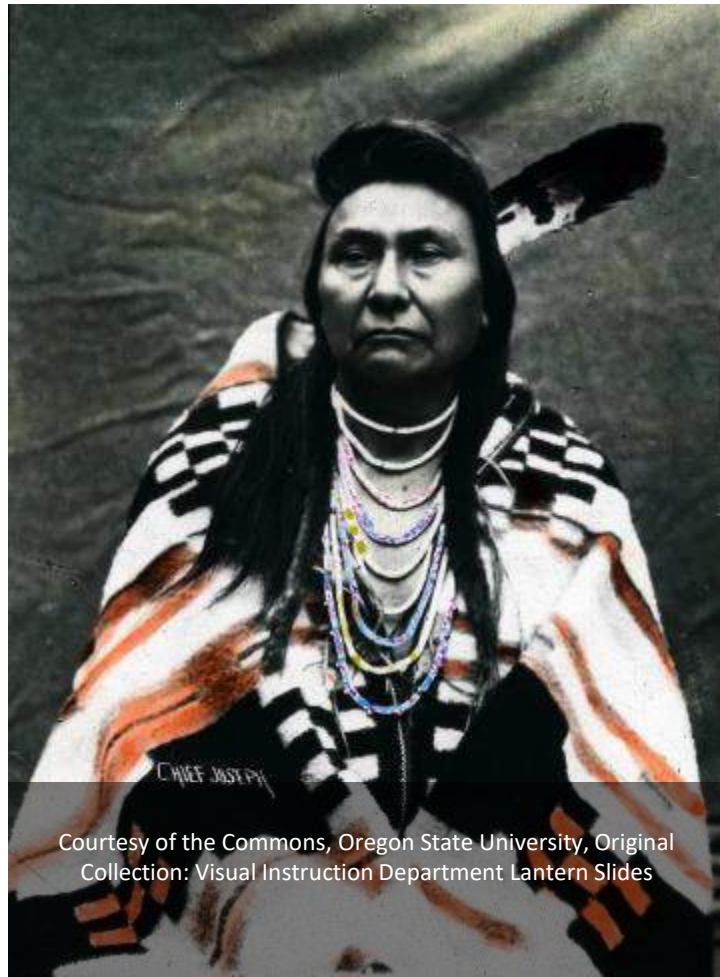
Equity and Environmental Justice

- Upriver flooded **permanently** for occasional flood control downriver
- 40% of salmon loss from above Grand Coulee
- Salmon produced inland, but harvest is at ocean and lower river
- 2013 BPA F&W mitigation funding: **\$461 million**
- **70%** of BPA mitigation dollars for salmon goes to downriver projects
- BPA funding to areas above blocked area: **16% of their funds**
- BPA focused on ***certainty*** of power generation but not Tribes' needs

