20th ANNUAL TRIBAL CLIENT SERVICE SEMINAR FOR TRIBAL LEADERS, TRIBAL ENVIRONMENTAL PROGRAM MANAGERS & IN-HOUSE COUNSEL

March 27 - 28, 2019

Exercising Governmental Sovereignty: What have Tribal environmental programs accomplished in the last 20 years and what does the future hold?

Presented by

OGDEN MURPHY WALLACE, PLLC
Tribal Practice Group

Richard Du Bey, Jennifer Sanscrainte, Nicholas Thomas, Elana Zana, Brian Epley, Emily Miner, Andrew Fuller, Kate Hambley, Dave Schoolcraft and Melody Simmons

Co-Sponsored by:

Industrial Economics, Inc., Boston MA

Guest Presentations by

DR Michel, Executive Director / Upper Columbia United Tribes

John Sirois, Committee Coordinator / Upper Columbia United Tribes

Robert Unsworth, Principal and Dr. Brent Boehlert / Industrial Economics, Inc.

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Tribal Environmental Seminar 2019[1]
AGENDA

Wednesday, March 27th

8:00 ***Registration / Refreshments***

8:45 **Greeting & Welcome Prayer**

Program Overview and Issues for Roundtable

9:00 **Tribal Environmental Talking Circle (All)**

- Major Achievements in 2018 *[Tribal Representatives]*

- Environmental Challenges Tribes Face in 2019 *[Tribal Representatives]*

10:15 **Exercising Tribal Sovereignty: What does the future hold?** *[R. Du Bey]*

11:00 ***Break***

11:20 **Update on the Columbia River Boundary Water Treaty Negotiations Between the U.S. and Canada** *[DR Michel]*

12:00 ***Working Lunch***

12:15 **Update on *Pakootas v. Teck Cominco Metals, Ltd*. Next step, the U.S. Supreme Court?** *[B. Epley]*

1:00 **The Culvert's Case: The Power of Treaty Rights** *[N. Thomas]*

1:40 **Tribal Natural Resource Damages and the DOI's Proposed Rulemaking** *[B. Unsworth]*

2:20 ***Break***

2:40 **What Is Tribal Consultation and Does it Work?** *[A. Fuller]*

3:20 **Climate Change and the Reservation Environment** *[Dr. Brent Boehlert]*

4:00 **Roundtable Discussion / Issue Follow-up / Questions** *[R. Du Bey]*

4:40 **Overview of Day 2 Tribal Workshop** *[Preparing for consultation: Best Practices]]*

5:00 ***Adjourn***

5:20 ***Reception [OMW 35th Floor Board Room]***

[1] Approved for 8 Law & Legal CLE credits through WSBA.

Tribal Environmental Seminar 2019
AGENDA

Thursday, March 28th

8:00	***Refreshments***
8:20	**Summary of Day One** *[A. Fuller]*
8:40	**Setting the Stage for Consultation** *[R. Du Bey and K. Hambley]*
9:20	**Small Group Discussion and Analysis** *[All]*
11:00	***Break***
11:20	**Summary and Feedback Session** *[R. Du Bey]*
11:50	**Closing Circle / Complete Evaluation Forms** *[R. Du Bey]*
12:15	***Adjourn – Safe Travels***

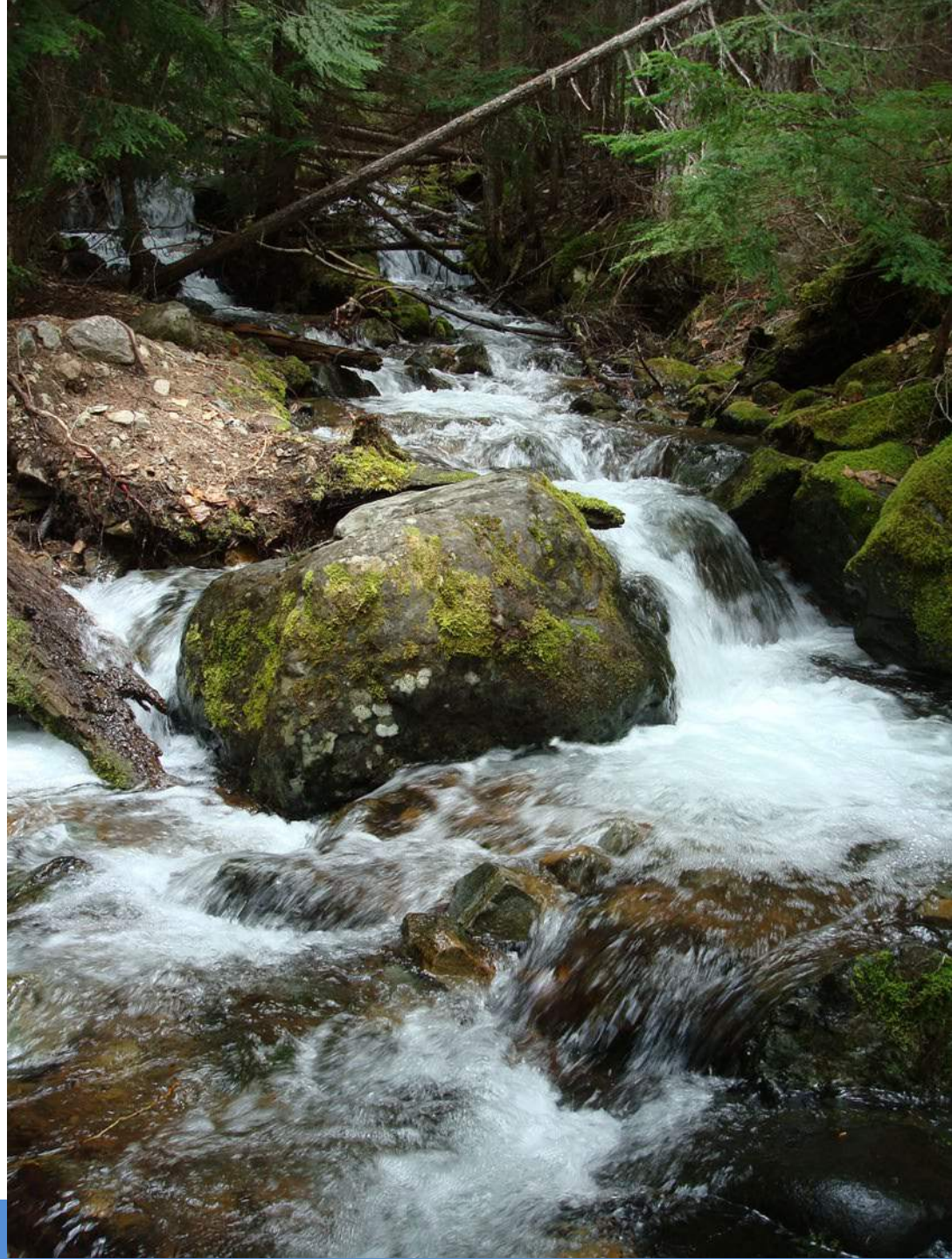
OGDEN MURPHY WALLACE
ATTORNEYS

"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)



TRIBAL ENVIRONMENTAL TALKING CIRCLE

- Major achievements in 2018

- Environmental challenges Tribes face in 2019

Notes

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ATTORNEYS

Exercising Tribal Sovereignty: What does the future hold?

Richard A. Du Bey

A

1984

E. SCOTT PRUITT
ADMINISTRATOR

October 11, 2017

MEMORANDUM

SUBJECT: Reaffirmation of the U.S. Environmental Protection Agency's Indian Policy

FROM: E. Scott Pruitt

TO: All EPA Employees

The U.S. Environmental Protection Agency has long recognized the importance of partnering with tribal governments in fulfilling the EPA's core mission. In fact, this agency was the first federal agency to adopt a formal Indian Policy, which memorialized the principles that would guide this agency in its tribal relationships. Today, I am proud to formally reaffirm that policy.

Unlike other partnerships, the United States has a unique legal relationship with tribal governments based on the Constitution, treaties, statutes, executive orders and court decisions. Through that authority, the EPA recognizes the right of the tribes to self-determination and acknowledges the federal government's trust responsibility to tribes. The EPA works with tribes on a government-to-government basis to protect the land, air and water in Indian Country.

This policy provides the foundation for the agency's tribal interactions and relationships with federally recognized tribes. It is also a framework that continues to inform the EPA's ongoing work with tribal governments and aligns with the cooperative federalism model to support protection of human health and the environment. Many significant milestones and success in the EPA-tribal environmental partnership can be directly traced to the EPA Indian Policy and the EPA-staff commitment to the EPA Indian Policy.

Today's reaffirmation of the Indian Policy highlights the importance of our relationship with tribal governments. Our work in Indian Country is crosscutting and affects all aspects of the EPA's day-to-day functions. It is only through continued partnership with tribes that we can truly achieve a cleaner, healthier and more prosperous America today and for future generations.

It is an important time in our partnership with tribes as the EPA builds on past successes and strives to meet current and future environmental challenges in and surrounding Indian

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Country. I look forward to your assistance in advancing our strong partnership with tribal governments to protect human health and to safeguard our shared environment.

Attachment

11/8/84

EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS

INTRODUCTION

The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed two related themes: (1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis.

The Environmental Protection Agency (EPA) has previously issued general statements of policy which recognize the importance of Tribal Governments in regulatory activities that impact reservation environments. It is the purpose of this statement to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal "self-government" and "government-to-government" relations between Federal and Tribal Governments. This statement sets forth the principles that will guide the Agency in dealing with Tribal Governments and in responding to the problems of environmental management on America Indian reservations in order to protect human health and the environment. The Policy is intended to provide guidance for EPA program managers in the conduct of the Agency's congressionally mandated responsibilities. As such, it applies to EPA only and does not articulate policy for other Agencies in the conduct of their respective responsibilities.

It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations cannot be accomplished immediately. Effective implementation will take careful and conscientious work by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be necessary to proceed in a carefully phased way, to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that exist now and continuing in the direction established under these principles, over time we can significantly enhance environmental quality on reservation lands.

POLICY

In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protection Agency is to protect human health and the environment. The keynote of this effort will be to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands. To meet this objective, the Agency will pursue the following principles:

1. **THE AGENCY STANDS READY TO WORK DIRECTLY WITH INDIAN TRIBAL GOVERNMENTS ON A ONE-TO-ONE BASIS (THE "GOVERNMENT-TO-GOVERNMENT" RELATIONSHIP). RATHER THAN AS SUBDIVISIONS OF OTHER GOVERNMENTS.**

EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.

2. **THE AGENCY WILL RECOGNIZE TRIBAL GOVERNMENTS AS THE PRIMARY PARTIES FOR SETTING STANDARDS, MAKING ENVIRONMENTAL POLICY DECISIONS AND MANAGING PROGRAMS FOR RESERVATIONS, CONSISTENT WITH AGENCY STANDARDS AND REGULATIONS.**

In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.

3. **THE AGENCY WILL TAKE AFFIRMATVE STEPS TO ENCOURAGE AND ASSIST TRIBES IN ASSUMING REGULATORY AND PROGRAM MANAGEMENT RESPONSIBILITIES FOR RESERVATION LANDS.**

The Agency will assist interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands. Within the constraints of EPA's authority and resources, this aid will include providing grants and other assistance to Tribes similar to that we provide State Governments. The Agency will encourage Tribes to assume delegable responsibilities, (i.e. responsibilities which the Agency has traditionally delegated to State Governments for non-reservation lands) under terms similar to those governing delegations to States.

Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government). Where EPA retains such responsibility, the Agency will encourage the Tribe to participate in policy-making and to assume appropriate lesser or partial roles in the management of reservation programs.

4. **THE AGENCY WILL TAKE APPROPRIATE STEPS TO REMOVE EXISTING LEGAL AND PROCEDURAL IMPEDIMENTS TO WORKING DIRECTLY AND EFFECTIVELY WITH TRIBAL GOVERNMENTS ON RESERVATION PROGRAMS.**

A number of serious constraints and uncertainties in the language of our statues and regulations have limited our ability to work directly and effectively with Tribal Governments on reservation problems. As impediments in our procedures, regulations or statues are identified which limit our ability to work effectively with Tribes consistent with this Policy, we will seek to remove those impediments.

5. **THE AGENCY, IN KEEPING WITH THE FEDERAL TRUST RESPONSIBILITY, WILL ASSURE THAT TRIBAL CONCERNS AND INTERESTS ARE CONSIDERED WHENEVER EPA'S ACTIONS AND/OR DECISIONS MAY AFFECT RESERVATION ENVIRONMENTS.**

EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian Law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.

6. **THE AGENCY WILL ENCOURAGE COOPERATION BETWEEN TRIBAL, STATE AND LOCAL GOVERNMENTS TO RESOLVE ENVIRONMENTAL PROBLEMS OF MUTUAL CONCERN.**

Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neighboring States, Tribes, or local units of government. Accordingly, EPA will encourage early communication and cooperation among Tribes, States and local governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.

7. **THE AGENCY WILL WORK WITH OTHER FEDERAL AGENCIES WHICH HAVE RELATED RESPONSIBILITIES ON INDIAN RESERVATIONS TO ENLIST THEIR INTEREST AND SUPPORT IN COOPERATIVE EFFORTS TO HELP TRIBES ASSUME ENVIRONMENTAL PROGRAM RESPONSIBILITIES FOR RESERVATIONS.**

EPA will seek and promote cooperation between Federal agencies to protect human health and the environment on reservations. We will work with other agencies to clearly identify and delineate the roles, responsibilities and relationships of our respective organizations and to assist Tribes in developing and managing environmental programs for reservation lands.

8. **THE AGENCY WILL STRIVE TO ASSURE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS.**

In those cases where facilities owned or managed by Tribal Governments are not in compliance with Federal environmental statues, EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary to enable Tribal facilities to comply. Because of the distinct status of Indian Tribes and the complex legal issues involved, direct EPA action through the judicial or administrative process will be considered where the Agency determines, in its judgement, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.

In those cases where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as the Agency would to noncompliance by the private sector elsewhere in the country. Where the Tribe has a substantial proprietary interest in, or control over, the privately owned or managed facility, EPA will respond as described in the first paragraph above.

9. **THE AGENCY WILL INCORPORATE THESE INDIAN POLICY GOALS INTO ITS PLANNING AND MANAGEMENT ACTIVITIES, INCLUDING ITS BUDGET, OPERATING GUIDANCE, LEGISLATIVE INITIATIVES, MANAGEMENT ACCOUNTABILITY SYSTEM AND ONGOING POLICY AND REGULATION DEVELOPMENT PROCESSES.**

It is a central purpose of this effort to ensure that the principles of this Policy are effectively institutionalized by incorporating them into the Agency's ongoing and long-term planning and management processes. Agency managers will include specific programmatic actions designed to resolve problems on Indian reservations in the Agency's existing fiscal year and long-term planning and management processes.

William D. Ruckelshaus

(c) minimize the delay and ensure respect and dignity in the process of distributing eagles for Native American religious purposes to the greatest extent possible;

(d) expand efforts to involve Native American tribes, organizations, and individuals in the distribution process, both at the Repository and on tribal lands, consistent with applicable laws;

(e) review means to ensure that adequate refrigerated storage space is available to process the eagles; and

(f) continue efforts to improve the Repository's ability to facilitate the objectives of this memorandum.

The Department of the Interior shall be responsible for coordinating any interagency efforts to address continuing executive branch actions necessary to achieve the objectives of this memorandum.

We must continue to be committed to greater intergovernmental communication and cooperation. In addition to working more closely with tribal governments, we must enlist the assistance of, and cooperate with, State and local governments to achieve the objectives of this memorandum. I therefore request that the Department of the Interior work with State fish and game agencies and other relevant State and local authorities to facilitate the objectives of this memorandum.

With commitment and cooperation by all of the agencies in the executive branch and with tribal governments, I am confident that we will be able to accomplish meaningful progress in the distribution of eagles for Native American religious purposes.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the *Federal Register*.

William J. Clinton

[Filed with the Office of the Federal Register, 4:17 p.m., May 2, 1994]

NOTE: This memorandum will be published in the *Federal Register* on May 4.

Memorandum on Government-to-Government Relations With Native American Tribal Governments

April 29, 1994

Memorandum for the Heads of Executive Departments and Agencies

Subject: Government-to-Government Relations with Native American Tribal Governments

The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty. Today, as part of an historic meeting, I am outlining principles that executive departments and agencies, including every component bureau and office, are to follow in their interactions with Native American tribal governments. The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes. I am strongly committed to building a more effective day-to-day working relationship reflecting respect for the rights of self-government due the sovereign tribal governments.

In order to ensure that the rights of sovereign tribal governments are fully respected, executive branch activities shall be guided by the following:

(a) The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government-to-government relationship with federally recognized tribal governments.

(b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties

may evaluate for themselves the potential impact of relevant proposals.

(c) Each executive department and agency shall assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities.

(d) Each executive department and agency shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes.

(e) Each executive department and agency shall work cooperatively with other Federal departments and agencies to enlist their interest and support in cooperative efforts, where appropriate, to accomplish the goals of this memorandum.

(f) Each executive department and agency shall apply the requirements of Executive Orders Nos. 12875 ("Enhancing the Intergovernmental Partnership") and 12866 ("Regulatory Planning and Review") to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities.

The head of each executive department and agency shall ensure that the department or agency's bureaus and components are fully aware of this memorandum, through publication or other means, and that they are in compliance with its requirements.

This memorandum is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the *Federal Register*.

William J. Clinton

[Filed with the Office of the Federal Register, 3:49 p.m., May 2, 1994]

NOTE: This memorandum will be published in the *Federal Register* on May 4.

Digest of Other White House Announcements

The following list includes the President's public schedule and other items of general interest announced by the Office of the Press Secretary and not included elsewhere in this issue.

April 23

In the morning, the President attended an all-day Cabinet meeting at Blair House.

April 25

At a White House ceremony, the President's intention to nominate Aileen Adams as the Director of the Office for Victims of Crime at the Department of Justice was announced.

April 26

The White House announced the President has invited Prime Minister P.V. Narasimha Rao of India to the White House for an official working visit on May 19.

The President declared a major disaster exists in the State of Illinois and ordered Federal funds be released to help individuals and families in that State recover from severe storms, heavy rain, and flooding which began on April 9.

The President announced the establishment of the United States Committee for the 50th Anniversary of the United Nations, to be chaired jointly by Secretary of State Warren Christopher and Ambassador Madeleine Albright.

April 27

In the afternoon, the President traveled to Irvine, CA, where he was joined by Hillary Clinton at the El Toro Marine Corps Air Station. They then went to Yorba Linda, CA, where they attended funeral services for President Richard Nixon at the Richard Nixon Library and Birthplace.

April 28

In the early morning, the President and Hillary Clinton returned to Washington, DC.

Federal Register
Vol. 65, No. 218
Thursday, November 9, 2000

Presidential Documents

Title 3—

The President

Executive Order 13175 of November 6, 2000

Consultation and Coordination With Indian Tribal Governments

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. *Definitions.* For purposes of this order:

(a) "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

(b) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. *Fundamental Principles.* In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. *Policymaking Criteria.* In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. *Special Requirements for Legislative Proposals.* Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. *Consultation.* (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the

need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. *Increasing Flexibility for Indian Tribal Waivers.*

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. *Accountability.*

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. *Independent Agencies.* Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. *General Provisions.* (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A–19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

Sec. 10. *Judicial Review.* This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

THE WHITE HOUSE,
November 6, 2000.

[FR Doc. 00-29003
Filed 11-8-00; 8:45 am]
Billing code 3195-01-P

EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights

Introduction

EPA recognizes the importance of respecting tribal treaty rights and its obligation to do so. The purpose of this Guidance is to enhance EPA's consultations under the *EPA Policy on Consultation and Coordination with Indian Tribes* in situations where tribal treaty rights may be affected by a proposed EPA action. Specifically, this Guidance provides assistance on consultation with respect to EPA decisions focused on specific geographic areas when tribal treaty rights relating to natural resources may exist in, or treaty-protected resources may rely upon, those areas.[1] In these instances, during consultation with federally recognized tribes (tribes), EPA will seek information and recommendations on tribal treaty rights in accordance with this Guidance. EPA will subsequently consider all relevant information obtained to help ensure that EPA's actions do not conflict with treaty rights, and to help ensure that EPA is fully informed when it seeks to implement its programs and to further protect treaty rights and resources when it has discretion to do so.[2]

The U.S. Constitution defines treaties as part of the supreme law of the land, with the same legal force as federal statutes. Treaties are to be interpreted in accordance with the federal Indian canons of construction, a set of long-standing principles developed by courts to guide the interpretation of treaties between the U.S. government and Indian tribes.[3] As the Supreme Court has explained, treaties should be construed liberally in favor of tribes, giving effect to the treaty terms as tribes would have understood them, with ambiguous provisions interpreted for their benefit. Only Congress may abrogate Indian treaty rights, and courts will not find that abrogation has occurred absent clear evidence of congressional intent. We note that this Guidance does not create any new legal obligations for EPA or expand the authorities granted by EPA's underlying statutes, nor does it alter or diminish any existing EPA treaty responsibilities.

Determining When to Ask About Treaty Rights During Tribal Consultation

EPA consultation with tribes provides the opportunity to ask whether a proposed EPA action that is focused on a specific geographic location may affect treaty-protected rights. Because treaty rights analyses are complex, staff are expected to inquire early about treaty rights.

Certain types of EPA actions, namely those that are focused on a specific geographic area, are more likely than others to have potential implications for treaty-protected natural resources. For example, EPA review of tribal or state water quality standards as a basis for National Pollutant Discharge Elimination System permits typically focuses on a specific water body. If a treaty

[1] This Guidance focuses on consultation in the context of treaties. EPA recognizes, however, that there are similar tribal rights in other sources of law such as federal statutes (e.g., congressionally enacted Indian land claim settlements).

[2] EPA Administrator, December 1, 2014 Memorandum, Commemorating the 30th Anniversary of the EPA Indian Policy.

[3] Minnesota v. Mille Lacs Band of Chippewa, 526 U.S. 172 (1999).

reserves to tribes a right to fish in the water body, then EPA should consult with tribes on treaty rights, since protecting fish may involve protection of water quality in the watershed.

Another example of an action in a specific geographic area is a site-specific decision made under the Comprehensive Environmental Response, Compensation, and Liability Act, such as a Record of Decision for a site, or the potential use of Applicable or Relevant and Appropriate Requirements for a cleanup. Other examples include a site-specific landfill exemption determination under the Resource Conservation and Recovery Act or other similar types of regulatory exemptions for specific geographic areas. In each case, employing the following questions in this Guidance during consultation may inform EPA of when treaty rights are present in the defined area and may be affected by the proposed decision.

For purposes of this Guidance, the treaty rights most likely to be relevant to an EPA action are rights related to the protection or use of natural resources, or related to an environmental condition necessary to support the natural resource, that are found in treaties that are in effect. Other treaty provisions, for example those concerning tribal jurisdiction or reservation boundaries, are outside the scope of this Guidance.

EPA actions that are national in scope, and thus not within a focused geographic area, fall outside the scope of this Guidance, because EPA actions focused on specific geographic areas are the ones we believe are most likely to potentially affect specific treaty rights. Examples of such activities outside the scope of this Guidance include the development of National Ambient Air Quality Standards under the Clean Air Act or the national registration of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act.

Where tribes raise treaty rights as a basis for consultation on issues that are national in scope, or treaty rights otherwise are raised during consultation on national actions, this Guidance can assist in the treaty rights consultation discussion.

In addition, EPA staff should be aware that treaty rights issues in the context of compliance monitoring and enforcement actions should be considered when consulting with tribes pursuant to the *Guidance on the Enforcement Principles of the 1984 Indian Policy* and the *Restrictions on Communications with Outside Parties Regarding Enforcement Actions*. EPA should also act consistent with the *EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples*.

Questions to Raise During Consultation

EPA should employ the following three questions during consultations when proposing an action that may affect tribal treaty rights within a specific geographic area. These questions may also be employed when treaty rights arise in other contexts. Collaboration between program and legal staff before and during consultation is an important aspect of ensuring both that these questions are

asked and the answers are understood. For any treaty rights discussion raised during consultation, the tribe may identify particular tribal officials to consult with EPA about treaty rights. It is important that EPA work to ensure that consultation occurs with the appropriate tribally identified officials.

(1) Do treaties exist within a specific geographic area?

This question is designed to help EPA determine when a treaty and its related resources exist within the specific geographic area of the proposed action. This question is important because tribes may possess treaty rights both inside and outside the boundaries of reservations. In some cases, EPA may already be aware of existing, relevant resource-based treaty rights in a specific geographic area; for example, when a tribe has treaty rights within the boundaries of its reservation or near its reservation. In other cases, EPA may not be aware of the full effects of the treaty rights, or EPA may find it difficult to determine when a specific geographic area has an associated treaty right. For example, some tribes in the Great Lakes area retain hunting, fishing, and gathering rights both in areas within their reservations and in areas outside their reservation boundaries, commonly referred to as ceded territories. Similarly, some tribes in the Pacific Northwest retain the right to fish in their "usual and accustomed" fishing grounds and stations both within and outside their reservation boundaries, and retained the right to hunt and gather throughout their traditional territories.

(2) What treaty rights exist in, or what treaty-protected resources rely upon, the specific geographic area?

This question is designed to help EPA understand the type of treaty rights that a tribe may retain. By asking this question, EPA can better understand the complexities that are often involved in treaty rights and better understand whether the proposed EPA action could affect those rights. Some treaties explicitly state the protected rights and resources. For example, a treaty may reserve or protect the right to "hunt," "fish," or "gather" a particular animal or plant in specific areas. Treaties also may contain necessarily implied rights. For example, an explicit treaty right to fish in a specific area may include an implied right to sufficient water quantity or water quality to ensure that fishing is possible. Similarly, an explicit treaty right to hunt, fish, or gather may include an implied right to a certain level of environmental quality to maintain the activity or a guarantee of access to the activity site.

(3) How are treaty rights potentially affected by the proposed action?

This question is designed to help EPA understand how a treaty right may be affected by the proposed action. EPA should explain the proposed action, provide any appropriate technical information that is available, and solicit input about any resource-based treaty rights. It is also appropriate to ask the tribe for any recommendations for EPA to consider to ensure a treaty right is protected.

EPA Actions That May Affect Treaty Rights

EPA's next steps typically will involve conducting legal and policy analyses in order to determine how to protect the rights. These analyses are often complex and depend upon the context and circumstances of the particular situation. Issues that may arise often involve precedent-setting questions or warrant coordination with other federal agencies. It is expected that the EPA lead office or region that engaged in the tribal consultation about the potentially affected treaty rights will coordinate with the Office of International and Tribal Affairs, the Office of General Counsel, and appropriate Offices of Regional Counsel to conduct these analyses. Although the details of how to conduct such legal and policy analyses are not addressed by this Guidance, the EPA process may warrant continued or additional consultation with tribes.

Conclusion

EPA is committed to both protecting treaty rights and improving our consultations with tribes on treaty rights. As part of its commitment, EPA will emphasize staff training and knowledge-sharing on the importance of respecting tribal treaty rights in order to better implement this Guidance. As EPA gains experience on tribal treaty rights and builds upon its prior knowledge, the Agency may modify this Guidance to meet this commitment.

OVERVIEW

EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights

Summary

EPA recognizes the importance of respecting tribal treaty rights and its obligation to do so. The purpose of the new *Guidance for Discussing Tribal Treaty Rights* (*Guidance*) is to enhance EPA's consultations under the *EPA Policy on Consultation and Coordination with Indian Tribes* (*EPA Consultation Policy*). The *Guidance* outlines affirmative steps for EPA tribal consultations in situations where tribal treaty rights or treaty-protected resources may be affected by an EPA action.

Background

In December 2014, EPA Administrator Gina McCarthy released a Memorandum commemorating the 30th anniversary of EPA's Indian Policy. The Memorandum provided a clear statement on the need to honor and respect tribal treaty rights in EPA's actions. To assist in implementing the Administrator's statement on treaty rights, EPA developed the *Guidance* to be used during tribal consultations under the *EPA Consultation Policy*. The *EPA Consultation Policy* describes how EPA consults on a government-to-government basis with federally recognized tribes when EPA actions may affect tribal interests. Under the *EPA Consultation Policy*, consultation by EPA consists of four phases: Identification, Notification, Input, and Follow-up. After an extensive national tribal consultation effort, the *Guidance* was issued in February 2016.

What does this Guidance do?

The *Guidance* provides assistance to EPA staff with respect to EPA actions focused on specific geographic areas when tribal treaty rights relating to natural resources may exist in, or treaty-protected resources may rely upon, those areas and EPA's action may affect the tribal treaty rights. In these instances, during consultation with federally recognized tribes under the *EPA Consultation Policy*, EPA will seek to obtain tribal treaty rights information and recommendations in accordance with the *Guidance*. The *Guidance* directs EPA to ask the following questions:

- Do treaties exist within a specific geographic area?
- What treaty rights exist in, or what treaty-protected resources rely upon, the specific geographic area?
- How are treaty rights potentially affected by the proposed action?

EPA will subsequently consider all relevant information obtained to help ensure that EPA's actions do not conflict with treaty rights, and to help ensure that EPA is fully informed when it

seeks to implement its programs to further protect treaty rights and resources when it has discretion to do so.

The *Guidance* does not create any new legal obligations for EPA, expand the authorities granted by EPA's underlying statutes, nor does it alter or diminish any existing EPA treaty responsibilities.

Where do I go for more information?

The EPA Consultation Policy, the Guidance, related documents, and answers to frequently asked questions may be found at http://www.epa.gov/tribal.

B

UNITED STATES DEPARTMENT OF INTERIOR
BUREAU OF INDIAN AFFAIRS

In re: Approval of Leech Lake Band of Ojibwe Hazardous Substances Control Ordinance International Paper, Appellant	ANSWER OF LEECH LAKE BAND OF OJIBWE, INTERESTED PARTY

1. INTRODUCTION

1.1 The Leech Lake Band of Ojibwe (the "Band") is a sovereign entity whose government is federally recognized. The Band acting through its duly elected Tribal Council enacted the ordinance questioned in this Appeal and appears in this matter as an interested party pursuant to 25 CFR § 2.11.

1.2 The Band objects to International Paper's Appeal of the Bureau of Indian Affairs' ("BIA") approval of the Band's Hazardous Substance Control Ordinance (the "Ordinance").

2. POSITION OF THE BAND

2.1 It is the position of the Band that the Ordinance indirectly

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challenged by IP in this matter is a valid and enforceable law of the Band. In support of its Ordinance, the Band answers the challenge by IP in the alternative. The first and primary argument is that the action by the Band to request that the BIA recognize the validity of the Ordinance was voluntary. There was no requirement under federal or Tribal law requiring BIA approval. Consequently, the requested approval letter issued by the BIA on October 5, 2000 was likewise voluntary and not required under the regulations, laws or Constitutions of the United States, the Minnesota Chippewa, or the Band. Therefore, the BIA approval was a voluntary discretionary act performed by BIA as a courtesy to the Band because it was not required, and to end this alleged appeal, the Band now requests that the BIA withdraw its "approval" of the Ordinance and dismiss this Appeal as moot.

2.2 Assuming *arguendo* that the BIA considers its approval of the Ordinance as a non-discretionary, non-voluntary administrative action subject to review and does not determine that this appeal is moot, the Band then asserts the following alternative argument. In short, that the Appeal should be denied on the grounds that *inter alia* the Ordinance is a valid exercise of the Band's civil regulatory jurisdiction over nonmembers, and is compatible with the regulatory scheme of CERCLA.

3. BACKGROUND

3.1 The Band is a sovereign Indian Tribe recognized under Treaty with the United States and organized pursuant to Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476.

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3.2 International Paper ("IP") is a Potentially Responsible Party, as defined under CERCLA, for the St. Regis Superfund Site ("Site") in Cass Lake, Minnesota.

3.3 Over a twenty-seven year period, IP's predecessors released hazardous wastes into the environment in the form of wastewater, sludges, air pollution, and solid waste. As a result, the Tribe and the quality of the Reservation environment suffer from contaminated air, soil, groundwater and surface water.

3.4 On August 25, 2000, the Band's Tribal Council, as authorized by Tribal and Federal law, enacted the Hazardous Substances Control Ordinance with the adoption of Resolution No. 01-29. This Resolution was adopted pursuant to the authority vested in the Band by its Constitution and Bylaws, the United States Congress, and Treaties with the United States. Although not required by Tribal or Federal law or regulations, the Ordinance was submitted for a courtesy approval to the BIA for ratification. The BIA issued a letter approving the Ordinance on October 5, 2000.

3.5 The Ordinance is generally applicable reservation-wide, providing a regulatory scheme as well as substantive clean-up standards which supplement the statutory framework of CERCLA.

3.6 As of this date, the Band has not yet acted to enforce the Ordinance against anyone, including IP. IP has apparently challenged BIA's approval on the grounds that the Ordinance, on its face, exceeds the Band's authority to regulate those who contaminate or threaten to contaminate the

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quality of the reservation environment or who pose a threat to the health and welfare of all persons who either reside or do business on the Leech Lake Reservation (the "Reservation Population").

3.7 For the reasons set out herein, the Band requests that the BIA either dismiss the appeal as moot or deny the appeal as without merit and uphold the BIA courtesy approval of the Ordinance.

4. The Ordinance is Properly Promulgated Regardless of BIA Approval.

4.1 The Band Properly Promulgated the Hazardous Waste Ordinance under its own Authority.

4.1.1 The Revised Constitution and Bylaws of the Minnesota Chippewa Tribe, approved by the Assistant Secretary of the Interior on March 3, 1964, empower the Tribe "to conserve and develop Tribal resources and to promote the conservation and development of individual Indian trust property, to promote the general welfare of the members of the Tribe; (and) to preserve and maintain justice for its members." The U.S. Congress authorized this Constitution under the Indian Reorganization Act of 1934.

4.1.2 The Band's authority over the Reservation Environment was guaranteed in the Treaties of 1837 and 1855 where hunting, fishing, ricing and gathering rights were reserved to the Band and its members.

4.1.3 And, as a general rule an Indian Tribe has unfettered authority to regulate and legislate land use activities occurring on its Reservation. *See, gen'ly*, Powers of Indian Tribes, 55 Decisions of the Department of Interior 14 *et. seq.* (1934); *FMC v. Shoshone-Bannock Tribes*,

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905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991).

4.1.4 The Band's regulation of its own natural environment is both an exercise of its inherent sovereign powers and part of a cooperative "pilot program" effort with the EPA. This pilot program is designed to "enhance the roles of tribes and states in the Superfund process." Letter from Francis Lyons, EPA Regional Administrator to Eli Hunt (Jun. 12, 2000) (attached as Exhibit A). Through this pilot program, the EPA has allocated funds to the Band through a CERCLA Cooperative Agreement.

4.2 The Band Does Not Require BIA Approval For the Ordinance to Be Effective.

4.2.1 The Band's Tribal Council is organized as a Reservation Business Committee under art. III § 2 of the Revised Constitution and Bylaws of the Minnesota Chippewa Tribe.

4.2.2 The Constitution of the Minnesota Chippewa provides for review by the Secretary of the Interior of Band Ordinances that "levy licenses or fees on non-members of non-tribal organizations doing business solely within their respective reservations." Minn. Chippewa Const. art. IV § 1(d). The terms "licenses and fees" are to be narrowly construed and do not include environmental regulatory programs of the sort created by this Ordinance. The Ordinance, on its face and in the future application of its compliance and enforcement provisions, neither provides nor requires a license. Nor does it impose a fee on any entity, until and unless the Ordinance is violated through the release of hazardous substances into the Reservation Environment.

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4.2.3 No other provisions of Tribal or Federal law require the Ordinance to be approved by the BIA. The Ordinance is properly promulgated and fully effective as an exercise of the sovereign authority of the Band regardless of BIA approval.

4.2.4 The BIA, in its discretion, and in response to the Band's request voluntarily approved the Ordinance as a courtesy to the Band. The approval was not required by law, has no practical effect and is therefore not a reviewable administrative action. The BIA should simply withdraw its courtesy approval and render the appeal moot.

5. If the BIA Reviews the Approval Decision, IP's Challenge Must Fail.

5.1 International Paper Has Not Met its Burden for Protesting BIA Approval

5.1.1 The BIA hears appeals under 25 C.F.R. § 2 *et seq.* Federal Regulations provide for review where decisions or actions of BIA officials are alleged to be in violation of constitutional law, applicable federal statutes, treaties or BIA regulations. *McCurdy v. Steele*, 353 F.Supp. 629 (D.Utah 1973).

5.1.2 IP has failed to show that any statutes or regulations were violated by the BIA's approval of the Band's Ordinance. Consequently, IP has not met its burden of showing that BIA acted in violation of applicable law in issuing a decision providing "courtesy approval" of the Ordinance. IP has provided the BIA with no basis upon which the BIA may disapprove of the Ordinance.

5.2 CERCLA Does Not Preempt Tribes From Implementing Their

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Own Standards.

5.2.1 The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") explicitly treats Tribes as states for certain enumerated purposes. 42 US § 9626(a). Affected Tribes must be consulted before the determination of appropriate remedial actions. 42 US § 9604(c)(2). Affected Tribes must be involved in all National Contingency Plan regulations promulgated under 42 US § 9605. In these provisions, Congress expressly requires Tribal participation in the CERCLA process for a broad range of purposes. In order to enhance the roles of both Tribes and states in the Superfund process, EPA awards CERCLA pilot program funds to both tribes and states, including the Band, under 40 CFR Part 31 and 35. Such funds are designed to allow local responsibility and control over clean-up efforts.

5.2.2 As an example of the alleged limitations of the authority of Tribes under CERCLA, IP references the § 9626(a) provision that Tribes are not to be treated as states for purposes of including "at least one facility per State on the National Priorities List." This is not evidence of Congressional intent to limit Tribal authority. With over 550 Tribes recognized by the United States, requiring the listing of at least one facility per Tribe would render this section nonsensical and bankrupt the Superfund.

5.2.3 IP argues that, because CERCLA expressly *permits* states to promulgate their own requirements, Tribes are necessarily *prohibited* from doing so. This argument rests on an incorrect assumption, namely, that Tribes require a grant of authority to set their own environmental standards.

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5.2.4 A Tribe is a sovereign and needs no grant authority from the federal government to exert authority over its own land and people. *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 149 (1982); *Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956).

5.2.5 Here, the relevant inquiry is whether Congress has acted to limit a Tribe's authority, not whether any authority exists to permit the tribe to act. *National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845, 852-853 (1985). As to the matter currently before the BIA, no such limit was imposed.

5.2.6 IP suggests that Congressional intent to limit Tribal authority be inferred by reading Tribes *out* of CERCLA wherever they are not mentioned. This type of *expressio unis est exclusion alterius* statutory interpretation is outweighed by contravening canons of interpretation favoring Indians. Standard principles of statutory construction do not have their usual force in cases involving Indian law. *Montana v. Blackfeet Tribe,* 471 U.S. 759, 766 (1985); *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 247 (1985). Statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit. *Montana v. Blackfeet Tribe,* 471 U.S. at 766; *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 174 (1973); *Choate v. Trapp,* 224 U.S. 665, 675 (1912).

5.2.7 And, if Tribal authority is not *expressly* abrogated by Congress, it is retained. IP has cited no express preemption of Tribal civil regulatory authority under CERCLA; hence, Tribal law is not preempted.

5.2.8 CERCLA does not preempt Tribal regulation of a Tribe's

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own Reservation Environments. To read CERCLA as IP suggests would defeat its purpose and violate well-established law and policy supporting federal recognition of Tribal sovereignty. *See* Environmental Protection Agency (EPA) Indian Policy, attached as Exhibit A.

5.3 The *Montana* Test Allows Jurisdiction Over Non-Tribal Members.

5.3.1 Hazardous substances have a serious and substantial effect on the Tribe's health and welfare. Under the *Montana* test, Tribal authorities can regulate nonmembers within the bounds of the reservation when the activities of nonmembers have a serious and substantial effect on the Tribe's health, welfare, political integrity, or economic security. *Montana v. United States*, 450 U.S. 544, 566 (1981).

5.3.2 Under EPA's interpretation of *Montana*, a Tribe may satisfy *Montana* in cases of pollution. A Tribe does so by showing that pollution is being produced or is likely to be produced by nonmembers, that tribal members or resources are exposed to this pollution, and that exposure to pollutants has the potential to affect tribal health, economics, politics and welfare. Memorandum from R. Perciasepe, Assistant Administrator for the EPA National Indian Program, to Assistant and Regional Administrators, *Making Factual Determinations under the Montana Test: Tribal Civil Regulatory Authority over Nonmember Activities on Fee Lands* (Mar. 19, 1998) (attached as Exhibit B).