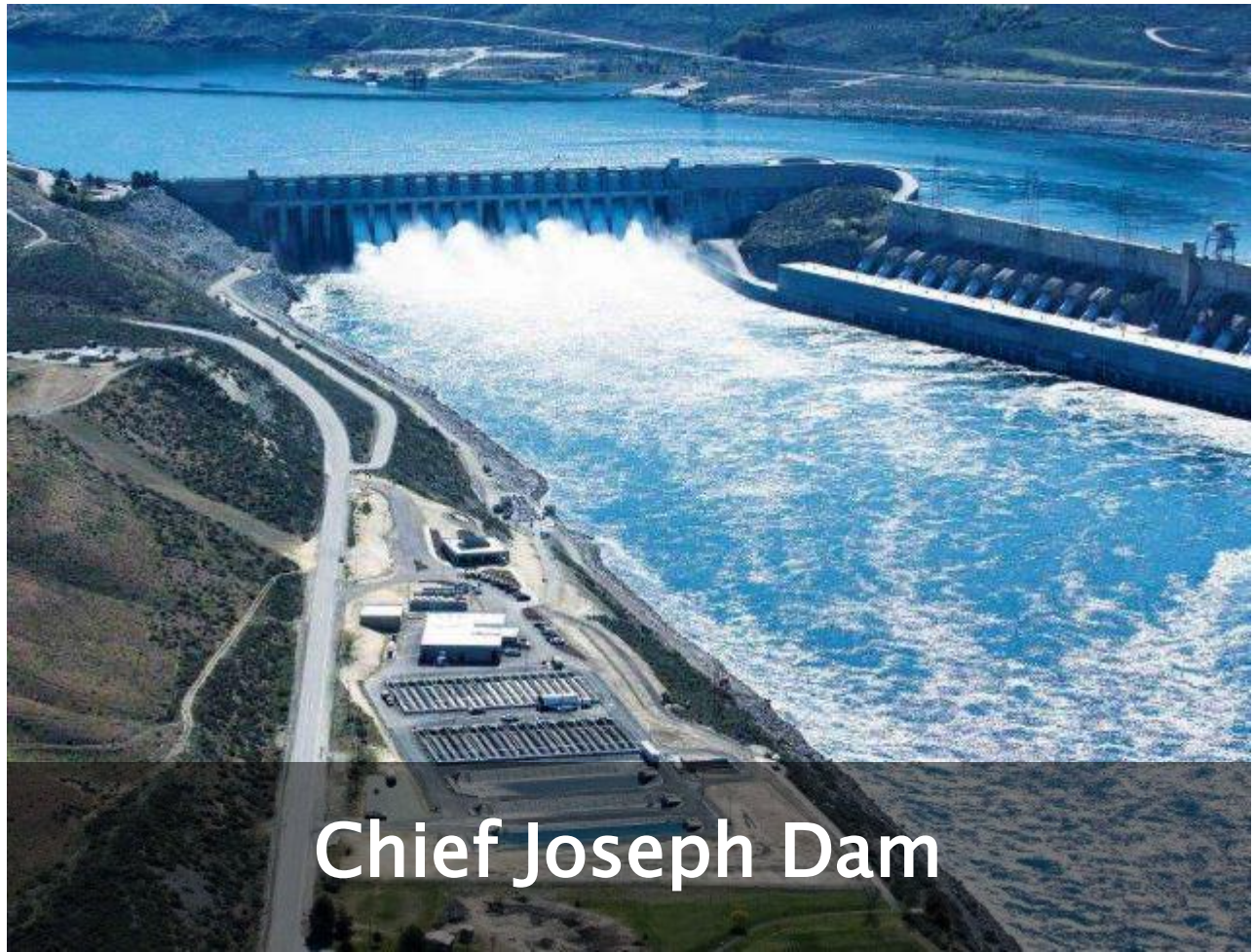


Grand Coulee Dam

- 550' high; 151-mile reservoir; 6,809 MW capacity
- *Only 355' from the tailrace to the top of Grand Coulee Dam



Courtesy of the Commons, Oregon State University, Original Collection: Visual Instruction Department Lantern Slides



Chief Joseph Dam

236' high; 51-mile reservoir; 2,260 MW capacity

Legacy of Human Caused Impacts Changed the Water Regime in the Columbia River Basin – 1950 to 1980



Requirements of the United Nations Declaration for the Rights of Indigenous Peoples

Article 11

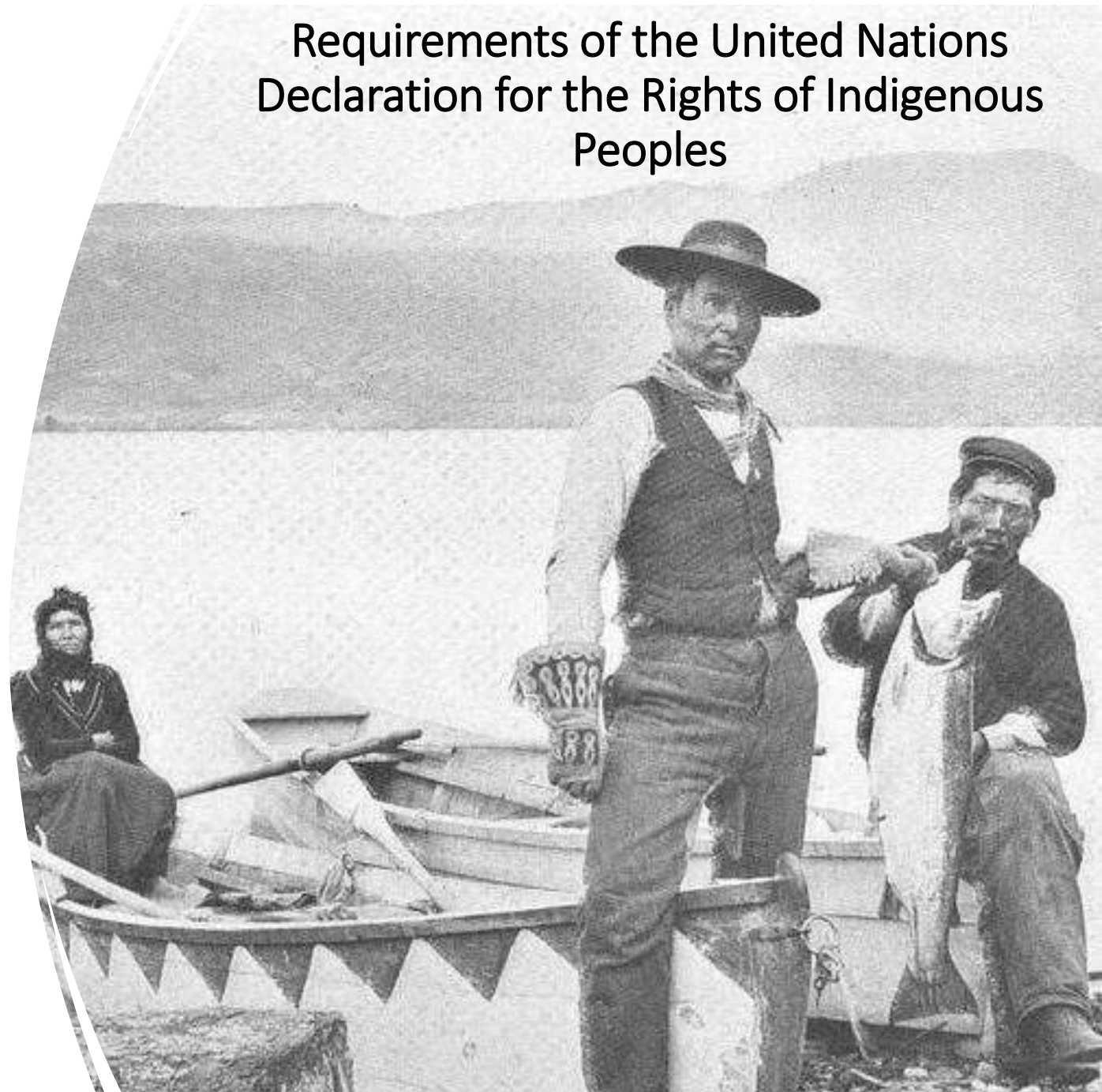
Indigenous peoples have the right to practise and revitalize their cultural traditions and customs...

Article 32

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.



Tribes Prepare for the Renewal of the Columbia River Treaty

Indigenous Voices Impacted the Process

- In 2009, the 15 Columbia Basin Tribes developed a Coalition to address the renewal of the CRT
- Tribes and First Nations wants to restore historic fish habitat and runs promised in Treaties and Executive Orders!
- Developed:
 - **Common Views Document 2010**
 - **Ecosystem-based Function Definition 2013**

Columbia Basin tribes¹
Common Views on the Future of the Columbia River Treaty
February 25, 2010

The present Columbia River power and flood control system operations are negatively affecting tribal rights and cultural interests throughout the Columbia Basin. The Columbia River Treaty is foundational to these operations.

The Columbia River Treaty –

- Was negotiated and continues to be implemented without regard to the tribes' unique legal and political relationship with the federal government.
- Is narrowly designed for the benefit of power and flood control.
- Does not include ecological considerations for critical tribal natural resources.
- Does not include considerations of critical tribal cultural resources.
- Created a power and flood control system that degraded rivers, First Foods, natural resources, and tribal customs and identities.
- Significantly affects tribal economies.
- Excludes tribal participation in its governance and implementation.
- Limits what can be accomplished with non-Treaty agreements to meet tribal resource priorities.

The Columbia River Treaty is under review by the U.S. and Canadian governments for reconsideration in 2014. Reconsideration of the Treaty provides an opportunity for the tribes to seek benefits not realized in 50 years of Treaty implementation.

The Columbia Basin tribes' interests must be represented in the implementation and reconsideration of the Columbia River Treaty. The Columbia River must be managed for multiple purposes, including -

- Respect for the sovereignty of each tribal government - each tribe has a voice in governance and implementation of the Columbia River Treaty.
- Tribal cultural and natural resources must be included in river management to protect and promote ecological processes – healthy and useable fish, wildlife, and plant communities.
- Integrate the tribes' expertise of cultural and natural resources in river management.
- Equitable benefits to each Tribe in priority to other sovereign parties in Columbia River management.
- Respecting and preserving the benefits of settlement agreements with tribes.
- Recognize tribal flood control benefits.
- Protecting tribal reserved rights to current and future beneficial uses, in a manner consistent with ecosystem-based management.

In order to realize these principles, the tribes' collective voices must be included in the implementation and reconsideration of the Columbia River Treaty.

¹ The Burns Paiute Tribe, the Coeur d'Alene Tribe, the Confederated Salish and Kootenai Tribes of the Flathead Nation, the Confederated Tribes of the Colville Reservation, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Cowlitz Indian Tribe, the Kalispel Tribe of Indians, the Kootenai Tribe of Idaho, the Nez Perce Tribe, the Fort McDermitt Paiute Shoshone Tribes, the Shoshone-Bannock Tribes of the Fort Hall Reservation, the Shoshone Paiute Tribe of the Duck Valley Indian Reservation, and the Spokane Tribe of Indians, with support from the Columbia River Inter-Tribal Fish Commission, Upper Columbia United Tribes, and the Upper Snake River Tribes tribal organizations have been working together to consider the effects and alternatives related to the Columbia River Treaty.