5.3.3 While the Band's Ordinance easily meets these broad standards, it also meets the more rigid test, suggested by IP, of being "necessary" to protect the Band's interest. Contrary to IP's assertions, the Band's interests are

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not adequately addressed by federal standards. Because Band members' subsistence use of reservation resources far exceed the use of such resources (e.g., fish) by non-Band members, Band members risk exposure to environmental contaminants in significantly higher levels, requiring more stringent standards to protect their health. The Ordinance provides a reservation-wide regulatory scheme as well as providing substantive standards which must be met under CERCLA. Far from being competitive, it is part of a cooperative effort between federal and tribal sovereigns to achieve resource quality which protects the health and welfare of those who use the resources.

5.3.4 IP's reliance on the Ninth Circuit's opinion in *Bugenig,* claiming it precludes the application of *Montana* exception to this case is misplaced. Appeal at 8. *Bugenig*, in fact, clearly allows the Band's Ordinance. In *Bugenig*, the court denied Tribal jurisdiction to stop logging on a parcel of non-member fee land where "the regulation concerned only the particular property of the *nonmember*." *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210 (9th Cir. 2000). The Ninth Circuit explicitly distinguished its holding from cases allowing a Tribe to promulgate water quality standards over members and nonmembers alike. *See Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998). *Bugenig* actually *reinforced* Tribal jurisdiction in cases of water pollution, finding it "difficult to imagine how serious threats to water quality could not have profound implications for tribal self-government."*Bugenig* 229 F.3d at 1222.

5.3.5 The Band's comprehensive regulation of air, soil, sediment

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groundwater and surface water contamination is clearly not the type of regulation prohibited by *Bugenig*. The Ordinance does *not* concern only the particular property of an individual nonmember, as was the case in *Bugenig*. To the contrary, the Ordinance addresses "serious threats" to water quality, and other matters of environmental contamination, that impact trust land and trust resources regardless of the political boundaries of any particular property owners.

5.3.6 The Band may regulate private individuals and corporations who release hazardous waste into its water, air, and soil, regardless of their race or membership status. This is the kind of jurisdiction over members and non-members alike contemplated by *Montana* and subsequent holdings.

5.4 Parties Releasing Hazardous Substances May Have Entered Into Consensual Relationships with the Band.

5.4.1 *Montana* further provides for jurisdiction over nonmembers who "enter consensual relationships with the tribe or its members." These relationships can include but are not limited commercial dealing, contracts, leases, or other arrangements. *Montana*, 450 U.S. at 565. Many other types of activities may constitute a consensual relationship. For example, Tribes have jurisdiction to tax on-reservation businesses and to issue permits for livestock within reservation boundaries. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-52 (1980); *Williams v. Lee*, 358 U.S. 217, 223 (1959); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905); *Morris v. Hitchcock*, 194 U.S. 384 (1904).

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5.4.2 IP claims that, because the Ordinance might conceivably apply to nonmembers who have not entered into consensual relationships with the Tribe, it is not justified under this *Montana* exception. This is an incorrect reading of *Montana*. The Tribe has the right to "regulate affairs on the reservation." Like the power to tax those who retain a benefit from the reservations' community and resources, the Tribe has jurisdiction over those who extract a benefit from business activities which pollute its water, soil and air.

6. CONCLUSION

6.1 The Leech Lake Band's Hazardous Substances Control Ordinance was properly promulgated by the Band as an exercise of the Band's sovereign authority. The Ordinance therefore requires no BIA Approval. CERCLA does not preempt or preclude this kind of local regulation, particularly where it is needed to address specific circumstances which threaten a community or where EPA declines to assert jurisdiction under CERCLA. To the extent the Ordinance will regulate nonmembers, it is permissible under the *Montana* provision for activities that substantially affect Tribal health and welfare.

6.2 Because the BIA approval was a voluntary act, not required by applicable law, the Band asks the BIA to simply withdraw the Superintendent's courtesy approval and thus render this appeal moot.

6.3 In the alternative, and assuming *arguendo*, that the BIA considers the Superintendent's approval to be a necessary and valid, non-discretionary administrative action subject to review, it is the position of the Band that

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International Paper has failed to meet its burden of demonstrating why the Ordinance should not be approved. Accordingly, the Leech Lake Band asks that the BIA affirm the Superintendent's approval.

RESPECTFULLY SUBMITTED this 25th day of January, 2001.

SHORT CRESSMAN & BURGESS PLLC

By _____

Richard A. Du Bey, WSBA No. 8109
Connie Sue Martin, WSBA No. 26525
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Special Environmental Counsel to the
Leech Lake Band of Ojibwe

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CERTIFICATE OF SERVICE

I, Kristine Dippold, an employee with the law firm of HELLER EHRMAN WHITE & McAULIFFE LLP, hereby certify under penalty of perjury under the laws of the State of Washington that on December 28, 2000, I caused the foregoing document to be filed by express mail with:

Joel Smith, Superintendent
Bureau of Indian Affairs
Minnesota Agency
Room 418, Federal Building
522 Minnesota Avenue NW
Bemidji, MN 56601-3062

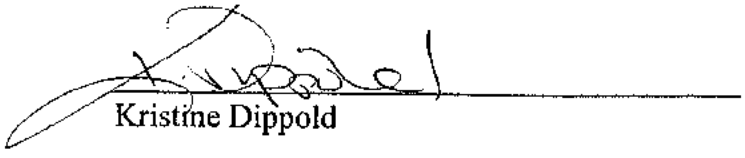
Larry Morrin
Midwest Regional Director
Bureau of Indian Affairs
One Federal Drive, Room 550
Minneapolis, MN 55111-4007

and served by express mail on the following interested parties:

Richard A. Du Bey
Short Cressman & Burgess PLLC
999 Third Avenue, Suite 3000
Seattle, WA 98104-4088

Eli O. Hunt
Chairman
Leech Lake Reservation Tribal Council
6530 Hwy 2 NW
Cass Lake, MN 56633

Signed at Seattle, Washington this 28th day of December, 2000.



Kristine Dippold

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EXHIBIT A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JUN 12 2000

REPLY TO THE ATTENTION OF:
R-19J

Eli Hunt, Chairman
Leech Lake Tribal Council
6530 Hwy 2 NW
Cass Lake, Minnesota 56633

RE: Superfund Cooperative Agreement # V975248-01-0

Dear Mr. Hunt:

I have reviewed your letter of March 10, 2000, requesting new funds for the Leech Lake Band's Superfund pilot project to conduct a project under U.S. EPA's pilot program to enhance the roles of tribes and states in the Superfund process. U.S. EPA has determined that this project is eligible for funding under this pilot program. The budget and project periods for this award are from April 1, 2000 through March 31, 2002.

The enclosed award provides the Leech Lake Band with funds totaling $300,000 to be used for the purposes described in the scope of work submitted with your request for funds. As my staff explained to your staff in January of this year, the funding vehicle for this award is a CERCLA cooperative agreement, which is subject to the regulations at 40 C.F.R. Part 31 and Part 35, Subpart O.

In the "*Special Conditions*" section of the award document, U.S. EPA has identified several provisions which will apply to this award, in addition to the grant regulations at 40 C.F.R. Part 31 and Part 35, Subpart O. These Special Conditions include the following provisions. First, U.S. EPA has identified the dates for which quarterly reports are to be submitted (specifically, January 30, April 30, July 30 and October 30). Second, as discussed by our respective staffs in prior conference calls, U.S. EPA has specified that expenditures for legal counsel to be provided under this award can be incurred only after such legal counsel has been re-procured in accordance with the procurement regulations at 40 C.F.R. § 31.36 and §§ 35.6550-6610. As you are aware, unless the Leech Lake Band completes proper procurement for such outside counsel, any expenditures from the award for such counsel would be disallowed.

While working on this award, U.S. EPA received the EPA Form 5700-48 which you signed on April 4, 2000 concerning Leech Lake Band's intent to comply with the relevant procurement regulations on April 4, 2000. In addition, U.S. EPA has received from the Leech Lake Band its property and procurement manual which was effective on November 2, 1998. Based on our review,

we have found that procedures outlined in the manual do not comply with the procurement regulations at 40 C.F.R. Parts 31 and 35 because policy number seven (7) under specific management policies (on page 23 of 44) provides that the Leech Lake Band may waive any defect, irregularity, or informality in any bid or bidding procedure. This waiver provision makes the Leech Lake Band's procurement procedures significantly less stringent than those contained in the federal regulations. As a result, Leech Lake Band will need to comply with the procurement regulations set forth at 40 C.F.R. § 31.36 and §§ 35.6550-6610.

As our respective staffs previously discussed, I have also enclosed an outline of issues which the Leech Lake Band should address in its quarterly reports for this award. This list of issues is derived from the regulations at 40 C.F.R. § 35.6650 and 31.40.

This award is subject to the terms and conditions set forth in the enclosed Cooperative Agreement document and the Assurances submitted as part of your Superfund Cooperative Agreement. As previously discussed by our respective staffs, because of statutory limitations on the use of Superfund monies, none of the funding in this Superfund Cooperative Agreement is to be used for the purpose of conducting a Natural Resource Damage Assessment.

If you concur with these provisions, please sign, date and return the original and two copies of this Amendment to the Acquisition & Assistance Branch, at the above address, within 21 days from the date of this letter. Should you have any questions regarding this letter, or the pilot award, please contact Romona Smith, Project Officer, at (312) 886-6139.

I wish you continual success in your endeavors in the Superfund program.

Sincerely yours,

David A. Ullrich

Francis X. Lyons
Regional Administrator

Enclosure

EXHIBIT B

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 19 1998

MEMORANDUM

SUBJECT: Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations

FROM: Robert Perciasepe
Assistant Administrator for the National Indian Program

Jonathan Z. Cannon
General Counsel

TO: Assistant Administrators
Regional Administrators

In a memorandum dated July 9, 1997, we established an Agency-wide workgroup to review EPA's process for making determinations on tribal applications for EPA-approved regulatory programs. That memorandum noted that "it is vital that the Agency have a clear, well-documented process to assemble and review relevant information, and decide on tribal program applications, in order to assure that the Agency makes sound decisions that can be defended successfully." The Workgroup's charge was to review the Agency's current process for making such determinations and develop recommendations, which might lead to written guidance, for improving the process to ensure reliably defensible decisions.

The Workgroup submitted its recommendations on December 23, 1997. Before making its final recommendations, the Workgroup shared its preliminary recommendations with the Tribal Caucus of the Tribal Operations Committee (the TOC), individual tribes, and EPA offices for their review and comment. The Workgroup's final recommendations have been shared with the EPA senior managers for the Indian Program for their views.

We too have reviewed the recommendations, and considered the comments received regarding the recommendations from within the Agency and from tribes. By this memo, we accept in full the recommendations made by the Workgroup. Below we provide: 1) a summary of the Workgroup process; and 2) a description of the recommendations and a discussion of how each recommendation will be implemented.

When we initiated the review that led to these recommendations, we asked that Regions generally defer making final determinations on tribal applications for regulatory authority until the review was completed. Now that the review is completed, we request that the Regions resume decision-making on tribal applications in accordance with the recommendations and guidance adopted today.

The Workgroup Process

The Workgroup, which was chaired by Robert G. Dreher, Deputy General Counsel, included representatives from all EPA Regions, and a number of headquarters (HQ) offices. The Workgroup developed a list of five issues to be addressed and established issue subgroups to prepare options papers on each issue. A list of Workgroup and Subgroup members is attached as Attachment A. The five issues identified and addressed by the Workgroup were: 1) the process for maintaining and compiling administrative records for EPA determinations on tribal eligibility to run regulatory programs; 2) the appropriate consultation and concurrence role for HQ in these decisions; 3) the application of the Montana test for evaluating tribal authority over non-Indians on fee lands within reservations; 4) opportunities for stakeholder involvement on EPA decisions regarding tribal applications for eligibility to establish water quality standards under the Clean Water Act; and 5) evaluation of treatment in the same manner as state (TAS) criteria for grants.[1]

The Workgroup arrived at preliminary recommendations by the middle of October. Workgroup members solicited comments on the options and preliminary recommendations from their respective offices. Then, at the beginning of November, the Workgroup solicited comments on the options and preliminary recommendations from the Tribal Caucus of the TOC and from individual tribes. The Workgroup also provided periodic updates on its progress during the TOC's monthly conference calls.

The Workgroup considered comments from the TOC, individual tribes, and EPA offices. The Workgroup made several changes to the preliminary recommendations to address these comments. Finally, the Workgroup provided its recommendations to us, along with a discussion of the key considerations, comments received, and options evaluated for each issue.

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[1] The Workgroup also identified one longer-term issue -- the tribal role under FIFRA -- that the Workgroup recommends the Agency evaluate in the future.

Adoption and Implementation of the Workgroup Recommendations

The primary considerations of the Workgroup were to develop recommendations that will: 1) improve the consistency and legal defensibility of EPA decisions regarding tribal programs; 2) avoid burdensome procedural requirements that may unnecessarily delay decisions on tribal applications; and 3) recognize the importance to tribes and EPA's Indian Program of decisions involving tribal sovereignty. The principal concerns raised by the TOC, tribes, and Regions in their comments on the preliminary recommendations were that the Agency avoid adopting procedures that will place undue burdens and delays on EPA's process for making decisions on tribal applications. The Workgroup considered and made several changes to the preliminary recommendations to address these concerns. We believe that the recommendations adopted below achieve the Workgroup's goal of significantly improving the defensibility of EPA's decisions without placing undue burdens on the decision-making process for tribal applications. To the extent the recommendations place additional burdens on the process, we believe they are warranted in order to ensure that the Agency handles decisions pertaining to tribal sovereignty with the utmost care.

Issue 1 -- Administrative Records: Improving EPA's process for maintaining and compiling administrative records on EPA decisions regarding tribal eligibility to run regulatory programs.

Workgroup Recommendation: The Assistant Administrator (AA) for Water (as the AA for the National American Indian Program) and the Office of General Counsel (OGC) should jointly issue a memorandum providing guidance and establishing docketing procedures specific to the compilation and maintenance of administrative records for EPA determinations on tribal applications for eligibility to run regulatory programs under all relevant EPA statutes. The memorandum should also ask Regions to establish a training program to ensure that the guidance and procedures are followed.

Adoption and Implementation: We adopt this recommendation in full. The final guidance is attached as Attachment B.

Issue 2 -- HQ Role: What concurrence/consultation role should HQ play in EPA decisions regarding tribal eligibility to run regulatory programs?

Workgroup Recommendation: HQ review and concurrence should be required for all nationally significant matters. Decisions on national significance should be guided by semi-annual review and

consultation meetings between HQ offices (the American Indian Environmental Office (AIEO), OGC, and the national program manager (NPM) offices) and Regions to discuss national concerns/issues and to provide Regions the opportunity to discuss potential upcoming tribal actions/cases.[2] In all cases, regional-HQ consultation should begin as early as possible, particularly prior to a tribe's application where regional staff believe, based on early involvement with the tribe, that nationally-significant issues may be raised by an application. In addition, to help inform decisions on national significance, Regions should be asked to provide a brief memorandum to HQ assessing the national significance of each tribal application for a regulatory program as applications come into the Region. HQ should be ultimately responsible for determining national significance.

The determination regarding national significance should be made within 30 days of EPA receipt of a tribal application. On applications with nationally-significant issues, an expectation should be established that HQ will concur or provide specific guidance to the Region within 30 days after a Region's tentative decision has been provided to HQ, provided there has been early involvement for HQ. Regions should ensure that a tribe that has applied for eligibility is kept informed of the status of the decision-making process. The process described above should be reevaluated after 3 years.

AIEO, OGC and the relevant national program office are the appropriate HQ offices to be involved in the consultation and concurrence process.

Finally, Regions should have periodic "Round table" discussions with their tribes. Regional Counsel attorneys should have early consultation with tribal attorneys to identify potential legal issues pertaining to tribal eligibility for regulatory programs.

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[2] The Workgroup recommended that there be one meeting involving all Regions and one Region-specific meeting each year. In addition, the Workgroup recommended that existing procedures (e.g., the National Indian Workgroup) be used to improve coordination. Although the scope of the Workgroup's analysis was limited to EPA determinations on tribal eligibility applications for regulatory programs, the Workgroup noted that other pending or possible future Agency actions affecting environmental programs in Indian country (e.g., PSD redesignations, site-specific rulemaking under RCRA) can and should be discussed in these semi-annual meetings.

Adoption and Implementation: We adopt this recommendation in full. Appropriate changes to the Agency's delegations manual will need to be made to implement the HQ concurrence aspects of this recommendation. Bob Perciasepe is initiating appropriate delegations manual changes for Office of Water programs. We have asked the Assistant Administrators for the Office of Prevention, Pesticides, and Toxic Substances and the Office of Air and Radiation to initiate appropriate changes to the delegations manual for their programs. We ask that AIEO consult with those offices and report to us on the status of these delegations manual changes in one month. We ask that regional and HQ offices implement all other aspects of the recommendations outlined above.

We emphasize that the consultation and concurrence process should operate as efficiently as possible. It is essential that HQ and Regions consult early in the process, even before tribal applications are submitted whenever possible. We will reevaluate this process, with input from Regions, NPMs, AIEO and tribes, after three years.

Issue 3 -- Application of the Montana test.

Issue 3a -- Should EPA prepare guidance on applying the Montana impacts test (regarding tribal authority over nonmembers on fee lands within reservations)?

Workgroup Recommendation: The AA for Water (as the AA for the National American Indian Program) and OGC should jointly issue general guidance to EPA regional staff, and request that AIEO work with OGC and the Regions to develop and initiate a training program to supplement the guidance. The training should be conducted in Regions with nonmember fee lands and should allow for discussion of the application of the Montana test and the development of decision documents. Such training should be required for all persons developing decision documents that include an analysis under the Montana test. For all other persons involved in the Indian Program, the training should be encouraged. Finally, Regions should be ready to work with tribes that request assistance in preparing applications involving Montana test issues.

Adoption and Implementation: We adopt this recommendation in full. The final guidance is attached as Attachment C. We ask that AIEO work with OGC and the Regions to develop a training program as discussed above.

Issue 3b -- Generalized Findings: Should EPA publish a set of generalized findings, to supplement reservation-specific findings, regarding the nature of the pollutants and activities regulated under the environmental statutes and the importance of effective regulation under those statutes?

Recommendation: The Agency should issue in the Federal Register an appropriate set of generalized findings for all relevant programs regarding the seriousness and mobility of pollutants and the importance of environmental regulation to tribal self-governance.

Adoption and Implementation: We adopt this recommendation in full and ask that AIEO and the relevant NPMs in the Office of Water and the Office of Prevention, Pesticides, and Toxic Substances, in consultation with OGC and the Regions, prepare in a timely manner appropriate generalized findings consistent with the Workgroup's recommendation.

Issue 4 -- Stakeholder Involvement: Who are the appropriate entities to comment on tribal water quality standards (WQS) eligibility applications? Should opportunity for comment be provided on supplemental application materials or tentative determinations? This issue is limited to opportunity for comment on a tribe's assertion of jurisdiction.

Recommendation: The current process for review of tribal eligibility to set WQS provides "appropriate governmental entities" (i.e., adjacent states, tribes, and federal agencies) an opportunity to comment on tribal assertions of jurisdiction contained in the initial application from a tribe. In addition, under the current process, notice of availability of a tribal application is provided to other potential commenters, specifying that any comments are to be funneled through "appropriate governmental entities." The Workgroup recommends that EPA supplement this current process by also providing: 1) supplemental application materials to "appropriate governmental entities," 2) a 30-day opportunity for these governments to comment on EPA's proposed findings of fact (under the Montana test) where a tribe seeks program approval over nonmembers on fee lands, and 3) notice of availability of such proposed findings of fact to other potential commenters (with comments to go through "appropriate governmental entities"). The Agency should also ensure that applicant tribes have an opportunity to review EPA's draft proposed findings of fact (under the Montana test) before they are made available to "appropriate governmental entities." EPA should also provide tribes an opportunity to respond to any comments submitted by "appropriate governmental entities."

In addition, EPA should ensure that tribes are given an opportunity to comment on any state application to EPA containing

an assertion of jurisdiction over areas that are in or adjacent to Indian country.

Adoption and Implementation: We adopt this recommendation in full. EPA decisions regarding tribal eligibility to set WQS should proceed consistent with the process detailed above. This expanded process may be implemented without changes to EPA regulations (see 40 C.F.R. § 131.8). Nonetheless, the Office of Science and Technology within the Office of Water, in consultation with AIEO, the Regions and OGC, should explore whether it is advisable for the Agency to incorporate this expanded process into regulation.

Issue 5 -- Eligibility requirements for grants: Ensuring consistent and adequate documentation regarding tribal eligibility for grants (i.e., evaluation of "treatment in the same manner as a state" (TAS) criteria -- federal recognition, substantial duties, jurisdiction, and capability).

Recommendation: EPA should prepare guidance for EPA staff on the TAS considerations unique to grants. The guidance should address issues such as: the jurisdictional component of grant eligibility decisions; tribal authority issues relating to CWA § 319(h) grants; the "reservation" requirement under the CWA; use of CWA § 106 funds for off-reservation activities that relate to the protection of waters within reservations; the capability component of grant eligibility decisions; procedures for documenting eligibility determinations for grants; and internal Agency concurrences required for grant eligibility decisions. The Agency should ensure that appropriate grant and program offices receive copies of the guidance.

Adoption and Implementation: We adopt this recommendation in full and ask that AIEO and the Office of Administration and Resources Management, in consultation with OGC and the Regions, prepare in a timely manner guidance consistent with the Workgroup's recommendation.

Conclusion

We would like to thank all the members of the Workgroup for dedicating so much of their time and energy to reviewing the Agency's process for making tribal eligibility determinations and developing the recommendations and the guidance for improving this process. Also, we would like to thank the Tribal Caucus of the TOC for taking the time to review thoroughly the draft recommendations and for providing the Workgroup with detailed comments. We believe that the recommended changes in the Agency's process, the proposed training programs, and the new guidance will improve the Agency's decision-making process for tribal applications for eligibility to run regulatory programs.

If you have any questions regarding this memorandum, please contact Robert Dreher (202-260-8064) or have your staff contact Tony Hanson (202-260-8106) or Jim Havard (202-260-1003).

Attachments

cc: Senior Indian Managers
Associate General Counsels
Regional Counsels
Tribal Eligibility Workgroup Members
National Indian Workgroup Members
EPA Indian Law Workgroup Members

ATTACHMENT A

EPA's Workgroup on Tribal Eligibility Determinations

Workgroup Members

Jim Sappier, Region 1
Nina Dale, Region 2
Christine Yost, Region 2
Samantha Fairchild, Region 3
Wayne Aronson, Region 4
Fred Hunter, Region 4
Bob Springer, Region 5
Ben Harrison, Region 6
Rupert Thomas, Region 7
Kerry Clough, Region 8
Tom Speicher, Region 8
Leigh Price, Region 8
Sadie Hoskie, Region 8
Danita Yocom, Region 9
Rich McAllister, Region 10
Joe Ryan, Region 10
Phil Metzger, OW
Tom Wall, OW (AIEO)
Kathy Gorospe, OW (AIEO)
Elizabeth Bell, OW (AIEO)
Jim Hanlon, OW (OST)
Karen Gourdine, OW (OST)
Betty West, OW (OWM)
Rosanna Hoffmann, OW (OWM)
Ray Enyeart, OW (OGWDW)
David Laroche, OAR
Maureen Ross, OARM
Tom Hooven, OPPTS
Pete Rosenberg, OECA
Bob Dreher, OGC
Jim Havard, OGC
Leslie Darman, OGC

EPA's Workgroup on Tribal Eligibility Determinations

Subgroup Members

Process for maintaining and compiling administrative records for determinations on tribal applications for eligibility to run regulatory programs

Rich McAllister, Wayne Aronson, Ben Harrison, Tom Speicher, Leigh Price, Robert Springer, Jim Havard

HQ role in determinations on tribal applications for eligibility to run regulatory programs programs

Betty West, Rosanna Hoffmann, Kerry Clough, Sadie Hoskie, Elizabeth Bell, Jim Havard, David LaRoche

Application of "the Montana test"

Robert Springer, Leigh Price, Tom Speicher, Rich McAllister, Phil Robinson, Tom Hooven, Betty West, Rosanna Hoffmann, Danita Yocom, Rupert Thomas, Phil Metzger, Elizabeth Bell, Tom Wall, Jim Havard

Stakeholder involvement

Sadie Hoskie, Kerry Clough, Joe Ryan, Jim Havard

Evaluating tribal applications to receive grants in the same manner as a state

Ben Harrison, Rich McAllister, Jim Havard, Leslie Darman, Samantha Fairchild, Nina Dale, Maureen Ross

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

ATTACHMENT B

MAR 19 1998

MEMORANDUM

SUBJECT: Administrative Records for EPA Determinations on Tribal Eligibility for Regulatory Programs

FROM: Robert Perciasepe
Assistant Administrator for the National Indian Program

Jonathan Z. Cannon
General Counsel

TO: Regional Administrators
Regional Counsels

This memorandum describes the procedures that the regional offices are to follow in establishing and maintaining administrative records for EPA determinations on tribal applications for eligibility to run regulatory programs.[1] Because of the large number of determinations on tribal applications for regulatory programs expected over the coming years, and because these determinations can be complex and often are controversial, regional offices are to follow these procedures to ensure that the technical, policy, and legal bases for EPA's decisions are articulated in supporting records that are maintained in an orderly fashion. In addition, we ask that regional offices establish a training mechanism to ensure that the guidance and procedures are followed.

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[1] This memorandum addresses EPA determinations on tribal applications for eligibility to run regulatory programs under all relevant statutes; it does not address EPA determinations on tribal grant applications. Although the scope of this memorandum is limited to EPA determinations on tribal eligibility applications for regulatory programs, the procedures and guidance outlined below may be valuable for ensuring sound and defensible decisions regarding other Agency actions affecting environmental programs in Indian country (e.g., PSD redesignations, site-specific rulemakings under RCRA).

We believe that following the procedures outlined below will foster quality decision-making by the Agency and facilitate the public's understanding of EPA's actions. Moreover, in any litigation challenging EPA's decisions, the administrative record serves as the basis for a reviewing court to determine whether the Agency's action complies with the Administrative Procedure Act -- i.e., whether the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

In deciding whether an agency decision is "arbitrary or capricious," the courts generally will be limited to reviewing the Agency's administrative record. Except in very rare circumstances, such review does not allow for testimony or after-the-fact explanations of the Agency's decision. Gaps in the record, including the omission of relevant factual material or the failure to articulate crucial steps in the Agency's reasoning, can result in a finding that the Agency has not complied with the Administrative Procedure Act, causing the court to remand and/or invalidate the Agency's action.

To ensure that the administrative record for EPA's decisions is developed in an orderly fashion, each Region is to establish a system for creating and maintaining an official docket for each determination on a tribal application for eligibility to run a regulatory program. A docket is a single repository for documents that comprise the record for an EPA action. The docket is organized chronologically and by type of document (e.g., correspondence, technical documents), and is updated with new record material as it is generated. Each document is assigned an identification number, and access to the docket is monitored to ensure that documents are not lost or misplaced. The documents are listed in an index as they are received or generated. While maintaining a formal docket involves some level of effort, we find that the resources needed to maintain a docketing system are more than justified because it enables the Agency to identify for decision-makers, the public, and the courts the bases for the Agency's decisions. Moreover, the Agency would need to compile an index to all information relied upon by the Agency in any event where EPA's action is the subject of litigation.

Section I, below, summarizes the general contents of an administrative record and discusses specific elements of an administrative record for tribal regulatory program eligibility decisions. Section II contains procedures regarding the establishment of dockets for such decisions in the regional offices.[2]

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[2] This memorandum does not address any requirements regarding the retention of documents under the Agency's records retention schedules.

I. Overview of the Administrative Record

The Administrative Record Generally

Below is a general discussion of the elements of an administrative record.

- The record is a set of documents relied upon by the Agency for its decision. It generally will contain all of the factual material relevant to the Agency's decision, relevant guidance used by the Agency, any comments/correspondence from outside parties and Agency responses, and EPA's explanation of how it arrived at its decision.

- The record generally should not contain internal documents reflecting the deliberations of the Agency (e.g., briefing documents, legal memoranda, drafts of documents).[3] If an internal document contains both factual and privileged information, and the factual information is not otherwise in the record, we can redact the privileged information and include the document in the record.

- Any documents prepared by EPA that are to be part of the administrative record should be dated and signed (if appropriate).

- The record may only include documents that are in existence at the time the Agency makes its decision. In any litigation challenging EPA's action, after-the-fact explanations or justifications of EPA's decisions are not permitted except in very rare circumstances. Therefore, all documentation needed to support the decision must be completed when EPA takes its action.

Elements of an Administrative Record on a Tribal Regulatory Program Eligibility Determination

Below is a list and discussion of the specific types of material that should be included in the administrative record for a determination on a tribal regulatory program application.

- The tribe's application and any post-application information submitted by the tribe.

- All other relevant correspondence between EPA and the tribe.

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[3] These documents may, however, be subject to Agency retention schedules.

- Any letters from EPA transmitting the tribe's application to appropriate governmental entities (i.e., adjacent states, tribes and federal agencies).

- Any comments or competing claims of jurisdiction received from appropriate governmental entities. Any other comments received on the application from outside of EPA.

- EPA's response to any comments.

- In cases where EPA consults with the Department of the Interior regarding its decision, any non-privileged record of such consultation.

- A decision document signed by the regional official delegated authority to make the decision providing a full explanation of the basis for the regional office's final determination. The Agency's decision document needs to clearly set forth the Agency's process and the data that supported the Agency's decision. The decision document needs to clearly lay out the Agency's determination with regard to each of the treatment in the same manner as a state criteria spelled out in EPA regulations (i.e., federal recognition, government with substantial powers and duties, jurisdiction, and capability).

- If the determination involves a finding of tribal jurisdiction over the activities of non-Indians on fee lands, the decision document should include a detailed, reservation-specific discussion of existing or potential impacts from such activities on the health, welfare, economic security or political integrity of the tribe (see EPA's Montana-test guidance, dated March 19, 1998).

- EPA's 1984 Indian Policy and any other Agency policy documents or Agency guidance that may be relevant to the determination.

- Non-deliberative documents reflecting any required concurrences.

- Any other non-deliberative materials relevant to the Agency's determination.

II. Establishing and Maintaining a Docket

Each region is to establish a docketing system for determinations on tribal applications for eligibility to run regulatory programs. Below is guidance on the operation of a docketing system. The guidance includes information regarding the general procedures that characterize the operation of a docket. It also contains a discussion of specific issues

relating to dockets for EPA tribal regulatory program eligibility determinations.

General Docketing Procedures

- Each regional office should identify a location for the docket and personnel that are responsible for overseeing and maintaining the docketing process.

- Any relevant materials should be forwarded to the docket from Agency personnel as soon as they are available in final form.

- Docket personnel should enter a copy of each document into the docket, indicating the date on which it was entered into the docket and a number identifying the document.

- An updated index to the docket should be maintained at all times.

- When in use for reading or copying, documents in the docket should be checked out to the individual using the documents to ensure that documents are not lost or misplaced. Records should be kept of any outside party that visits the docket.

- In general, documents relied upon by the Agency must themselves be placed in the docket. However, where a document is readily available to the public (e.g., through public libraries) a reference to the document (e.g., a copy of the title page and table of contents) may be placed in the docket in lieu of an actual copy.

Issues Specific to Tribal Eligibility Determination Dockets

- The docket should include the tribal application and all supplementary material submitted by the tribe to support the tribe's application.

- The docket should include all correspondence between EPA and outside parties regarding the tribe's application.

- As comments are received by the Agency, a copy should be placed into the docket as soon as possible. If comments are received after the close of the comment period, they should be placed in the docket in a separate section entitled "Comments received after the close of the comment period."[4]

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[4] It is the Agency's policy to respond to late comments whenever possible. Any decision not to respond to late comments should only be made after consultation with the Office of

- The docket should include any responses to comments prepared by the Agency.

- The decision document explaining the basis for the Agency's decision, along with any other non-deliberative materials relevant to the Agency's decision should be placed in the docket as soon as they are final.

- Non-deliberative documents reflecting any required concurrences should be placed in the docket.

- As noted previously, record documents cannot be generated or modified after EPA takes its action.

- Regions may want to consider establishing a "generic" tribal eligibility determination docket that would include documents (such as EPA's 1984 Indian Policy) that the regional office will rely upon in any tribal eligibility determination rather than including such documents in the docket for each determination.

We hope that this memorandum will assist the Regions in making decisions on tribal eligibility for regulatory programs and in improving EPA's technical, policy, and legal bases for all such decisions.

Regional Counsel.

ATTACHMENT C

MONTANA-TEST GUIDANCE

Making Factual Determinations under the Montana Test: Tribal Civil Regulatory Authority over Nonmember Activities on Fee Lands

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NOTICE

The following guidance is intended only for EPA managers and staff in the analysis of tribal assertions of civil regulatory jurisdiction over nonmember activities on fee lands within a tribe's reservation. Specifically, the guidance is intended to assist in the collection and analysis of factual information related to the question of whether or not the activities of nonmembers on reservation fee lands may have serious and substantial effects 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). Because of the importance of EPA's determinations in this area, it is very important that all readily-obtainable factual information be available to EPA managers in order to make properly-informed decisions.

The following guidance should be viewed as offering suggestions only. The guidance is based upon the experience of the Agency to date and offers suggestions on questions to ask and various types of information that, if available, may be helpful to the Agency in making jurisdictional determinations. The guidance does not establish any requirements. In particular, it does not establish any requirement that any specific information or category of information listed here is necessary in order to determine that nonmember activities either do or do not have the impacts on the tribe necessary to warrant tribal regulation of those activities. The determination of the sufficiency of information is a matter of the expert and professional judgment of the decision-maker based on the facts of the particular application, and cannot be reduced to guidance of this nature.

Background

In their applications for eligibility to implement a number of EPA programs, tribes must demonstrate that they have sufficient jurisdiction to enforce tribal laws over the areas covered in the application, including, where appropriate, civil regulatory jurisdiction over nonmember activities that may occur on any nonmember-owned fee lands located on a tribe's reservation. The Supreme Court has set forth a legal test for determining whether a tribe has jurisdiction over nonmember activities on fee lands, called the "Montana Test."

> **The Montana Test establishes that a tribe may "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).**

In 1991, EPA decided that it would apply a more rigorous formulation of the Montana Test by establishing an "operating rule" that requires tribes seeking eligibility to set water quality standards governing the activities of nonmembers on fee lands to show that the effects are "serious and substantial."[1] At the same time, EPA published its finding that the behaviors regulated under the Clean Water Act (CWA) tend to have serious and substantial effects on human health and welfare (and, thus, the CWA regulates them). EPA also announced that it would require tribes seeking eligibility to set water quality standards governing the activities of nonmembers on fee lands to provide facts, on a case-by-case basis, demonstrating that water pollution from nonmember fee land sources has or may have serious and substantial effects on the health or welfare of tribal members under the particular conditions of the tribe's reservation.

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[1] EPA noted in 1991 that "[t]he choice of an Agency operating rule containing this standard is taken solely as a matter of prudence in light of judicial uncertainty and does not reflect an Agency endorsement of this standard per se." Since 1991, however, the Supreme Court has reaffirmed Montana's impacts test in 1993 (Bourland), and again in 1997 (Strate), both times quoting the Montana impacts test verbatim without addressing the need for "serious" or "substantial" impacts. While it appears that the Montana Test does not require "serious and substantial" impacts, for the time being, as a matter of prudence, EPA will continue to look to see whether such impacts exist when evaluating tribal authority under the Montana Test.

The Agency now has several years of experience in reviewing tribal applications for EPA programs that involve an assertion of tribal jurisdiction over nonmember activities on fee lands. The Agency's experience shows that it is important for the Agency to be consistent in its application of the Montana Test. To help ensure national consistency in the Agency's process for making determinations under the Montana Test, the following factors should be considered.

Guidance

A. **What types or categories of facts may be relevant to a determination of whether pollution generated on nonmember fee lands may have a deleterious effect on tribal health or welfare or the tribe's political integrity or economic security?** The following questions should be considered:

(1) Is pollution being produced on nonmember fee lands, or may it be/is it likely to be produced? Are there facts showing that pollution is presently being produced on nonmember fee lands within the reservation? If no pollution is presently being produced, are there circumstances showing that new pollution sources may be established in the future that may have impacts on tribal health, welfare, political integrity, or economic security? The threat of such impacts is a reasonable basis for a tribal government to establish controls intended to prevent harm from occurring in the first place. Thus, any information regarding present or potential pollution sources on nonmember fee lands should be considered.

(2) Are tribal members or resources exposed, or may they be/are they likely to be exposed to the pollution? Are there facts showing, not only that pollution is occurring or may occur, but that tribal members may be exposed to the pollution? For example, such exposure can occur if pollution is carried from nonmember lands due to the ambient nature of air and water. Tribal members may be exposed to the pollution when they are on nonmember fee lands. Pollution can also be carried through the food chain or drinking water supplies. Any facts relating to the means by which tribal members are or might be exposed to pollution should be considered. Are there facts showing that resources upon which tribal members depend (e.g., air, water, plants and animals) are or may be exposed to pollution?

(3) Does the exposure to the pollutants affect or have the potential to affect tribal politics, economics, health or welfare? Are there facts or studies supporting a showing that, if exposed to the pollutants generated on nonmember fee lands, tribal members may suffer deleterious effects on their "political integrity, economic security or health or welfare?" Effects on "political integrity" and "economic security" may occur when tribal members, or species or resources on which tribal members depend, are exposed. For example, the tribe may depend economically upon the consumption or commercial sale of fish, and protection of the fish resource depends upon effective protection of the resource habitat. Are the impacts to tribal members serious and substantial?

B. **Do the facts relating to a Montana Test analysis differ from program to program or under different environmental statutes?** Yes. Again, the purpose of this guidance is simply to suggest questions to ask and possible areas to investigate to ensure that as many of the relevant facts are before the EPA decision-maker as are reasonably available. The types of pollutants may vary from program to program. Similarly, the route of exposure often may vary from program to program.

C. **How detailed should the Montana Test analysis be?** Any factual data readily available to the tribes, EPA and any other commenters, such as state or local governments, businesses and private citizens, might be considered. One approach would be to use the information provided in the tribal application, and information provided by external commenters and by an EPA review of the literature and relevant information in Agency files. In order to base Montana-Test decisions on as much relevant information as is reasonably available, Agency staff should do the best job that can reasonably be done in thoroughly substantiating their recommendations with available facts and studies. A "best reasonable effort" would not ordinarily require EPA Regions to carry out or contract for original research.

D. **Should Montana-Test determinations address how regulation of nonmember water-polluting activities is necessary to effective tribal "self-governance?"** This issue arises as a result of a discussion of impacts on self-government by the Supreme Court in it's 1997 decision in Strate v. A-1 Contractors. The Agency determined in its 1984 EPA Indian Policy that "the principle of Indian self-government" appropriately includes such governmental functions as "setting standards, making environmental policy decisions and...carrying out program responsibilities affecting Indian

reservations, their environments, and the health and welfare of the reservation populace." The tribal governments' views on this issue are particularly important. It will greatly assist the Agency in making Montana-Test determinations if the applicant tribal government would also give its reasoning and basis (including any supporting facts) for concluding that effective self-government includes enabling the tribe to carry out the program for which it is applying.

E. **Should EPA consider a tribe's treaty rights or other similar rights embodied in statutes or executive orders in making its determinations?** The applicant tribe may have signed a treaty with the United States in which the United States has guaranteed rights that are clearly tied to tribal politics, economics, health or welfare. While this information does not in and of itself demonstrate that nonmember activities may impact the tribal interests recognized in the Montana Test, it may be relevant to the analysis of whether there are impacts that are serious and substantial and a threat to effective self-government.

F. **At what point should Regional management and staff seek input and advice from Headquarters in making Montana Test determinations?** National Program Offices, the Office of General Counsel and the American Indian Environmental Office can all provide important assistance and advice, based upon the Agency's experience in addressing the issues encountered in evaluating tribal assertions of civil regulatory authority over nonmember activities. This body of Agency experience is constantly growing, and informed by new federal court decisions applying the Montana Test. In order to benefit from the most current and relevant information, Regions should coordinate closely with Headquarters' offices and seek Headquarters concurrence on applications raising nationally-significant issues. This coordination should begin as early in the process as possible, such as upon notice that a tribe is interested in pursuing regulatory authority over nonmembers on fee lands, and no later than when individual tribal applications are received in the Regional Office.