FISH PASSAGE &
REINTRODUCTION
— into the —
U.S. & CANADIAN
UPPER COLUMBIA BASIN

Years of Work & Preparation to Address Our One River' Health

- Fish Reintroduction into the U.S. And Canadian Upper Columbia River-Feb. 2014, Joint Fish Passage Paper
 - US Regional Recommendation developed in a multi-year process by federal agencies, communities, Tribes and NGOs;
<http://www.crt2014-2024review.gov/RegionalDraft.aspx>
 - Became Circular 175; Official State Department Position 2014 (includes Ecosystem Based Function (EbF) as an equal pillar
 - Collaborative Transboundary Water Modeling Group
- Indigenous Knowledge AFFIRMED in the EbF definition and Circular 175. First Nations pushed for the same with the Canadian and Provincial Governments.**

Tribal Voices Heard: A New 3rd Function of the Treaty

The U.S. Entity's position includes a third purpose of a renewed treaty: **ecosystem-based function (EbF)**

We must take into account fish, wildlife, habitat, water quality, and **health of Our River**

EbF can be incorporated while still meeting needs of hydropower and flood control

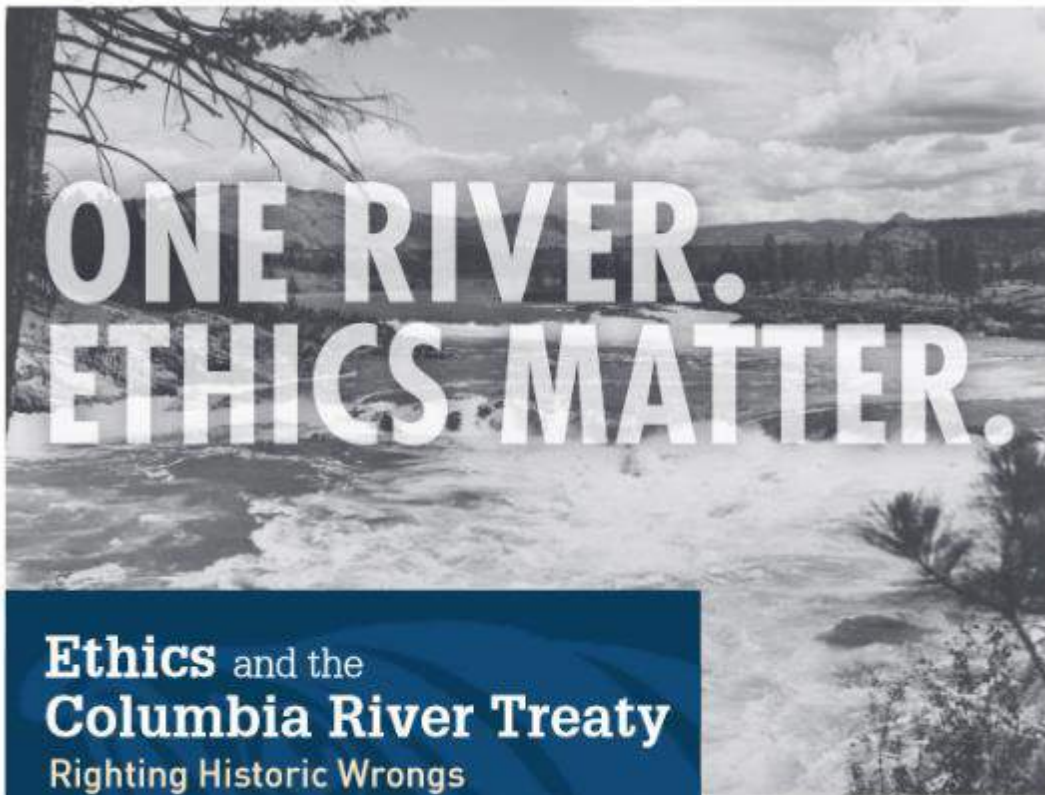
US and Canada began negotiations in 2015 with informal meetings

US Chief Negotiator appointed in 2016 supports the Regional Recommendation and Circular 175.

However, US Entity decides against including the Tribes as a part of the negotiation team. Federal Agencies will represent the Tribes' interests and Eco-based System Function .

US Chief Negotiator and Canadian Counterpart **END** the Collaborative Water Modeling Group on 2/2/18

Negotiations Have Been informational meetings with very little information shared with US Tribes



ONE RIVER. ETHICS MATTER.

Ethics and the
Columbia River Treaty
Righting Historic Wrongs

Join US for a one day conference to reflect on the impact of the dam building era on the Columbia Basin. We will discuss ways to modernize the Columbia River Treaty as we seek to establish a water ethic as foundational for resolving international water conflicts.

PRESENTERS INCLUDE:

Bishop William Skystad	Jennifer Ferguson
John Sirois	Rachael Paschal Osborn
Allan Scholz, PhD	D.R. Michel
Eileen Delehanty Pearkes	Pat Ford
Virgil Seymour	Pauline Terbasket
Stevy Seymour	Bishop Martin Wells

Conference is FREE to attend and lunch is provided

**TUESDAY,
MAY 13, 2014
8:00 A.M. - 4:00 P.M.**

GONZAGA UNIVERSITY
CATALDO HALL
GLOBE ROOM

RSVP BY MAY 8

Contact John Osborn
john@waterplanet.ws
or 509.939.1290

HOSTED BY:

SPONSORED BY:

Path Forward with the Columbia River Treaty *One River, Ethics Matter*

Incorporating the Health of the
Columbia River

Tribes
First Nations
Environment NGOs
Universities
Religious Communities
Farmers
Anyone and Everyone Invited

<https://vimeo.com/147803645>

Tribes & First Nations Continue to Lead in Fish Passage

Fish Reintroduction at Two US Dams

A precise response to the NPCC 2014 Program Amendments with a multi-phase investigation

3 Pathways Exist to Address Fish Passage

1. Columbia River Treaty (EbF) *International*
2. NPCC (at BPA Discretion) *Domestic*
3. Tribal Initiatives (Funded Phase 1). *Tribal*

Currently:

- UCUT finished Phase 1, ISRP Review, now working on Phase 2 Implementation Studies
- Bring Salmon Home with First Nations



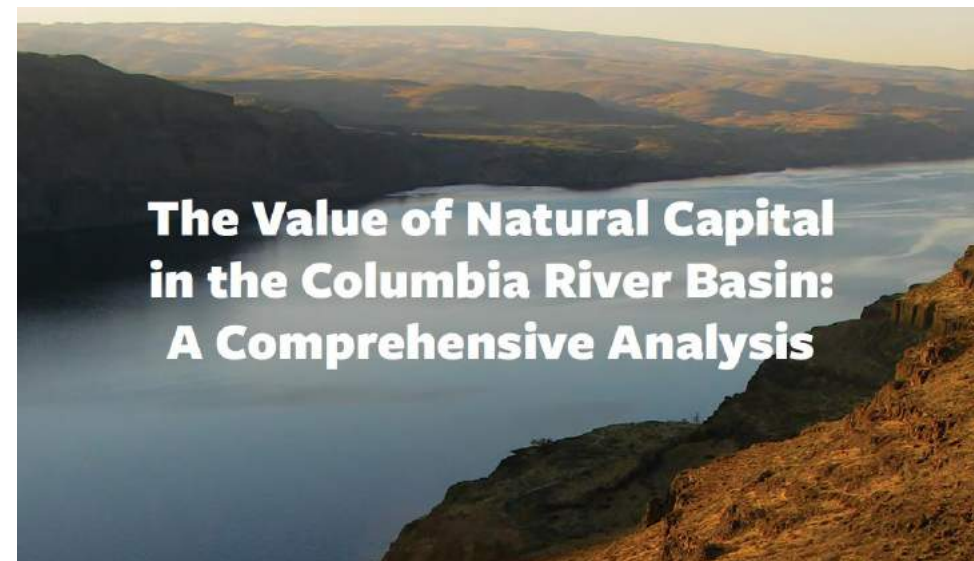
Northwest Power Planning Council –
Established by the Northwest Power
Act of 1980 to address the
disappearing salmon runs.

Earth Economics, NGOs and Tribes Columbia Basin Benefits Valuation Report 2017

The 15 US Tribes partnered with Earth Economics and Non-government Organizations to:

Understand the natural capital evaluation of Columbia River Basin **ecosystem-based function** for modernization of the Columbia River Treaty.

Provide a basis for an equitable comparison of economic Costs and Benefits with a sound evaluation.



ucut.org/habitat/value-natural-capital-columbia-river-basin

Key Points On Ecosystem Based Services

The Columbia River Basin Provides:

\$189 Billion in EbF services

**\$14 Billion comes in the form of
Agriculture**

**\$3 Billion comes in the form of
power generated at hydropower
plants**

1. The Columbia River Basin holds immense natural capital value.
2. The Columbia River Treaty could modernize in a way that recognizes natural capital value.
3. A 10 percent increase in ecosystem-based function would add \$19 billion to the Basin's natural capital value.