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The Water Report™
Water Rights, Water Quality & Water Solutions in the West

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TREATY RIGHTS & NATURAL RESOURCES

THE NEXT CHAPTER: *UNITED STATES V. WASHINGTON* - THE CULVERTS CASE

by Richard Du Bey, Andrew S. Fuller and Emily Miner
Ogden Murphy Wallace PLLC (Seattle, WA)

"The Earth and myself are of one mind.
The measure of the land and the measure of our bodies are the same."
Nez Perce Chief, Hinmaton Yalatkit (Chief Joseph)

Introduction

Water is the lifeblood of our natural world. How we use, regulate, and protect our water and the habitat and fishery resources it sustains is a reflection of who we are as individuals, governments and nations. Pacific Northwest Tribes (PNW Tribes) have served as guardians of our natural resources since time immemorial. The Tribes of Washington State that are parties to the Culverts Case proceeding include: Suquamish Indian Tribe, Jamestown S'Klallam, Lower Elwha Band of Klallam, Port Gamble Clallam, Nisqually Indian Tribe, Nooksack Tribe, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit Tribe, Tulalip Tribe, Lummi Indian Nation, Quinault Indian Nation, Puyallup Tribe, Hoh Tribe, Confederated Bands and Tribes of the Yakama Indian Nation, Quileute Indian Tribe, Makah Nation, and Swinomish Tribal Community. (References to "PNW Tribes," means all Tribes listed here).

In more recent times, over the last 150 years, the PNW Tribes have been forced to fight with individuals, businesses, and the State of Washington to protect and maintain their treaty rights to harvest enough salmon to feed their families. While the PNW Tribes' treaty rights to fish, hunt, and gather has been long-established, the state and federal government's duty not to interfere with the PNW Tribes' exercise of those treaty protected rights is less well defined. However, on June 11, 2018, the State of Washington's duty not to interfere with the PNW Tribe's treaty fishing rights was dramatically defined by the United States Supreme Court decision in *Washington v. United States, et al*., 584 U.S. ____ (2018) (Culverts Case), which affirmed the 9th Circuit's decision in favor of Plaintiffs. This decision recognized Plaintiff PNW Tribes' enforceable right to protect fishery habitat as a component of their treaty fishing rights.

In Section I of this article we will briefly review the historical circumstances and case law leading up to the recent decision in *Washington v. United States* and then discuss the procedural history in the trial court that lead up to the 9th Circuit decision that was affirmed by the Supreme Court. In Section II, we analyze the decision by the 9th Circuit and in Section III, we explore how this most recent expansion of tribal treaty rights may be used by other treaty tribes to protect their treaty protected fishing, hunting and gathering rights. In Section IV, we look into the future application of tribal treaty rights under the Superfund Statute, the Clean Water Act (CWA), and the National Environmental Policy Act (NEPA) and in Section V, we offer our view of the Culverts Case treaty claim model framework.

Culverts Case

Treaty-Based Rights

Uphill Battle

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Section I. History & Case Law

TREATY RIGHTS IGNORED FROM THE BEGINNING

The tribal fishing rights at issue in *Washington v. United States* were established in 1854 and 1855 by the Stevens Treaties. In a series of eight treaties, then Governor Stevens negotiated with the Tribes of the Pacific Northwest for the cession of the lands, surface waters, and marine areas they controlled in exchange for the small tracts of land which comprised their reservations, and their "right of taking fish, at all usual and accustomed grounds and stations… ." Treaty of Medicine Creek, 10 Stat. 1132; *see also* Treaty of Point Elliot art. V, 12 Stat. 927, Treaty of Point No Point art. IV, 12 Stat. 933. Ever since, the PNW Tribes have sought to clarify and exercise their treaty-based rights to fish. The *Washington v. United States* case sets new precedent in that it recognized the PNW Tribes' right to enforce an implied duty on the part of the state and federal governments to refrain from, and prevent damage to, natural habitats that support the PNW Tribes' treaty protected resources, including fish, water, and game. *See* Mason Morisset and Carly Summers, *Clear Passage: The Culvert Case Decision as a Foundation for Habitat Protection and Preservation,* 1 Bellweather: The Seattle J. Envtl. L. Pol'y 29, 34 (2009).

Tribes have faced an uphill battle in exercising their treaty-based fishing rights despite the fact that the treaties explicitly provided the right. In the late 1880s, several members of the Yakima Tribe were forced to file suit to enforce their right to access off-reservation fishing sites because a private landowner had fenced off sections of the Yakima River, preventing access to the Tribe's traditional fishing grounds. The trial court initially ruled in favor of the landowner, but the Supreme Court of the Territory of Washington reversed that decision, finding that the treaty created an equitable servitude on the land that was not ended by the transfer of land from the government to a private individual. *U.S. v. Taylor*, 3 Wash. Terr. 88 (1887). A similar issue arose several years later when two brothers who owned land on opposite sides of the Columbia River obtained licenses from the State of Washington to operate several fish wheels that prevented passage of many of the salmon at Celilo Falls. There, the US Attorney filed suit to enforce tribal treaty rights and again the trial court upheld the landowners' right to exclude others from their property. In 1905, however, the US Supreme Court (Supreme Court) reversed that decision, holding that the applicable treaty reserved the tribal right to fish at traditional locations and therefore when the government transferred the land the new owners could not obtain greater property rights than those acquired by the government through the treaty. *U.S. v. Winans*, 198 U.S. 371 (1905). Fourteen years later, in another case involving landowners preventing access to fishing grounds near Celilo Falls, the Supreme Court affirmed an injunction issued by the US District Court in Oregon that prevented the landowners from excluding tribal members. *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919). Significantly, this case also affirmed the tribal right to access fishing grounds *outside* of their ceded territory if it can be shown that the area was used for tribal resource gathering.

Not only did PNW Tribes face significant resistance from private landowners and State authorities to access their usual and accustomed fishing grounds, but the number of fish also steadily decreased. As the State developed and became more populated, pressure on the fisheries increased. In response, the State put in place fishing regulations and attempted to force the PNW Tribes to comply with those regulations.

The Fish Wars

Though the PNW Tribes' right to fish is protected by treaty, tribal members began being arrested when fishing off-reservation for their failure to obtain a fishing license. In 1945, Billy Frank Jr., a member of the Nisqually Tribe who later became a prominent activist for treaty rights and also the long-term Chairman of the Northwest Indian Fisheries Commission, was arrested by game wardens at the age of 14 for fishing with a net on off-reservation property owned by his family on the Nisqually River. Tensions continued to grow as the fish stocks declined due to increased harvests by unregulated commercial boats and new hydroelectric projects that impacted available habitat. By the 1960s Billy Frank Jr.'s property, known as "Frank's Landing," was the site of unlicensed "fish-ins" where tribal members repeatedly returned to exercise their treaty rights despite numerous arrests and convictions. The cause began to draw national attention, and in a show of support to the Puyallup Tribe Marlon Brando was arrested for unlicensed fishing during a protest in 1964.

In September 1970, a group of members of the Puyallup Tribe in boats challenged government authorities who approached their nets, wielding rifles and firing warning shots. A protester eventually threw a fire bomb onto a bridge to block the officials from approaching, but the authorities eventually raided the group's camp, breaking up the demonstration with clubs and tear gas. It was in this context that the federal government finally intervened on behalf of the PNW Tribes, suing the State of Washington for its failure to satisfy its obligations under the treaties.

Culverts Case

Fisheries Regulation

***Puyallup I and II* – Duty Not to Degrade Tribal Fishing Rights**

In what became known at *Puyallup I and II*, the Supreme Court found that state regulation of fisheries for the purpose of conservation could be upheld so long as appropriate standards were met — with "fair apportionment" of fish between Indians and non-Indians. *Puyallup I*, 391 U.S at 398 (1968), and *Puyallup II*, 414 U.S. at 4849 (1973). This ruling affirmed the PNW Tribes' interpretation of their treaty rights, and protected their "right to take fish" for both a living and for food. These decisions were significant because they implied a clear duty on the part of the State not to take actions that degrades the PNW Tribes' treaty-based fishing rights. Earlier Supreme Court decisions laid the foundation for the tribal rights. *U.S. v. Winans,* 198 U.S. 371 (1905), held that the right to take fish requires grantees of the state to allow tribe members access to the usual and accustomed fishing sites; *U.S. v. Winters,* 207 U.S. 564 (1908) held that the tribes had a treaty-based right to water for the purposes of the tribal reservation, including farming and fishing.

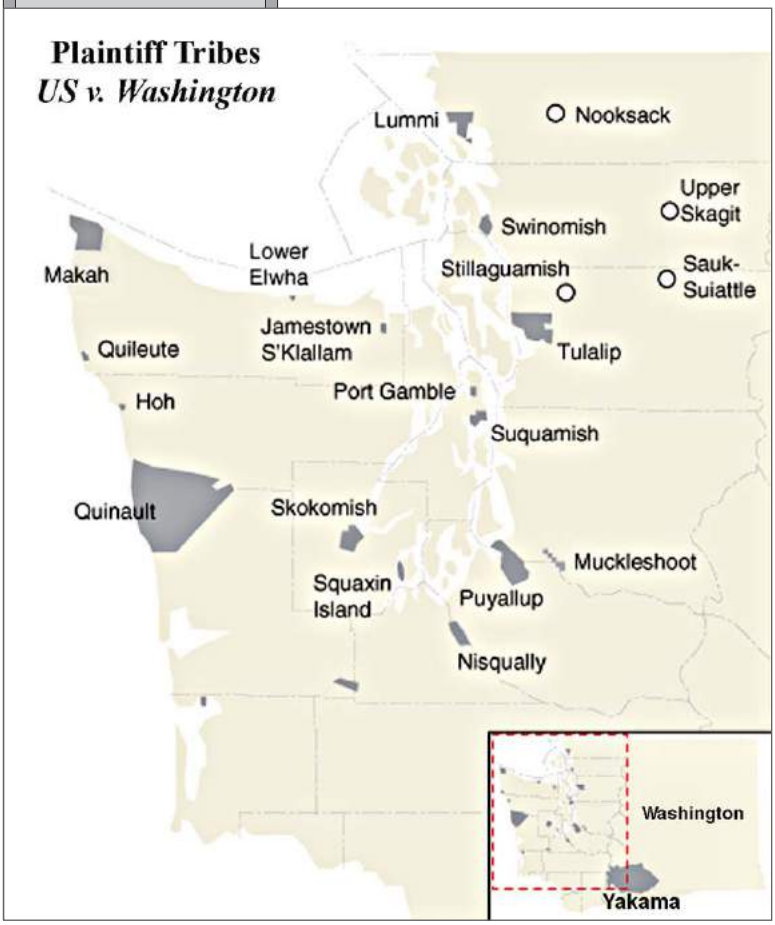
"Fair Apportionment"

The "Boldt Decision" Clarifies Existence of Off-Reservation Treaty Rights

As fisheries declined, due at least in part to habitat loss, the PNW Tribes asked the court to determine to what extent they could enforce the implied duty of the State to not degrade fishing or hunting habitats used under their treaty rights. In 1974, in a case known as the "Boldt Decision,", Federal District Court Judge Boldt clarified the meaning of "fair apportionment" and the "right to take fish." *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974). He found that the PNW Tribes had bargained for the right to continue fishing where they always had, regardless of whether that location was on their reservation or not. *Id*. This decision acknowledged the role of the twenty treaty Indian tribes in western Washington as co-managers of the salmon resource with the State of Washington. The decision apportioned the fish between tribal and non-tribal fisherman, holding that PNW Tribes were entitled to 50% of the fish runs passing through the Tribes' usual and accustomed fishing grounds. *Id*.

Tribes Co-Managers

The case brought against the State was bifurcated for trial, and in 1980, Phase II of the case proceeded to trial. The federal government and tribal governments alleged that an environmental right to have the fisheries resource protected from adverse State action also arose by implication from the reserved right to harvest fish. *Id*. Judge Orrick of the Northern Division of California held that there is an "implied environmental right" in the Treaties. *United States v. Washington* (*Phase II*), 506 F. Supp. 187 (W.D. Wash. 1980). The Judge analogized the habitat right tribes sought to the right of an implied reservation of water necessary for the protection of fish and farming recognized by the *Winters* Doctrine. *Id*. The *Winters* Doctrine held that an implied reservation of water reserved the amount of water necessary to fulfill the purpose of the reservation. *U.S. v. Winters*, 207 U.S. 564, 576 (1908). On appeal of Phase II, the 9th Circuit dismissed the proceeding for procedural reasons, but made it clear that the issue would be reconsidered if the plaintiffs came forward with a specific case demonstrating the State's obligations regarding habit protection.



Section II. *United States v. Washington*

THE CULVERTS CASE

As Washington grew and a network of roads was built, the State constructed and maintained culverts under State roads and highways to divert water away from the roadways. However, the culverts were often not designed or built to allow for fish to pass upstream to access their spawning grounds. These culverts, owned and operated by the State, directly contributed to the reduction of salmon runs by reducing available habitat essential to the reproductive cycle of anadromous fish. This situation provided the set of facts the 9th Circuit had noted in its 1993 decision would be required if the plaintiffs were to prove that the State violated its obligations regarding habitat protection. *United States v. Washington*, No. 13291 (W.D. Wash. June 22, 1993).

Culverts Case

Culvert Impacts

Treaty Obligation

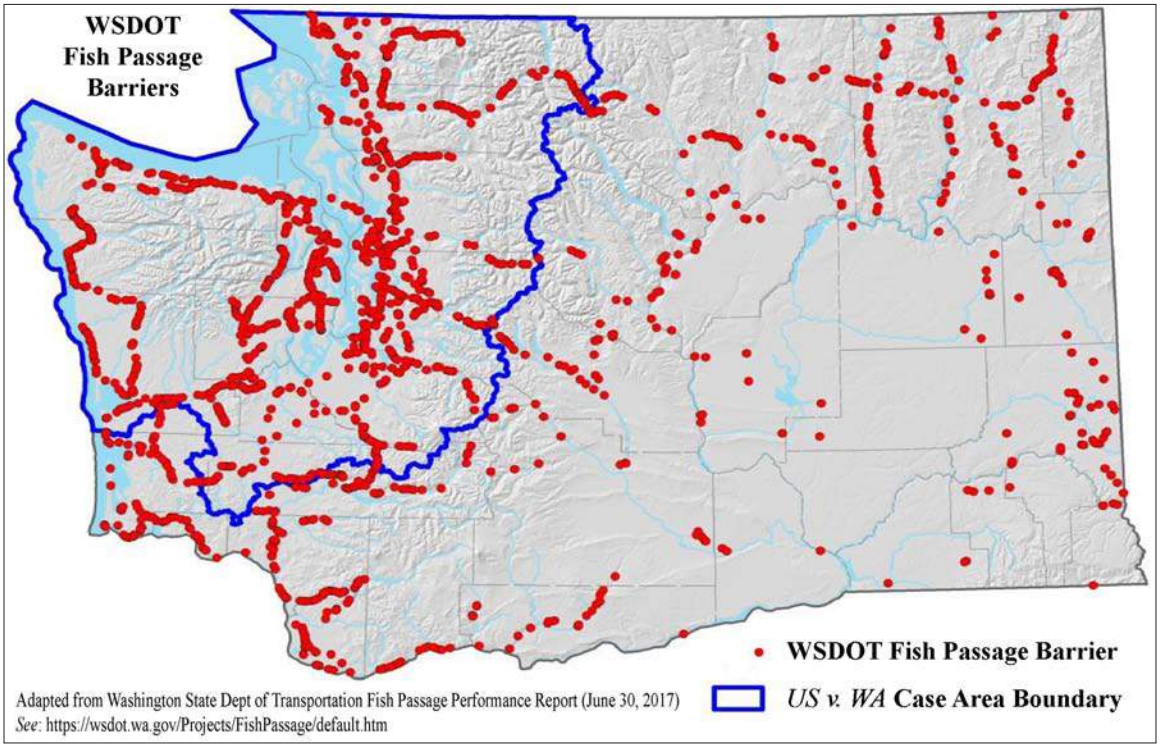
"Moderate Living"

2001 District Court: State's Obligation Under the Treaties

Based on the adverse impacts of culverts on the fisheries, in 2001 the PNW Tribes, joined by the United States, asked the US District Court to find that Washington State had a treaty-based duty to preserve fish runs and habitat at off-reservation fishing sites that were usual and accustomed places. The PNW Tribes sought to compel the State to repair or replace culverts that impede salmon migration. The PNW Tribes averred that a "significant reason for the decline of harvestable fish has been the destruction and modification of habitat needed for their survival" (*United States v. State of Washington*, 2007 WL 2437166, at *2), and noted that the State's own estimate was that removal of obstacles presented by blocked culverts would result in an annual production increase of 200,000 fish. *Id*. ¶¶ 2.5, 2.6, 2.7.

District Court Judge Martinez found in favor of the PNW Tribes, holding that while culverts impeding fish migration were not the only factor diminishing their upstream habitat, the State's construction and maintenance of culverts that impede salmon migration had diminished the size of salmon runs and thereby violated the State's obligation under the treaties. *United States v. State of Washington*, 2007 WL 2437166, at *10. While not explicitly imputing an affirmative duty to take any and all steps possible to protect fish habitat, the decision did cite Judge Orrick's opinion for the basis that such a duty is implied and held that the State had to "refrain from building or operating culverts under state-maintained roads that hinder fish passage." *Id*. The decision incorporated the 9th Circuit's caveat that a remedy would only be granted on the basis of the specific facts and circumstances of a particular complaint. *Id.* at *5.

Judge Martinez found that the intent of the parties to the Stevens Treaties was to ensure the PNW Tribes would be able to take fish in sufficient amounts to meet their subsistence needs forever. *Id*. at *9. Thus, it is the State's burden to show that "any environmental degradation of the fish habitat proximately caused by the State's actions would not impair the Tribes' ability to satisfy their moderate living needs." *Id*. at 4, (citing *United States v. Washington*, 506 F. Supp. 187, 207 (1990)). The term "moderate living" was interpreted to mean a measure securing fish in an amount so much as, but not more than necessary, to provide the Tribes with a livelihood. *United States v. State of Washington*, 2007 WL 2437166, at *7. Based on that definition, Judge Martinez indicated that the PNW Tribes had provided sufficient evidence of a diminishment of salmon, and that the State's actions were a direct cause of the diminishment, such that the PNW Tribes' treaty rights had been damaged. Further, Judge Martinez ruled that the PNW Tribes did not have to "exactly quantify the numbers of missing fish" so long as there is evidence that the culverts are responsible for some portion of the proven decrease of fish runs. *United States v. State of Washington*, 2007 WL 2437166, at *3.



Adapted from Washington State Dept of Transportation Fish Passage Performance Report (June 30, 2017)
See: https://wsdot.wa.gov/Projects/FishPassage/default.htm

Culverts Case

Permanent Injunction

2013 District Court: Man-Made Degradation of Fish Habitat

In light of the specific factual showing of lost fishing opportunities due to culverts that blocked the upstream migration of fish, in 2013 the District Court issued a permanent injunction requiring the State to significantly increase its efforts to remove and replace the State-owned culverts that have the greatest adverse impact on the fish habitat by 2030. *U.S. v. Washington*, No. CV 70-9213, 2013 WL 1334391 (W.D. Wash. Mar. 29, 2013). The Court determined that the PNW Tribes' treaty right to take fish includes protection of fish habitat from man-made degradation. It found that culverts blocking the free passage of salmon upstream result in man-made degradation of the fish habitat. In coming to this conclusion, the District Court relied on the significant decrease in salmon stocks in Washington since 1985, specifically focusing on evidence demonstrating that barrier culverts block hundreds of thousands of salmon from traveling up freshwater rivers and streams to reach their spawning grounds.

Culvert Repair or Replacement

2017 9th Circuit Decision: "Moderate Living"

On appeal, the 9th Circuit upheld the District Court's injunction with a unanimous 3-0 decision, affirming the District Court's requirement that the State repair or replace State-owned culverts prohibiting free passage of fish to spawning grounds and other important habitats. In affirming the injunction, the court ruled that the State was obligated under the Stevens Treaties to ensure that there were enough fish available for the PNW Tribes to make a "moderate living." *Id*. The State petitioned the 9th Circuit for both a panel and en banc rehearing but was denied. The dissenting minority of the en banc review issued an opinion and argued that the majority's reasoning ignored the Supreme Court's holding in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), that the opinion was overly broad, and if unchecked, could significantly affect natural resource management throughout the Northwest. The majority disagreed with each of those allegations, but because the court declined to articulate a standard for "moderate living," this standard may be the subject of future litigation.

Supreme Court Issues

2017 *Washington v. United States*

In response to the 9th Circuit decision, in 2017 the State filed a petition for review of the 9th Circuit decision by the United States Supreme Court. The Supreme Court accepted review and agreed to hear three issues:

(i) whether the treaties guarantee the tribes a "moderate living" from salmon harvests;
(ii) whether the federal government is barred from bringing the suit because the federal government approved the design and implementation of the culverts for decades; and
(iii) whether the district court's injunction violates principles of federalism because there was no judicial finding of a clear connection between culvert replacement and tribal fishing.

The Justices who heard argument appeared particularly interested in identifying a clear test for determining treaty violations and in searching for some quantitative measure of habitat degradation that could serve as a standard for determining when state, local, or private activity would interfere with tribal fishing rights. Unfortunately, neither side would commit to an absolute percentage as a test of habitat degradation. Considerable time was also spent discussing the scope of the District Court injunction, with the State of Washington contesting its factual premises. Washington's Solicitor General proposed a standard based on "a large decline in a particular river." Attorneys for the US and the PNW Tribes argued that the test should be whether the culverts caused a "substantial decline" in the salmon population.

Section III. 2018 – Supreme Court Affirms the 9th Circuit

Split Decision

On June 22, 2018, the United States Supreme Court affirmed per curiam the 9th Circuit's decision in *Washington v. United States* in a 4-4 decision. *Washington v. United States*, 584 U.S. __ (2018). [Editor's Note: a "per curiam" decision is issued in the name of the court, rather than a specific judge]. The Justices were evenly split due to Justice Kennedy having recused himself from hearing the case because he had previously heard a portion of the case when he sat on the 9th Circuit. Justice Kennedy had traditionally been a skeptic of tribal rights and his recusal may have been instrumental in the Court's affirmation of the 9th Circuit decision.

Ruling's Applicability

When the Supreme Court ties, the lower-court ruling generally stands, but that does not mean the lower court's decision becomes the law of the land. In *United States v. Pink*, 315 U.S. 203, 216 (1941) the Supreme Court explained that an affirmance by equal division is binding on the parties to that litigation but no one else. *See also*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987): "Of course, an affirmance by an equally divided Court is not entitled to precedential weight." The Court's first tie decision was in 1792. The case, *Hayburn's Case*, required federal circuit courts to determine pensions for disabled revolutionary war veterans. The Supreme Court heard the case, but as it explained, "THE COURT

Culverts Case

Tie Vote Implications

being divided in opinion on that question, the motion was not allowed." The tie vote in *Hayburn's Case* didn't result in the affirmance of a lower court decision but rather denial of the Attorney General's motion. The principle embodied in the case, however, applies to situations where the Supreme Court reviews the decision of a lower court. Under the principle in *Hayburn's Case*, the Supreme Court views itself as being unable to take affirmative action — including reversing the decision of a lower court — in the absence of a majority vote of the Justices. *See* Justin Pidot, *Tie Votes in the Supreme Court*, 101 Minn. L. Rev. 245, 253 (2016). Thus, a tie decision essentially binds only the parties to the case to obey what the lower court ruled. That said, if there is no existing authority on the law or the facts, a tie decision still carries persuasive authority in the form of the lower court's decision. For example, if another circuit heard a case with similar facts, it may look to the 9th Circuit's decision as persuasive authority. *Id. at* 245, 251 (2016); Pidot's survey showed that tie votes have been rare, averaging fewer than two occurrences per year. His survey also showed that issues of importance are very quickly presented to the Court again. *Id*. at 276.

Supreme Court Appointments

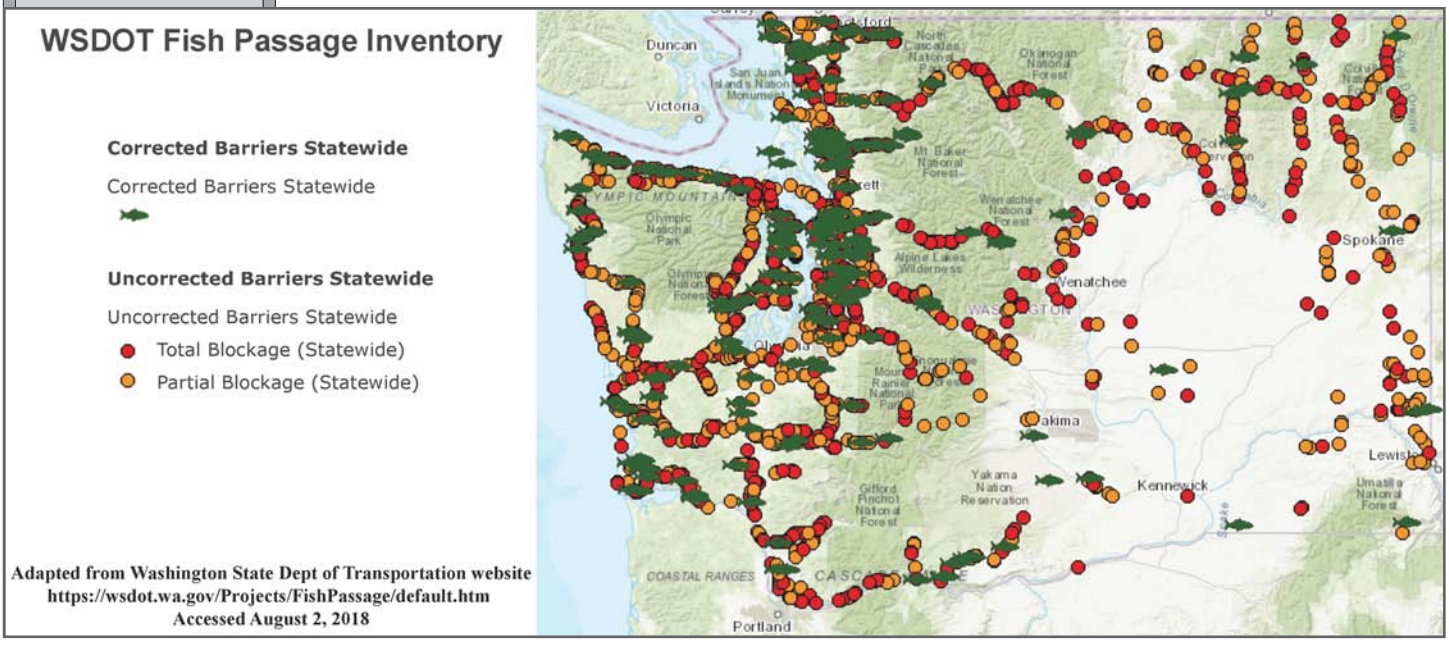
If a similar case were to be heard by the Supreme Court, however, the decision will likely be significantly influenced by recent changes to the makeup of the court, which may soon include President Trump's nominee to replace retiring Justice Kennedy, Brett Kavanaugh. Mr. Kavanaugh's views regarding Indian Law are relatively unknown. According to Mathew Fletcher, professor of law at Michigan State University, and citizen of Grand Traverse Band of Ottawa and Chippewa Indians, Kavanaugh has written less than ten relevant opinions addressing tribal issues, and of those, none "are overtly pro-Indian or anti-Indian"(*see* https://nativenewsonline.net/opinion/brett-kavanaugh-the-new-supreme-court-associate-justice-nominee-should-be-questioned-about-native-rights/).

In contrast, Justice Gorsuch's time on the Tenth Circuit provided significant opportunities to address tribal issues. While sitting on the Tenth Circuit, Justice Gorsuch wrote eighteen opinions related to federal Indian law or Indian interests and participated in an additional 42 such cases (*see* www.americanbar.org/groups/crsj/publications/crsj-human-rights-magazine/vol--43/vol--43--no--1/justice-gorsuch-and-federal-indian-law.html). Rather than defer to agency interpretation, Justice Gorsuch has turned to canons of statutory construction, suggesting that he may look closely at specific treaty language when making determinations regarding the rights reserved to Indian tribes. His previous experience with federal Indian law suggests he may be both attentive to the details and respectful of the fundamental principles of tribal sovereignty and the federal trust responsibility. *See Ute Indian Tribe v. State of Utah*, 790 F.3d 1255 (10th Cir. 2015) (addressing issues of sovereignty); see also *Ute Indian Tribe v. Myton*, 835 F.3d 1000 (10th Cir. 2016) (addressing issues of sovereignty); *see also Fletcher v. United States*, 730 F.3d 1206 (10th Cir. 2013).

Precedential History

Building upon Federal Common Law

The Supreme Court has previously recognized implied rights beyond those expressly reserved within the treaties. This precedential history offers context for the courts' determination that implied resource habitat protection rights logically follow from adherence to the canons of treaty construction. Mason Morisset and Carly Summers, *Clear Passage: The Culvert Case Decision as a Foundation for Habitat Protection and Preservation,* 1 Bellweather: The Seattle J. Envtl. L. Pol'y 29, 7 (2009).



Culverts Case

Water Rights Effects

***Winters* Tribal Right to Water**

The 2017 9th Circuit decision in *United States v. Washington* specifically looked to water rights case law when the court found an implied duty of the State to not degrade fish habitat. *United States v. Washington*, 853 F. 3d 946, 965 (2017). The water rights cases held that when interpreting the treaties, courts should infer a promise to "support the purpose of the Treaties." *Id*. As reflected in the water rights cases discussed below, this meant that even though an explicit promise to provide water or access to water was not written into the treaty, the Courts found the treaties carried an implied promise — otherwise the purpose of the treaty would have been meaningless.

The 1908 Supreme Court decision in *Winters* was the first case to recognize the implied right to water. In the Treaty that created the Fort Belknap Reservation, there was no explicit reservation of water use on the reserved lands, but the Supreme Court inferred a reservation of water "sufficient to support the tribe" because without the reservation of water, the lands reserved for the Tribe were arid and practically valueless. *Winters*, 207 U.S. 564, 576 (1908). "Between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it, the court chose the former." *Id*. at 577.

The *Winters* decision was later affirmed in *United States v. Adair*. In *Adair*, the Klamath Tribe's 1854 treaty promised that the Tribe would have the right to "hunt, fish, and gather on their reservation" but contained no explicit reservation of water rights. *U.S. v. Adair*, 723 F. 2d 1394, 1408 (9th Circ. 1983). The Klamath Marsh, on the reservation, provided the Tribe's primary hunting and fishing areas and relied on a flow of water from the Williamson River. Because game and fish in the Klamath Marsh depended on a continual flow of water, the treaty's purpose would have been defeated without the flow. In a decision foreshadowing the eventual decision regarding the impacts of culverts on fisheries in Washington, the court inferred a promise of water sufficient to ensure an adequate supply of game and fish. *Id*.

Tribal Groundwater Case

Cases involving treaty-reserved water rights have typically addressed surface waters. However, in a case that is still before the courts, the 9th Circuit recently affirmed a trial judge's determination that the Agua Caliente Band of Cahuilla Indians, located in California's Coachella Valley, have a reserved right applying to groundwater. *Agua Caliente Band of Indians v. Coachella Valley Water Dist.,* 849 F.3d 1262 (9thCir. 2017); *Desert Water Agency v. Agua Caliente Band of Cahuilla Indians*, No. 17-42, 2017 U.S. LEXIS 7023, at *1 (Nov. 27, 2017) (Supreme Court denying certiorari). There, due to the arid environment, the groundwater of the Coachella Valley aquifer has been essential for tribal irrigation and drinking water, and is also a key part of the Band's ceremonial and spiritual traditions. The Tribe filed suit against the Coachella Valley Water District and Desert Water Agency in May 2013 for damage caused by the water agencies' ongoing overdraft of the Coachella Valley aquifer and its artificial recharge with untreated water imported from the Colorado River. The Band and the US argued that under federal law the Band has a reserved right to enough water to fulfill its present and future needs, regardless of whether that water is surface or groundwater. The trial judge recognized the Tribe's reserved water rights, ruling that under the doctrine of *U.S. v. Winters*, a tribal reserved right may be satisfied with groundwater. That decision was affirmed by the 9th Circuit in 2017 and the Supreme Court refused to hear an appeal from the water agencies. The parties agreed to approach the case in three phases, addressing in turn: (I) whether the Tribe has a reserved or aboriginal right to groundwater (now complete — affirming the reserved right); (II) whether the Tribe's reserved right to groundwater includes a water quality component, the standards for quantifying Tribe's water rights, and whether the Tribe owns the pore space in the aquifer below its reservation; and (III) actual quantification of the Tribe's groundwater and pore space rights within the aquifer, and potentially a determination of the water quality standard that must be met to fulfill the Tribe's water right. Phase II of the case is currently before the trial court. *See*: Munson & Reeves, *TWR* #161.

Treaty Securities

The treaty language at issue in *Washington v. United States* explicitly promises that the treaty secures the PNW Tribes' right to fish such that there would be food forever. Treaty of Medicine Creek, 10 Stat. 1132; *see also* Treaty of Point Elliot art. V, 12 Stat. 927, Treaty of Point No Point art. IV, 12 Stat. 933. Thus, no inference was needed there. However, the 9th Circuit's decision explicitly stated that even if the treaty had not contained the explicit promise of "food forever," the court would have inferred, as in *Winters* and *Adair*, a promise to support the purpose or intent of the treaties. *United States v. Washington*, 853 F. 3d at 965.

Section IV. Tribal Treaty Rights

WHERE DO WE GO FROM HERE?

Bringing Claims

New Platform

Washington v. United States has the potential to create a new platform from which Tribes may assert their treaty rights. The case builds on strong precedent and outlines a clear strategy for bringing treaty-based claims. *Washington v. United States* could be used to support the ability of tribes to protect both their direct resources (the reserved right, i.e. to hunt, fish, gather, etc.) and indirect resources (protection of

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habitat that ensures continued access to the named right) guaranteed under the treaty. The decision could have broad implications for other government and private entities that own, manage, and/or control barriers (e.g., tide gates, floodgates, and dams) if it can be demonstrated that those barriers block or diminish a treaty guaranteed right to hunt, fish, or gather a natural resource. This decision creates a foundation from which to argue a de facto environmental servitude on the part of the State and federal government, once a tribe can establish that a State action causes significant decreases in the tribe's ability to hunt, fish, or gather their named resource under the treaty. This narrow focus may actually make the decision less vulnerable to reversal by future courts because there is a definitive standard that tribes must meet in order to bring a duty-based treaty resource claim.

De Facto Environmental Servitude

In order to bring a successful duty-based treaty resource claim, tribes will need to have a treaty-reserved right to fish, game, or other natural food source that then creates an inference of an implied duty by the State to protect the natural habitat that supports the specific resource protected under the treaty.

Chippewa Case

As an example of expanding the scope of this decision beyond just the PNW tribes in the Culverts Case, the Chippewa Tribes have a treaty reserved right similar to the PNW Tribes. The 1837 Treaty explicitly states that the Chippewa Tribes retain the privilege of hunting, fishing, and gathering the wild rice upon the lands, the rivers, and the lakes included in the territory ceded, but such privilege is at the pleasure of the President. Treaty with the Chippewa, July 29, 1837, 7 Sta., 536, Article 5. So long as the Chippewa can identify a diminishment of the wild rice, and can aver that a significant reason for the diminishment is the State's destruction and modification of the habitat where the wild rice grows, it is likely that a court will find an implied duty on the part of the State to ensure the amount of wild rice within the habitat is enough to provide for a moderate living.

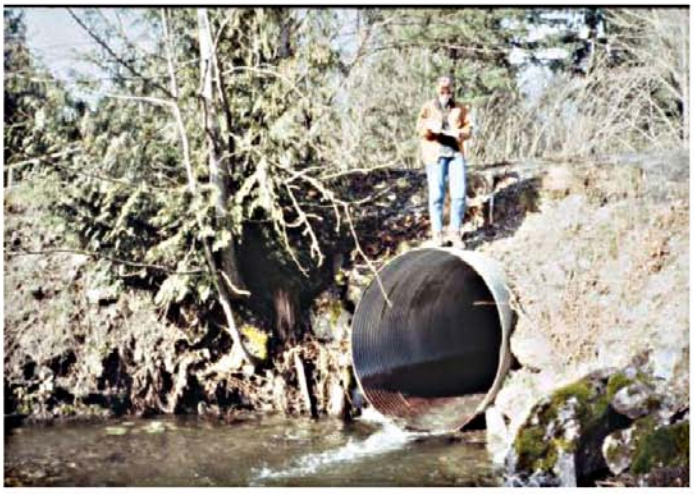
Cleanup Requirements

Application under the Superfund Program

Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, for wastes left on-site, remedial actions must comply with Federal and State environmental laws that are legally applicable or are relevant and appropriate under the circumstances of the release. The standards which must be complied with are called "**a**pplicable or **r**elevant and **a**ppropriate **r**equirements" (ARARs). *See* CERCLA Section 121(d)(2). In addition, Superfund remedial actions must comply with State environmental or facility siting laws (ARARs), provided that the State requirements: (1) are promulgated; (2) are more stringent than Federal laws; and (3) are identified by the State in a timely manner.

Culvert Replacement on High Creek, Washington

Before Construction



The old crossing was a 6.2 ft (1.89 m) diameter corrugated steel pipe that was a barrier to fish passage due to excessive slope.

After Construction

The new crossing is a 27 ft (8.23 m) wide concrete box structure that provides access to 2.4 mi (3.9 km) of potential habitat for chum and coho salmon, steelhead, sea run cutthroat, resident and bull trout.

Adapted from Washington State Dept of Transportation Fish Passage Performance Report (June 30, 2017)
See: https://wsdot.wa.gov/Projects/FishPassage/default.htm

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Treaty-Related "ARARs"

The decision in *Washington v. United States* may be interpreted to establish treaty-related ARARs that prohibit the diminishment of treaty-reserved tribal resources. In the appropriate context, treaties should be found to establish ARARs because treaties to which the United States is a party are equivalent in status to Federal legislation, forming part of what the Constitution calls "the supreme Law of the Land." U.S. Const., Art. VI, Clause 2 (the "Supremacy Clause"). Where the implied obligation to protect indirect resources under a treaty is not met by existing federal or State laws, the treaty's requirements can be read to be a federal environmental law applicable as an ARAR if EPA is notified by the affected tribe of the obligation. This could help tribes ensure that the cleanup of contaminated sites, either on or off the reservation, is performed to a standard that is protective of their direct and indirect treaty-based resource rights.

Application under the Clean Water Act

Water Quality Standards

Under the Clean Water Act (CWA), the federal government has an obligation to establish **w**ater **q**uality **s**tandards (WQS), which provide the regulatory and scientific foundation for protecting water quality under the CWA. *See* 40 C.F.R. § 131. WQS not only set water quality goals for specific water bodies, but also serve as the regulatory basis for establishing water quality-based treatment controls and strategies. The authority to develop WQS can be delegated to states and tribes, but the EPA must approve all proposed standards before they are applicable under the CWA.

The decision in *Washington v. United States* may provide a tool to allow tribes to push for the establishment of more stringent WQS based on the federal and state obligation to protect the indirect resources supporting the treaty-reserved resources. Where a proposed WQS fails to protect those resources the approval of the WQS would result in a violation of the treaty-based obligations addressed in *Washington v. United States*.

Application Under the National Environmental Policy Act and Related State Acts

No Treaty Diminishment

The National Environmental Policy Act (NEPA) and the local State Environmental Policy Act (SEPA) both present opportunities to pro-actively apply the *Washington v. United States* decision. The decision holds that governmental agencies and third parties cannot take actions that diminish a Tribe's right to a reserved or implied treaty right. The most efficient way to ensure those rights are considered is to add a requirement into NEPA and SEPA environmental checklists requiring applicants to prove that their proposed development will not diminish a reserved or implied tribal right.

By placing the tribal rights review requirement into the permitting documents, concerns of whether a proposed development will affect tribal rights in the future is addressed preemptively. This creates a place for tribes to be at the negotiating table and provides an opportunity for cooperation that could preemptively avoid protracted, uncertain, and costly litigation.

Section V. The Culverts Case Model

POTENTIAL LIMITATIONS

Claims Limitations

Despite the Culverts Case's ability to augment certain types of claims, there are three overarching potential limitations on the scope of the decision's ability to create a successful new pathway for tribal claims. The first limitation is the fact-specific inquiry that must be conducted. Judge Martinez specifically limited his decision to the particular facts of the case, so any future case must also go through a fact-specific inquiry. The second limitation is the lack of a definitive standard for what amounts to a "moderate living." This is concerning because "moderate living" standards can change depending on what resource must be protected, and it affects what duty the State and third-party actors must take to mitigate or remedy the degradation. Finally, the third limitation is determining what an appropriate remedy would be for any future cases. In *Washington v. United States* a clear remedy was available based on the allegations brought, but due to the complexity of environmental damages claims, determining remedies is never easy.

The PNW Tribes' and federal governments' arguments proved successful in part because the PNW Tribes established that State-owned road culverts were causing a substantial decrease in the number of salmon to which the PNW Tribes were entitled. There was a clear decrease in the protected resource — salmon. The State's duty was identified. The PNW Tribes presented sufficient evidence of causation with regard to State actions that caused the decrease in their protected resource.

Claims' Needs

Accordingly, successful application of the principals of the Culverts Case elsewhere will likely require:

1) a similar fact-specific inquiry in order to determine the baseline level of unimpaired resources, services, and evidence of the decline in a treaty protected resource;
2) a duty on the part of the State or third-party to protect or not degrade the resource; and
3) sufficient evidence to demonstrate the State or third-party's actions caused or contributed to the decline in the treaty-protected resource.

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Extent of Duty

Appropriate Remedies?

Treaty Protections

Furthermore, because neither the District Court nor the 9th Circuit defined the "moderate living" standard, the Supreme Court's tie decision leaves open the extent of the State's duty in any particular case. While the State tried to argue that a definition was needed in order to establish the extent of its duty, the Courts found that in this case a definition was not needed in order to find a duty on the part of the State. However, because this term was not defined, the extent of the State's duty will need to be determined on a case-by-case basis.

Finally, the question of what an appropriate remedy is remains in any future case. In *Washington v. United States*, the Court ordered the State to remove or fix all State-owned culverts that blocked access to salmon passage. This is a relatively straightforward remedy because there is a direct connection between physical structures and diminishment of the fisheries. For other claims of resource impairments, a determination of an appropriate remedy may prove more challenging due to the complexity of environmental claims and number of parties involved.

Conclusion

The 9th Circuit decision, affirmed by the Supreme Court, requires the State to meet its duty to not interfere with the PNW Tribes' treaty protected rights and to correct its own actions, as well as those of State-sanctioned private actors that either directly or indirectly limit those treaty rights. *United States v. State of Washington*, 2007 WL 2437166, *4, W.D.Wash., August 22, 2007.

This newly defined obligation creates an opportunity for tribes, States, private parties, and federal agencies to develop guidelines to improve their relationships and improve the quality of the environment for the benefit of all citizens. It is your co-authors hope that going forward we shall all be guided by the words of Chief Joseph and embrace our collective duty to protect the Earth.

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Prior *TWR* Culverts Case coverage: Moon, *TWR* #110; Water Briefs, *TWR* #112; Moon, *TWR* #120; Moon, *TWR* #149; Water Briefs, *TWR* #151; Water Briefs, *TWR* #160; Water Briefs, *TWR* #167; Water Briefs, *TWR* #173

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DUANNA KNIGHTON, *Plaintiff-Appellant,* v. CEDARVILLE RANCHERIA OF NORTHERN PAIUTE INDIANS; CEDARVILLE RANCHERIA TRIBAL COURT; PATRICIA R. LENZI, in her capacity as Chief Judge of the Cedarville Rancheria Tribal Court, *Defendants-Appellees.*	No. 17-15515 D.C. No. 2:16-cv-02438-WHO OPINION

Appeal from the United States District Court
for the Eastern District of California
William Horsley Orrick, District Judge, Presiding

Argued and Submitted November 16, 2018
San Francisco, California

Filed March 13, 2019

Before: A. Wallace Tashima and Milan D. Smith, Jr., Circuit Judges, and Lawrence L. Piersol,* District Judge.

Opinion by Judge Piersol

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* The Honorable Lawrence L. Piersol, United States District Judge for the District of South Dakota, sitting by designation.

SUMMARY**

Tribal Jurisdiction

The panel affirmed the district court's dismissal of an action challenging a tribal court's subject matter jurisdiction over tort claims brought by the tribe against a nonmember employee.

The tort claims arose from conduct committed by the nonmember on tribal lands during the scope of her employment. The panel held that a tribe's regulatory power over nonmembers on tribal land derives both from the tribe's inherent sovereign power to exclude nonmembers from tribal land and from the tribe's inherent sovereign power to protect self-government and control internal relations.

The panel held that the tribe had authority to regulate the nonmember employee's conduct at issue pursuant to its exclusionary power. Alternatively, the tribe had regulatory authority under both *Montana* exceptions, which allow a tribe (1) to regulate the activities of nonmembers who enter consensual relationships with the tribe or its members and (2) to exercise civil authority over the conduct of nonmembers on fee lands within its reservation when that conduct threatens or directly affects the political integrity, the economic security, or the health or welfare of the tribe. Given the existence of regulatory authority, the sovereign interests at stake, and the congressional interest in promoting

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

self-government, the tribal court had jurisdiction over the tribe's tort claims.

COUNSEL

Patrick L. Deedon (argued), Maire & Deedon, Redding, California, for Plaintiff-Appellant.

Jack Duran, Jr., Esq. (argued), Duran Law Office, Roseville, California, for Defendants-Appellees.

OPINION

PIERSOL, Senior District Judge:

This case concerns the sources and scope of an Indian tribe's jurisdiction over tort claims brought by the tribe against a nonmember employed by the tribe. The tort claims arose from conduct committed by the nonmember on tribal lands during the scope of her employment. The question presented is whether the tribal court has jurisdiction to adjudicate tribal claims against its nonmember employee, where the tribe's personnel policies and procedures manual regulated the nonmember's conduct at issue and provided that the tribal council would address violations by the nonmember during the course of her employment, and the tribal court and tribal judicial code were established and enacted after the nonmember left her employment with the tribe.

We previously held that a tribe's inherent sovereign power to exclude nonmembers from tribal land is an independent source of regulatory power over nonmember

conduct on tribal land. *See Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 814 (9th Cir. 2011) (per curiam) (stating that where the nonmember activity occurred on tribal land, and when there are no competing state interests at play, "the tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana* [*v. United States*, 450 U.S. 544 (1981)]"). Today we also observe that a tribe's regulatory power over nonmembers on tribal land does not solely derive from an Indian tribe's exclusionary power, but also derives separately from its inherent sovereign power to protect self-government and control internal relations. *See Montana*, 450 U.S. at 564 (stating that Indian tribes retain their inherent sovereign power to protect tribal self-government and to control internal relations); *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144–45 (1982) (holding that the tribe's authority to tax nonmember mining and drilling on tribal land derived from its inherent power to govern and pay for the costs of self-government and stating that such regulations were also within the tribe's inherent power to condition the continued presence of nonmembers on tribal land).

Accordingly, we now hold that under the circumstances presented here, the tribe has authority to regulate the nonmember employee's conduct at issue pursuant to its inherent power to exclude nonmembers from tribal lands. We also hold, in the alternative, that the tribe has regulatory authority over the nonmember employee's conduct under both *Montana* exceptions. Given the existence of regulatory authority, the sovereign interests at stake, and the congressional interest in promoting tribal self-government, we conclude that the tribal court has jurisdiction over the tribe's claims in this case.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

A. The Cedarville Rancheria Tribe

The Cedarville Rancheria of Northern Paiute Indians ("the Tribe") is a federally recognized Indian tribe that has approximately twelve voting members and operates a 17-acre Rancheria in Cedarville, California ("the Rancheria"). The Rancheria is held in trust for the Tribe by the United States government. During the latter part of events at issue in this case, the Tribe's administrative offices were relocated from the Rancheria to land held in fee[1] by the Tribe in Alturas, California.

The Tribe's governing body is the Community Council, which is composed of all qualified voters of the Rancheria who are 18 years of age or older. Every three years, the Community Council elects three of its members to serve on the Executive Committee—the Tribal Chairperson, Vice Chairperson, and Secretary. The Executive Committee enforces the Community Council's ordinances and other enactments and represents the Tribe in negotiations with tribal, federal, state, and local governments.

B. Knighton's Employment with the Tribe

Duanna Knighton ("Knighton") was employed by the Tribe from July 1996 until she resigned in March 2013. Knighton is not a member of the Tribe and had never resided on or owned land within the Rancheria. At the time of her

[1] Pending with the Bureau of Indian Affairs is a petition by the Tribe to place the property on which the Tribe's administrative offices are now located in trust with the United States government.

resignation, Knighton's position was that of Tribal Administrator. As Tribal Administrator, she oversaw the day-to-day management of the Rancheria, its personnel, and many aspects of its finances.

During Knighton's employment, the Tribe regulated its employees pursuant to the Cedarville Rancheria Personnel Policies and Procedures Manual ("the Personnel Manual"). The Personnel Manual regulated employee conduct including, but not limited to: misfeasance and malfeasance in the performance of duty, incompetency in the performance of job duties, theft, carelessness or negligence with the monies or property of the Rancheria, inducement of an employee to act in violation of Rancheria regulations, and violation of personnel rules. Disciplinary actions for an employee's breach of rules and standards of conduct in the course of employment specified in the Personnel Manual included a verbal warning, written reprimand, suspension without pay, demotion, and involuntary termination.

The Personnel Manual provided that where the Tribal Administrator was the subject of disciplinary action, the Community Council directly oversaw the disciplinary process.

C. Knighton's Employment with RISE

From 2009 until at least 2016, in addition to her position as Tribal Administrator, Knighton was also serving as an employee or officer of Resources for Student Education ("RISE"), a California nonprofit, that provides education services and programs to Indian children. RISE is not a tribally created or licensed business entity, and it receives the majority of its funding from state and federal grants and private donations.

D. The Tribe's Purchase of RISE Property

In mid-2009, Knighton, acting in her capacity as Tribal Administrator, negotiated the Tribe's purchase from RISE of a building in Alturas, California, where the Tribe's administrative offices are now located. During this time, Knighton was also an employee or agent of RISE.

Knighton initially recommended that the Tribe purchase the building for $350,000, allegedly representing that such a price was below market value even though she had not received a professional appraisal of the property. The Tribe later discovered that the $350,000 purchase price recommended by Knighton was $200,000 above market value. Knighton also represented to the Tribe that it could pay off its building loan within five years after the purchase and that RISE would pay rent to the Tribe for its occupancy until the note on the building was paid off.

The Tribe asserts that at no time during the purchase negotiations did Knighton disclose she had a conflict of interest representing both RISE and the Tribe in the sale, that RISE was close to insolvency, or that she had an agreement with RISE to split the proceeds of the building sale. The parties settled on a purchase price of $300,000. Within twelve months of the sale, RISE moved its business operations out of the building.

E. Knighton's Resignation

Before Knighton resigned in March 2013 as Tribal Administrator, she allegedly cashed out $29,925 in vacation and sick pay in violation of the Tribe's policies and procedures. The Tribe issued a check in the amount of $29,925, payable to RISE on Knighton's behalf. The Tribal Vice Chairman approved Knighton's request to cash out

based on her representation that her request had been approved by the Tribal Chairperson, when in fact, the Tribal Chairperson had denied Knighton's request.

When Knighton resigned in March 2013, she took with her all files, including files belonging to the Tribe, room furnishings, and a computer, representing to the Tribe that the property removed belonged to RISE.

In late 2013, the Tribe wrote a letter to RISE demanding the return of the $29,925 and any and all tribal property, including the computer. Both RISE and Knighton refused through their counsel to return the funds or any of the property.

F. Creation of Constitution, Tribal Judicial Code, and Tribal Court

In February 2011, while Knighton was still employed by the Tribe, the Tribe's voting membership adopted the Constitution and Bylaws of the Cedarville Rancheria, which was approved by the Regional Director of the Bureau of Indian Affairs. Article II of the Tribe's Constitution provides that the "jurisdiction of [the Tribe] shall extend to the land now within the confines of the [] Rancheria and to such other lands as may thereafter be added thereto."

In December 2013, nine months after Knighton's resignation, the Tribe enacted the Cedarville Rancheria Judicial Code ("the Tribal Judicial Code") and established the Cedarville Rancheria Tribal Court, which consists of a tribal court ("the Tribal Court") and a tribal court of appeals ("the Tribal Court of Appeals"). All judges must be lawyers experienced in the practice of tribal and federal Indian law and licensed to practice in the highest court of any state. Judges cannot be the Tribal Administrator, Assistant Clerks,

or members of the Executive Committee. The Tribal Judicial Code provides that the Tribal Court and Tribal Court of Appeals have jurisdiction over all civil causes of action that arise within the boundaries of the Rancheria. Pursuant to the Tribal Judicial Code, the Tribal Court has the power to issue orders and judgments and to award limited money damages.

G. The Tribe's Audit Findings

In early 2014, after Knighton resigned, the Tribe conducted a forensic accounting of the Tribe's financial position. The Tribe alleges that the forensic accounting came about after the former Tribal Chairperson shot and killed four tribal members at an Executive Committee meeting on February 20, 2014. The Tribal Chairman was a vocal critic of Knighton's performance. He was among those killed by his sister. During this accounting, the Tribe reviewed its annual audit reports dating back to 2005 and found that the reports detailed several material weakness findings by the auditor. The auditor's findings noted major deficiencies in the accounting of the Tribe's finances, which Knighton oversaw, and noted that the Tribe had not adopted a policy regarding the investment of tribal funds. The Tribe also discovered that in 2008, an annual audit of the Tribe's finances showed that $3.07 million of the Tribe's money had been invested by Knighton in high-risk investments, which had declined in value by more than $1.2 million by the end of 2008. The Tribe also discovered that tribal funds belonging to the Tribe's children had been co-mingled with funds invested on behalf of adults, resulting in improper taxation.

The Tribe asserts that the annual audit reports, and the material weakness findings and investment losses detailed therein, had not been provided by Knighton to the Tribe and

were only discovered by the Tribe after Knighton's resignation.

II. Procedural Background

The Tribe filed a complaint in the Tribal Court against Knighton, RISE, and Oppenheimer Funds, Inc.[2] The complaint included claims for fraud and deceit, recovery of unauthorized and excessive pension payments, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and unjust enrichment, common count-account stated, and common count-money had and received. In support of its claims, the Tribe alleged that Knighton improperly manipulated the Tribe's policies and procedures to provide her salary and fringe benefits, including a pension in excess of what would normally be paid to a Tribal Administrator for a like-sized tribe. The Tribe also alleged that Knighton invested its money in high-risk investments without the appropriate authority, and attempted to enter financial agreements without appropriate authorization or waivers of tribal sovereign immunity.

Knighton responded by filing a motion to dismiss, claiming, in relevant part, that the Tribal Court lacked subject matter jurisdiction under *Montana v. United States*.

The Tribal Court denied Knighton's motion to dismiss, finding that it had jurisdiction over the Tribe's claims against Knighton under both *Montana* exceptions because Knighton entered into a consensual relationship with the Tribe, by virtue of her employment with the Tribe, and because Knighton's conduct threatened or had a direct effect on the

[2] RISE and Oppenheimer Funds, Inc. are no longer parties in this lawsuit.

political integrity, economic security, and health and welfare of the Tribe. The Tribal Court's decision was affirmed by the Tribal Court of Appeals, but the case was remanded to the Tribal Court to determine whether RISE was an indispensable party to the suit, following a finding that the issue had not been raised in the Tribal Court.

On remand, pursuant to a stipulation between the parties, the Tribal Court stayed the case to allow Knighton to contest in federal district court the Tribal Court's jurisdiction over the Tribe's asserted claims. As a result of the stay, there is no Tribal Court exhaustion issue in this case.

Knighton filed a lawsuit in federal district court seeking, among other things, a declaratory judgment that the Tribal Court lacks subject matter jurisdiction over the Tribe's claims against Knighton under both *Montana* exceptions, and a permanent injunction against further proceedings in the Tribal Court. The defendants moved to dismiss Knighton's complaint on the basis that the Tribal Court's jurisdiction over the Tribe's claims was proper under both *Montana* exceptions.

The district court ruled that the Tribal Court has subject matter jurisdiction over the Tribe's claims, and granted defendants' motion to dismiss. The district court declined to apply *Montana* in its jurisdictional analysis based on its finding that Knighton's alleged conduct occurred either on tribal land within the Rancheria's borders or was closely related to tribal land. The district court stated that under *Water Wheel*, the *Montana* framework did not apply to jurisdictional issues involving nonmember conduct on tribal land. The district court concluded that the Tribe had authority to regulate Knighton's conduct because "Knighton's employment activities directly affected the Tribe's inherent powers to protect the welfare of its members

and preserve the integrity of its government" and because "her conduct threatened the Tribe's very economic survival," and held that the Tribal Court had jurisdiction to adjudicate the Tribe's claims.

Knighton appealed.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291. The question of tribal court jurisdiction is a question of federal law, which we review *de novo*, with factual findings reviewed for clear error. *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1130 (9th Cir. 2006) (en banc).

ANALYSIS

"To exercise its inherent civil authority over a defendant, a tribal court must have both subject matter jurisdiction—consisting of regulatory and adjudicative jurisdiction—and personal jurisdiction." *Water Wheel*, 642 F.3d at 809. At issue in this case is whether the Tribal Court has subject matter jurisdiction over the Tribe's claims against Knighton.

I. Regulatory Jurisdiction

A. Legal Precedent and This Case

"The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."

Id. In *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, the Court recognized that "[t]he tribes also retain some of the inherent powers of the self-governing political communities that were formed long before Europeans first settled in North America." 471 U.S. 845, 851 (1985) (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 55–56 (1978)). The Court went on to say that under 28 U.S.C. § 1331, a federal court may determine "whether a tribal court has exceeded the lawful limits of its jurisdiction." *Id.* at 853. Thus, the outer boundaries of tribal court jurisdiction are a matter of federal common law.

We have noted that the Court has long recognized that as part of their residual sovereignty, tribes retain the inherent power to exclude nonmembers from tribal lands. *See Water Wheel*, 642 F.3d at 808; *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) ("A tribe's power to exclude nonmembers entirely or to condition their presence on [tribal land] is [] well established."). "From a tribe's inherent sovereign powers flow lesser powers, including the power to regulate [nonmembers] on tribal land." *Water Wheel*, 642 F.3d at 808–09 (citing *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993)).

The Court has made clear, however, "that once tribal land is converted into fee simple [land], the tribe loses plenary jurisdiction over it . . . . As a general rule, then 'the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land.'" *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328–29 (2008) (quoting *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 430 (1989) (plurality opinion)). In *Montana v. United States*, the Court recognized two exceptions to this

general rule. First, "[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*, 450 U.S. at 565. Second, a tribe may exercise civil authority over the conduct of nonmembers 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." *Id.* at 566.

"Since deciding *Montana*, the Supreme Court has applied those exceptions almost exclusively to questions of jurisdiction arising on [non-tribal] land." *Water Wheel*, 642 F.3d at 809. The exception is *Nevada v. Hicks*, 533 U.S. 353 (2001). *Water Wheel*, 642 F.3d at 809. In *Hicks*, the Court addressed a tribal court's jurisdiction over claims against state officers arising from the execution of a search warrant on tribal land for alleged violations of state poaching laws—specifically, the killing of bighorn sheep off the reservation. 533 U.S. at 356–57. Both the state court and then the tribal court issued search warrants. *Id.* at 356. The Court stated that although ownership status of the land "may sometimes be a dispositive factor" in determining a tribe's authority to regulate nonmember activity on tribal land, the tribe's power to exclude nonmembers from tribal land was "not alone enough to support" the tribe's regulatory jurisdiction over the state officers' activities when the state had a competing interest in executing a warrant for an off-reservation crime. *Id.* at 360. The Court applied *Montana* and concluded that "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations" while "[t]he State's interest in execution of process is considerable." *Id.* at 364.

Although some jurisdictions have interpreted *Hicks* as eliminating the right-to-exclude framework as an independent source of regulatory power over nonmember conduct on tribal land, we have declined to do so. In *Water Wheel*, we observed that *Hicks* "expressly limited its holding to 'the question of tribal-court jurisdiction over state officers enforcing state law.'" *Water Wheel*, 642 F.3d at 813 (quoting *Hicks*, 533 U.S. at 358 n.2). Indeed, the *Hicks* Court specifically "le[ft] open the question of tribal-court jurisdiction over nonmember defendants in general." *Hicks*, 533 U.S. at 358 n.2. In *Water Wheel*, we held that a "tribe's status as landowner is enough to support regulatory jurisdiction" except "when the specific concerns at issue [in *Hicks*] exist." 642 F.3d at 813. "Doing otherwise would impermissibly broaden *Montana*'s scope beyond what any precedent requires and restrain tribal sovereign authority despite Congress's clearly stated federal interest in promoting tribal self-government." *Id.* at 813.

In *Hicks*, the defendants were state officers enforcing a state-court-issued search warrant, so there was a significant state interest at stake. By contrast, the present case involves a private, consensual employment relationship between Knighton and the Tribe, which occurred primarily on tribal land. There are no significant competing state interests, as in *Hicks*. Accordingly, our *Water Wheel* precedent compels the conclusion that the Tribe possesses regulatory jurisdiction over its claims against Knighton.

Since *Hicks*'s limited holding, the Court in *Plains Commerce Bank* held that a tribal court did not have jurisdiction to adjudicate a discrimination claim concerning a non-Indian defendant's sale of fee land. *Plains Commerce Bank*, 554 U.S. at 323, 340–41. The land in question was sold as part of the 1908 Allotment Act and was owned by a

non-Indian party for at least 50 years. *Id.* at 331, 341. The Court found that the discrimination law that the plaintiffs were attempting to enforce operated as a restraint on alienation and had the effect of regulating the substantive terms on which the non-Indian bank was able to offer its fee land for sale. *Id.* at 331. The Court stated that while "*Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests," that case "does not permit Indian tribes to regulate the sale of non-Indian fee land," as neither of the *Montana* exceptions applies. *Id.* at 332. By contrast, in the present case the nonmember defendant *while on tribal land* allegedly used her position as Tribal Administrator to violate the terms of her employment in a wide variety of ways that were significantly detrimental to the management and financial security of the Tribe.

B. Appellant's Arguments

Knighton argues that treating ownership status of the land as a dispositive factor in upholding a tribe's power to regulate nonmember conduct on tribal land (unless, as in *Hicks*, there are significant state interests present) is contrary to our prior rulings in *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002), and *Smith v. Salish Kootenai College*. We disagree. In *McDonald*, we specifically recognized that a tribe's jurisdiction over civil claims against nonmembers arising on tribal land is limited under *Hicks* only in cases where significant state interests are present. *See* 309 F.3d at 540. And in *Window Rock Unified School District v. Reeves*, 861 F.3d 894, 902 n.9 (9th Cir. 2017), we concluded that *Smith* did not limit a tribe's jurisdiction over civil claims against nonmembers bearing a direct connection to tribal land. We concluded that *Smith* was distinguishable because it involved a nonmember plaintiff, as opposed to a

nonmember defendant, who had entered into a consensual relationship with the tribe by filing his action in tribal court. *Id.*

Knighton's argument that a tribe's regulatory power over nonmember conduct on tribal land is limited to conduct that directly interferes with a tribe's inherent powers to exclude and manage its own lands is also unavailing. In *Window Rock*, we concluded that the tribal court's jurisdiction over employment-related claims that did not involve access to tribal land was plausible; accordingly, we held that the nonmember defendants were required to exhaust their tribal court remedies before proceeding in federal court. *Id.* at 896, 906. Moreover, limiting a tribe's regulatory power over nonmember conduct to that which directly interferes with a tribe's inherent powers to exclude and manage its own lands, as Knighton suggests, would restrict tribal sovereignty absent explicit authorization from Congress—an approach we specifically rejected in *Water Wheel*. *See* 642 F.3d at 812 (stating that the tribe's right to exclude nonmembers from tribal land includes the power to regulate them "unless Congress has said otherwise, or unless the Supreme Court has recognized that such power conflicts with federal interests promoting tribal self government").

Knighton also argues that under the facts of this case, *Water Wheel*'s right-to-exclude framework is inapplicable because some of her alleged misconduct occurred *off* tribal land, after the tribal administrative offices were relocated to fee land owned by the Tribe. Although the Tribe's complaint does not allege precisely where the conduct at issue occurred, most of the claims alleged against Knighton involve conduct that took place on tribal land, before the Tribe's administrative offices were moved in mid-2009 to the RISE building in Alturas, California. Moreover, the facts

of this case are unique in that any claims that may have arisen outside tribal land are based on alleged misconduct and misrepresentations made by Knighton on tribal land. *See Smith*, 434 F.3d at 1135 (stating that jurisdictional inquiry is not limited to deciding precisely when and where the claim arose, but whether it bears some direct connection to tribal lands). For example, the $29,925 overpayment for unused vacation and sick leave that the Tribe seeks to recover stems from misrepresentations that Knighton allegedly made throughout the course of her employment, before the Tribe's administrative offices relocated. In addition, the relocation of the Tribe's administrative offices from tribal land to the RISE building on tribal fee land was allegedly due to misrepresentations by Knighton.

Knighton further argues that even if the Tribe had the power to regulate her conduct on tribal land during the course of her employment under *Water Wheel*'s right-to-exclude framework, the Tribe's authority is limited to the regulations that were in place during her employment—which is to say, those provided for in the Personnel Manual. Knighton contends that the Tribe is attempting to impose new regulations on her through tort law after she left her employment with the Tribe.

A tribe's power to exclude nonmembers from tribal lands permits a tribe to condition a nonmember's entry or continued presence on tribal land, *see Merrion*, 455 U.S. at 144–45, but this inherent power does not permit the Tribe to impose new regulations upon Knighton's conduct retroactively when she is no longer present on tribal land. However, we agree with the district court that Knighton's alleged conduct violated the Tribe's regulations that were in place at the time of her employment. The Personnel Manual regulated employee conduct including, but not limited to,

misfeasance or malfeasance in the performance of duty, incompetency in the performance of job duties, theft, carelessness or negligence with the monies or property of the Rancheria, inducement of an employee to act in violation of Rancheria regulations, and violation of personnel rules—all conduct that forms the basis of the Tribe's claims against Knighton.

C. Sources of Authority

In *Water Wheel*, we concluded that a tribe's inherent sovereign power to exclude nonmembers from tribal land provides an independent basis upon which a tribe may regulate the conduct of nonmembers on tribal land. But, a tribe's power to exclude is not the only source of its regulatory authority over nonmembers on tribal land. *See Brendale*, 492 U.S. at 425 ("An Indian tribe's [] power to exclude nonmembers of the tribe from its lands is not the only source of Indian regulatory authority."). "[T]ribes have inherent sovereignty independent of that authority arising from their power to exclude." *Id.* (citing *Merrion*, 455 U.S. at 141); *see also Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 592 (9th Cir. 1983) ("The power to exercise tribal civil authority over [nonmembers] derives not only from the tribe's inherent powers necessary to self-government and territorial management, but also from the power to exclude nonmembers from tribal land." (citing *Merrion*, 455 U.S. at 141–44)).

In addition to the power to exclude, we have the *Montana* Court's acknowledgment that Indian tribes retain their inherent sovereign power to protect tribal self-government and to control internal relations. 450 U.S. at 564. "[I]n accordance with that right tribes 'may regulate nonmember behavior that implicates [these sovereign interests].'" *Attorney's Process & Investigation Servs., Inc.*

v. Sac & Fox Tribe of Miss. in Iowa, 609 F.3d 927, 936 (8th Cir. 2010) (quoting *Plains Commerce Bank*, 554 U.S. at 335).

Subsequent to *Montana*, in *Merrion*, the Court affirmed that Indian tribes have inherent sovereign power to regulate nonmember conduct on tribal land independent of that authority arising from their power to exclude. *Merrion*, 455 U.S. at 144. The Court in *Merrion* concluded that a tribe's power to tax nonmember mining and drilling on tribal land derived from its inherent "power to govern and to pay for the costs of self-government," and concluded that such regulatory authority was also within the tribe's inherent power to condition the continued presence of nonmembers on tribal land. *Id.* at 144–45. These varied sources of tribal regulatory power over nonmember conduct on the reservation were affirmed by the Court in *Plains Commerce Bank*. 554 U.S. at 337 ("[T]he regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.").

While the district court believed that our caselaw prohibited the application of the *Montana* framework to tribal jurisdictional issues involving nonmember conduct on tribal land, it also recognized that a tribe's regulatory power over nonmembers on tribal land does not solely derive from its power to set conditions on entry or continued presence. Accordingly, it concluded that the Tribe had regulatory jurisdiction over Knighton's conduct because "Knighton's employment activities directly affected the Tribe's inherent powers to protect the welfare of its members and preserve the integrity of its government," and because "her conduct threatened the Tribe's very economic survival."

We now clarify *Water Wheel* and our subsequent cases involving tribal jurisdictional issues on tribal land do not exclude *Montana* as a source of tribal regulatory authority over nonmember conduct on tribal land. Rather, our caselaw states that an Indian tribe has power to regulate nonmember conduct on tribal land incident to its sovereign power to exclude nonmembers from tribal land, regardless of whether either of the *Montana* exceptions is satisfied. *See Water Wheel*, 642 F.3d at 814 ("[T]he tribe's status as landowner is enough to support regulatory jurisdiction *without considering Montana*." (emphasis added)); *Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1204 (9th Cir. 2013) ("[A] tribe's inherent authority over tribal land may provide for regulatory authority over [nonmembers] on that land *without the need to consider Montana*." (emphasis added)); *Window Rock*, 861 F.3d at 902 ("[I]n civil cases involving nonmember conduct on tribal land, we have held that tribal courts have jurisdiction unless a treaty or federal statute provides otherwise—*regardless of whether the Montana exceptions would be satisfied*." (emphasis added)). Certainly, as our caselaw has discussed at length, without evidence of a contrary intent by Congress, a tribe's power to regulate nonmember conduct on tribal land flows from its inherent power to exclude and is circumscribed only to the limited extent that the circumstances in *Hicks*—significant state interests—are present. *See Water Wheel*, 642 F.3d at 813; *Grand Canyon*, 715 F.3d at 1205; *Window Rock*, 861 F.3d at 902. However, the Court has made clear that a tribe also has sovereign authority to regulate nonmember conduct on tribal lands independent of its authority to exclude if that conduct intrudes on a tribe's inherent sovereign power to preserve self-government or control internal relations. The *Montana* exceptions are "rooted" in the tribes' inherent power to regulate nonmember behavior that implicates these

sovereign interests. *Attorney's Process*, 609 F.3d at 936 (citing *Plains Commerce Bank*, 554 U.S. at 335).

Accordingly, although we conclude that the Tribe had authority to regulate Knighton's conduct on tribal land pursuant to its sovereign exclusionary powers, a separate question remains as to whether the Tribe also had regulatory authority over Knighton's conduct pursuant to *Montana*.

i. First *Montana* Exception

Montana's consensual relationship exception recognizes that tribes have jurisdiction to regulate consensual relations "through taxation, licensing, or other means." 450 U.S. at 565. Courts have recognized that tort law, under which the Tribe's claims against Knighton arise, constitutes a form of regulation. *See Attorney's Process*, 609 F.3d at 938 (stating that if a tribe retains the power under *Montana* to regulate nonmember conduct, it does not make any difference whether it does so through precisely tailored regulations or through tort claims). However, *Montana*'s consensual relationship exception requires that "the regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001). "A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another." *Id.*

Examining the facts of this case, we conclude that the Tribe has regulatory authority over Knighton's conduct in this case under *Montana*'s consensual relationship exception. The conduct that the Tribe seeks to regulate through tort law arises directly out of the consensual employment relationship between the Tribe and Knighton. Moreover, given the circumstances, Knighton should have reasonably anticipated that her conduct might "trigger" tribal

authority. *Water Wheel*, 642 F.3d at 818 (quoting *Plains Commerce Bank*, 554 U.S. at 338). Knighton is no stranger to the Tribe's governance and laws. She had been an employee of the Tribe for approximately sixteen years and, as Tribal Administrator, was responsible for the overall supervision and management of tribal operations and carrying out tribal projects consistent with the Tribal Constitution. The Tribal Constitution, adopted approximately two years before Knighton resigned as Tribal Administrator, specifically provided that the "jurisdiction of [the Tribe] shall extend to land now within the confines of the [Rancheria] and to such other lands as may thereafter be added thereto." We conclude that given these circumstances, Knighton should reasonably have anticipated that her conduct on tribal land would fall within the Tribe's regulatory jurisdiction.

ii. Second *Montana* Exception

In determining whether Knighton's conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe—the second *Montana* exception, 450 U.S. at 566—we find instructive the Eighth Circuit's decision in *Attorney's Process*. In that case, API, a nonmember corporation, was hired by a tribal government leader who refused to step down from leadership after he lost in a special tribal election. 609 F.3d at 932. Under their contract, API agreed to perform services relating to "the investigation of a takeover by dissidents at the Tribe's facility located on the Tribe's reservation lands." *Id.* As the newly elected tribal council occupied the casino and tribal government offices, approximately thirty API agents forced their way into both buildings, which were located on tribal land. *Id.* The agents were armed with batons, at least one carried a firearm, and they seized

confidential information from both facilities related to the tribe's gaming operations and finances. *Id.* In addition to the wrongfully seized confidential information, the agents caused approximately $7,000 in property damage and committed various intentional torts against tribal members. *Id.* The tribe filed suit in tribal court for trespass to tribal land and chattels, misappropriation of trade secrets, and other claims. *Id.*

API argued that tort claims do not in the ordinary course threaten the political integrity, economic security, or the health or welfare of the tribe and thus the tribal court had no jurisdiction over the tribe's claims under *Montana*'s second exception. *Id.* at 937. Relying on *Plains Commerce Bank*, the court in *Attorney's Process* stated that courts "should not simply consider the abstract elements of the tribal claim at issue, but must focus on the specific nonmember conduct alleged, taking a functional view of the regulatory effect of the claim on the nonmember." *Id.* at 938. The court concluded that API's raid on the casino and government offices, leading to the claims for trespass to land, trespass to chattels, and misappropriation of tribal trade secrets, "menace[d] the 'political integrity, the economic security, [and] the health [and] welfare' of the Tribe to such a degree that it 'imperil[ed] the subsistence' of the tribal community" and that the tribe therefore retained the inherent power under the second *Montana* exception to regulate that conduct. *Id.* at 939 (alterations in original) (quoting *Plains Commerce Bank*, 554 U.S. at 341).

While Knighton's conduct constitutes a different type of violation, it was of long duration and had a great impact upon the Tribe, and so we conclude that the alleged harm to the Tribe caused by her conduct "'imperil[ed] the subsistence' of the tribal community." *Evans v. Shoshone-Bannock Land*

Use Policy Comm'n, 736 F.3d 1298, 1306 (9th Cir. 2013) (quoting *Plains Commerce Bank*, 554 U.S. at 341). Among the tribe's many claims are allegations that Knighton invested the Tribe's money without appropriate authority, concealed investment documents and audit reports from the Tribe, and attempted to enter financial agreements without the appropriate authorization or waiver of tribal sovereign immunity. The Tribe also alleges that Knighton made unreasonably risky investments that led to investment losses in excess of $1.2 million, excess transaction fees, and state and federal tax exposure, and that she breached her fiduciary duty and deceived the Tribe, causing it to pay $300,000, $150,000 above market value, for the RISE building purchase. Finally, the Tribe alleges that when she resigned her employment with the Tribe, Knighton took all files, including files belonging to the Tribe, room furnishings, and a computer, representing to the Tribe that the property removed belonged to RISE. We conclude that this conduct threatened the Tribe's very subsistence and that the Tribe therefore retains the inherent power under the second *Montana* exception to regulate this conduct.

II. Adjudicatory Jurisdiction

Knighton also contends that the Tribe is seeking to exercise greater adjudicative authority over her than it was capable of at the time of her employment. She argues that the adjudicatory authority of the Tribe is limited to the disciplinary procedures provided for in the Personnel Manual. At the time of her employment, the disciplinary actions detailed in the Personnel Manual for an employee's breach of rules and standards of conduct in the course of employment included a verbal warning, written reprimand, suspension without pay, demotion, and involuntary termination. The Personnel Manual provided that when the

Tribal Administrator was the subject of disciplinary action, the Community Council directly oversaw the disciplinary and grievance procedures.

We hold that the Tribe has the power to regulate Knighton's conduct incident to its sovereign powers to exclude nonmembers from tribal land, and also, in the alternative, under both *Montana* exceptions. "[W]here tribes possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'" *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (second and third alterations in original) (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987)). However, a tribe's adjudicative authority over nonmembers may not exceed its regulatory authority. *Id.*

We conclude that under the facts of this case, the Tribe's adjudicatory authority does not exceed the regulatory authority it had over Knighton's conduct during her employment under *Water Wheel*'s right-to-exclude framework. As discussed above, the Personnel Manual regulated the conduct that forms the basis of the Tribe's claims against Knighton and conferred jurisdiction over her conduct as Tribal Administrator on the Community Council. The fact that the Tribe now seeks to adjudicate these claims in the Tribal Court does not undermine its jurisdiction over the Tribe's claims.

Likewise, examining the Tribe's adjudicative authority over Knighton's conduct under *Montana*, we return to the illuminating Eighth Circuit opinion in *Attorney's Process*. Similar to this case, in *Attorney's Process*, the tribal court system was established after the tort claims against API arose. 609 F.3d at 933. API argued that the tribe lacked jurisdiction over its claims because there were no written

regulations in place at the time which prohibited the tortious conduct that API was alleged to have committed. *Id.* at 938. The court stated that "[i]f the Tribe retains the power under *Montana* to regulate such conduct, we fail to see how it makes any difference whether it does so through precisely tailored regulations or through tort claims such as those at issue [in the case]." *Id.* The court concluded that because API's intervention onto tribal land threatened the "'political integrity, the economic security, [and] the health [and] welfare' of the Tribe," the tribe had the authority to regulate and adjudicate such conduct under *Montana*, as well as incident to its sovereign right to exclude nonmembers from tribal land. *Id.* at 940 (alterations in original) (quoting *Montana*, 450 U.S. at 566).

As the court in *Attorney's Process* recognized, our task is to outline the boundaries of the inherent sovereign power retained by the Indian tribes. "Those boundaries are established by federal law, a source of law external to the tribes." *Id.* at 938 (citing *Nat'l Farmers Union*, 471 U.S. at 852). In contrast, "positive tribal law," the court stated, "is internal to the tribes." *Id.* "It is a manifestation of tribal power, and as such it does not contribute to the external limitations which concern us here. Once it is determined that certain conduct is within the scope of a tribe's power as a matter of federal law, our inquiry is at an end." *Id.*

In the present case, the Tribe's authority to regulate Knighton's conduct derived not only from its sovereign power to exclude nonmembers from tribal lands, but also from its inherent sovereign power to regulate consensual relations with nonmembers "through taxation, licensing, or other means," and to protect the "political integrity, the economic security, [and] the health [and] welfare" of the Tribe. *Montana*, 450 U.S. at 565–66.

Once the authority to regulate nonmember conduct exists, whether from *Water Wheel* or from *Montana*, then the observation from the court in *Attorney's Process* persuades us that it makes no difference whether the Tribe adjudicates Knighton's conduct through the Personnel Manual or through tort law.

CONCLUSION

There is no general rule as to the extent of a tribe's adjudicative jurisdiction over non-Indians on tribal land, but "it is clear that the general rule announced in *Strate*, and confirmed in *Hicks* and *Plains Commerce Bank*, that adjudicative jurisdiction is confined by the bounds of a tribe's regulatory jurisdiction" applies. *Water Wheel*, 642 F.3d at 814. Given the existence of regulatory authority, the sovereign interests at stake, and the congressional interest in promoting tribal self-government, we conclude that the Tribal Court has jurisdiction over the Tribe's claims in this case.

AFFIRMED.

E

188 Wash.2d 55
Supreme Court of Washington.

COUGAR DEN, INC., a Yakama Nation corporation, Respondent,
v.
WASHINGTON STATE DEPARTMENT OF LICENSING, Appellant.

No. 92289-6
|
Argued Oct. 11, 2016
|
Filed Mar. 16, 2017

Synopsis
Background: Confederated tribes and bands of Indian nation appealed decision of the Director of the State Department of Licensing that tribe's right to travel on highways did not preempt state fuel taxes. The Superior Court, Yakima County, No. 14-2-03851-7, Michael G. McCarthy, J., reversed. Department appealed.

[Holding:] The Supreme Court, Johnson, J., held that tribes were entitled under treaty to import fuel without holding importer's license and without paying state fuel taxes.

Affirmed.

Fairhurst, C.J., filed dissenting opinion.

West Headnotes (7)

[1] **Administrative Law and Procedure** ⇐ Correctness or error
Generally, an agency decision is presumed correct and the challenger bears the burden of proof.