2019: First Nations Receive Observer Status; US Tribes Role?

First Nations signed NDAs to protect Canadian government negotiating positions

- The Canadian Courts have firmly upheld Title and Rights for First Nations, Reconciliation efforts, implementing UNDRIP
- Canadian Negotiators asked about the IJC and Adaptive Management

US Tribes were able to join negotiations as technical presenters of information around fish passage and Climate Change.

- US Entity shares very little with US Tribes outside of an NDA

Challenges Beyond the Columbia River Treaty; Columbia River Concerns

1. Legacy Pollution; Teck Metals, Silver Valley, Midnight Mine and DOD/DOE projects (Hanford, Fairchild AFB).
 2. Agriculture and Irrigation; pesticides, herbicides, animals
 3. CRSO-EIS, 401 Certification of Columbia River Hydropower projects.
 4. Reservoir mismanagement (erosion, flows, dissolved gases)
 5. Spokane River Water Quality Standards; Ecology's variances?
 6. "Digital" Agriculture; server farms located for cheap power
- *Historic and contemporary! We need action by all agencies!**



Most impacted and least mitigated





Let Us Prepare Our Waters to Bring Back Our Salmon



UCUT Historical Summer Chinook Harvest

For 9,000 years, during 60 days
each summer:

- 1,000-2,000/day at Kettle Falls
- 1,000-1,400/day at Little Falls
- 1,000/day in Little Spokane River
- 1,000/day at Spokane Falls
- 250/day at other fisheries (e.g., Sanpoil River)

**Total 300,000 Summer Chinook
per year**

Does not include Spring or Fall Chinook, Steelhead, Coho, Sockeye, White Fish, Sturgeon and Lamprey; Cutthroat, Kokanee, Bull Trout, Red Band Trout, and Suckers

Citation: Scholz, et al. 1985

Phase 1 Report on Reintroduction Into the Blocked Area – Realizing UCUT's Mission

Fish Reintroduction Work Plan at Two US Dams

- A precise response to the NPCC 2014 Program Amendments to restore salmon runs above Chief Joseph and Grand Coulee Dams.
- Diverse and inclusive collaboration to mitigate the effects of these dams to return salmon to historic habitats
- Multi-Phase investigation to properly study with all jurisdictions
- Supported by 14 Tribes Coalition, local governments, WA Dept of Fish and Wildlife, Office of the Columbia River, Northwest Power Conservation Council and many others.