Cases that cite this headnote

[2] **Appeal and Error** ⇐ Treaties
Treaties ⇐ Construction and operation in general
A treaty interpretation is a legal question reviewed de novo.

Cases that cite this headnote

[3] **Taxation** ⇐ Indians and persons dealing with Indians on Indian lands
Outside an Indian reservation, Indian citizens are subject to state tax laws, absent express federal law to the contrary.

Cases that cite this headnote

[4] **Taxation** ⇐ Indians and persons dealing with Indians on Indian lands

A treaty constitutes an express federal law that exempts Indian citizens outside an Indian reservation from state tax laws.

Cases that cite this headnote

[5] **Indians** ⇐ Construction and operation

Indian treaties must be interpreted as the Indians would have understood them.

Cases that cite this headnote

[6] **Indians** ⇐ Construction and operation

Indian treaties are broadly interpreted, with doubtful or ambiguous expressions resolved in the Indians' favor.

Cases that cite this headnote

[7] **Taxation** ⇐ Persons subject to or liable for tax in general

Under Indian treaty securing right of way with free access from reservation to public highways and right to travel upon all public highways, tribes were entitled to import fuel without holding importer's license and without paying state fuel taxes; travel provision was written in light of tribe's essential need to travel extensively for trade purposes. Wash. Rev. Code Ann. §§ 82.36.010 et seq. (repealed), 82.38.010 et seq.

1 Cases that cite this headnote

Appeal from Yakima County Superior Court, No. 14-2-03851-7, Honorable Michael G. McCarthy.

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Opinion

JOHNSON, J.

*57 ¶1 Article III of the Yakama Nation Treaty of 1855 provides in pertinent part:

> [I]f necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens **1015 of the United States, to travel upon all public highways.

Treaty with the Yakamas, 12 Stat. 951, 952-53 (1855).

¶2 The issue in this case centers on the interpretation of the "right to travel" provision in the treaty, in the context of importing fuel into Washington State. The Washington State Department of Licensing (Department) challenges Cougar Den Inc.'s importation of fuel without holding an importer's license and without paying state fuel taxes under former chapter 82.36 RCW, *repealed by* LAWS OF 2013, ch. 225, § 501, and former chapter 82.38 RCW (2007).

*58 ¶3 An administrative law judge (ALJ) ruled in favor of Cougar Den, holding that the right to travel on highways should be interpreted to preempt the tax. The Department's director, Pat Kohler, reversed. On appeal, the Yakima County Superior Court reversed the director's order and ruled in favor of Cougar Den. We affirm.

FACTS AND PROCEDURAL HISTORY

¶4 Cougar Den is a Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) corporation that transports fuel from Oregon to the Yakama Indian Reservation, where it is sold. Kip Ramsey, Cougar Den's owner and president, is an enrolled member of the Yakama Nation.

¶5 Cougar Den began transporting fuel in 2013 from Oregon to the Yakama Indian Reservation. Cougar Den contracted with KAG West, a trucking company, to transport the fuel into Washington from March 2013 to October 2013.

¶6 On December 9, 2013, the Department issued assessment number 756M against Cougar Den, demanding $3.6 million in unpaid taxes, penalties, and licensing fees for hauling the fuel across state lines. Cougar Den appealed the assessment to the Department's ALJ, who held in his initial order that the assessment was an impermissible restriction under the treaty. The Department sought review of the ALJ's initial order. Upon review, the director of the Department reversed the ALJ and entered findings of fact and conclusions of law.

¶7 The director held that the Yakama treaty did not preempt the taxes, license requirements, and penalties sought against Cougar Den. Cougar Den then petitioned for review of the final order by the Department. The Yakima County Superior Court, sitting in an appellate capacity, reversed the director's order and held that the taxation violated the tribe's right to travel. The Department appealed *59 the superior court's decision and sought direct review under RAP 4.2(a)(2). We granted direct review.

ANALYSIS

[1] [2] ¶8 This case began as a challenge to an administrative order; therefore, review is governed by chapter 34.05 RCW. Under that statute, in relevant part, we review to determine whether the decision is an erroneous interpretation or application of the law. [1] Generally, an " 'agency decision is presumed correct and the challenger bears the burden of proof.' " *King County Pub. Hosp. Dist. No. 2 v. Dep't of Health*, 178 Wash.2d 363, 372, 309 P.3d 416 (2013) (quoting

Providence Hosp. of Everett v. Dep't of Soc. & Health Servs., 112 Wash.2d 353, 355, 770 P.2d 1040 (1989)). However, this case involves a treaty interpretation, which is a legal question reviewed de novo. *Chi. Title Ins. Co. v. Office of Ins. Comm'r*, 178 Wash.2d 120, 133, 309 P.3d 372 (2013) ("The agency's interpretation of pure questions of law is not accorded deference." (citing *Hunter v. Univ. of Wash.*, 101 Wash.App. 283, 292, 2 P.3d 1022 (2000))). This court sits in the same position as the superior court, reviewing the standards of the Washington Administrative Procedure Act, chapter 34.05 RCW, directly to the record established before the agency.

¶9 Washington State law imposes a tax on fuels used for the propulsion of motor vehicles on the highways of the state. In 2013, when Cougar Den transported fuel into the **1016 state, chapter 82.36 RCW governed taxes on motor vehicle fuel, or gasoline, and former chapter 82.38 RCW governed *60 taxes on "special fuel," which includes diesel fuel.[2] Fuel taxes are imposed at the wholesale level, when fuel is removed from the terminal rack or imported into the state. Former RCW 82.36.020(2) (2007); former RCW 82.38.030(7) (2007).

[3] [4] ¶10 The Yakama Indian Reservation is a federally recognized Indian tribal reservation located within the state of Washington. Outside an Indian reservation, Indian citizens are subject to state tax laws, "[a]bsent express federal law to the contrary." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973). A treaty constitutes an express federal law. There is no dispute that the taxes and licensing requirements would apply if the treaty provision does not apply here. However, Cougar Den asserts that the right to travel provision in the treaty precludes the State from demanding unpaid taxes, penalties, and licensing fees for hauling the fuel across state lines (relying on treaty language that "the right of way ... is secured to them ... to travel upon all public highways").

[5] ¶11 The United States Supreme Court has established a rule of treaty interpretation: Indian treaties must be interpreted as the Indians would have understood them.

> The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them.

Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970).

> It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning *61 they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

Tulee v. Washington, 315 U.S. 681, 684-85, 62 S.Ct. 862, 86 L.Ed. 1115 (1942).

[6] ¶12 The Ninth Circuit has recognized this rule of treaty construction. *See United States v. Smiskin*, 487 F.3d 1260, 1264 (9th Cir. 2007); *Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998) (*Cree II*). Treaties are broadly interpreted, with doubtful or ambiguous expressions resolved in the Indians' favor.

[7] ¶13 The Department argues that Cougar Den's reading of the right to travel provision is overly broad. It asserts that the Ninth Circuit cases involving the right to travel forbid the State from specifically restricting the right to travel on

a highway, but allow the State to restrict or regulate a specific good that is incidentally brought over a highway. The Department argues that the treaty does not preempt Washington State fuel taxes in this case. Both parties here support their arguments by citing several Ninth Circuit cases.

¶14 The Department's interpretation of the treaty provision ignores the historical significance of travel to the Yakama Indians and the rule of treaty interpretation established by the United States Supreme Court. In ruling in Cougar Den's favor, both the ALJ and the Yakima County Superior Court based their decisions on the history of the right to travel provision of the treaty, relying on the findings of fact and conclusions of law from *Yakama Indian Nation v. Flores*, 955 F.Supp. 1229 (E.D. Wash. 1997).

¶15 The factual record regarding the treaty interpretation of the historical meaning of the right to travel relied on *62 below was developed in a federal action, *Cree II*.[3] Because **1017 the rule of treaty interpretation requires that treaties be read as the Indians would have understood them, the district court conducted an extensive factual inquiry regarding the treaty and the historical context of the right to travel provision. The court determined that the treaty and the right to travel provision in particular was of tremendous importance to the Yakama Nation at the time the treaty was signed. Travel was woven into the fabric of Yakama life in that it was necessary for hunting, gathering, fishing, grazing, recreational, political, and kinship purposes. Importantly, at the time, the Yakamas exercised free and open access to transport goods as a central part of a trading network running from the western coastal tribes to the eastern plains tribes. The court found that the record unquestionably depicted a tribal culture whose manner of existence was dependent on the Yakamas' ability to travel. *Yakama Indian Nation*, 955 F.Supp. at 1239.

¶16 At the time the treaty was drafted, agents of the United States knew of the Yakamas' reliance on travel. During negotiations, the Yakamas' right to travel off reservation had been repeatedly broached, and assurances were made that entering into the treaty would not infringe on or hinder their tribal practices. Promises were made to protect the Indians from " 'bad white men' " if the tribes agreed to live within designated reservations. *Yakama Indian Nation*, 955 F.Supp. at 1243. Agents of the United States thus repeatedly emphasized in negotiations that tribal members would retain the " 'same liberties ... *to go on the roads to* *63 *market*' " *Yakama Indian Nation*, 955 F.Supp. at 1244. The court further determined that "both parties to the treaty expressly intended that the Yakamas would retain their right to travel outside reservation boundaries, with no conditions attached." *Yakama Indian Nation*, 955 F.Supp. at 1251. The treaty was presented as a means to preserve Yakama customs and protect against further encroachment by white settlers. There was no mention of any sort of restriction on hunting, fishing, or travel other than the condition that the government be permitted to construct wagon roads and a railroad through the reservation. Finally, the court found that "the Treaty was clearly intended to reserve to the Yakamas' right to travel on the public highways to engage in *future* trading endeavors." *Yakama Indian Nation*, 955 F.Supp. at 1253.

¶17 In reliance on these vital promises, the Yakamas forever ceded 90 percent of their land in exchange for these rights. Yakama Nation thus understandably assigned a special significance to each part of the treaty at the time of the signing and continues to view the treaty as a sacred document today. It is important to note that although the United States negotiated with many Northwest tribes, only the treaties with the Yakamas and Nez Perce contained highway clauses like this one. *Cree II*, 157 F.3d at 772.

¶18 With the historical importance of the right to travel in mind, on review, the Ninth Circuit adopted the findings and treaty interpretation from the district court and held that the treaty exempted the Yakama Indians from various Washington truck license and overweight permit fees. In that case, the plaintiff, Yakama Indian Nation, sold timber and hauled logs from within reservation lands to off-reservation mills. Defendants were state officers authorized to issue traffic citations for violations of state vehicle registration, licensing, and permitting statutes. Plaintiff brought suit after the officers issued citations for violation of these statutes. In determining whether the treaty exempted Yakama Indian Nation from the fees, the court considered *64 the historical context of the treaty and recognized the significance of travel to the Yakamas. The court agreed with the district court's finding that the treaty secured for the Yakamas' the

right to use future roads and to *trade* their goods. The court held that the treaty exempted the tribe from truck license and permitting fees. *Cree II*, 157 F.3d at 774.

**1018 ¶19 Nine years later, the Ninth Circuit considered the right to travel in another context in *Smiskin.* In that case, agents of the federal Bureau of Alcohol, Tobacco, Firearms and Explosives suspected the Smiskins, members of Yakama Nation, of transporting unstamped cigarettes from smoke shops on an Idaho Indian reservation to smoke shops on various Indian reservations in Washington. In June 2004, the agents seized 4,205 cartons of unstamped cigarettes from the Smiskins' residence and charged them with violating the federal contraband cigarette trafficking act (CCTA), 18 U.S.C. § 2342(a). Under the CCTA, it is "unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes." 18 U.S.C. § 2342(a). " '[C]ontraband cigarettes' means a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found." 18 U.S.C. § 2341(2).

¶20 Washington State requires wholesalers to affix either a "tax paid" or "tax exempt" stamp to cigarette packaging prior to sale. *See* RCW 82.24.030. Individuals other than licensed wholesalers may transport unstamped cigarettes only if they have "given notice to the [Washington State Liquor Control Board] in advance of the commencement of transportation." RCW 82.24.250(1). The Smiskins did not provide notice to the State prior to transporting unstamped cigarettes; therefore, the cigarettes were unauthorized under state law. As a result, the Smiskins' possession and transportation of the contraband cigarettes was alleged to violate the terms of the CCTA.

*65 ¶21 Again, to determine whether the treaty precluded the State from prosecuting the Smiskins' violation of the State's prenotification requirement, the Ninth Circuit looked to the right to travel provision of the treaty. The court held that the Smiskins were not required to notify anyone prior to transporting goods to market because the treaty " 'expressly intended that the Yakamas would retain their right to travel outside reservation boundaries, *with no conditions attached.*' " *Smiskin*, 487 F.3d at 1266 (quoting *Yakama Indian Nation*, 955 F.Supp. at 1251). It held that applying a prenotification requirement was a condition on travel that violated the Yakamas' treaty right to transport goods to market without restriction.

¶22 The court noted the "tremendous importance" of the right to travel provision and "refuse[d] to draw what would amount to an arbitrary line between travel and trade." *Smiskin*, 487 F.3d at 1265-66. "[W]hether the goods at issue are timber or tobacco products, the right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview would effectively abrogate our decision in *Cree II* and render the Right to Travel provision truly impotent." *Smiskin*, 487 F.3d at 1266-67 (footnote omitted).

¶23 Of importance in the decision is the court's discussion of the regulatory exception. In resolving conflicts between state laws and Indian treaties, the United States Supreme Court has stated that pure regulatory restrictions may be validly applied to tribal members. The State in *Smiskin* argued that the State's tax collection effects had a regulatory purpose. However, the court found that Washington's stated purpose for requiring cigarette stamps, and hence for requiring notice before unstamped cigarettes are transported within the State, was to " 'enforce collection of the tax hereby levied.' " *Smiskin*, 487 F.3d at 1269 (quoting RCW 82.24.030(1)). The court rejected the State's arguments and held that the treaty protected the activity.

¶24 More recently, in 2014, the Ninth Circuit addressed the right to travel provision again. The Department relies *66 on *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), to assert that the trial court interpreted the right to travel provision too broadly. In *King Mountain*, the plaintiff was a private tobacco company owned by Delbert Wheeler, an enrolled member of the Yakama Nation. King Mountain sought relief from application of Washington's escrow statute, which required King Mountain to place money into escrow to reimburse the State for health care costs related to the use of tobacco products. The court analyzed the treaty again and held that the plain text reserved to **1019 the Yakamas the right " 'to travel upon all public highways,' " not the "right to trade." *King Mountain*, 768 F.3d

at 997, 998 (quoting 12 Stat. 953). The court distinguished *King Mountain* from the *Cree* cases by noting that the *Cree* cases involved "the right to travel (driving trucks on public roads) for the purpose of transporting goods to market." *King Mountain*, 768 F.3d at 998. The court affirmed judgment in favor of the State and rejected King Mountain's reliance on the treaty right to travel.

¶25 The Department argues that this case is analogous to *King Mountain* because both companies "claim[ ] a right to engage in *trade* in addition to or above and beyond a right to travel upon the highways." Appellant's Opening Br. at 27. The Department asserts that Cougar Den is not facing a tax for " 'using public highways.... [Rather, it] is being taxed for importing fuel.' " Appellant's Opening Br. at 27 (quoting Clerk's Papers at 1008). The Department argues that Cougar Den relies "heavily on dicta" in *Smiskin*. Appellant's Opening Br. at 29. The Department argues that in *Smiskin*, the State restricted the right to travel on the highway, whereas here, the State is regulating fuel. The Department argues, and the Director agreed, that the taxes are assessed based on incidents of ownership or possession of fuel, and not incident to use of or travel on the roads or highways. It distinguishes *Smiskin* by asserting that Cougar Den does not need a fuel importer license in order to use public highways. "Rather, Cougar Den needs a fuel importer license *67 to engage in business as a fuel trader." Appellant's Opening Br. at 30. The "tax applies without regard to travel on a highway," and "Cougar Den happens to hire trucks," but "[t]he tax is not a condition or restriction on Cougar Den's use of highways." Appellant's Opening Br. at 30, 31. It argues that the tax is imposed at the border and is assessed regardless of whether Cougar Den uses the highway.

¶26 The Department's argument is unpersuasive. *Smiskin* is nearly identical to this case. In both cases, the State placed a condition on travel that affected the Yakamas' treaty right to transport goods to market without restriction. The difference between *Smiskin* and *King Mountain* is that in *King Mountain*, travel was not at issue. In *King Mountain*, the court held under the facts that "there is no right to trade in the Yakama Treaty." *King Mountain*, 768 F.3d at 998. Where trade does not involve travel on public highways, the right to travel provision in the treaty is not implicated. Here, travel on public highways is directly at issue because the tax was an importation tax. The fact that the tax is imposed at the border and is assessed regardless of whether Cougar Den uses the highway is immaterial because, in this case, it was impossible for Cougar Den to import fuel without using the highway.

¶27 In addition, the tax does not, as the State argues, fall under the regulatory exception. In *Smiskin*, the purpose of the notice requirement was the collection of taxes on the transported goods. The prenotification requirement was triggered by the transportation of cigarettes into the state. Likewise, here, the Department requires that companies obtain a license prior to hauling goods into the state: the purpose of the licensing requirement is to collect taxes. We hold that the right to travel provision in the treaty protects the Tribe's historical practice of using the roads to engage in trade and commerce.

¶28 Finally, the Department argues that applying the Ninth Circuit's reasoning would lead to "unimagined and unintended preemption of fundamental state powers." Appellant's *68 Opening Br. at 32. The Department noted that the superior court's reasoning "could allow Yakama tribal members to avoid state laws that regulate goods by simply contriving to possess the goods on public highways." Appellant's Opening Br. at 33. An example the Department gave was that Yakama tribal members could avoid the law barring a felon from possessing a firearm simply because by traveling on a public highway, the treaty preempts state law. This same argument was made by the Defendants in *Smiskin:* if affirmed, the court's ruling would "preclude the State of Washington and the federal government from regulating tribal transportation of other 'restricted goods,' such as illegal narcotics and 'forbidden fruits **1020 [and] vegetables.' " *Smiskin*, 487 F.3d at 1270-71 (alteration in original). The Ninth Circuit rejected this argument, observing that the concern was "unfounded, if not disingenuous." *Smiskin*, 487 F.3d at 1271. Laws with a purely regulatory purpose can be validly applied. In addition, the Ninth Circuit quoted the Yakama Nation and its amicus brief:

> "The Yakama Nation is a sovereign nation, with its own government, laws and courts, not a rogue organization or menace to civil order. The Yakama Nation does not and never has asserted that its members have a right under its treaty to traffic in narcotics. For the government of the United States to be suggesting otherwise is irresponsible.

required to drive a tanker truck, in Washington's ability to tax goods consumed within the state, without legal basis. Therefore, I respectfully dissent.

**1021 I. ANALYSIS

¶33 "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973). This includes state fuel excise taxes. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 97, 126 S.Ct. 676, 163 L.Ed.2d 429 (2005) The majority holds that the treaty right to travel preempts Washington's motor vehicle fuel excise tax, former chapter 82.36 RCW (2007), *repealed by* LAWS OF 2013, ch. 225, § 501, and special fuel excise tax, former chapter 82.38 RCW (2007), *amended by* LAWS OF 2013, ch. 225, § 501. [1] As a result, it finds Cougar Den Inc.'s off-reservation fuel importation activities exempt from Washington's fuel excise tax regime. I disagree and, therefore, respectfully dissent.

A. Former chapters 82.36 and 82.38 RCW represent a tax on the *wholesale possession*, not transportation, of fuel

¶34 The majority reaches its holding after finding that Washington's fuel excise tax regime "taxes the importation of fuel, which is the transportation of fuel." Majority at 1020. *71 But "import," as used here, is a term of art not requiring transportation of any kind. Former RCW 82.36.010(10); former RCW 82.38.020(12). "Import" is defined as "bring[ing] ... fuel into this state," other than through a "pipeline or vessel" operated by a "licensee" and bound for a "terminal" or "refinery," unless located in "the fuel supply tank of a motor vehicle." Former RCW 82.36.010(3), (4), (10), .020(2)(c); former RCW 82.38.020(4), (5), (12), .030(7)(c). Further, the tax is levied "at the time and place of the first taxable event and upon the first taxable person within this state." Former RCW 82.36.022; former RCW 82.38.031. The statutory language alone demonstrates the clear intent of the legislature—to levy an excise tax on the first instance of *wholesale possession* of fuel not distributed through a refinery or importation terminal within the state. Whether that fuel is then brought to market within Washington is not necessary or relevant for purposes of assessing tax due. The history of Washington's fuel tax regime only further reinforces this conclusion.

¶35 Washington first levied an excise tax on motor vehicle fuel in 1921. *Auto. United Trades Org. v. State*, 183 Wash.2d 842, 845, 357 P.3d 615 (2015) (citing LAWS OF 1921, ch. 173, § 2). Until 1999, retailers were primarily responsible for paying the tax. *Id.* at 847, 357 P.3d 615. To improve compliance and reduce administrative costs, Washington shifted the reporting and collection burden to the suppliers at the top of the fuel supply chain in 1999. S.B. REP. ON SUBSTITUTE H.B. 2659, at 1-2, 55th Leg., Reg. Sess. (Wash. 1998). [2]

¶36 Refiners and terminal operators were now charged with collecting, reporting, and remitting excise tax when fuel was removed "from a terminal ... at the rack," LAWS OF 1998, ch. 176, § 7(2)(a) (formatting omitted), or "from a refinery" by "bulk transfer" or "refinery rack," *id.* § 7(2)(b)(i), (ii) (formatting omitted). " 'Rack' " is defined as *72 a "mechanism for delivering ... fuel from a refinery or terminal." [3] *Id.* §§ 6(23), 50(20) (formatting omitted). But distributors, and ultimately retailers, remained burdened with paying the tax. *Squaxin Island Tribe v. Stephens*, 400 F.Supp.2d 1250, 1261 (W.D. Wash. 2005). They were required to reimburse refiners and terminal operators for tax those **1022 suppliers prepaid on their behalf. [4] LAWS OF 1998, ch. 176, § 12(5). Fuel transport within Washington was not mentioned in the revised scheme, except for certain basic reporting obligations and routine inspections for those transporting fuel. *See id.* §§ 32, 33, 66, 80. For refined fuel bypassing the rack system via direct importation, the fuel importer would be liable for the tax on any fuel that it imports for purposes of "sale, consumption, use, or storage." *Id.* §§ 6(11), 7(2)(c), 50(12), 51(2)(c) (formatting omitted). Cougar Den's tax assessments arose under a version of this provision, as revised in 2007.

¶37 In 2007, the legislature revised the statute to address the opportunity *Squaxin Island Tribe*, 400 F.Supp.2d at 1250, gave tribal retailers operating on Indian lands to avoid the imposition of Washington's fuel excise tax for their fuel sales to both tribal and nontribal members.[5] S.B. *73 REP. ON S.B. 5272, at 1-2, 60th Leg., Reg. Sess. (Wash. 2007). Under the revised 2007 regime, those at the top of the supply chain—refiners and terminal operators—would now be solely responsible for the payment of tax when fuel is removed from their rack.[6] *Id.*; LAWS OF 2007, ch. 515, §§ 2, 6, 9, 18, 21. They would no longer prepay tax on behalf of the distributors and retailers they sold to. *Id.* §§ 4, 23.[7] Should there be any question, the legislature also added the following language: "It is the intent and purpose ... that the tax shall be imposed *at the time and place of the first taxable event* and upon the first taxable person within this state." *Id.* at §§ 20, 33 (emphasis added); former RCW 82.36.022; former RCW 82.38.031. These changes reinforce the notion that possession, not distribution, is the intended activity subject to tax.

¶38 The legislature made another change in 2007 that reinforces this notion. From 1999 through 2007, tax applied to imported motor vehicle fuel only when that fuel was imported for purposes of "sale, consumption, use, or storage" within Washington. LAWS OF 1998, ch. 176, § 7(2)(c) (formatting omitted). Beginning in 2007, *all* imported motor vehicle fuel would be subject to tax, regardless of the purpose for which it was imported.[8] LAWS OF 2007, ch. 515, § 2(2)(c); former RCW 82.36.020(2)(c). This language was operative *74 at the time of the Department of Licensing's (DOL) assessments against Cougar Den. *See* Clerk's Papers (CP) at 66-68, 81-82 (December **1023 2013 and February 2014 DOL tax assessments against Cougar Den).

¶39 This history further demonstrates the legislature's intent—to impose tax at the highest level possible in the supply chain. For importation activities, this would be the first instance of *wholesale possession* of fuel within Washington. I fail to see how such a scheme directly implicates travel.

B. The Yakama Nation's treaty right to travel applies to trade *only* when it cannot, be meaningfully separated from travel, not when travel is merely necessary for trade

¶40 Both *Smiskin* and *King Mountain* provide that a treaty right to travel applies to trade *only* when Washington law imposes a limitation on travel and trade, *and* the two cannot be meaningfully separated. *United States v. Smiskin*, 487 F.3d 1260, 1266 (9th Cir. 2007); *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 997-98 (9th Cir. 2014). Such is not the case with Washington's fuel excise tax. The majority fails to see this distinction and, instead, concludes that Cougar Den's trading activity is exempt from Washington's fuel excise tax merely because travel is necessary for trade. But neither *Smiskin* nor *King Mountain* held this to be a relevant consideration.

¶41 At issue in *Smiskin* was the application of the contraband cigarette trafficking act (CCTA), 18 U.S.C. § 2342(a), to a Yakama Nation member. 487 F.3d at 1263. The CCTA imposes criminal penalties for dealing in contraband cigarettes. *Id.* "Contraband cigarettes," in turn, are defined by state law. Washington law provides that cigarettes not containing tax stamps that are transported by wholesalers who fail to first notify Washington's Liquor *75 Control Board of their intent to transport are contraband. *Id.*; RCW 82.24.250(1). Transport, *not possession*, was the predicate for the prosecution at issue in *Smiskin*.[9]

¶42 In ruling for Smiskin, the United States Court of Appeals for the Ninth Circuit held that his treaty right to travel preempted Washington's transportation notice requirement because the right includes the right to " 'transport goods to *market*' for '*trade* and other purposes' " and the notice requirement burdened such transport. *Smiskin*, 487 F.3d at 1266 (quoting *Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998)). The court noted that when "the right to travel overlaps with the right to trade ... such that excluding commercial exchanges ... would effectively abrogate our [prior decisions] and render the Right to Travel provision truly impotent," it should not "draw what would amount to an arbitrary line between travel and trade." *Id.* at 1266-67. But *Smiskin* does not stand for the proposition the majority asserts—the Yakama Nation's treaty right to travel is a de facto right to trade simply because travel is necessary for trade. Indeed, a

reading of *King Mountain* confirms the opposite to be true. 768 F.3d at 989. Travel was necessary for the trade at issue in *King Mountain*, yet the Ninth Circuit found the state obligation burdened only trade, rather than travel and, therefore, was not preempted by the Yakama Nation's treaty right to travel. *Id.* at 997-98. *Smiskin* simply stands for the proposition that when travel and trade cannot be meaningfully separated within a state scheme, a Yakama Nation member's treaty right to travel preempts both aspects of that scheme.

¶43 The state obligation in *King Mountain* arose from a Washington statute requiring tobacco product manufacturers to place into escrow funds to reimburse Washington for *76 health care costs associated with the tobacco products they sold to Washington consumers. *Id.* at 991-92; RCW 70.157.020. King Mountain asserted that the Yakama Nation's treaty right to travel " 'unequivocally prohibit[s] imposition of economic restrictions ... on the Yakama people's Treaty right to ... trade,' " which includes bringing goods to market. *King Mountain*, 768 F.3d at 997. But the Ninth Circuit held otherwise, limiting **1024 the scope of the treaty right to travel to " 'guarantee[ing] the Yakamas the right to transport goods to market over public highways without payment of fees for that use.' " *Id.* (quoting *Cree*, 157 F.3d at 769). It is not a "right to trade." *Id.*

¶44 Cougar Den and amicus make similar arguments as King Mountain attempted to make—the treaty applies equally to trade and travel. Resp't's Br. at 24-26; Amicus Curiae Br. of Yakama Nation at 12-13; *see King Mountain*, 768 F.3d at 992 (King Mountain asserts treaty right applies to "state economic regulation"). But this is not so. The treaty right applies to trade only if inextricably linked to travel. Otherwise, the argument fails. *Smiskin*, 487 F.3d at 1266. As a result, it should fail here, as it failed in *King Mountain*, 768 F.3d at 997-98.

¶45 The escrow payment in *King Mountain* had nothing to do with travel, other than to impose a financial burden on the products King Mountain sought to bring to market in Washington. [10] *Id.* at 991; *see* RCW 70.157.020 (requiring an escrow payment by tobacco manufacturers for products sold to "consumers within the State"). Similarly, Washington's fuel excise tax on importers, imposed on the first incidence of wholesale possession of fuel within Washington, has nothing to do with travel, other than to impose a financial burden on the products fuel importers seek to bring to market in Washington. Former RCW 82.36.020(2)(c), .022; former RCW 82.38.030(7)(c), .031. In both instances, King Mountain's and Cougar Den's, travel is necessary for trade.

*77 ¶46 Without travel, most goods have no market. But as *King Mountain* demonstrates, necessity of transport, without an inextricable link between travel and trade, is not sufficient for preemption. 768 F.3d at 997-98. The necessity to bring its burdened goods to market did not entitle King Mountain to an exemption on its escrow obligation. Nor should Cougar Den be entitled to such an exemption.

¶47 Curiously, the majority claims, "*Smiskin* is nearly identical to this case." Majority at 1019. I disagree. The specific provision Harry Smiskin was accused of violating required a wholesaler to " 'give[ ] notice to the [Liquor Control Board] in advance of the commencement of *transportation*' " of unstamped cigarettes. *Smiskin*, 487 F.3d at 1263 (emphasis added) (second alteration in original) (quoting RCW 82.24.250(1)). Transportation was at the very essence of the Washington law at issue in *Smiskin*. *See* RCW 82.24.250(1). Trade was peripheral. Washington's fuel excise tax, on the other hand, accrues "at the time and place of the first taxable event and upon the first taxable person within this state," i.e., *wholesale possession*, not subsequent transportation. Former RCW 82.36.022; former RCW 82.38.031. I fail to see the similarity between *Smiskin* and this case.

C. The implications of the majority's holding extend beyond this tax regime

¶48 The majority is too quick to dismiss the " 'parade of horribles' " the State claims could arise from the majority's ruling. Majority at 1020. True, felons will not avoid firearm possession charges as a result of this holding, even if they are Yakama Nation members traveling on public highways. Nor would Washington be precluded from regulating the

transportation of restricted goods by tribal members. The regulatory exception covers such instances. *Smiskin*, 487 F.3d at 1271.

¶49 But what this ruling puts at risk is Washington's, and potentially other states', ability to tax goods consumed ***78** within its borders. A simple extension of the majority's logic would allow *nontribal members* to avoid the imposition of state use, excise, or sales tax on goods they consume through a contrived transport by Yakama Nation or Nez Perce tribal members. [11] The majority provides no clear limits. Transport is *necessary* to bring many goods to market. *See* Appellant's Opening Br. at 33 (discussing the potential ****1025** impact on Washington's use tax regime from such a ruling). Does this mean all goods transported to market by Yakama Nation members, regardless of the identity of the buyer and the purpose of transport, are exempt from state tax? Nothing indicates any of the parties understood the Treaty of 1855 to provide for such a right. *See Cree*, 157 F.3d at 766-68 (describing the historical context of treaty negotiations). Yet the majority's ruling seems to create just such a right.

¶50 Ours is a case in point. Cougar Den delivers almost all of its fuel to retail gas stations in Washington. Those gas stations, in turn, sell not just to tribal members, but the general public. [12] Cougar Den seeks an exemption from Washington's fuel excise tax on *all* of the fuel it distributes. Indeed, another Yakama Nation member has made similar claims in California, with detrimental impacts not just to the state's ability to tax, but its competitive business environment. *See Salton Sea Venture, Inc. v. Ramsey*, No. 11CV1968-IEG, 2011 WL 4945072, at *7 (S.D. Cal. Oct. 18, 2011) (court order) (competitor asserts a Yakama Nation member's claimed exemption from the imposition of California's fuel excise tax due based on the treaty right to travel was an unfair business advantage). The majority's ruling would, undoubtedly, provide a basis for further examples.

***79** ¶51 For the reasons stated above, I dissent. The Yakama Nation's treaty right to travel on public highways does not preclude taxation of Cougar Den's off-reservation fuel distribution activities pursuant to former chapters 82.36 and 82.38 RCW. I would reverse the superior court and affirm the ruling of DOL's director. Like the majority, I would not reach Cougar Den's appearance of unfairness argument because of the de novo review engaged in by this court.

Wiggins, J.

All Citations

188 Wash.2d 55, 392 P.3d 1014

Footnotes

1 "Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
"....
"(d) The agency has erroneously interpreted or applied the law." RCW 34.05.570(3)(d).

2 In 2013, Governor Jay Inslee signed House Bill 1883, which repealed chapter 82.36 RCW and combined it with chapter 82.38 RCW. H.B. 1883, 63d Leg., Reg. Sess. (Wash. 2013).

3 This *Cree* case began in the federal district court as *Cree v. Waterbury*, 873 F.Supp. 404 (E.D. Wash. 1994), appealed to the Ninth Circuit, then remanded for factual development in *Yakama Indian Nation. Cree v. Waterbury* (*Cree I*), 78 F.3d 1400 (9th Cir. 1996). In *Yakama Indian Nation*, the court undertook "a 'factual investigation into the historical context and parties' intent at the time the Treaty was signed [in order to] determine the precise scope of the highway right,' " and " 'examine[d] the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed in order to interpret the scope of the highway right.' " *Yakama Indian Nation*, 955 F.Supp. at 1234, 1235 (quoting *Cree I*, 78 F.3d at 1403, 1405). After completing extensive investigation, it entered findings of fact and conclusions of law.

4 Cougar Den also asserts that the director of the Department violated the appearance of unfairness doctrine. The Department counters by arguing that Cougar Den failed to raise the issue; therefore, the appellate court cannot entertain disqualification claims. This claim does not need to be addressed because the merits of the claim are reviewed de novo by this court. And, under either result here, the director will have no future role.

1 The distinction between motor vehicle fuel and special fuel, which includes diesel fuel, was removed effective July 1, 2015. The statute was simplified and recodified into chapter 82.38 RCW. LAWS OF 2013, ch. 225, § 501. Previously, taxes were separately imposed on motor vehicle fuel, special fuel, and aviation fuel pursuant to separate RCW chapters. S.B. REP. ON SUBSTITUTE H.B. 1883, at 2, 63d Leg., Reg. Sess. (Wash. 2013). All references to chapters 82.36 and 82.38 RCW in this opinion are to the RCW in effect at the time of the Department of Licensing's tax assessments against Cougar Den—2013.

2 At the time, there were 740 licensed fuel distributors and 27,000 individuals licensed to purchase fuel without paying tax at the time of purchase. S.B. REP. ON SUBSTITUTE H.B. 2659, at 1.

3 There were 24 terminal racks within Washington when the statute was last modified in 2013. S.B. REP. ON SUBSTITUTE H.B. 1883, at 1, 63d Leg., Reg. Sess. (Wash. 2013).

4 Further, refiners and terminal operators were entitled to refunds from the State for any prepaid tax they could not collect on fuel sold to distributors and retailers. LAWS OF 1998, ch. 176, § 15.

5 The court held that despite suppliers' collection and reporting obligations under the 1999 statute, the legal incidence of the fuel excise tax regime continued to fall on retailers, rather than suppliers, distributors, or consumers. *Squaxin Island Tribe*, 400 F.Supp.2d at 1261. To the extent those retailers were tribes or tribal members operating on Indian lands, they were exempt from Washington's fuel excise tax. *Id.* In *Squaxin*, the court applied *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458-59, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995), which established a legal incidence test, to determine whether Washington's fuel tax regime ran afoul of tribal sovereignty. *Id.* Under this test, who ultimately pays the tax does not control. "Although consumers in Washington State will nearly always find the tax imbedded in the price of fuel, the Supreme Court explicitly cautioned against using 'economic reality' as a basis for answering the legal incidence question." *Id.* (citing *Chickasaw*, 515 U.S. at 459-60, 115 S.Ct. 2214). Instead, the language of the statute controls. *Id.* If this language places the legal incidence of the state tax on a sovereign party, that tax cannot be levied. *Id.*

6 In response, some tribes threatened to establish their own refineries or terminals on Indian land in order to avoid the imposition of tax based on sovereign authority. *Auto. United Trades*, 183 Wash.2d at 848, 357 P.3d 615. Instead, most—excluding the Yakama Nation—entered into tax sharing arrangements in which the tribe receives a refund of tax paid by suppliers on fuel purchased by tribal members on their reservations. *Id.* at 850-51, 357 P.3d 615.

7 Further, the suppliers' statutory mechanism to recover prepaid tax was removed. LAWS OF 2007, ch. 515, §§ 4, 23.

8 A similar "sale, consumption, use, or storage" condition was included in Washington's special fuel excise tax statute prior to the 2007 change. LAWS OF 1998, ch. 176, § 51(2)(c) (formatting omitted). In what may have been a scrivener's error, the language was retained for special fuel while removed for motor vehicle fuel. LAWS OF 2007, ch. 515, § 21(7)(c); former RCW 82.38.030(7)(c). When the statutes were later consolidated into chapter 82.38 RCW, effective July 2015, this conditional language remained. LAWS OF 2013, ch. 225, § 103(7)(c). It is not clear whether keeping this conditional language was intended, as it had previously been removed in 2007 for imported motor vehicle fuel.

9 In *United States v. Fiander*, another Yakama Nation member successfully defended a CCTA charge based on his treaty right to travel. 547 F.3d 1036 (9th Cir. 2008). While the CCTA defense was upheld, the court held the defendant could still be prosecuted for conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d), for his activities. *Id.* at 1039-42.

10 King Mountain also distributed its products outside of Washington. *King Mountain*, 768 F.3d at 997-98.

11 Both the Nez Perce and Yakama Nation tribes have similar treaty rights to travel. *Cree*, 157 F.3d at 772. The majority's ailing could apply with equal force to transport activities by members of either tribe.

12 Cougar Den asserts that it provides "fuel [only] to members of the Yakama Nation." Resp't's Br. at 4. But it fails to note that "more than 90 percent of the fuel it imported" during the period at issue was to tribal members who are "retail gas stations [permitted to] ... sell to 'any person.' " CP at 1004.

End of Document

F

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WASHINGTON STATE DEPARTMENT OF LICENSING *v.* COUGAR DEN, INC.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 16–1498. Argued October 30, 2018—Decided March 19, 2019

The State of Washington taxes "motor vehicle fuel importer[s]" who bring large quantities of fuel into the State by "ground transportation." Wash. Rev. Code §§82.36.010(4), (12), (16). Respondent Cougar Den, Inc., a wholesale fuel importer owned by a member of the Yakama Nation, imports fuel from Oregon over Washington's public highways to the Yakama Reservation to sell to Yakama-owned retail gas stations located within the reservation. In 2013, the Washington State Department of Licensing assessed Cougar Den $3.6 million in taxes, penalties, and licensing fees for importing motor vehicle fuel into the State. Cougar Den appealed, arguing that the Washington tax, as applied to its activities, is pre-empted by an 1855 treaty between the United States and the Yakama Nation that, among other things, reserves the Yakamas' "right, in common with citizens of the United States, to travel upon all public highways," 12 Stat. 953. A Washington Superior Court held that the tax was pre-empted, and the Washington Supreme Court affirmed.

Held: The judgment is affirmed.

188 Wash. 2d 55, 392 P. 3d 1014, affirmed.

JUSTICE BREYER, joined by JUSTICE SOTOMAYOR and JUSTICE KAGAN, concluded that the 1855 treaty between the United States and the Yakama Nation pre-empts the State of Washington's fuel tax as applied to Cougar Den's importation of fuel by public highway. Pp. 4–18.

(a) The Washington statute at issue here taxes the importation of fuel by public highway. The Washington Supreme Court construed the statute that way in the decision below. That court wrote that the statute "taxes the importation of fuel, which is the transportation of

fuel." 188 Wash. 2d 55, 69, 392 P. 3d 1014, 1020. It added that "travel on public highways is directly at issue because the tax [is] an importation tax." *Id.*, at 67, 392 P. 3d, at 1019. The incidence of a tax is a question of state law, *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U. S. 450, 461, and this Court is bound by the Washington Supreme Court's interpretation of Washington law, *Johnson* v. *United States*, 559 U. S. 133, 138. Nor is there any reason to doubt that the Washington Supreme Court meant what it said when it interpreted the statute. In the statute's own words, Washington "impose[s] upon motor vehicle fuel licensees," including "licensed importer[s]," a tax for "each gallon of motor vehicle fuel" that "enters into this state," but only "if . . . entry is" by means of "a railcar, trailer, truck, or other equipment suitable for ground transportation." Wash. Rev. Code §§82.36.010(4), 82.36.020(1), (2), 82.36.026(3). Thus, Cougar Den owed the tax because Cougar Den traveled with fuel by public highway. See App. 10a–26a; App. to Pet. for Cert. 55a. Pp. 4–10.

(b) The State of Washington's application of the tax to Cougar Den's importation of fuel is pre-empted by the Yakama Nation's reservation of "the right, in common with citizens of the United States, to travel upon all public highways." This conclusion rests upon three considerations taken together. First, this Court has considered this treaty four times previously; each time it has considered language very similar to the language now before the Court; and each time it has stressed that the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have in 1855. See *United States* v. *Winans*, 198 U. S. 371, 380–381; *Seufert Brothers Co.* v. *United States*, 249 U. S. 194, 196–198; *Tulee* v. *Washington*, 315 U. S. 681, 683–685; *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 677–678. Thus, although the words "in common with" on their face could be read to permit application to the Yakamas of general legislation (like the legislation at issue here) that applies to all citizens, this Court has refused to read "in common with" in this way because that is not what the Yakamas understood the words to mean in 1855. See *Winans*, 198 U. S., at 379, 381; *Seufert Brothers*, 249 U. S., at 198–199; *Tulee*, 315 U. S., at 684; *Fishing Vessel*, 443 U. S., at 679, 684–685. Second, the historical record adopted by the agency and the courts below indicates that the treaty negotiations and the United States' representatives' statements to the Yakamas would have led the Yakamas to understand that the treaty's protection of the right to travel on the public highways included the right to travel with goods for purposes of trade. Third, to impose a tax upon traveling with certain goods burdens that travel. And the right to travel on the public highways without such burdens is just what the treaty protects. Therefore,

precedent tells the Court that the tax must be pre-empted. In *Tulee*, for example, the fishing right reserved by the Yakamas in the treaty was held to pre-empt the application to the Yakamas of a state law requiring fishermen to buy fishing licenses. 315 U. S., at 684. The Court concluded that "such exaction of fees as a prerequisite to the enjoyment of" a right reserved in the treaty "cannot be reconciled with a fair construction of the treaty." *Id.*, at 685. If the cost of a fishing license interferes with the right to fish, so must a tax imposed on travel with goods (here fuel) interfere with the right to travel. Pp. 10–18.

JUSTICE GORSUCH, joined by JUSTICE GINSBURG, concluded that the 1855 treaty guarantees tribal members the right to move their goods, including fuel, to and from market freely. When dealing with a tribal treaty, a court must "give effect to the terms as the Indians themselves would have understood them." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 196. The Yakamas' understanding of the terms of the 1855 treaty can be found in a set of unchallenged factual findings in *Yakama Indian Nation* v. *Flores*, 955 F. Supp. 1229, which are binding here and sufficient to resolve this case. They provide "no evidence [suggesting] that the term 'in common with' placed Indians in the same category as non-Indians with respect to any tax or fee the latter must bear with respect to public roads." *Id.*, at 1247. Instead, they suggest that the Yakamas understood the treaty's right-to-travel provision to provide them "with the right to travel on all public highways without being subject to any licensing and permitting fees related to the exercise of that right while engaged in the transportation of tribal goods." *Id.*, at 1262. A wealth of historical evidence confirms this understanding. "Far-reaching travel was an intrinsic ingredient in virtually every aspect of Yakama culture," and travel for purposes of trade was so important to their "way of life that they could not have performed and functioned as a distinct culture" without it. *Id.*, at 1238. Everyone then understood that the treaty would protect the Yakamas' preexisting right to take goods to and from market freely throughout its traditional trading area. The State reads the treaty only as a promise to tribal members of the right to venture out of their reservation and use the public highways like everyone else. But the record shows that the consideration the Yakamas supplied—millions of acres desperately wanted by the United States to settle the Washington Territory—was worth far more than an abject promise they would not be made prisoners on their reservation. This Court's cases interpreting the treaty's neighboring and parallel right-to-fish provision further confirm this understanding. See, *e.g.*, *United States* v. *Winans*, 198 U. S. 371. Pp. 1–11.

BREYER, J., announced the judgment of the Court and delivered an

opinion, in which SOTOMAYOR and KAGAN, JJ., joined. GORSUCH, J., filed an opinion concurring in the judgment, in which GINSBURG, J., joined. ROBERTS, C. J., filed a dissenting opinion, in which THOMAS, ALITO, and KAVANAUGH, JJ., joined. KAVANAUGH, J., filed a dissenting opinion, in which THOMAS, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 16–1498

WASHINGTON STATE DEPARTMENT OF LICENSING, PETITIONER *v.* COUGAR DEN, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[March 19, 2019]

JUSTICE BREYER announced the judgment of the Court, and delivered an opinion, in which JUSTICE SOTOMAYOR and JUSTICE KAGAN join.

The State of Washington imposes a tax upon fuel importers who travel by public highway. The question before us is whether an 1855 treaty between the United States and the Yakama Nation forbids the State of Washington to impose that tax upon fuel importers who are members of the Yakama Nation. We conclude that it does, and we affirm the Washington Supreme Court's similar decision.

I

A

A Washington statute applies to "motor vehicle fuel importer[s]" who bring large quantities of fuel into the State by "ground transportation" such as a "railcar, trailer, [or] truck." Wash. Rev. Code §§82.36.010(4), (12), (16) (2012). The statute requires each fuel importer to obtain a license, and it says that a fuel tax will be "levied and imposed upon motor vehicle fuel licensees" for "each gallon of motor vehicle fuel" that the licensee brings into the State. §§82.36.020(1), (2)(c). Licensed fuel importers who

import fuel by ground transportation become liable to pay the tax as of the time the "fuel enters into this [S]tate." §82.36.020(2)(c); see also §§82.38.020(4), (12), (15), (26), 82.38.030(1), (7)(c)(ii) (equivalent regulation of diesel fuel importers).

But *only* those licensed fuel importers who import fuel *by ground transportation* are liable to pay the tax. §§82.36.026(3), 82.36.020(2)(c). For example, if a licensed fuel importer brings fuel into the State by pipeline, that fuel importer need not pay the tax. §§82.36.026(3), 82.36.020(2)(c)(ii), 82.36.010(3). Similarly, if a licensed fuel importer brings fuel into the State by vessel, that fuel importer need not pay the tax. §§82.36.026(3), 82.36.020(2)(c)(ii), 82.36.010(3). Instead, in each of those instances, the next purchaser or possessor of the fuel will pay the tax. §§82.36.020(2)(a), (b), (d). The only licensed fuel importers who must pay *this* tax are the fuel importers who bring fuel into the State by means of ground transportation.

B

The relevant treaty provides for the purchase by the United States of Yakama land. See Treaty Between the United States and the Yakama Nation of Indians, June 9, 1855, 12 Stat. 951. Under the treaty, the Yakamas granted to the United States approximately 10 million acres of land in what is now the State of Washington, *i.e.*, about one-fourth of the land that makes up the State today. Art. I, *id.*, at 951–952; see also Brief for Respondent 4, 9. In return for this land, the United States paid the Yakamas $200,000, made improvements to the remaining Yakama land, such as building a hospital and schools for the Yakamas to use, and agreed to respect the Yakamas' reservation of certain rights. Arts. III–V, 12 Stat. 952–953. Those reserved rights include "the right, in common with citizens of the United States, to travel upon all public

highways," "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory," and other rights, such as the right to hunt, to gather roots and berries, and to pasture cattle on open and unclaimed land. Art. III, *id.*, at 953.

C

Cougar Den, Inc., the respondent, is a wholesale fuel importer owned by a member of the Yakama Nation, incorporated under Yakama law, and designated by the Yakama Nation as its agent to obtain fuel for members of the Tribe. App. to Pet. for Cert. 63a–64a; App. 99a. Cougar Den buys fuel in Oregon, trucks the fuel over public highways to the Yakama Reservation in Washington, and then sells the fuel to Yakama-owned retail gas stations located within the reservation. App. to Pet. for Cert. 50a, 55a. Cougar Den believes that Washington's fuel import tax, as applied to Cougar Den's activities, is pre-empted by the treaty. App. 15a. In particular, Cougar Den believes that requiring it to pay the tax would infringe the Yakamas' reserved "right, in common with citizens of the United States, to travel upon all public highways." Art. III, 12 Stat. 953.

In December 2013, the Washington State Department of Licensing (Department), believing that the state tax was not pre-empted by the treaty, assessed Cougar Den $3.6 million in taxes, penalties, and licensing fees. App. to Pet. for Cert. 65a; App. 10a. Cougar Den appealed the assessment to higher authorities within the state agency. App. 15a. An Administrative Law Judge agreed with Cougar Den that the tax was pre-empted. App. to Brief in Opposition 14a. The Department's Director, however, disagreed and overturned the ALJ's order. App. to Pet. for Cert. 59a. A Washington Superior Court in turn disagreed with the director and held that the tax was pre-empted. *Id.*, at 34a. The director appealed to the Washington Supreme Court.

188 Wash. 2d 55, 58, 392 P. 3d 1014, 1015 (2017). And that court, agreeing with Cougar Den, upheld the Superior Court's determination of pre-emption. *Id.*, at 69, 392 P. 3d, at 1020.

The Department filed a petition for certiorari asking us to review the State Supreme Court's determination. And we agreed to do so.

II

A

The Washington statute at issue here taxes the importation of fuel by public highway. The Washington Supreme Court construed the statute that way in the decision below. That court wrote that the statute "taxes the importation of fuel, which is the transportation of fuel." *Ibid.* It added that "travel on public highways is directly at issue because the tax [is] an importation tax." *Id.*, at 67, 392 P. 3d, at 1019.

Nor is there any reason to doubt that the Washington Supreme Court means what it said when it interpreted the Washington statute. We read the statute the same way. In the statute's own words, Washington "impose[s] upon motor vehicle fuel licensees," including "licensed importer[s]," a tax for "each gallon of motor vehicle fuel" that "enters into this state," but *only* "if . . . entry is" by means of "a railcar, trailer, truck, or other equipment suitable for ground transportation." Wash. Rev. Code §§82.36.010(4), 82.36.020(1), (2), 82.36.026(3). As is true of most tax laws, the statute is long and complex, and it is easy to stumble over this technical language. But if you are able to walk slowly through its provisions, the statute is easily followed. We need take only five steps.

We start our journey at the beginning of the statute which first declares that "[t]here is hereby levied and imposed upon motor vehicle fuel licensees, other than motor vehicle fuel distributors, a tax at the rate . . . pro-

vided in [the statute] on each gallon of motor vehicle fuel." §82.36.020(1). That is simple enough. Washington imposes a tax on a group of persons called "motor vehicle fuel licensees" for "each gallon of motor vehicle fuel."

Who are the "motor vehicle fuel licensees" that Washington taxes? We take a second step to find out. As the definitions section of the statute explains, the "motor vehicle fuel licensees" upon whom the tax is imposed are "person[s] holding a . . . motor vehicle fuel importer, motor vehicle fuel exporter, motor vehicle fuel blender, motor vehicle distributor, or international fuel tax agreement license." §82.36.010(12). This, too, is easy to grasp. Not everyone who possesses motor vehicle fuel owes the tax. Instead, only motor vehicle fuel importers (and other similar movers and shakers within the motor vehicle fuel industry) who are licensed by the State to deal in fuel, must pay the tax.

But must each of these motor vehicle fuel licensees pay the tax, so that the fuel is taxed as it passes from blender, to importer, to exporter, and so on? We take a third step, and learn that the answer is "no." As the statute explains, "the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state." §82.36.022. Reading that, we understand that only the first licensee who can be taxed, will be taxed.

So, we ask, who is the first taxable licensee? Who must actually pay this tax? We take a fourth step to find out. Logic tells us that the first licensee who can be taxed will likely be the licensee who brings fuel into the State. But, the statute tells us that a "licensed importer" is "liable for and [must] pay tax to the department" when "[m]otor vehicle fuel enters into this state *if* . . . [t]he entry is *not* by bulk transfer." §§82.36.020(2)(c), 82.36.026(3) (emphasis added). That is, a licensed importer can only be the first taxable licensee (and therefore the licensee that must pay the tax) if the importer brings fuel into the State by a

method other than "bulk transfer."

But what is "bulk transfer"? What does it mean to say that licensed fuel importers need only pay the tax if they do not bring in fuel by "bulk transfer"? We take a fifth, and final, step to find out. "[B]ulk transfer," the definitions section explains, "means a transfer of motor vehicle fuel by pipeline or vessel," as opposed to "railcar, trailer, truck, or other equipment suitable for ground transportation." §§82.36.010(3), (4). So, we learn that if the licensed fuel importer brings fuel into the State by ground transportation, then the fuel importer owes the tax. But if the licensed fuel importer brings fuel into the State by pipeline or vessel, then the importer will not be the first taxable person to possess the fuel, and he will not owe the tax.

In sum, Washington taxes travel by ground transportation with fuel. That feature sets the Washington statute apart from other statutes with which we are more familiar. It is not a tax on possession or importation. A statute that taxes possession would ordinarily require all people who own a good to pay the tax. A good example of that would be a State's real estate property tax. That statute would require all homeowners to pay the tax, every year, regardless of the specifics of their situation. And a statute that taxes importation would ordinarily require all people who bring a good into the State to pay a tax. A good example of that would be a federal tax on newly manufactured cars. That statute would ordinarily require all people who bring a new car into the country to pay a tax. But Washington's statute is different because it singles out ground transportation. That is, Washington does not just tax possession of fuel, or even importation of fuel, but instead taxes importation by ground transportation.

The facts of this case provide a good example of the tax in operation. Each of the assessment orders that the Department sent to Cougar Den explained that Cougar Den owed the tax because Cougar Den traveled by high-

way. See App. 10a–26a; App. to Pet. for Cert. 55a. As the director explained, Cougar Den owed the tax because Cougar Den had caused fuel to enter "into this [S]tate at the Washington-Oregon boundary on the Highway 97 bridge" by means of a "tank truck" destined for "the Yakama Reservation." *Ibid.* The director offers this explanation in addition to quoting the quantity of fuel that Cougar Den possessed because the element of travel by ground transportation is a necessary prerequisite to the imposition of the tax. Put another way, the State must prove that Cougar Den *traveled by highway* in order to apply its tax.

B

We are not convinced by the arguments raised to the contrary. The Department claims, and THE CHIEF JUSTICE agrees, that the state tax has little or nothing to do with the treaty because it is not a tax on *travel with fuel* but rather a tax on the *possession of fuel*. See Brief for Petitioner 26–28; *post*, at 5 (dissenting opinion).

We cannot accept that characterization of the tax, however, for the Washington Supreme Court has authoritatively held that the statute is a tax on travel. The Washington Supreme Court held that the Washington law at issue here "taxes the importation of fuel, which is the transportation of fuel." 188 Wash. 2d, at 69, 392 P. 3d, at 1020. It added that "travel on public highways is directly at issue because the tax [is] an importation tax." *Id.*, at 67, 392 P. 3d, at 1019. In so doing, the State Supreme Court heard, considered, and rejected the construction of the fuel tax that the Department advances here. See *ibid.*, 392 P. 3d, at 1019 ("The Department argues, and the director agreed, that the taxes are assessed based on incidents of ownership or possession of fuel, and not incident to use of or travel on the roads or highways. . . . The Department's argument is unpersuasive. . . . Here, travel

on public highways is directly at issue because the tax was an importation tax"). The incidence of a tax is a question of state law, *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U. S. 450, 461 (1995), and this Court is bound by the Washington Supreme Court's interpretation of Washington law, *Johnson* v. *United States*, 559 U. S. 133, 138 (2010). We decline the Department's invitation to overstep the bounds of our authority and construe the tax to mean what the Washington Supreme Court has said it does not.

Nor would it make sense to construe the tax's incidence differently. The Washington Supreme Court's conclusion follows directly from its (and our) interpretation of how the tax operates. See *supra*, at 4–7. To be sure, it is generally true that fuel imported into the State by trucks driving the public highways *can also* be described as fuel that is *possessed for the first time* in the State. But to call the Washington statute a tax on "first possession" would give the law an over-inclusive label. As explained at length above, there are several ways in which a company could be a "first possessor" of fuel without incurring the tax. See *ibid.* For example, Cougar Den would not owe the tax had Cougar Den "first possessed" fuel by piping fuel from out of State into a Washington refinery. First possession is not taxed if the fuel is brought into the State by pipeline and bound for a refinery. §§82.36.026(3), 82.36.020(2)(c)(ii), 82.36.010(3). Similarly, Cougar Den would not owe the tax had Cougar Den "first possessed" fuel by bringing fuel into Washington through its waterways rather than its highways. First possession is not taxed if the fuel is brought into the State by vessel. §§82.36.026(3), 82.36.020(2)(c)(ii), 82.36.010(3). Thus, it seems rather clear that the tax cannot accurately be described as a tax on the *first possession of fuel*.

But even if the contrary were true, the tax would still have the practical effect of burdening the Yakamas' travel.

Here, the Yakamas' lone off-reservation act within the State is traveling along a public highway with fuel. The tax thus operates on the Yakamas exactly like a tax on transportation would: It falls upon them only because they happened to transport goods on a highway while en route to their reservation. And it is the practical effect of the state law that we have said makes the difference. We held, for instance, that the fishing rights reserved in the treaty pre-empted the State's enforcement of a trespass law against Yakama fishermen crossing private land to access the river. See, *e.g.*, *United States* v. *Winans*, 198 U. S. 371, 381 (1905). That was so even though the trespass law was not limited to those who trespass in order to fish but applied more broadly to any trespasser. Put another way, it mattered not that the tax was "on" trespassing rather than fishing because the tax operated upon the Yakamas when they were exercising their treaty-protected right. *Ibid.*; see also *Tulee* v. *Washington*, 315 U. S. 681, 685 (1942) (holding that the fishing rights reserved in the treaty pre-empted the State's application of a fishing licensing fee to a Yakama fisherman, even though the fee also applied to types of fishing not practiced by the Yakamas). And this approach makes sense. When the Yakamas bargained in the treaty to protect their right to travel, they could only have cared about preventing the State from burdening their exercise of that right. To the Yakamas, it is thus irrelevant whether the State's tax might apply to other activities beyond transportation. The only relevant question is whether the tax "act[ed] upon the Indians as a charge for exercising the very right their ancestors intended to reserve." *Tulee*, 315 U. S., at 685. And the State's tax here acted upon Cougar Den in exactly that way.

For the same reason, we are unpersuaded by the Department's insistence that it adopted this tax after a District Court, applying this Court's decision in *Chickasaw*

Nation, barred the State from taxing the sale of fuel products on tribal land. See Brief for Petitioner 6–7; *Squaxin Island Tribe* v. *Stephens*, 400 F. Supp. 2d 1250, 1262 (WD Wash. 2005). Although a State "generally is free to amend its law to shift the tax's legal incidence," *Chickasaw Nation*, 515 U. S., at 460, it may not burden a treaty-protected right in the process, as the State has done here.

Thus, we must turn to the question whether this fuel tax, falling as it does upon members of the Tribe who travel on the public highways, violates the treaty.

III

A

In our view, the State of Washington's application of the fuel tax to Cougar Den's importation of fuel is pre-empted by the treaty's reservation to the Yakama Nation of "the right, in common with citizens of the United States, to travel upon all public highways." We rest this conclusion upon three considerations taken together.

First, this Court has considered this treaty four times previously; each time it has considered language very similar to the language before us; and each time it has stressed that the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have in 1855. See *Winans*, 198 U. S., at 380–381; *Seufert Brothers Co.* v. *United States*, 249 U. S. 194, 196–198 (1919); *Tulee*, 315 U. S., at 683–685; *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 677–678 (1979).

The treaty language at issue in each of the four cases is similar, though not identical, to the language before us. The cases focus upon language that guarantees to the Yakamas "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." Art. III, para. 2, 12 Stat. 953. Here, the language guarantees to the Yakamas "the right, in common with citizens of

the United States, to travel upon all public highways." Art. III, para. 1, *ibid.* The words "in common with" on their face could be read to permit application to the Yakamas of general legislation (like the legislation before us) that applies to all citizens, Yakama and non-Yakama alike. But this Court concluded the contrary because that is not what the Yakamas understood the words to mean in 1855. See *Winans*, 198 U. S., at 379, 381; *Seufert Brothers*, 249 U. S., at 198–199; *Tulee*, 315 U. S., at 684; *Fishing Vessel*, 443 U. S., at 679, 684–685.

The cases base their reasoning in part upon the fact that the treaty negotiations were conducted in, and the treaty was written in, languages that put the Yakamas at a significant disadvantage. See, *e.g.*, *Winans*, 198 U. S., at 380; *Seufert Brothers*, 249 U. S., at 198; *Fishing Vessel*, 443 U. S., at 667, n. 10. The parties negotiated the treaty in Chinook jargon, a trading language of about 300 words that no Tribe used as a primary language. App. 65a; *Fishing Vessel*, 443 U. S., at 667, n. 10. The parties memorialized the treaty in English, a language that the Yakamas could neither read nor write. And many of the representations that the United States made about the treaty had no adequate translation in the Yakamas' own language. App. 68a–69a.

Thus, in the year 1905, in *Winans*, this Court wrote that, to interpret the treaty, courts must focus upon the historical context in which it was written and signed. 198 U. S., at 381; see also *Tulee*, 315 U. S., at 684 ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council"); cf. *Water Splash, Inc.* v. *Menon*, 581 U. S. ___, ___ (2017) (slip op., at 8) (noting that, to ascertain the meaning of a treaty, courts "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties")

(internal quotation marks omitted).

The Court added, in light of the Yakamas' understanding in respect to the reservation of fishing rights, the treaty words "in common with" do not limit the reservation's scope to a right against discrimination. *Winans*, 198 U. S., at 380–381. Instead, as we explained in *Tulee*, *Winans* held that "Article III [of the treaty] conferred upon the Yakimas continuing rights, *beyond those which other citizens may enjoy*, to fish at their 'usual and accustomed places' in the ceded area." *Tulee*, 315 U. S., at 684 (citing *Winans*, 198 U. S. 371; emphasis added). Also compare, *e.g.*, *Fishing Vessel*, 443 U. S., at 677, n. 22 ("Whatever opportunities the treaties assure Indians with respect to fish are admittedly *not 'equal' to, but are to some extent greater than*, those afforded other citizens" (emphasis added)), with *post*, at 4 (KAVANAUGH, J., dissenting) (citing this same footnote in *Fishing Vessel* as support for the argument that the treaty guarantees the Yakamas only a right against discrimination). Construing the treaty as giving the Yakamas only antidiscrimination rights, rights that any inhabitant of the territory would have, would amount to "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." *Winans*, 198 U. S., at 380.

Second, the historical record adopted by the agency and the courts below indicates that the right to travel includes a right to travel with goods for sale or distribution. See App. to Pet. for Cert. 33a; App. 56a–74a. When the United States and the Yakamas negotiated the treaty, both sides emphasized that the Yakamas needed to protect their freedom to travel so that they could continue to fish, to hunt, to gather food, and to trade. App. 65a–66a. The Yakamas maintained fisheries on the Columbia River, following the salmon runs as the fish moved through Yakama territory. *Id.*, at 62a–63a. The Yakamas traveled to the nearby plains region to hunt buffalo. *Id.*, at 61a.

They traveled to the mountains to gather berries and roots. *Ibid.* The Yakamas' religion and culture also depended on certain goods, such as buffalo byproducts and shellfish, which they could often obtain only through trade. *Id.*, at 61a–62a. Indeed, the Yakamas formed part of a great trading network that stretched from the Indian tribes on the Northwest coast of North America to the plains tribes to the east. *Ibid.*

The United States' representatives at the treaty negotiations well understood these facts, including the importance of travel and trade to the Yakamas. *Id.*, at 63a. They repeatedly assured the Yakamas that under the treaty the Yakamas would be able to travel outside their reservation on the roads that the United States built. *Id.*, at 66a–67a; see also, *e.g.*, *id.*, at 66a ("'[W]e give you the privilege of traveling over roads'"). And the United States repeatedly assured the Yakamas that they could travel along the roads for trading purposes. *Id.*, at 65a–67a. Isaac Stevens, the Governor of the Washington Territory, told the Yakamas, for example, that, under the terms of the treaty, "You will be allowed to go on the roads, to take your things to market, your horses and cattle." App. to Brief for Confederated Tribes and Bands of the Yakama Nation as *Amicus Curiae* 68a (record of the treaty proceedings). He added that the Yakamas "will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites; all this outside the Reservation." *Ibid.* Governor Stevens further urged the Yakamas to accept the United States' proposals for reservation boundaries in part because the proposal put the Yakama Reservation in close proximity to public highways that would facilitate trade. He said, "'You will be near the great road and can take your horses and your cattle down the river and to the [Puget] Sound to market.'" App. 66a. In a word, the treaty negotiations and the United States'

representatives' statements to the Yakamas would have led the Yakamas to understand that the treaty's protection of the right to travel on the public highways included the right to travel with goods for purposes of trade. We consequently so construe the relevant treaty provision.

Third, to impose a tax upon traveling with certain goods burdens that travel. And the right to travel on the public highways without such burdens is, as we have said, just what the treaty protects. Therefore, our precedents tell us that the tax must be pre-empted. In *Tulee*, for example, we held that the fishing right reserved by the Yakamas in the treaty pre-empted the application to the Yakamas of a state law requiring fishermen to buy fishing licenses. 315 U. S., at 684. We concluded that "such exaction of fees as a prerequisite to the enjoyment of" a right reserved in the treaty "cannot be reconciled with a fair construction of the treaty." *Id.*, at 685. If the cost of a fishing license interferes with the right to fish, so must a tax imposed on travel with goods (here fuel) interfere with the right to travel.

We consequently conclude that Washington's fuel tax "acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve." *Ibid.* Washington's fuel tax cannot lawfully be assessed against Cougar Den on the facts here. Treaties with federally recognized Indian tribes—like the treaty at issue here—constitute federal law that pre-empts conflicting state law as applied to off-reservation activity by Indians. Cf. *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148–149 (1973).

B

Again, we are not convinced by the arguments raised to the contrary. THE CHIEF JUSTICE concedes that "the right to travel with goods is just an application of the Yakamas' right to travel." *Post*, at 2 (dissenting opinion); see also *ibid.* ("It ensures that the Yakamas enjoy the same privi-

leges when they travel with goods as when they travel without them."). But he nevertheless insists that, because of the way in which the Washington statute taxes fuel, the statute does not interfere with the right to travel reserved by the Yakamas in the treaty. *Post*, at 3.

First, THE CHIEF JUSTICE finds it significant that "[t]he tax is calculated per gallon of fuel; not, like a toll, per vehicle or distance traveled." *Ibid.*, see also *ibid.* ("The tax before us does not resemble a blockade or a toll"). But that argument fails on its own terms. A toll on highway travel is no less a toll when the toll varies based on the number of axels on a vehicle traveling the highway, or on the number of people traveling in the vehicle. We cannot, therefore, see why the number of gallons of fuel that the vehicle carries should make all the difference. Put another way, the fact that a tax on travel varies based on the features of that travel does not mean that the tax is not a tax on travel.

Second, THE CHIEF JUSTICE argues that it "makes no sense," for example, to hold that "a tax on certain luxury goods" that is assessed the first time the goods are possessed in Washington cannot apply to a Yakama member "who buys" a mink coat "over the state line in Portland and then drives back to the reservation," but the tax can apply to a Yakama member who "buys a mink coat at an off-reservation store in Washington." *Post*, at 4. The short, conclusive answer to this argument is that there is a treaty that forbids taxing Yakama travel on highways with goods (*e.g.*, fuel, or even furs) for market; and there is no treaty that forbids taxing Yakama off-reservation purchases of goods. Indeed, if our precedents supported THE CHIEF JUSTICE's rule, then our fishing rights cases would have turned on whether Washington also taxed fish purchased in the grocery store. Compare, *e.g.*, *Tulee*, 315 U. S., at 682, n. 1 (holding that the fishing right reserved by the Yakamas in the treaty pre-empted the application

to the Yakamas of a state law which prohibited "'catch[ing] . . . fish for food'" without having purchased a license). But in those cases, we did not look to whether fish were taxed elsewhere in Washington. That is because the treaty does not protect the Yakamas from state sales taxes imposed on the off-reservation sale of goods. Instead, the treaty protects the Yakamas' right to travel the public highways without paying state taxes on that activity, much like the treaty protects the Yakamas' right to fish without paying state taxes on that activity.

Third, THE CHIEF JUSTICE argues that only a law that "punished or charged the Yakamas" for an "integral feature" of a treaty right could be pre-empted by the treaty. *Post*, at 6. But that is true of the Washington statute at issue here. The treaty protects the right to travel with goods, see *supra*, at 10–14, and the Washington statute taxes travel with goods, see *supra*, at 4–7. Therefore, the statute charges the Yakamas for an "integral feature" of a treaty right. But even if the statute indirectly burdened a treaty right, under our precedents, the statute would still be pre-empted. One of the Washington statutes at issue in *Winans* was not a fishing regulation, but instead a trespassing statute. That trespassing statute indirectly burdened the right to fish by preventing the Yakamas from crossing privately owned land so that the Yakamas could reach their traditional fishing places and camp on that private property during the fishing season. See 198 U. S., at 380–381. It cannot be true that a law prohibiting trespassing imposed a burden on the right to fish that is "integral" enough to be pre-empted by the treaty, while a law taxing goods carried to the reservation on the public highway imposes a burden on the right to travel that is too attenuated to be pre-empted by the treaty.

C

Although we hold that the treaty protects the right to

travel on the public highway with goods, we do not say or imply that the treaty grants protection to carry any and all goods. Nor do we hold that the treaty deprives the State of the power to regulate, say, when necessary for conservation. To the contrary, we stated in *Tulee* that, although the treaty "forecloses the [S]tate from charging the Indians a fee of the kind in question here," the State retained the "power to impose on Indians, equally with others, such restrictions of a purely regulatory nature . . . as are necessary for the conservation of fish." 315 U. S., at 684. Indeed, it was crucial to our decision in *Tulee* that, although the licensing fees at issue were "regulatory as well as revenue producing," "their regulatory purpose could be accomplished otherwise," and "the imposition of license fees [was] not indispensable to the effectiveness of a state conservation program." *Id.*, at 685. See also *Puyallup Tribe* v. *Department of Game of Wash.*, 391 U. S. 392, 402, n. 14 (1968) ("As to a 'regulation' concerning the time and manner of fishing outside the reservation (as opposed to a 'tax'), we said that the power of the State was to be measured by whether it was 'necessary for the conservation of fish'" (quoting *Tulee*, 315 U. S., at 684)).

Nor do we hold that the treaty deprives the State of the power to regulate to prevent danger to health or safety occasioned by a tribe member's exercise of treaty rights. The record of the treaty negotiations may not support the contention that the Yakamas expected to use the roads entirely unconstrained by laws related to health or safety. See App. to Brief for Confederated Tribes and Bands of the Yakama Nation as *Amicus Curiae* 20a–21a, 31a–32a. Governor Stevens explained, at length, the United States' awareness of crimes committed by United States citizens who settled amongst the Yakamas, and the United States' intention to enact laws that would restrain both the United States citizens and the Yakamas alike for the safety of both groups. See *id.*, at 31a.

Nor do we here interpret the treaty as barring the State from collecting revenue through sales or use taxes (applied outside the reservation). Unlike the tax at issue here, which applies explicitly to transport by "railcar, trailer, truck, or other equipment suitable for ground transportation," see *supra*, at 6, a sales or use tax normally applies irrespective of transport or its means. Here, however, we deal with a tax applicable simply to importation by ground transportation. Moreover, it is a tax designed to secure revenue that, as far as the record shows here, the State might obtain in other ways.

IV

To summarize, our holding rests upon three propositions: First, a state law that burdens a treaty-protected right is pre-empted by the treaty. See *supra*, at 14–18. Second, the treaty protects the Yakamas' right to travel on the public highway with goods for sale. See *supra*, at 10–14. Third, the Washington statute at issue here taxes the Yakamas for traveling with fuel by public highway. See *supra*, at 4–10. For these three reasons, Washington's fuel tax cannot lawfully be assessed against Cougar Den on the facts here. Therefore, the judgment of the Supreme Court of Washington is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 16–1498

WASHINGTON STATE DEPARTMENT OF LICENSING, PETITIONER *v.* COUGAR DEN, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[March 19, 2019]

JUSTICE GORSUCH, with whom JUSTICE GINSBURG joins, concurring in the judgment.

The Yakamas have lived in the Pacific Northwest for centuries. In 1855, the United States sought and won a treaty in which the Tribe agreed to surrender 10 million acres, land that today makes up nearly a quarter of the State of Washington. In return, the Yakamas received a reservation and various promises, including a guarantee that they would enjoy "the right, in common with citizens of the United States, to travel upon all public highways." Today, the parties offer dueling interpretations of this language. The State argues that it merely allows the Yakamas to travel on public highways like everyone else. And because everyone else importing gasoline from out of State by highway must pay a tax on that good, so must tribal members. Meanwhile, the Tribe submits that the treaty guarantees tribal members the right to move their goods to and from market freely. So that tribal members may bring goods, including gasoline, from an out-of-state market to sell on the reservation without incurring taxes along the way.

Our job here is a modest one. We are charged with adopting the interpretation most consistent with the treaty's original meaning. *Eastern Airlines, Inc.* v. *Floyd*, 499 U. S. 530, 534–535 (1991). When we're dealing with a

tribal treaty, too, we must "give effect to the terms as the Indians themselves would have understood them." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 196 (1999). After all, the United States drew up this contract, and we normally construe any ambiguities against the drafter who enjoys the power of the pen. Nor is there any question that the government employed that power to its advantage in this case. During the negotiations "English words were translated into Chinook jargon . . . although that was not the primary language" of the Tribe. *Yakama Indian Nation* v. *Flores*, 955 F. Supp. 1229, 1243 (ED Wash. 1997). After the parties reached agreement, the U. S. negotiators wrote the treaty in English—a language that the Yakamas couldn't read or write. And like many such treaties, this one was by all accounts more nearly imposed on the Tribe than a product of its free choice.

When it comes to the Yakamas' understanding of the treaty's terms in 1855, we have the benefit of a set of unchallenged factual findings. The findings come from a separate case involving the Yakamas' challenge to certain restrictions on their logging operations. *Id.*, at 1231. The state Superior Court relied on these factual findings in this case and held Washington collaterally estopped from challenging them. Because the State did not challenge the Superior Court's estoppel ruling either in the Washington Supreme Court or here, these findings are binding on us as well.

They also tell us all we need to know to resolve this case. To some modern ears, the right to travel in common with others might seem merely a right to use the roads subject to the same taxes and regulations as everyone else. *Post*, at 1–2 (KAVANAUGH, J., dissenting). But that is not how the Yakamas understood the treaty's terms. To the Yakamas, the phrase "'in common with' . . . implie[d] that the Indian and non-Indian use [would] be joint but [did]

not imply that the Indian use [would] be in any way restricted." *Yakama Indian Nation*, 955 F. Supp., at 1265. In fact, "[i]n the Yakama language, the term 'in common with' . . . suggest[ed] public use or general use without restriction." *Ibid.* So "[t]he most the Indians would have understood . . . of the term[s] 'in common with' and 'public' was that they would share the use of the road with whites." *Ibid.* Significantly, there is "no evidence [to] sugges[t] that the term 'in common with' placed Indians in the same category as non-Indians with respect to any tax or fee the latter must bear with respect to public roads." *Id.*, at 1247. Instead, the evidence suggests that the Yakamas understood the right-to-travel provision to provide them "with the right to travel on all public highways without being subject to any licensing and permitting fees related to the exercise of that right while engaged in the transportation of tribal goods." *Id.*, at 1262.

Applying these factual findings to our case requires a ruling for the Yakamas. As the Washington Supreme Court recognized, the treaty's terms permit regulations that allow the Yakamas and non-Indians to share the road in common and travel along it safely together. But they do not permit encumbrances on the ability of tribal members to bring their goods to and from market. And by everyone's admission, the state tax at issue here isn't about facilitating peaceful coexistence of tribal members and non-Indians on the public highways. It is about taxing a good as it passes to and from market—exactly what the treaty forbids.

A wealth of historical evidence confirms this understanding. The *Yakama Indian Nation* decision supplies an admirably rich account of the history, but it is enough to recount just some of the most salient details. "Prior to and at the time the treaty was negotiated," the Yakamas "engaged in a system of trade and exchange with other plateau tribes" and tribes "of the Northwest coast and

plains of Montana and Wyoming." *Ibid.* This system came with no restrictions; the Yakamas enjoyed "free and open access to trade networks in order to maintain their system of trade and exchange." *Id.*, at 1263. They traveled to Oregon and maybe even to California to trade "fir trees, lava rocks, horses, and various species of salmon." *Id.*, at 1262–1263. This extensive travel "was necessary to obtain goods that were otherwise unavailable to [the Yakamas] but important for sustenance and religious purposes." *Id.*, at 1262. Indeed, "far-reaching travel was an intrinsic ingredient in virtually every aspect of Yakama culture." *Id.*, at 1238. Travel for purposes of trade was so important to the "Yakamas' way of life that they could not have performed and functioned as a distinct culture . . . without extensive travel." *Ibid.* (internal quotation marks omitted).

Everyone understood that the treaty would protect the Yakamas' preexisting right to take goods to and from market freely throughout their traditional trading area. "At the treaty negotiations, a primary concern of the Indians was that they have freedom to move about to . . . trade." *Id.*, at 1264. Isaac Stevens, the Governor of the Washington Territory, specifically promised the Yakamas that they would "'be allowed to go on the roads to take [their] things to market.'" *Id.*, at 1244 (emphasis deleted). Governor Stevens called this the "'same libert[y]'" to travel with goods free of restriction "'outside the reservation'" that the Tribe would enjoy within the new reservation's boundaries. *Ibid.* Indeed, the U. S. representatives' "statements regarding the Yakama's use of the public highways to take their goods to market clearly and without ambiguity promised the Yakamas the use of public highways without restriction for future trading endeavors." *Id.*, at 1265. Before the treaty, then, the Yakamas traveled extensively without paying taxes to bring goods to and from market, and the record suggests that the Yaka-

mas would have understood the treaty to preserve that liberty.

None of this can come as much of a surprise. As the State reads the treaty, it promises tribal members only the right to venture out of their reservation and use the public highways like everyone else. But the record shows that the consideration the Yakamas supplied was worth far more than an abject promise they would not be made prisoners on their reservation. In fact, the millions of acres the Tribe ceded were a prize the United States desperately wanted. U. S. treaty negotiators were "under tremendous pressure to quickly negotiate treaties with eastern Washington tribes, because lands occupied by those tribes were important in settling the Washington territory." *Id.*, at 1240. Settlers were flooding into the Pacific Northwest and building homesteads without any assurance of lawful title. The government needed "to obtain title to Indian lands" to place these settlements on a more lawful footing. *Ibid.* The government itself also wanted to build "wagon and military roads through Yakama lands to provide access to the settlements on the west side of the Cascades." *Ibid.* So "obtaining Indian lands east of the Cascades became a central objective" for the government's own needs. *Id.*, at 1241. The Yakamas knew all this and could see the writing on the wall: One way or another, their land would be taken. If they managed to extract from the negotiations the simple right to take their goods freely to and from market on the public highways, it was a price the United States was more than willing to pay. By any fair measure, it was a bargain-basement deal.

Our cases interpreting the treaty's neighboring and parallel right-to-fish provision further confirm this understanding. The treaty "secure[s] . . . the right of taking fish at all usual and accustomed places, *in common with* citizens of the Territory." Treaty Between the United States

and the Yakama Nation of Indians, Art. III, June 9, 1855, 12 Stat. 953 (emphasis added). Initially, some suggested this guaranteed tribal members only the right to fish according to the same regulations and subject to the same fees as non-Indians. But long ago this Court refused to impose such an "impotent" construction on the treaty. *United States* v. *Winans*, 198 U. S. 371, 380 (1905). Instead, the Court held that the treaty language prohibited state officials from imposing many nondiscriminatory fees and regulations on tribal members. While such laws "may be both convenient and, in [their] general impact, fair," this Court observed, they act "upon the Indians as a charge for exercising the very right their ancestors intended to reserve." *Tulee* v. *Washington*, 315 U. S. 681, 685 (1942). Interpreting the same treaty right in *Winans*, we held that, despite arguments otherwise, "the phrase '*in common with* citizens of the Territory'" confers "upon the Yak[a]mas continuing rights, *beyond those which other citizens may enjoy*, to fish at their 'usual and accustomed places.'" *Tulee*, 315 U. S., at 684 (citing *Winans*, 198 U. S., at 371; emphasis added). Today, we simply recognize that the same language should yield the same result.