SALMON AND FISH PASSAGE – PHASED APPROACH

Phase 1: *Completed, Reviewed and Supported*

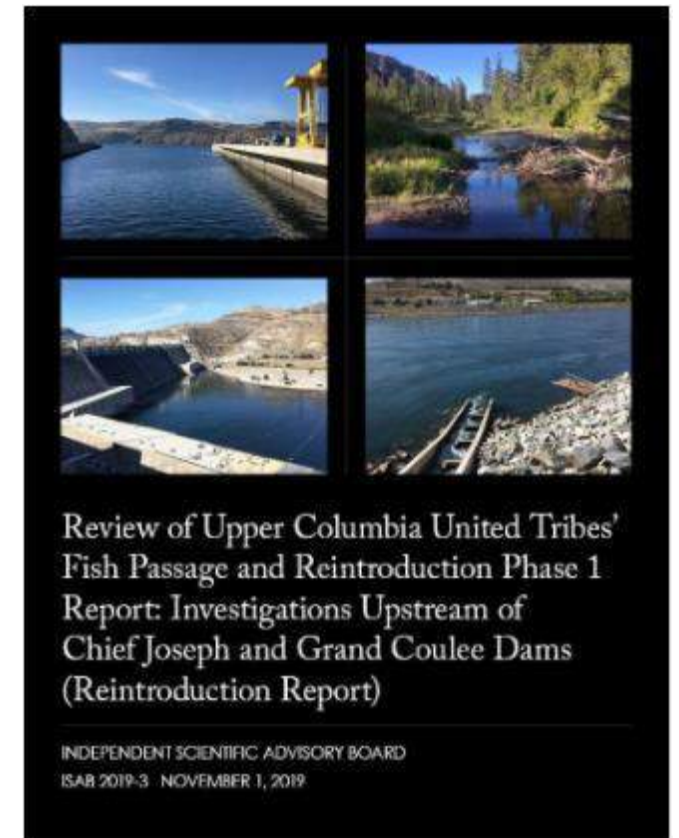
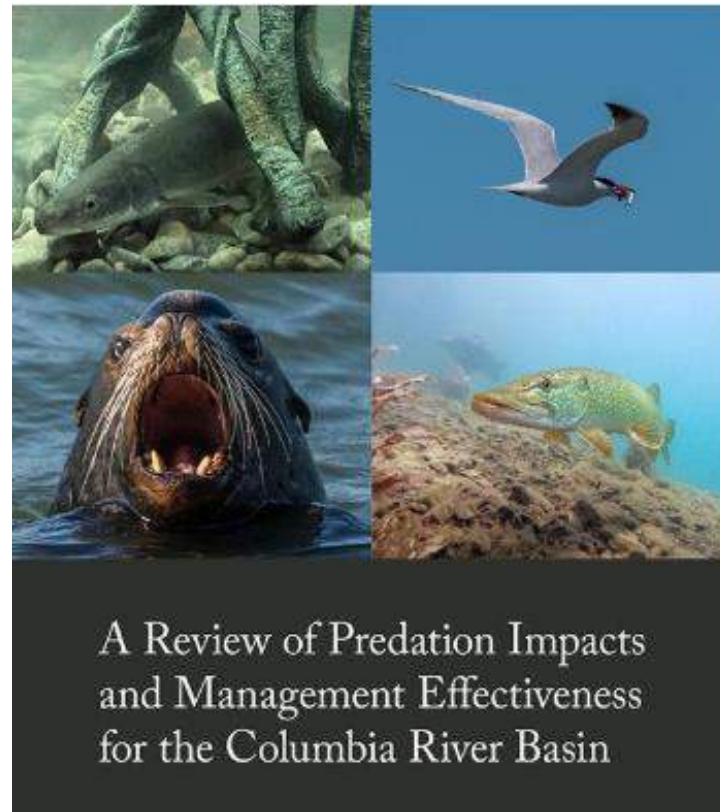
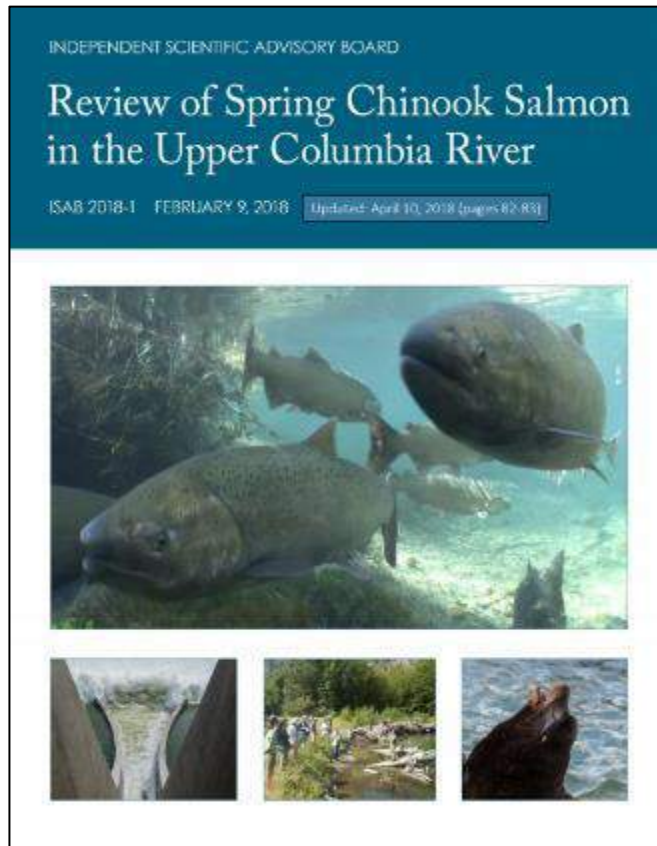
- Evaluate passage studies at hydroelectric projects, including Chief Joseph & Grand Coulee Dams
- Investigate habitat availability, suitability and salmon survival potential in habitats above GCD
- Investigate possible cost of upstream and downstream passage options

Phase 2: Finalizing the Implementation Plan

- Design and test reintroduction strategies and fish passage facilities at CJD & GCD
- Reintroduction pilot projects
- Monitoring, evaluation, and adaptive management

Phase 3:

- Review results to determine implementation & permanent inclusion to the Program



NPCC, ISAB/Review Panel and UCUT

Spokane Tribe Welcomes Back Released Chinook from 2017

Number of individual fish detected downstream of Chief Joseph Dam, among various types of observations.

Observed Location	# Unique Detected
Juvenile Fish Bypass Facilities	75
Estuary Trawl Net	3
Avian Colonies	3
Adult Fishways	9
Total	90

**The Spokane Tribe reports a total of four (4) Chinook have returned from that same class released in 2017 from the original 753 Chinook released.*





Cultural Release and Harvest of Salmon by the Spokane Tribe
on the Spokane Reservation in 2019

Community Salmon Celebration, Coeur d'Alene Indian Reservation, Hangman Creek on June 26, 2020



The Future of Salmon in the Upper Columbia

- Continue cultural and scientific releases
- Movement of adults and juveniles in the reservoirs
- Predator/prey interactions in the blocked area
- Instream and streamside egg incubation
- Juvenile rearing and migration
- Adult return migration
- Strategic Implementation Plan
- Research and manage in all tributaries to the Columbia River like Little Spokane, Spokane Arm, Hangman Creek, Colville River, and others
- We need a **Salmon Coalition with a region wide voice**. Current partners; WDFW, USGS, PNNL, ONA, and NPCC





Indigenous Knowledge; Salmon Need to Come Home

Indigenous-Led Vision

Bringing the Salmon Home: The Columbia River Salmon Reintroduction Initiative is an Indigenous-led collaboration of the Syilx Okanagan Nation, Ktunaxa Nation, Secwépemc Nation, Canada and British Columbia. Salmon have been blocked from returning to the Canadian portion of the upper Columbia River for more than 80 years. The long-term vision is to return salmon stocks for Indigenous food, social and ceremonial needs, and to benefit the region's residents and ecosystems as a whole. *Learn more about this Initiative...*



The Columbia River Salmon Reintroduction Initiative

BRINGING *the* SALMON HOME

K4palkstim i? ntytyix

?at? su?kini? swaqmu

Tspelq'entém re Sqléltén

Indigenous Knowledge shows us, but we must act.

“We can get loyal to the future or stay loyal to the illegal past...”

-Jeannette Armstrong, June 26, 2018

At the “Adding Ecosystem Functions to the Columbia River Treaty Workshop”



Historic Canoe Journey – Exercise Cultural Ways to Maintain Relationship with the River



Lim'limpt' Thank You –
Questions?

DR Michel
Executive Director
dr@ucut-nsn.org
509.838.1057
www.ucut.org



Protecting the Tribe's Future Vision for the Reservation Homeland –Planning, Land Use, and Brownfield Redevelopment

3:45 p.m. – 4:30 p.m. CT
April 21, 2021



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 both 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 their Tribal air, water, and hazardous substances clean up laws.

Tribal Environmental Protection

- Indian Reservations are the remaining homeland of Indian Tribes.
- Tribes are entitled to the full use and enjoyment of their reservation homeland and its associated on and off Reservation natural resource base.
- Tribal natural resource rights have significant cultural, spiritual and economic value to the Tribe and its members.
- The protection of Tribal natural resources necessarily includes protecting the on-Reservation and off Reservation environmental quality and habitat of such resources.

- Delayed action due to an overly burdensome administrative process is the enemy of timely and effective Tribal Brownfield planning and enforcement programs.
- 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 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).

Tribes Have Retained Inherent Sovereignty Over Non-Members:

1. To regulate the activities of nonmembers who have entered into *consensual relationships* through commercial dealing, contracts, regulatory licenses, permits, leases or other voluntary arrangements; and
2. To exercise civil authority over conduct of nonmembers on the Reservation that directly effects the Tribe's *health, welfare, political integrity, or economic security*.

Montana v. United States, 450 U.S. 544 (1981).

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).

Tribal Homeland Plan

Protecting Reservation Environments, under federal and Tribal law, presents complex technical and legal challenges.

The following steps should be considered by the Tribe in the development of its Homeland Plan:

- ***Establish a Team:*** Establish a team of Council, staff and outside experts (as needed) to manage this task and develop a strategic plan.

Tribal Implementation (Cont.)

- **Big Picture:** Step back and consider the “big picture” including what the goals are as well as the possible solutions.
- **Establish Reservation Environment Baselines:** Establishing baseline environmental data is an important part of the action plan to protect Tribal values and provide for natural resource use.
- **Future Land Use:** Consider the future Tribal Homeland vision for land and resource use as part of the planning process.

The Legal Use of Treaties

- Treaties to which the U.S. is a party are equivalent in status to federal legislation.
- Under the U.S. Constitution, treaties like federal statutes, are “the Supreme law of the Land.” (*U.S. Const.* art. VI, cl 2).
- Under the Clean Water Act, treaty requirements under federal law have the status of ARARs. (40 CFR §§ 131.4(c), 131.10–13).

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 eloquent words of Nez Perce Chief Hinmaton Yalatkan (Joseph) continue to resound with truth and spiritual clarity:

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

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

OMW

Richard A. Du Bey
rdubey@omwlaw.com

OGDEN MURPHY WALLACE
OMWLAW.COM



CLOSING CIRCLE



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

ADJOURN

THANK YOU FOR ATTENDING!