With its primary argument now having failed, the State encourages us to labor through a series of backups. It begins by pointing out that the treaty speaks of allowing the Tribe "free access" from local roads to the public highways, but indicates that tribal members are to use those highways "in common with" non-Indians. On the State's account, these different linguistic formulations must be given different meanings. And the difference the State proposes? No surprise: It encourages us to read the former language as allowing goods to be moved tax-free along local roads to the highways but the latter language as authorizing taxes on the Yakamas' goods once they arrive there. See also *post*, at 3 (KAVANAUGH, J., dissenting).

The trouble is that nothing in the record supports this interpretation. Uncontested factual findings reflect the Yakamas' understanding that the treaty would allow them to use the highways to bring goods to and from market freely. These findings bind us under the doctrine of collateral estoppel, and no one has proposed any lawful basis for ignoring them. Nor, for that matter, has anyone even tried to offer a reason why the Tribe might have bargained for the right to move its goods freely only part of the way to market. Our job in this case is to interpret the treaty as the Yakamas originally understood it in 1855—not in light of new lawyerly glosses conjured up for litigation a continent away and more than 150 years after the fact.

If that alternative won't work, the State offers another. It admits that the Yakamas personally may have a right to travel the highways free of most restrictions on their movement. See also *post*, at 3 (ROBERTS, C. J., dissenting) (acknowledging that the treaty prohibits the State from "charg[ing] . . . a toll" on Yakamas traveling on the highway). But, the State continues, the law at issue here doesn't offend that right. It doesn't, we are told, because the "object" of the State's tax isn't *travel* but the *possession* of fuel; the fact that the State happens to assess its tax when fuel is possessed on a public highway rather than someplace else is neither here nor there. And just look, we are told, at the anomalies that might arise if we ruled otherwise. A tribal member who buys a "mink coat" in a Washington store would have to pay the State's sales tax, but a tribal member who purchases the same coat at market in Oregon could not be taxed for possessing it on the highway when reentering Washington. See *post*, at 2–7.

This argument suffers from much the same problem as its predecessors. Now, at least, the State may acknowledge that the Yakamas personally have a right to travel free of most restrictions. But the State still fails to

give full effect to the treaty's terms and the Yakamas' original understanding of them. After all and as we've seen, the treaty doesn't just guarantee tribal members the right to *travel* on the highways free of most restrictions on their movement; it also guarantees tribal members the right to *move goods* freely to and from market using those highways. And it's impossible to *transport* goods without *possessing* them. So a tax that falls on the Yakamas' possession of goods as they travel to and from market on the highway violates the treaty just as much as a tax on travel alone would.

Consider the alternative. If the State could save the tax here simply by labeling it a fee on the "possession" of a good, the State might just as easily revive the fishing license fee *Tulee* struck down simply by calling it a fee on the "possession" of fish. That, of course, would be ridiculous. The Yakamas' right to fish includes the right to *possess* the fish they catch—just like their right to *move* goods on the highways embraces the right to *possess* them there. Nor does the State's reply solve the problem. It accepts, as it must, that possessing fish is "integral" to the right to fish. *Post*, at 6, n. 2 (ROBERTS, C. J., dissenting). But it stands pat on its assertion that the treaty protects nothing more than a personal right to travel, ignoring all of the facts and binding findings before us establishing that the treaty *also* guarantees a right to move (and so possess) goods freely as they travel to and from market. *Ibid.*

What about the supposed "mink coat" anomaly? Under the terms of the treaty before us, it's true that a Yakama who buys a mink coat (or perhaps some more likely item) at an off-reservation store in Washington will have to pay sales tax because the treaty is silent there. And it is also true that a Yakama who buys the same coat right over the state line, pays any taxes due at market there, and then drives back to the reservation using the public highways is

entitled to move that good tax-free from market back to the reservation. But that is hardly anomalous—*that* is the treaty right the Yakamas reserved. And it's easy to see why. Imagine the Yakama Reservation reached the Washington/Oregon state line (as it did before the 1855 Treaty). In that case, Washington would have no basis to tax the Yakamas' transportation of goods from Oregon (whether they might be fuel, mink coats, or anything else), as all of the Yakamas' conduct would take place outside of the State or on the reservation. The only question here is whether the result changes because the Tribe must now use Washington's highways to make the trek home. And the answer is no. The Tribe bargained for a right to travel with goods off reservation just as it could on reservation and just as it had for centuries. If the State and federal governments do not like that result, they are free to bargain for more, but they do not get to rewrite the existing bargain in this Court.

Alternatively yet, the State warns us about the dire consequences of a ruling against it. Highway speed limits, reckless driving laws, and much more, the State tells us, will be at risk if we rule for the Tribe. See also *post*, at 7–10 (ROBERTS, C. J., dissenting). But notice. Once you acknowledge (as the State and primary dissent just have) that the Yakamas *themselves* enjoy a right to travel free of at least some nondiscriminatory state regulations, this "problem" inevitably arises. It inevitably arises, too, once you concede that the Yakamas enjoy a right to travel freely at least on local roads. See *post*, at 3 (KAVANAUGH, J., dissenting). Whether you read the treaty to afford the Yakamas the further right to bring goods to and from market is beside the point.

It turns out, too, that the State's parade of horribles isn't really all that horrible. While the treaty supplies the Yakamas with special rights to travel with goods to and from market, we have seen already that its "in common

with" language *also* indicates that tribal members knew they would have to "share the use of the road with whites" and accept regulations designed to allow the two groups' safe coexistence. *Yakama Indian Nation*, 955 F. Supp., at 1265. Indeed, the Yakamas *expected* laws designed to "protec[t]" their ability to travel safely alongside non-Indians on the highways. See App. to Brief for Confederated Tribes and Bands of the Yakama Nation as *Amicus Curiae* 21a, 31a. Maybe, too, that expectation goes some way toward explaining why the State's hypothetical parade of horribles has yet to take its first step in the real world. No one before us has identified a single challenge to a state highway speed limit, reckless driving law, or other critical highway safety regulation in the entire life of the Yakama treaty.

Retreating now, the State suggests that the real problem isn't so much about the Yakamas themselves traveling freely as it is with their goods doing so. We are told we should worry, for example, about limiting Washington's ability to regulate the transportation of diseased apples from Oregon. See also *post*, at 10 (ROBERTS, C. J., dissenting). But if bad apples prove to be a public menace, Oregon and its localities may regulate them when they are grown or picked at the orchard. Oregon, its localities, and maybe even the federal government may regulate the bad apples when they arrive at market for sale in Oregon. The Tribe and again, perhaps, the federal government may regulate the bad apples when they arrive on the reservation. And if the bad apples somehow pose a threat to safe travel on the highways, even Washington may regulate them as they make their way from Oregon to the reservation—just as the State may require tribal members to abide nondiscriminatory regulations governing the safe transportation of flammable cargo as they drive their gas trucks from Oregon to the reservation along public highways. The only thing that Washington may not do is

reverse the promise the United States made to the Yakamas in 1855 by imposing a tax or toll on tribal members or their goods as they pass to and from market.

Finally, some worry that, if we recognize the potential permissibility of state highway safety laws, we might wind up impairing the interests of "tribal members across the country." See *post*, at 10 (ROBERTS, C. J., dissenting). But our decision today is based on unchallenged factual findings about how the Yakamas themselves understood this treaty in light of the negotiations that produced it. And the Tribe itself has expressly acknowledged that its treaty, while extending real and valuable rights to tribal members, does not preclude laws that merely facilitate the safe use of the roads by Indians and non-Indians alike. Nor does anything we say here necessarily apply to other tribes and other treaties; each must be taken on its own terms. In the end, then, the only true threat to tribal interests today would come from replacing the meaningful right the Yakamas thought they had reserved with the trivial promise the State suggests.

Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.

SUPREME COURT OF THE UNITED STATES

No. 16–1498

WASHINGTON STATE DEPARTMENT OF LICENSING, PETITIONER *v.* COUGAR DEN, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[March 19, 2019]

CHIEF JUSTICE ROBERTS, with whom JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE KAVANAUGH join, dissenting.

In the 1855 treaty in which the Yakamas surrendered most of their lands to the United States, the Tribe sought to protect its way of life by reserving, among other rights, "the right, in common with citizens of the United States, to travel upon all public highways." Treaty Between the United States and the Yakama Nation of Indians, Art. III, June 9, 1855, 12 Stat. 953. Cougar Den, a Yakama corporation that uses public highways to truck gas into Washington, contends that the treaty exempts it from Washington's fuel tax, which the State assesses upon the importation of fuel into the State. The plurality agrees, concluding that Washington cannot impose the tax on Cougar Den because doing so would "have the practical effect of burdening" Cougar Den's exercise of its right to travel on the highways. *Ante*, at 9. The concurrence reaches the same result, reasoning that, because the Yakamas' right to travel includes the right to travel with goods, the State cannot tax or regulate the Yakamas' goods on the highways. *Ante*, at 7–8 (GORSUCH, J., concurring in judgment).

But the mere fact that a state law has an effect on the Yakamas *while* they are exercising a treaty right does not establish that the law impermissibly burdens the right

itself. And the right to travel with goods is just an application of the Yakamas' right to travel. It ensures that the Yakamas enjoy the same privileges when they travel with goods as when they travel without them. It is not an additional right to possess whatever goods they wish on the highway, immune from regulation and taxation. Under our precedents, a state law violates a treaty right only if the law imposes liability upon the Yakamas "for exercising the very right their ancestors intended to reserve." *Tulee* v. *Washington*, 315 U. S. 681, 685 (1942). Because Washington is taxing Cougar Den for possessing fuel, not for traveling on the highways, the State's method of administering its fuel tax is consistent with the treaty. I respectfully dissent from the contrary conclusion of the plurality and concurrence.[1]

We have held on three prior occasions that a nondiscriminatory state law violated a right the Yakamas reserved in the 1855 treaty. All three cases involved the "right of taking fish at all usual and accustomed places, in common with citizens of the Territory." Art. III, 12 Stat. 953. In *United States* v. *Winans*, 198 U. S. 371 (1905), and later again in *Seufert Brothers Co.* v. *United States*, 249 U. S. 194 (1919), we held that state trespass law could not be used to prevent tribe members from reaching a historic fishing site. And in *Tulee* v. *Washington*, we held that Washington could not punish a Yakama member for fishing without a license. We concluded that the license law was preempted because the required fee "act[ed] upon the Indians as a charge for exercising the very right their ancestors intended to reserve"—the right to fish. 315

[1] There is something of an optical illusion in this case that may subtly distort analysis. It comes from the fact that the tax here happens to be on motor fuel. There is no claim, however, that the tax inhibits the treaty right to travel because of the link between motor fuel and highway travel. The question presented must be analyzed as if the tax were imposed on goods of any sort.

U. S., at 685.

These three cases found a violation of the treaty when the challenged action—application of trespass law and enforcement of a license requirement—actually blocked the Yakamas from fishing at traditional locations. Applying the reasoning of those decisions to the Yakamas' right to travel, it follows that a State could not bar Yakama members from traveling on a public highway, or charge them a toll to do so.

Nothing of the sort is at issue here. The tax before us does not resemble a blockade or a toll. It is a tax on a product imported into the State, not a tax on highway travel. The statute says as much: "There is hereby levied and imposed . . . a tax . . . *on each gallon of motor vehicle fuel*." Wash. Rev. Code §82.36.020(1) (2012) (emphasis added). It is difficult to imagine how the legislature could more clearly identify the object of the tax. The tax is calculated per gallon of fuel; not, like a toll, per vehicle or distance traveled. It is imposed on the owner of the fuel, not the driver or owner of the vehicle—separate entities in this case. And it is imposed at the same rate on fuel that enters the State by methods other than a public highway—whether private road, rail, barge, or pipeline. §§82.36.010(4), 020(1), (2). Had Cougar Den filled up its trucks at a refinery or pipeline terminal in Washington, rather than trucking fuel in from Oregon, there would be no dispute that it was subject to the exact same tax. See §§82.36.020(2)(a), (b)(ii). Washington is taxing the fuel that Cougar Den imports, not Cougar Den's travel on the highway; it is not charging the Yakamas "for exercising the very right their ancestors intended to reserve." *Tulee*, 315 U. S., at 685.

It makes no difference that Washington happens to impose that charge when Cougar Den's drivers cross into Washington on a public highway. The time and place of the imposition of the tax does not change what is taxed,

and thus what activity—possession of goods or travel—is burdened. Say Washington imposes a tax on certain luxury goods, assessed upon first possession of the goods by a retail customer. A Yakama member who buys a mink coat at an off-reservation store in Washington will pay the tax. Yet, as the plurality acknowledges, under its view a tribal member who buys the same coat right over the state line in Portland and then drives back to the reservation will owe no tax—all because of a reserved right to travel on the public highways. *Ante*, at 15. That makes no sense. The tax charges individuals for possessing expensive furs. It in no way burdens highway travel.

The plurality devotes five pages to planting trees in hopes of obscuring the forest: to delving into irrelevancies about how the tax is assessed or collected, instead of the substance of what is taxed. However assessed or collected, the tax on 10,000 gallons of fuel is the same whether the tanker carrying it travels three miles in Washington or three hundred. The tax varies only with the amount of fuel. Why? Because the tax is on fuel, not travel. If two tankers travel 200 miles together from the same starting point to the same destination—one empty, one full of fuel—the full tanker will pay the fuel tax, the empty tanker will pay nothing. Their travel has been identical, but only the full one pays tax. Why? Because the tax is on fuel, not travel. The tax is on the owner of the fuel, not the owner of the vehicle. Why? You get the point.

The plurality responds that, even though the tax is calculated per gallon of fuel, it remains a tax on travel because it taxes a "feature" of travel. *Ante*, at 15. It is of course true that tanker trucks can be seen from time to time on the highways, but that hardly makes them a regular "feature" of travel, like the plurality's examples of axels or passengers. And we know that Washington is not taxing the gas insofar as it is a feature of Cougar Den's travel, because Washington imposes the exact same tax on

gas that is not in transit on the highways.

Rather than grappling with the substance of the tax, the plurality fixates on variations in the time and place of its assessment. The plurality thinks it significant that Washington does not impose the tax at the moment of entry on fuel that enters the State by pipeline or by a barge bound for a refinery, but instead when a tanker truck withdraws the fuel from the refinery or pipeline terminal. This may demonstrate that the tax is not on *first* possession of fuel in the State, as the plurality stresses, but it hardly demonstrates that the tax is not on possession of fuel *at all*. Regardless of how fuel enters the State, someone will eventually pay a per-gallon charge for possessing it. Washington simply assesses the fuel tax in each case upon the wholesaler. See 188 Wash. 2d 55, 60, 392 P. 3d 1014, 1016 (2017). This variation does not indicate, as the plurality suggests, that the fuel tax is somehow *targeted* at highway travel.

The plurality also says that it is bound by the Washington Supreme Court's references to the tax as an "importation tax" and tax on "the importation of fuel," *ante*, at 7 (quoting 188 Wash. 2d, at 67, 69, 392 P. 3d, at 1019, 1020), but these two references to the point at which the tax is *assessed* are not authoritative constructions of the *object* of the tax. The state court did not reject Washington's argument that this is a tax on fuel; instead, like the plurality today, it ignored that argument and concluded that the tax was invalid simply because Washington imposed it while Cougar Den was traveling on the highway. In any event, the state court more often referred to the tax as a "tax on fuels" or "fuel tax[ ]." *Id.*, at 58–61, 392 P. 3d, at 1015–1016.

After the five pages arguing that a tax expressly labeled as on "motor vehicle fuel" is actually a tax on something else, the plurality concludes . . . it doesn't matter. As the plurality puts it at page nine of its opinion, "even if" the

tax is on fuel and not travel, it is preempted because it has "the practical effect of burdening" the Yakamas' right to travel on the highways. The plurality's rule—that States may not enforce general legislation that has an effect on the Yakamas while they are traveling—has no basis in our precedents, which invalidated laws that punished or charged the Yakamas simply for exercising their reserved rights. The plurality is, of course, correct that the trespass law in *Winans* did not target fishing, but it effectively made illegal the very act of fishing at a traditional location. Here, it is the possession of commercial quantities of fuel that exposes the Yakamas to liability, not travel itself or any integral feature of travel.

The concurrence reaches the same result as the plurality, but on different grounds. Rather than holding that the treaty preempts any law that burdens the Yakamas while traveling on the highways, the concurrence reasons that the fuel tax is preempted because it regulates the possession of goods, and the Yakamas' right to travel includes the right to travel with goods. *Ante*, at 7–8. But the right to travel with goods is just an application of the right to travel. It means the Yakamas enjoy the same privileges whether they travel with goods or without. It does not provide the Yakamas with an additional right to carry any and all goods on the highways, tax free, in any manner they wish.[2] The concurrence purports to find this additional right in the record of the treaty negotiations, but

[2]The plurality simply assumes that the right to travel with goods is an additional, substantive right when it reasons that the fuel tax is preempted because it taxes an "integral feature" of travel with goods. *Ante*, at 16. The concurrence makes the same assumption when it compares the fuel tax to a tax on " 'possession' of fish" *Ante*, at 8. That tax would be preempted because "taking possession of fish" is just another way of describing the act of fishing. But possession of a tanker full of fuel is not an integral feature of travel, which is the relevant activity protected by the treaty.

the record shows only that the Yakamas wanted to ensure they could continue to travel to the places where they traded. They did not, and did not intend to, insulate the goods they carried from all regulation and taxation.

Nothing in the text of the treaty, the historical record, or our precedents supports the conclusion that the right "to travel upon all public highways" transforms the Yakamas' vehicles into mobile reservations, immunizing their contents from any state interference. Before it reaches the reservation, the fuel in Cougar Den's tanker trucks is always susceptible to state regulation—it does not pass in and out of state authority with every exit off or entry onto the road.

Recognizing the potentially broad sweep of its new rule, the plurality cautions that it does not intend to deprive the State of the power to regulate when necessary "to prevent danger to health or safety occasioned by a tribe member's exercise of treaty rights." *Ante*, at 17. This escape hatch ensures, the plurality suggests, that the treaty will not preempt essential regulations that burden highway travel. *Ante*, at 9–10. I am not so confident.

First, by its own terms, the plurality's health and safety exception is limited to laws that regulate dangers "occasioned by" a Yakama's travel. That would seem to allow speed limits and other rules of the road. But a law against possession of drugs or illegal firearms—the dangers of which have nothing to do with travel—does not address a health or safety risk "occasioned by" highway driving. I do not see how, under the plurality's rule or the concurrence's, a Washington police officer could burden a Yakama's travel by pulling him over on suspicion of carrying such contraband on the highway.

But the more fundamental problem is that this Court has never recognized a health and safety exception to reserved treaty rights, and the plurality today mentions the exception only in passing. Importantly, our prece-

dents—all of which concern hunting and fishing rights—acknowledge the authority of the States to regulate Indians' exercise of their reserved rights only in the interest of *conservation*. See *Tulee*, 315 U. S., at 684 ("[T]he treaty leaves the state with power to impose on Indians, equally with others, such restrictions . . . as are necessary for the conservation of fish . . . ."); see also *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 205 (1999) ("We have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation."); *Confederated Tribes of Colville Reservation* v. *Anderson*, 903 F. Supp. 2d 1187, 1197 (ED Wash. 2011) ("Notably absent from the binding Supreme Court and Ninth Circuit cases dealing with state regulation of 'in common' usufructuary rights is any reference to a state's exercise of its public-safety police power."). Indeed, this Court had previously assured the Yakamas that "treaty fishermen are *immune from all regulation save that required for conservation*." *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 682 (1979) (emphasis added). Adapted to the travel right, the conservation exception would presumably protect regulations that preserve the subject of the Yakamas' right by maintaining safe and orderly travel on the highways. But many regulations that burden highway travel (such as emissions standards, noise restrictions, or the plurality's hypothetical ban on the importation of plutonium) do not fit that description.

The need for the health and safety exception, of course, follows from the overly expansive interpretation of the treaty right adopted by the plurality and concurrence. Today's decision digs such a deep hole that the future promises a lot of backing and filling. Perhaps there are good reasons to revisit our long-held understanding of reserved treaty rights as the plurality does, and adopt a

broad health and safety exception to deal with the inevitable fallout. Hard to say, because no party or *amicus* has addressed the question.

The plurality's response to this important issue is the following, portentous sentence: "The record of the treaty negotiations may not support the contention that the Yakamas expected to use the roads entirely unconstrained by laws related to health or safety." *Ante*, at 17. A lot of weight on two words, "may not." The plurality cites assurances from the territorial Governor of Washington that the United States would make laws to prevent "bad white men" from harming the Yakamas, and that the United States expected the Yakamas to exercise similar restraint in return. *Ante*, at 18. What this has to do with health and safety regulations affecting the highways (or fishing or hunting) is not clear.

In the meantime, do not assume today's decision is good news for tribal members across the country. Application of state safety regulations, for example, could prevent Indians from hunting and fishing in their traditional or preferred manner, or in particular "usual and accustomed places." I fear that, by creating the need for this untested exception, the unwarranted expansion of the Yakamas' right to travel may undermine rights that the Yakamas and other tribes really did reserve.

The concurrence does not mention the plurality's possible health and safety exception, but observes that the Yakamas expected to follow laws that "facilitate the safe use of the roads by Indians and non-Indians alike." *Ante*, at 11. The State is therefore wrong, the concurrence says, to contend that a decision exempting Cougar Den's fuel from taxation would call into question speed limits and reckless driving laws. But that is not the State's principal argument. The State acknowledges that laws facilitating safe travel on the highways would fall within the long-recognized conservation exception. See Tr. of Oral Arg.

12–13. The problem is that today's ruling for Cougar Den preempts the enforcement of any regulation of *goods* on the highway that does not concern *travel* safety—such as a prohibition on the possession of potentially contaminated apples taken from a quarantined area (a matter of vital concern in Washington). See *id.*, at 13; Brief for Petitioner 44.

The concurrence says not to worry, the apples could be regulated and inspected where they are grown, or when they arrive at a market. Or, if the Yakamas are taking the apples back to the reservation, perhaps the Federal Government or the Tribe itself could address the problem there. *Ante*, at 10. What the concurrence does not say is that the State could regulate the contraband apples on the highway. And there is no reason offered why other contraband should be treated any differently.

Surely the concurrence does not mean to suggest that the parties to the 1855 treaty intended to confer on the Tribe the right to travel with illegal goods, free of any regulation. But if that is not the logical consequence of the decision today, the plurality and the concurrence should explain why. It is the least they should do.

I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 16–1498

WASHINGTON STATE DEPARTMENT OF LICENSING, PETITIONER *v.* COUGAR DEN, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[March 19, 2019]

JUSTICE KAVANAUGH, with whom JUSTICE THOMAS joins, dissenting.

The text of the 1855 treaty between the United States and the Yakama Tribe affords the Tribe a "right, in common with citizens of the United States, to travel upon all public highways." Treaty Between the United States and the Yakama Nation of Indians, Art. III, June 9, 1855, 12 Stat. 953. The treaty's "in common with" language means what it says. The treaty recognizes tribal members' right to travel on off-reservation public highways on equal terms with other U. S. citizens. Under the text of the treaty, the tribal members, like other U. S. citizens, therefore still remain subject to *nondiscriminatory* state highway regulations—that is, to regulations that apply equally to tribal members and other U. S. citizens. See *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148–149 (1973). That includes, for example, speed limits, truck restrictions, and reckless driving laws.

The Washington law at issue here imposes a nondiscriminatory fuel tax. THE CHIEF JUSTICE concludes that the fuel tax is not a highway regulation and, for that reason, he says that the fuel tax does not infringe the Tribe's treaty right to travel on the public highways. I agree with THE CHIEF JUSTICE and join his dissent.

Even if the fuel tax is a highway regulation, it is a *non-*

discriminatory highway regulation. For that reason as well, the fuel tax does not infringe the Tribe's treaty right to travel on the public highways on equal terms with other U. S. citizens.

The plurality, as well as the concurrence in the judgment, suggests that the treaty, if construed that way, would not have been important to the Yakamas. For that reason, the plurality and the concurrence would not adhere to that textual meaning and would interpret "in common with" other U. S. citizens to mean, in essence, "exempt from regulations that apply to" other U. S. citizens.

I respectfully disagree with that analysis. The treaty right to travel on the public highways "in common with"—that is, on equal terms with—other U. S. citizens was important to the Yakama tribal members at the time the treaty was signed. That is because, as of 1855, States and the Federal Government sometimes required tribal members to seek permission before leaving their reservations or even prohibited tribal members from leaving their reservations altogether. See, *e.g.*, Treaty Between the United States of America and the Utah Indians, Art. VII, Dec. 30, 1849, 9 Stat 985; Mo. Rev. Stat., ch. 80, §10 (1845). The Yakamas needed to travel to sell their goods and trade for other goods. As a result, those kinds of laws would have devastated the Yakamas' way of life. Importantly, the terms of the 1855 treaty made crystal clear that those kinds of travel restrictions could not be imposed on the Yakamas.

In particular, the treaty afforded Yakama tribal members two relevant rights. First was "free access" on roads from the reservation to "the nearest public highway." Art. III, 12 Stat. 953. Second was a right to travel "in common with" other U. S. citizens on "all public highways." *Ibid.* The right to free access from the reservation to public highways, combined with the right to travel off

reservation on public highways, facilitated the Yakama tribal members' extensive trading network.

In determining the meaning of the "in common with" language, we must recognize that the treaty used different language in defining (1) the right to "free access," which applies only on roads connecting the reservation to the off-reservation public highways, and (2) the right to travel "in common with" other U. S. citizens, which applies on those off-reservation public highways. The approach of the plurality and the concurrence would collapse that distinction between the "free access" and "in common with" language and thereby depart from the text of the treaty. I would stick with the text. The treaty's "in common with" language—both at the time the treaty was signed and now—means what it says: the right for Yakama tribal members to travel on public highways on equal terms with other U. S. citizens.

To be sure, the treaty as negotiated and written may not have turned out to be a particularly good deal for the Yakamas. As a matter of separation of powers, however, courts are bound by the text of the treaty. See *Oregon Dept. of Fish and Wildlife* v. *Klamath Tribe*, 473 U. S. 753, 774 (1985). It is for Congress and the President, not the courts, to update a law and provide additional compensation or benefits to tribes beyond those provided by an old law. And since 1855, and especially since 1968, Congress has in fact taken many steps to assist tribes through a variety of significant legislative measures. In short, lament about the terms of the treaty negotiated by the Federal Government and the Tribe in 1855 does not support the Judiciary (as opposed to Congress and the President) rewriting the law in 2019.

What about precedent? It is true that some of our older precedents interpreted similar "in common with" treaty language regarding fishing rights to grant tribal members an exemption from certain fishing regulations, even when

the fishing regulations were nondiscriminatory. But as we explained in the most recent of those fishing cases, those nondiscriminatory fishing regulations had the effect of preventing the Tribes from catching a fair share of the fish in the relevant area. In other words, the fishing regulations at issue were discriminatory in effect even though nondiscriminatory on their face. See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 676, n. 22 (1979).

That rationale for departing from the treaty text in the narrow context of the fishing cases does not apply in the highway context. Facially nondiscriminatory highway regulations—such as speed limits, truck restrictions, and reckless driving laws—are also nondiscriminatory in effect, as relevant here. They do not deprive tribal members of use of the public highways or deprive tribal members of a fair share of the public highways.

Washington's facially nondiscriminatory fuel tax is likewise nondiscriminatory in effect. The Washington fuel tax therefore does not violate the key principle articulated in the fishing cases. I would adhere to the text of the treaty and hold that the tribal members, like other citizens of the State of Washington, are subject to the nondiscriminatory fuel tax.

The Court (via the plurality opinion and the concurrence) disagrees. The Court relies on the fishing cases and fashions a new right for Yakama tribal members to disregard even nondiscriminatory highway regulations, such as the Washington fuel tax and perhaps also Washington's similarly structured cigarette tax. The Court's newly created right will allow Yakama businesses not to pay state taxes that must be paid by other competing businesses, including by businesses run by members of the many other tribes in the State of Washington. As a result, the State of Washington (along with other States) stands to lose millions of dollars annually in tax revenue, which

will necessarily mean fewer services or increased taxes for other citizens and tribes in the State.

In addition, the Court's newly created right—if applied across the board—would seem to afford Yakama tribal members an exemption from all manner of highway regulations, ranging from speed limits to truck restrictions to reckless driving laws. No doubt because of those negative real-world consequences, the Court simultaneously fashions a new health and safety exception.* But neither the right nor the exception comes from the text of the treaty. As THE CHIEF JUSTICE explains, the Court's "need for the health and safety exception, of course, follows from the overly expansive interpretation of the treaty right adopted by the plurality and concurrence." *Ante*, at 8.

I share THE CHIEF JUSTICE's concern that the Court's new right for tribal members to disregard even nondiscriminatory highway regulations and the Court's new exception to that right for health and safety regulations could generate significant uncertainty and unnecessary litigation for States and tribes. THE CHIEF JUSTICE says it well: The Court "digs such a deep hole that the future promises a lot of backing and filling." *Ibid.*

Instead of judicially creating a new atextual right for tribal members to disregard nondiscriminatory highway regulations and then backfilling by judicially creating a new atextual exception to that right for health and safety regulations, I would adhere to the text of the treaty and leave it to Congress, if it chooses, to provide additional benefits for the Yakamas. In my respectful view, even when we interpret any ambiguities in the treaty in favor of the Tribe, the treaty phrase "in common with" cannot properly be read to exempt tribal members from nondiscriminatory highway regulations.

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*I understand both the plurality opinion and the concurrence to approve of a health and safety exception.

In sum, under the treaty, Washington's nondiscriminatory fuel tax may be imposed on Yakama tribal members just as it may be imposed on other citizens and tribes in the State of Washington. I respectfully dissent.

G

United States Government Accountability Office

Report to Congressional Requesters

January 2019

SUPERFUND

EPA Should Improve the Reliability of Data on National Priorities List Sites Affecting Indian Tribes

GAO-19-123

GAO Highlights

Highlights of GAO-19-123, a report to congressional requesters

January 2019

SUPERFUND

EPA Should Improve the Reliability of Data on National Priorities List Sites Affecting Indian Tribes

Why GAO Did This Study

Superfund is EPA's principal program to address sites with hazardous substances, and some of the most seriously contaminated of these sites are listed on the NPL. Many of these sites can affect Indian tribes or their land. EPA has a policy to consult with tribes when EPA actions or decisions may affect tribal interests, including on cleanup of NPL sites that are on tribal property or that affect tribes.

GAO was asked to analyze NPL sites that are on tribal property or that affect tribes and EPA's consultation with tribes at these sites. This report: (1) examines the extent to which EPA has reliable data identifying NPL sites that are located on tribal property or that affect tribes, (2) examines the extent to which EPA has reliable data on the agency's consultation with tribes regarding NPL sites, and (3) describes the actions EPA has taken to address the unique needs of tribes when making decisions about cleanup actions at Superfund sites. GAO reviewed laws and policies, assessed EPA data on NPL sites, and interviewed EPA and tribal officials about cleanup actions and consultations at six non-generalizable NPL sites selected in part for their geographic diversity.

What GAO Recommends

GAO is making four recommendations to EPA, including that it take actions to improve the data it collects and to clearly define circumstances under which consultation with tribes should be considered. EPA generally agreed with GAO's recommendations.

View GAO-19-123. For more information, contact Alfredo Gómez, (202) 512-3841 or gomezj@gao.gov

What GAO Found

The Environmental Protection Agency (EPA) does not have reliable data identifying National Priorities List (NPL) sites that are located on tribal property or that affect tribes. Specifically, EPA collects data on whether sites are on tribal property or have Native American Interest (a data variable indicating sites where tribal members or tribal land would be directly affected by the release of hazardous substances), as well as which tribes are associated with NPL sites. However, EPA's data are not always accurate or complete for a number of reasons. For example, EPA can have difficulty identifying some tribal property boundaries, and NPL site boundaries may evolve as the site is investigated and remediated. EPA does not have a regular review process for its data on whether an NPL site is on tribal property. In addition, EPA's guidance for determining whether a site has Native American Interest is unclear, and regions may not interpret it consistently. Without improving its review process and clarifying its guidance, EPA will not have reasonable assurance that its data on tribes that are affected by NPL sites are accurate or complete.

EPA consults with tribes when actions at an NPL site may affect tribal interests, but the agency does not have reliable data on its consultations with tribes. Data from EPA's system for tracking consultation did not include documentation of some consultations that GAO confirmed had occurred. One possible reason that EPA data are incomplete is that the agency's policy is unclear on which interactions are considered consultation and are therefore to be documented in EPA's system of record, which is not consistent with federal standards for internal control. EPA's policy provides a broad definition of consultation and specifies which staff are responsible for determining when consultation may be appropriate. However, the policy does not provide further guidance on the circumstances under which consultation should be considered. For example, it does not specify any specific points in the hazardous substance cleanup process at which consultation should be considered or provide further detail on which tribal interests should be considered when determining if tribal interests on NPL sites are affected. Without clarifying guidance to clearly define circumstances under which consultation with tribes should be considered, EPA cannot have reasonable assurance that it is applying its consultation policy consistently.

EPA has taken various actions to address the unique needs of tribes when making decisions about cleanup actions. These actions include minimizing tribal members' exposure to contaminants because of tribal lifestyle (e.g., greater consumption of local fish and game) and limiting potential damage to culturally important sites. For example, EPA officials said that at one site, they altered the design and route of the roads used to remove contaminated materials to minimize the impact of cleanup activities' on cultural resources. EPA also published a memorandum in 2017 with recommendations on considering tribes' traditional ecological knowledge in the cleanup process if tribes offer it.

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Abbreviations list

CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
EPA	Environmental Protection Agency
NAI	Native American Interest
NPL	National Priorities List
PCB	Polychlorinated biphenyls
SEMS	Superfund Enterprise Management System
TCOTS	Tribal Consultation Opportunity Tracking System

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Congressional Requesters

Releases of hazardous substances into the environment can create significant risks to human health and the environment, and Indian tribes can face unique challenges associated with exposure to such substances.[1] According to the Environmental Protection Agency (EPA), more than 300,000 Indians—roughly 12 percent of the approximate total Indian population of the United States—live within 3 miles of a site that has released or may release a hazardous substance. For example, in upstate New York, elevated levels of polychlorinated biphenyls,[2] which were released into the St. Lawrence and Grasse Rivers by an aluminum manufacturing facility and an aluminum die casting plant, have posed a threat to the health and traditional cultural practices of members of the Saint Regis Mohawk Tribe since at least 1954, according to officials from the tribe. According to these officials, fish consumption restrictions associated with the contamination in the St. Lawrence and Grasse Rivers disrupted the tribe's subsistence lifestyle and the role that fishing plays in tribal members' lives.[3] In addition, in 2014, we reported that for more than 30 years, the Navajo people have lived with the environmental and health effects of uranium contamination resulting from the extraction of millions

[1]For the purpose of this report, we focus only on federally recognized Indian tribes. We use the term "tribe," to refer to a "federally recognized Indian tribe."

[2]Polychlorinated biphenyls (PCB) were developed in the 1940's and used extensively in the manufacture of heat transfer devices, such as transformers and capacitors, through the late 1970s. PCBs are a group of chemicals that have extremely high boiling points and are practically nonflammable. Because of this, they were used extensively as heat transfer fluids in transformers and capacitors. In 1979, their manufacture and importation was banned in the United States, based on mounting evidence that they were toxic to humans and wildlife. Today they are classified as probable human carcinogens and are listed in the top 10 percent of EPA's most toxic chemicals.

[3]The Saint Regis Mohawk Tribe issued a fish consumption advisory in 1986 limiting the consumption of fish from any body of water in or around the Saint Regis Mohawk reservation. Additionally, the New York State Department of Health issued a fish consumption advisory in 1990 that indicated that no fish in the area should be eaten. This advisory is updated annually and, as of April 2017, the advisory to consume no fish from the mouth of the Grasse River to the Massena Power Canal—an area near the aluminum product manufacturing facility—remains in effect.

of tons of uranium ore from mines on the Navajo reservation to support the development of the U.S. nuclear weapons stockpile.[4]

The federal government's principal program to address sites with hazardous substances—the Superfund program—was established by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 and is administered by EPA.[5] EPA assesses contaminated sites using a Hazard Ranking System that considers several factors, such as exposure pathways, to determine a site's relative threat to human health or the environment. Sites with sufficiently high scores under this system are eligible to be proposed for listing on the National Priorities List (NPL), which includes some of the most seriously contaminated sites that EPA identifies for long-term cleanup. After a site is listed on the NPL, or a release or threatened release of a hazardous substance is identified, EPA or a potentially responsible party can begin the multi-phase remedial cleanup process,[6] which we refer to as cleanup actions. Potentially responsible parties are liable for conducting or paying for the cleanup of hazardous substances.[7]

In certain circumstances involving Superfund sites, EPA is required or directed to consult with federally recognized Indian tribes. Specifically, for Superfund sites on land where a tribe has jurisdiction, CERCLA requires EPA to give tribes "substantially the same treatment as a state" for,

[4]GAO, *Uranium Contamination: Overall Scope, Time Frame, and Cost Information Is Needed for Contamination Cleanup on the Navajo Reservation*, GAO-14-323 (Washington, D.C.: May 5, 2014).

[5]Pub. L. No. 96-510, 94 Stat. 2767 (1980) (*codified as amended at* 42 U.S.C. §§ 9601 – 9675). EPA's program under CERCLA is better known as "Superfund," because the law established a trust fund that is used to pay for, among other things, remedial actions at nonfederal sites on the NPL. Under Superfund's remedial program, EPA implements various processes to determine the need for and to conduct or oversee cleanup operations at NPL sites. EPA's remedial program works closely with states, tribes, and communities in cleanups and enhancement of response capabilities of states and tribes, among other things.

[6]Under CERCLA, potentially responsible parties generally include current or former owners or operators of a site or the generators and transporters of the hazardous substances.

[7]Cleanup costs for which potentially responsible parties are liable include the cost of conducting remedial investigations and feasibility studies and implementing the selected remedy, such as extraction, treatment, and containment of the hazardous substance. In addition, potentially responsible parties are liable for damages related to the loss, injury, or destruction of natural resources, such as land, water, and air and the costs of certain health assessments or effect studies.

among other things, consultation on remedial actions. In addition, in 2011, EPA issued a general, agency-wide policy for consultation and coordination with tribes when EPA actions and decisions may affect tribal interests. The policy outlines a four-phase consultation process that includes EPA notifying tribes sufficiently early in the process to allow for meaningful input by tribes and providing formal, written feedback explaining how EPA considered tribes' input in its final action.

You asked us to examine Superfund sites that are located on tribal property or that affect tribes, and EPA's consultation with tribes regarding cleanup actions at these sites. This report (1) examines the extent to which EPA has reliable data identifying NPL sites that are located on tribal property or that affect tribes, (2) examines the extent to which EPA has reliable data on the agency's consultation with tribes regarding NPL sites, and (3) describes what actions, if any, EPA has taken to address the unique needs of tribes when making decisions about cleanup actions at NPL sites.

To examine the extent to which EPA has reliable data identifying NPL sites that are located on tribal property or that affect tribes, we obtained EPA data on NPL sites currently proposed, final, or deleted,[8] that (1) EPA data indicate are associated with Indian tribes, (2) the agency has determined to have Native American Interest (NAI),[9] and (3) EPA officials told us may be within 10 miles of tribal property.[10] We limited our review to NPL remedial cleanup sites—proposed, final, and deleted—because they represent sites with the highest national priority due to the

[8]EPA provided data from the Superfund Enterprise Management System (SEMS) on sites with Native American Interest (NAI), sites on tribal property, and sites with an associated tribe. In some cases, the SEMS data did not have an associated tribe for sites with NAI, and EPA used a publicly available database to add tribes known to have interest in the sites to the data they provided us. Additionally, EPA provided information on each site's approximate distance to tribal property based on site boundary data, tribal boundary data, and information from EPA's Environmental Data Gateway. According to agency officials, these data were intended to help provide quality assurance for SEMS data. Officials told us that this proximity data had not been confirmed for accuracy and is not sufficiently reliable to report.

[9]EPA identifies a site as having NAI if EPA regional officials determine that the site may be of interest to one or more Native American entities whose members or land are directly affected by a release from the site.

[10]EPA officials told us they approximated the distance of NPL sites to tribal property by comparing the sites' geographical coordinates to tribes' geographic locations as recorded in EPA's Environmental Data Gateway.

significance of releases, or threatened releases, of hazardous substances.[11] To assess the reliability of EPA's data, we worked with officials from EPA headquarters and each of its 10 regional offices to perform data quality checks and identify any errors or omissions. We also interviewed EPA officials about selected sites of interest that, according to EPA, may be located within 1 mile of tribal property, but that EPA had not identified as having NAI. Additionally, we reviewed documents and interviewed officials from EPA headquarters and regional offices to better understand the agency's management and use of the database of record for collecting and maintaining data on all Superfund sites, the Superfund Enterprise Management System (SEMS). We worked with agency officials to correct errors in order for us to report on the number of NPL sites known to be on tribal property or that affect tribes as of December 2017, and we identified 87 sites of the total 1,785 NPL sites that were proposed, final, or deleted at that time. In addition, in their comments on a draft of this report, the Confederated Salish and Kootenai Tribes of the Flathead Reservation identified an additional site that was not included in EPA's data, bringing the total to 88 NPL sites known to be on tribal property or affect tribes. We recognize there may be additional sites that may be of interest to tribes; however, we determined that the data were sufficiently reliable for the purpose of providing information on NPL sites known to affect tribes or to be located on tribal property. Appendix I provides information on and cleanup status for these 88 sites.

To examine whether EPA has reliable data regarding its consultation with tribes about NPL sites, we reviewed data from EPA's Tribal Consultation Opportunity Tracking System (TCOTS) regarding consultations that had taken place since 2011 and related agency documentation, interviewed knowledgeable agency officials, and compared TCOTS data with other data EPA provided on tribal consultation in support of our first objective. We worked with agency officials to correct errors and omissions to reach a final set of data that were sufficiently reliable to report, as of May 2018. These data provide the total number of consultations that EPA officials have had with tribes regarding NPL site cleanup decisions since 2011. We also interviewed EPA headquarters and regional officials to obtain their perspectives on how and when EPA consults with tribes.

[11]EPA considers Superfund sites to be eligible for deletion from the NPL when the agency determines that no further response actions are appropriate under CERCLA. To make this determination, EPA considers whether all appropriate response actions have been implemented, if no further cleanup is appropriate, or if the remedial investigation indicates that no remedial measures are necessary to protect public health or the environment.

In addition, using the number of NPL sites known to be on tribal property or affecting tribes that we developed for objective one, we selected a nonprobability sample of six final or proposed NPL sites to use as case studies.[12] We selected these sites to reflect different EPA regions, listings on the NPL before and after EPA's 2011 consultation and coordination policy went into effect, and sites that have had at least two assessments or inspections performed, according to EPA data. While we selected six NPL sites EPA has identified as affecting tribes or located on tribal property, our interviews with tribal and EPA officials covered a broader spectrum of sites and included officials' views regarding any Superfund program activities in which they had been involved. For each case study, we requested information about EPA's consultation with tribes as well as any documentation that demonstrated whether and how EPA took into account unique tribal needs associated with the site when making cleanup decisions. We also interviewed officials from the tribe or tribes involved with the cleanup at each of our six selected NPL sites, as well as EPA regional officials for the region in which the site is located.[13] We analyzed EPA and tribal officials' experiences with consultation and coordination at the six selected NPL sites based on EPA's consultation policy.

To describe what actions EPA has taken to address the unique needs of tribes when making cleanup decisions, we interviewed EPA officials from the regional offices associated with the six selected NPL sites. We also interviewed officials from the tribe or tribes with interests at each of the selected sites in our review. Our interviews with EPA and tribal officials covered a broader spectrum of sites and included officials' views about other Superfund activities in which they had been involved. Appendix II provides a more detailed description of the objectives, scope, and

[12]Because this was a nonprobability sample, it is not generalizable to other sites but provides illustrative examples of NPL sites with NAI that have had at least two assessments or inspections performed according to EPA data, and includes sites listed on the NPL since the publication of EPA's 2011 policy on tribal consultation and coordination.

[13]The selected sites are: Creese & Cook Tannery site in Danvers, MA (EPA Region 1: New England and 10 tribal nations); General Motors (Central Foundry Division) site in Massena, NY (EPA Region 2: New Jersey, New York, Puerto Rico, U.S. Virgin Islands, and 8 tribal nations); Petoskey Manufacturing Company Groundwater site in Petoskey, MI (EPA Region 5: Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin, and 35 tribal nations); Jackpile-Paguate Uranium Mine site in Laguna Pueblo, NM (EPA Region 6: Arkansas, Louisiana, New Mexico, Oklahoma, Texas, and 66 tribal nations); Smurfit Stone Mill Frenchtown site in Missoula, MT (EPA Region 8: Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming, and 27 tribal nations); and the Midnite Mine in Wellpinit, WA (EPA Region 10: Alaska, Idaho, Oregon, Washington and 271 tribal nations).

methodology for this report. Appendix III provides additional information about our six selected case study sites and the EPA regions in which they are located.

We conducted this performance audit from May 2017 to January 2019 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

This section presents information on the Superfund program and the stages of the cleanup process, the relationship between federally recognized tribes and the federal government, the laws and policies that govern EPA's consultation with federally recognized tribes regarding Superfund cleanup actions, and EPA's administration of the Superfund program.

The Superfund Program and Remedial Cleanup Process

CERCLA established the Superfund program to clean up contaminated sites to protect human health and the environment from the effects of hazardous substances. Under CERCLA, potentially responsible parties are liable for conducting or paying for the cleanup of hazardous substances at contaminated sites. Under the Superfund program, EPA and potentially responsible parties can undertake two types of cleanup actions: removal actions and remedial actions. Removal actions are usually short-term cleanups for sites that pose immediate threats to human health or the environment. Remedial actions are generally long-term cleanups—consisting of one or more remedial action projects—that aim to permanently and significantly reduce contamination; these actions can take a considerable amount of time and money, depending on the nature of the contamination and other site-specific factors.

The Superfund process begins with the discovery of a potentially hazardous site or notifications to EPA regarding the possible release of hazardous substances that may threaten human health or the environment. EPA delineates the Superfund remedial cleanup process in nine phases:

1. **Preliminary Assessment and Site Investigation.** EPA's regional offices may discover sites with releases of hazardous substances or

potential for releases of hazardous substances, or such sites may come to EPA's attention through notifications—either reports from state agencies or citizens. As part of this first phase of the process, EPA's regional offices use a screening system called the Hazard Ranking System to guide decision making and, as needed, to numerically assess the site's relative potential to pose a threat to human health or the environment.

2. **NPL Site Listing Process.** EPA may propose sites that score at or above an established level for listing on the NPL.[14] EPA regions submit sites to EPA headquarters for possible listing on the NPL based on a variety of factors, including the availability of alternative state or federal programs that may be used to clean up the site.[15] Sites that EPA proposes to list on the NPL are published in the Federal Register. After a period of public comment, EPA reviews the comments and makes final decisions on whether to list the sites on the NPL.
3. **Remedial Investigation and Feasibility Study.** EPA or a potentially responsible party will generally begin the remedial cleanup process for an NPL site by conducting a two-part study of the site: (1) a remedial investigation to characterize site conditions and assess the risks to human health and the environment, among other actions and (2) a feasibility study to evaluate various options to address the problems identified through the remedial investigation.
4. **Record of Decision.** At the culmination of the remedial investigation and feasibility study, EPA issues a record of decision that identifies EPA's selected remedy for addressing the contamination. A record of

[14]Sites with a Hazard Ranking System score of 28.50 or greater are eligible for listing on the NPL.

[15]In addition, EPA officials have noted that, as a matter of policy, EPA seeks concurrence from the governor of the state or head of the state's environmental agency in which a site is located before listing a site on the NPL.

decision typically lays out the planned cleanup activities for each operable unit of the site.[16]

5. **Remedial Design and Remedial Action.** EPA or a potentially responsible party plans the implementation of the selected remedy during the remedial design phase, and then, in the remedial action phase, EPA or a potentially responsible party carries out one or more remedial action projects.
6. **Construction Completion.** EPA generally considers the construction to be complete for a site when all physical construction at a site is complete, including actions to address all immediate threats and to bring all long-term threats under control.
7. **Post-Construction Completion.** The potentially responsible party or the state generally conducts operation and maintenance to maintain the remedy, such as operating a groundwater extraction and treatment system. EPA generally performs reviews of the remedy at least every five years to evaluate whether it continues to protect human health and the environment.
8. **NPL Deletion**. EPA may delete a site, or part of a site, from the NPL when the agency and the relevant state authority determine that no further site response is needed.
9. **Site Reuse and Redevelopment.** EPA works with communities to ensure that site cleanups are consistent with the site's future use and to make sure sites or portions of sites are used safely.

[16]An operable unit is a discrete action that comprises an incremental step toward comprehensively addressing site problems. 40 C.F.R. § 300.5. The cleanup of a site can be divided into a number of operable units, depending on the complexity of the problems associated with the site. Operable units may address geographical portions of a site, specific site problems, or initial phases of an action, or may consist of any set of actions performed over time or any actions that are concurrent but located in different parts of a site. EPA guidance notes that, in practice, operable units are more commonly used to refer to a geographical area, a contaminated medium, or a chronological phase of a cleanup.

Relationship between Federally Recognized Tribes and the Federal Government

The federal government recognizes Indian tribes as distinct, independent political communities that possess certain powers of self-government and sovereignty. As of January 9, 2019, there were 573 federally recognized Indian tribes.[17] The federal government has a government-to-government relationship with Indian tribes, so EPA works directly with tribes. The federal government also has a trust responsibility to Indian tribes and their members based on treaties, federal laws, and court decisions. In addition, treaties between tribes and the federal government may reserve rights to a tribe that could be affected by a proposed EPA action. For example, an NPL site may contaminate fish or wildlife that a tribe has a treaty right to fish or hunt. EPA guidance notes that certain types of EPA actions, namely those that are focused on a specific geographic area, are more likely than others to have potential implications for treaty-protected natural resources.

Laws and Policies Governing EPA Consultation with Tribes Regarding Superfund Cleanup Actions

CERCLA includes a requirement for EPA to consult with Indian tribes in certain circumstances regarding cleanup actions at Superfund sites. Specifically, under CERCLA, EPA is required to treat tribes substantially the same as states with regard to consultation on remedial actions on lands for which an Indian tribe has jurisdiction, among other things.[18] In addition to this CERCLA requirement, the following government-wide and agency policies apply when EPA consults with tribes regarding cleanup actions at Superfund sites:

- **Executive Order 13175 (2000).** Directs agencies to have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.[19]

[17] 83 Fed. Reg. 34863 (July 23, 2018).

[18] 42 U.S.C. § 9626(a); 40 C.F.R. § 300.515(b)(3).

[19] *Executive Order 13175, Consultation and Coordination with Indian Tribal Governments* , 65 Fed. Reg. 67249 (Nov. 9, 2000). Policies that have tribal implications refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes.

- **EPA policies and guidance**
  - **EPA Policy for the Administration of Environmental Programs on Indian Reservations (1984).** Sets forth principles to guide EPA in dealing with tribal governments and responding to the problems of environmental management on reservations in order to protect human health and the environment.[20]
  - **EPA Policy on Consultation and Coordination with Indian Tribes (2011).** Provides a general, agency-wide policy for consultation and coordination with tribes in cases in which EPA actions and decisions may affect tribal interests.[21] EPA developed this policy in response to Executive Order 13175 and a 2009 presidential memorandum on tribal consultation.[22] The policy notes that EPA submits annual progress reports to the Office of Management and Budget (OMB) on the status of its consultation actions pursuant to this 2009 presidential memorandum. This policy provides guiding principles for consultation, outlines a four-phase process for conducting consultation, and establishes the roles and responsibilities for specific EPA officials.[23] Some EPA regional offices have their own specific guidance for consulting with tribes that include the elements of EPA's agency-wide consultation policy, but may include more specific guidelines. For example, Region 2's consultation guidance includes a list of specific subjects to include in notification letters to tribes.
  - **EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples (2014).** Affirms EPA's commitment to provide federally recognized tribes and indigenous peoples in the United States fair treatment and

[20]Environmental Protection Agency, *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (Washington, D.C.: November 8, 1984). EPA re-affirmed this policy in October 2017.

[21]Environmental Protection Agency*, EPA Policy on Consultation and Coordination with Indian Tribes* (Washington, D.C.: May 4, 2011).

[22]In 2009, a presidential memorandum directed agencies to develop detailed plans of actions that they were to take to implement the policies and directives of Executive Order 13175. The White House, Office of the Press Secretary, *Memorandum for the Heads of Departments and Agencies on Tribal Consultation* (Washington, D.C.: November 5, 2009).

[23]For example, the policy says EPA should notify tribes of activities that may be appropriate for consultation sufficiently early in the process to allow for meaningful input by the tribe, and that EPA should provide tribes with formal, written feedback from a senior EPA official to the most senior tribal official involved in the consultation, describing how a tribe's input was considered in making the agency's final action.

meaningful involvement in EPA decisions that may affect their health or environment.[24]

- **EPA Guidance for Discussing Tribal Treaty Rights (2016).** The guidance states that it is intended to enhance EPA's consultations in situations where tribal treaty rights may be affected by a proposed EPA action.[25]
- **EPA Memorandum on Considering Traditional Ecological Knowledge During the Cleanup Process (2017).** Provides direction to improve the Superfund decision-making process to ensure EPA considers a tribe's traditional ecological knowledge when tribes willingly provide such information.[26]
- **EPA Memorandum on Consideration of Tribal Treaty Rights and Traditional Ecological Knowledge in the Superfund Remedial Program (2017).** Provides recommendations for regional Superfund Remedial Program staff to consider when (1) evaluating tribal treaty rights and treaty-protected resources in program implementation and (2) considering traditional ecological knowledge during the cleanup process when the information is freely provided by the tribe or tribes with interests at the site.[27]

EPA's Administration of the Superfund Program

EPA's 10 regional offices are responsible for carrying out many of the implementation and management responsibilities for NPL sites, and are guided by the Superfund Program Implementation Manual, as well as CERCLA, CERCLA's implementing regulations, supplementary guidance, and agency policy. The Superfund Program Implementation Manual states that its purpose is to provide overarching program management priorities, procedures, and practices for EPA's Superfund remedial and removal programs, providing a link between EPA's strategic plan and Superfund program internal processes, among other things. Further, the

[24]Environmental Protection Agency, *EPA Policy on Environmental Justice for Working with Federally-Recognized Tribes and Indigenous People* (Washington, D.C.: July 24, 2014).

[25]Environmental Protection Agency, *EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights* (February 2016).

[26]Environmental Protection Agency, *Considering Traditional Ecological Knowledge (TEK) During the Cleanup Process* (Washington, D.C.: January3, 2017).

[27]Environmental Protection Agency, *Consideration of Tribal Treaty Rights and Traditional Ecological Knowledge in the Superfund Remedial Program*, OLEM 9200.2-177 (Washington, D.C.: January 17, 2017).

manual includes definitions for Superfund program accomplishments and outlines processes for planning and tracking accomplishments through milestones, including site-wide milestones specific to how the agency manages the release of hazardous substances (e.g., human exposure under control).[28]

Using its SEMS and TCOTS data systems, EPA tracks NPL sites that are on tribal property or that affect federally recognized Indian tribes, as well as the agency's efforts to consult with Indian tribes regarding cleanup decisions at NPL sites. SEMS is EPA's primary database to track Superfund program accomplishments and milestones and to answer Superfund-related questions from Congress, federal and state agencies, and the public. SEMS is EPA's primary system for Superfund data collection, reporting, and tracking and serves as the Superfund program's data management system for accomplishment planning and tracking. According to the Superfund Program Implementation Manual, EPA regional staff are to input data into SEMS regarding planned or actual accomplishments, and EPA headquarters staff are to use SEMS data as the basis for tracking, managing, and reporting on the performance of the Superfund program.

SEMS is the system of record for NPL site data, including information on tribes that have an interest in the site. We looked at three of the variables SEMS uses for tracking sites that are located on tribal property or that affect tribes[29]:

- **On tribal property.** This variable indicates whether the release of hazardous materials is on Indian country and any other land owned by an Indian tribe or an Alaska Native entity.[30]

[28]For the purposes of this report, we use the phrase site-wide milestones to refer to four of the indicators EPA uses to measure progress at remedial sites: construction completion, human exposure under control, groundwater migration under control, and site-wide ready for anticipated use. These milestones are further explained in Appendix I.

[29]In its fiscal year 2018 manual, EPA added a variable for sites that are on land under the governance of the Navajo Nation. We did not examine these data specifically because sites under the governance of the Navajo Nation were captured in our data through other tribal-related variables.

[30]Federal law defines the term "Indian country" as all land within the limits of any Indian reservation under the jurisdiction of the U.S. government, all dependent Indian communities within U.S. borders, and all Indian allotments, the Indian titles to which have not been extinguished, including any rights-of-way running through an allotment. See 18 U.S.C. § 1151.

- **NAI.** This variable identifies sites that may be of interest to one or more Native American entities whose members or land would be directly affected by the release of hazardous materials.
- **Associated tribe.** This variable identifies the specific Indian entity or entities associated with a site with NAI.

TCOTS tracks information about potential future tribal consultation opportunities and serves as a repository for consultation-related documents for active consultations for all EPA programs, including Superfund. EPA uses TCOTS to (1) track current and forecasted consultation, (2) publicize current EPA consultation opportunities for tribal governments, and (3) provide reports to OMB, as called for in the 2009 presidential memorandum on tribal consultation.[31]

EPA Does Not Have Reliable Data Identifying NPL Sites Located on Tribal Property or That Affect Tribes

EPA data identifying NPL sites that are located on tribal property or that affect tribes are not reliable. Specifically, EPA data identifying sites that are on tribal property, sites that have NAI, and the tribes that have interest in NAI sites are not accurate or complete based on our reviews of agency data and interviews with EPA officials.

EPA Data Identifying NPL Sites Located on Tribal Property Are Not Accurate

EPA data identifying NPL sites that are on tribal property are not accurate. EPA headquarters officials told us that the SEMS data variable for identifying sites "on tribal property" may not always accurately identify whether NPL sites are located on tribal property. Because EPA officials told us that the agency's data regarding NPL sites on tribal property may not be accurate and provided explanations for why these data are unreliable, we did not evaluate these data to determine the total number of inaccuracies.

EPA officials we interviewed provided a number of reasons why the agency's data regarding NPL sites located on tribal property may not be accurate:

[31]The memorandum directs agencies to develop a plan of actions to implement the policies and directives of Executive Order 13175 and to submit an annual report to OMB that includes any proposed updates to the plan and a progress report on the status of each action included in agencies' plans.

- First, EPA officials told us that some site location information was inaccurately transposed during maintenance of the former database of record used prior to adopting SEMS, and that these errors, in some cases, carried over to SEMS.[32] According to these officials, the transposed information resulted in some sites appearing in the incorrect geographic hemisphere (i.e., sites located in the western hemisphere appeared to be located in the eastern hemisphere in the incorrectly transposed data). These officials told us that they have worked over the past year to correct these errors and to verify the accuracy of site coordinates.
- Second, EPA officials told us that accurately documenting which sites are on tribal property can be complicated due to difficulties identifying tribal property boundaries and evolving site boundaries. For example, tribal property boundaries may be difficult to establish without reviewing land titles and other documents. Further, EPA officials told us they use the best available data to identify tribal property but there are limitations in that data. In addition, EPA officials we interviewed told us that site boundaries can be difficult to define or change over time. For example, an agency official told us NPL sites may not have clearly delineated boundaries until after the remedial investigation is complete and the full extent of contamination has been determined. Further, the official said that site boundaries may change during the cleanup process or during post-cleanup reviews if EPA discovers new or more widespread contamination. According to EPA headquarters officials, EPA regional officials are responsible for tracking changes to site boundaries in their respective regions, but specific information on the location of site boundaries is not documented in SEMS. Additionally, for one site—the Tar Creek site in Oklahoma (Region 6)—EPA's publicly-available information states that there are no clear site boundaries. One EPA regional official we interviewed told us that he was not aware of guidance for regions regarding changing tribal property information in circumstances in which site boundaries change to include land that is tribal property. Additionally, EPA officials told us that regional offices may be inconsistent in how they determine site boundaries. EPA released recommended practices for collecting geospatial data for Superfund sites in 2017 that included guidance for determining and documenting NPL site boundaries. Further, in May 2018, EPA provided national standards intended to

[32]The previous database of record was called the Comprehensive Environmental Response, Compensation and Liability Information System, CERCLIS, and EPA replaced this database with SEMS in fiscal year 2014.

provide a uniform method for collecting, documenting, and managing geospatial information for Superfund sites, including information identifying site boundaries.

- Third, EPA headquarters officials stated that EPA checks the accuracy of these data infrequently. Headquarters officials told us there are several standardized automated reports that officials at the headquarters and regional levels can use to review SEMS data and identify quality issues, including quality issues in the variables for NAI and the associated tribes. However, these reports do not contain the on tribal property variable, and SEMS currently does not have the ability to run automated checks of site proximity to tribal property based on location data. Officials told us that they review the on tribal property data periodically outside of these reports; however, EPA currently lacks a regular review process for these data.

Under federal standards for internal control, management should use quality information to achieve the entity's objectives. Quality information is appropriate, current, complete, accurate, accessible, and provided on a timely basis.[33] In addition, under federal standards for internal control, management should design control activities to achieve objectives and respond to risks, such as by conducting reviews at the functional or activity level. According to EPA officials, data identifying NPL sites that are on tribal property may not be accurate for a number of reasons. Because SEMS automated reports do not contain the on tribal property variable, EPA regions cannot regularly conduct quality reviews of information in SEMS on tribal property using those reports. Without a regular review process to ensure the quality of SEMS data identifying sites on tribal property and the ability to use automated reports to check the accuracy of on tribal property data in SEMS, EPA does not have reasonable assurance that regional officials have accurately identified sites on tribal property.

EPA Data Identifying Sites as Having NAI Are Not Accurate or Complete

EPA data identifying which sites have NAI are inaccurate and incomplete, based on our reviews of the data. We found three types of errors in these data. First, we found that SEMS did not include some sites with known tribal interest as having NAI. Second, we found some sites that EPA identified in SEMS as having NAI when there was no tribal interest. Third,

[33]GAO, Standards for Internal Control in the Federal Government, GAO-14-704G (Washington, D.C.: September 2014).

we found that EPA regional officials inconsistently used the NAI variable in SEMS when there was no longer tribal interest in a site.

- **SEMS does not include some NPL sites with known tribal interests as having NAI.** We found nine sites with tribal interest that EPA did not identify as having NAI in SEMS. For six of these sites, EPA regional officials told us that they knew the sites were of interest to one or more tribes, even though they were not identified as having NAI in SEMS. For example, we found that EPA Region 10 had invited the Cow Creek Band of Umpqua Tribe of Indians to consult regarding the Black Butte Mine site, but the site was not identified as having NAI in SEMS. For two additional sites, following our request to review the SEMS data, officials from Region 4 contacted tribal officials in their region to inquire about their potential interest in NPL sites and found that the Eastern Band of Cherokee Indians had interest in two sites in North Carolina not previously identified as having NAI: Barber Orchard and Benefield Industries. EPA designated both sites as ready for their intended use—meaning that construction of the remedy had been completed—in 2011 and 2014, respectively. For the remaining site, EPA officials in Region 5 stated that they learned of tribal interest in the Petoskey Manufacturing Company Groundwater site when the Little Traverse Bay Bands of Odawa Indians contacted them in December 2017, after coverage of the site's contamination hazards on the local news.[34]
- **SEMS incorrectly includes some sites as having NAI when no tribal interest exists.** When responding to our request to verify the accuracy of data in SEMS, EPA regional officials identified 10 sites that were incorrectly included in SEMS as having NAI when there was no actual tribal interest. For example, officials from Region 4 stated that they removed the NAI designation from three sites because the sites are situated more than 100 miles from the nearest federally recognized tribe's property and the officials were not aware of any tribal interest in the sites. Similarly, EPA regional officials determined that two other sites—Eielson Air Force Base in Region 10 and Seneca Army Depot in Region 2—were incorrectly identified as having NAI. These officials told us that these sites should not have been

[34]In providing technical comments to a draft of this report, EPA commented that Region 5's Tribal and International Affairs Office can help the Superfund Program identify where there may be potential tribal interest or impacts on the tribe, and provide the appropriate tribal contacts so that the tribe can be notified directly from EPA prior to media coverage as much as possible. EPA noted that communicating directly with tribes on a government-to-government basis should begin as soon as site work is contemplated.

designated as NAI because no tribes had expressed interest in either site.

- **EPA inconsistently identified sites with prior NAI in SEMS.** We found that EPA regional officials inconsistently used the NAI variable in SEMS when tribes were no longer interested in a site. For example, Region 2 officials stated that they maintained the NAI designation for the Hooker Hyde Park site in order to preserve the historical record after EPA identified that the Seneca Nation of Indians no longer had an interest in the site. Conversely, Region 8 officials indicated that they removed the NAI designation for the Arsenic Trioxide site when it was determined that the relevant tribe no longer had interest in the site.

Based on our review of EPA guidance and data provided by EPA officials, we identified several possible reasons that the agency's data for identifying tribal interests are not accurate or complete. One possible reason that NAI data in EPA's SEMS may be inaccurate and incomplete is because EPA's guidance for making NAI determinations is unclear, resulting in EPA regional officials inconsistently determining and documenting sites with NAI. EPA's Superfund Program Implementation Manual, which provides guidance to EPA regional officials for identifying sites as having NAI, contains one sentence regarding how EPA regional officials are to determine when to designate a site as having NAI. The manual states that EPA regional officials should designate NAI in SEMS when a site "may be of interest to tribes whose members or land are directly affected" by the release of hazardous materials from the site, but the manual does not specify criteria EPA regional officials should consider for determining what constitutes NAI. For example, the manual does not specify whether ancestral lands, areas where tribes have treaty rights, or areas otherwise of interest to a tribe but that are not tribal property should be considered in making this determination. It also does not specify what types of tribal interests to consider. However, officials from tribes we interviewed for our case studies told us that tribal interests in NPL sites may be related to a variety of factors, including contamination potentially affecting tribal members living in or around the contaminated area or land where the tribe has treaty hunting or fishing rights. Furthermore, EPA's Superfund Program Implementation Manual does not specify whether officials should remove the NAI designation if officials determine tribes no longer have interest in a site. In the case of the Petoskey Manufacturing Company Groundwater site in Michigan, EPA Region 5 officials we interviewed told us that they were uncertain as to whether they should identify the site as having NAI, because they were unsure if the level of the tribe's interest was significant enough.

EPA officials we interviewed provided additional reasons for the lack of accuracy and completeness in the agency's data regarding sites with NAI. EPA headquarters officials told us they periodically, but infrequently, review SEMS data on Superfund sites identified as having NAI. In addition, EPA officials told us that, in some cases, they did not identify sites as having NAI where there was tribal interest or incorrectly identified sites as having NAI when no tribal interests were involved due to errors. Additionally, some regional officials expressed that identifying NAI can be complicated by the fact that tribes may have interest in sites not located near their current property due to historical interest or treaty rights.

Under federal standards for internal control, management should design control activities to achieve objectives and respond to risks, such as by clearly documenting internal control in management directives, administrative policies, or operating manuals.[35] Although EPA has documented guidance, it is not clear about how EPA officials should make determinations about designating sites as having NAI. Without clear guidance to regional offices on how to determine whether sites have NAI—including criteria to assist regions in determining when a site should be designated as having NAI in the SEMS database and how, if at all, to adjust the NAI data for sites that no longer have tribal interest—EPA does not have reasonable assurance that its data on tribes that may be affected by hazardous releases at NPL sites are accurate or complete.

EPA Data on Tribes with Interest in Sites That Have NAI Are Not Accurate or Complete

EPA data do not accurately or completely identify the tribes that have interest in the sites that EPA identified as having NAI. Specifically, through reviewing EPA's data with officials in each region, we found examples of sites that EPA indicated as having NAI but that (1) did not identify any tribes with an interest in the sites, (2) did not identify all tribes with an interest in the sites, and (3) incorrectly identified tribes associated with a site.

- **SEMS does not include tribes for all sites.** We found eight sites with NAI for which EPA did not identify an interested tribe in SEMS. For these eight sites, EPA officials added the tribes' names prior to sending us the data.
- **SEMS does not include all tribes that have an interest in some sites.** We identified eight sites for which EPA did not identify in SEMS

[35]GAO-14-704G.

all the tribes that had interest in the site. For example, for the Smurfit Stone Mill Frenchtown site in Missoula, Montana, EPA data listed the Confederated Salish and Kootenai Tribes of the Flathead Reservation as having an interest in the site. However, after speaking with EPA Region 8 officials, we learned that the Kalispel Indian Community of the Kalispel Reservation also has an interest in the site but could not be included in SEMS because the tribe resides in the state of Washington, and the site is located in Montana. In providing technical comments on a draft of this report, EPA identified a ninth site, the St. Louis River site, for which an additional tribe should be added to the data in SEMS.[36]

- **SEMS incorrectly identified an interested tribe associated with one site determined to have NAI.** For the Velsicol Chemical Corporation site in Michigan, EPA identified in SEMS the interested tribe as the Sault Ste. Marie Tribe of Chippewa Indians, when the actual interested tribe was the Saginaw Chippewa Indian Tribe of Michigan. Additionally, in providing technical comments on a draft of our report, EPA also made corrections to the tribes originally listed for the Tar Lake site and clarified the tribe originally listed for the St. Louis River site.[37]

EPA officials we interviewed told us that a possible reason for the inaccuracies in the data regarding the tribe or tribes interested in NPL sites that have NAI is that, until recently, regional officials could not enter the names of additional tribes to a SEMS site record that was created in the agency's previous database of record. In addition, officials from two EPA regions told us that they could not record tribes as having an interest in a site when the tribe is headquartered in a state other than the state address on file for the site. EPA headquarters officials told us they submitted a request in August of 2017 to have the issue resolved and that, as of April 2018, the issue had been corrected and that regions can now add additional tribes, or tribes from other states outside of the state where the site is headquartered. Officials told us that prior to the correction in SEMS, officials at the headquarters level could manually enter data to record the names of additional tribes with NAI in a site or identify tribes interested in a site that reside in states other than the state in which the site is located.

[36]This addition is reflected in our table of sites with known Native American interest in Appendix I.

[37]These corrections are reflected in our table of sites with known Native American interest in Appendix I.

EPA Does Not Have Reliable Data about the Agency's Consultation with Tribes Regarding NPL Sites

EPA does not have reliable data on the agency's consultation with tribes regarding NPL sites. Additionally, based on our analysis of EPA data and related documentation, as well as discussions with officials from EPA and Indian tribes, we found that EPA officials more frequently coordinated informally with tribes than conducted consultation.

EPA Does Not Have Reliable Data on Consultation with Tribes Regarding NPL Sites

EPA does not have reliable data on the NPL sites at which it has conducted tribal consultation. According to data in TCOTS, consultation had occurred or was projected to occur at 18 sites since EPA's consultation and coordination policy went into effect in 2011.[38] However, TCOTS data are incomplete and did not include records for 7 NPL sites where, based on our interviews with EPA regional officials and a review of agency documents, we determined that consultation had occurred since 2011.

One possible reason that EPA data on consultation with tribes are incomplete is that the agency's guidance regarding what constitutes consultation, and therefore is to be recorded in TCOTS, is unclear. EPA officials told us they consider consultation a specific, formal interaction that involves government-to-government interaction between tribal governments and senior EPA officials, such as Regional Administrators, and generally happens at major decision points or at the request of a tribe. Several EPA officials we interviewed clarified that the majority of day-to-day interaction with tribes do not require consultation and are less formal coordination efforts. EPA's 2011 consultation policy provides a broad definition of consultation and makes specified program and regional officials responsible for determining when consultation may be appropriate, but the policy does not provide specific criteria for regions to use to determine if consultation with a tribe should be considered. The policy initially states that it is EPA's policy to "consult on a government-to-government basis with federally recognized tribal governments when EPA actions or decisions may affect tribal interests." According to the policy, the broad scope of consultation contemplated by the policy creates "a large number of actions that may be appropriate for consultation." To provide "a general framework from which to begin the determination of whether any particular action or decision is appropriate for consultation," the policy provides a list of general EPA activity categories, including Superfund response actions. However, the policy does not provide any further guidance on the circumstances under which consultation should be considered. For example, it does not specify any particular points in the Superfund process at which consultation should be considered or any

[38]TCOTS data for one site correctly recorded a projected consultation, but that consultation did not take place. Subsequently, EPA regional officials requested that the projected consultation be removed from TCOTS because they did not expect to take any actions in the next 6 months.

further detail on what tribal interests should be considered when determining if tribal interests are affected.

Under federal standards for internal control, management should design control activities to achieve objectives and respond to risks, such as by clearly documenting internal control in management directives, administrative policies, or operating manuals.[39] Although EPA has documented guidance about consulting with tribes, it does not provide clear direction to regions about the circumstances under which the agency should consider consulting with tribes during the Superfund process. Without clarifying guidance on tribal consultation to clearly identify the circumstances under which the agency should consider consulting with tribes, EPA does not have reasonable assurance that regions are applying the consultation policy consistently and uniformly.

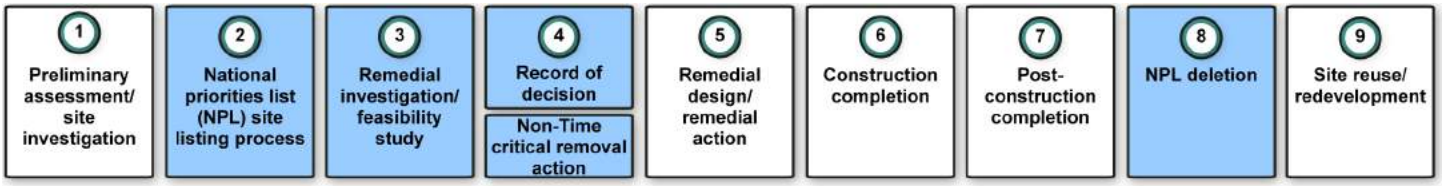
In addition, EPA regional officials do not consistently document invitations to consult with tribes in TCOTS, which could result in incomplete or inaccurate data on EPA consultation with tribes. EPA headquarters officials told us that invitations to consult should be entered in TCOTS, because the database has a specific field for this information. Officials we interviewed from EPA Regions 6 and 10, the two regional offices that combined manage nearly half of Superfund sites that EPA identified as having NAI, told us that they do not document all invitations to consult in TCOTS. Specifically, an official we interviewed from Region 6 told us that consultation invitations that were not made in writing are generally not entered into TCOTS, and an official from Region 10 told us that officials in the region would not document invitations to consult that did not lead to actual consultation. In providing technical comments on our draft report, EPA noted that Region 10 now documents all invitations to consult with tribes in the TCOTS database.

Although EPA headquarters officials told us that invitations to consult should be entered in TCOTS, agency guidance does not direct officials to do so. EPA has developed guidance on key points in the Superfund process at which regional officials should document consultation if it occurs, but this guidance does not direct regional officials to document invitations to consult in TCOTS. Moreover, officials we interviewed from 6 of EPA's 10 regional offices were unaware of this guidance. An EPA headquarters official we interviewed told us that EPA regional officials

[39]GAO-14-704G.

may be unaware of this guidance because EPA has not conducted annual training regarding documenting tribal consultation and has decided to offer the training on an as-needed basis. This guidance identifies five decision points in the Superfund process at which EPA regional officials should, at a minimum, document any associated consultation with tribes in TCOTS, outlined in figure 1 below.

Figure 1: Phases in the Superfund Cleanup Process When the Environmental Protection Agency Should Document Consultation with Tribes



Office of International and Tribal Affairs recommends that, at a minimum, upcoming and current consultations should be entered into the Tribal Consultation Opportunities Tracking System at these phases of the Superfund cleanup process.

Source: GAO analysis of Environmental Protection Agency information. | GAO-19-123

Under federal standards for internal control, management should design control activities to achieve objectives and respond to risks, such as by clearly documenting internal control in management directives, administrative policies, or operating manuals.[40] By developing or revising guidance to clearly direct regional officials to document all invitations to consult with tribes in the TCOTS database and providing the guidance to those officials, EPA would have greater assurance that its regional offices are accurately and consistently documenting invitations to consult and that the data that EPA provides to OMB regarding agency consultations with tribes are accurate and complete.

Consultation Is Relatively Infrequent Compared to Coordination

Based on our analysis of EPA data and documentation, as well as interviews with EPA and tribal officials, we found that EPA more frequently coordinated informally with tribes regarding cleanup decisions at NPL sites than conducted consultation with tribes. Consultation between EPA and tribes, as defined in EPA's 2011 tribal consultation policy, is relatively infrequent compared to less-formal coordination efforts. For example, officials from the Kalispel Indian Community told us that consultation is reserved for instances in which regular communication and coordination is not working. Additionally, EPA officials in Region 8

[40]GAO-14-704G.

told us that most of their day-to-day interactions with tribes are considered coordination, and that consultation only occurs at key decision points in the Superfund process. Most EPA regional officials we interviewed as part of our case studies stated that consultation was relatively infrequent. At the same time, these officials stated that they frequently coordinate with tribes during the Superfund cleanup process. Additionally, EPA's policy says that tribal officials may request consultation with the agency.

Tribal officials we interviewed as part of our case studies expressed varying levels of satisfaction with EPA's coordination and consultation efforts, as well as with EPA's cleanup decisions overall. In the case of the General Motors Central Foundry site in Massena, New York, officials we interviewed from the Saint Regis Mohawk Tribe told us that they were dissatisfied with the consultation and the remedy at the General Motors Central Foundry site. Specifically, tribal officials stated that they were dissatisfied with EPA's decision to install a permanent cap over an industrial landfill at the site, rather than removing all of the waste, to address the contamination at the site. Officials from the tribe told us that they felt EPA was disregarding the tribe's health and safety concerns at the site. EPA acknowledged in its amended record of decision for the site that the tribe only partially agreed with the remedy; however, EPA notes that they took some steps to revise the remedy to address the tribe's concerns. For example, the amended record of decision was created in part, due to tribal opposition, and includes a contingency remedy that expands the scope of the amended decision to include removal of contaminated soil located on the tribe's property rather than on-site treatment. In other cases, officials of some tribes told us that the working relationship with their local EPA region was good and that coordination had been effective. For example, officials from the Pueblo of Laguna reported that communication and coordination with EPA region 6 regarding the cleanup of the Jackpile-Paguate Superfund site in Laguna Pueblo, New Mexico, was effective, and that the EPA remedial project manager for the site had been responsive to the tribe's needs.

EPA Has Taken Various Actions to Address Unique Tribal Needs When Making NPL Site Cleanup Decisions

EPA has taken various actions to address the unique needs of tribes when making cleanup decisions at NPL sites. These actions include efforts to minimize tribal members' exposure to contaminants and limit potential damage to tribal archeological sites. For example:

- **EPA Regions 1 and 10 took steps to protect tribal cultural resources at NPL sites.** EPA officials we interviewed from Region 1 told us that at one site, regional officials rerouted and improved roads used to remove contaminated materials to minimize the impact of cleanup activities' on historically significant cultural resources. In addition, EPA officials we interviewed from Region 10 told us that they coordinated with tribal cultural resource program officials to ensure that tribal officials were present during excavation work at the Midnite Mine site in Wellpinit, Washington, to observe and ensure that EPA was taking appropriate measures to protect sites that are culturally important to the tribe.
- **EPA Region 2 officials revised risk assessments at an NPL site.** Because of concerns about the potential health impacts to the Saint Regis Mohawk Tribe, EPA Region 2 officials revised the risk assessment for a site with polychlorinated biphenyl contamination to more accurately reflect the typical exposure of tribal members. EPA's revised hazard exposure assessment for the General Motors Central Foundry site assumed a higher rate of exposure to contaminants for tribal members, given that they, on average, live on the reservation longer than an adult non-tribal member may live in the same place for most of his or her life. Specifically, EPA's exposure estimate was based on an exposure duration of 64 years for an adult tribal member and an exposure duration of 30 years for adult non-tribal member.
- **EPA Region 9 incorporated tribal information into risk assessments for some NPL sites.** EPA officials we interviewed from EPA's Region 9 office told us about several sites where they had considered tribal members' heightened exposure to contamination. For example, at one site, officials told us they worked closely with tribal officials to gather data on tribal members' uses of vegetation and tribal game consumption. These EPA officials stated that they used these data to develop risk assessment plans that were sensitive to unique tribal needs.

EPA officials we interviewed also provided examples of the use of traditional ecological knowledge at some NPL sites.[41] Traditional ecological knowledge sometimes represents unique tribal needs. For example, EPA officials we interviewed described instances in which a tribe provided EPA with selected information about their traditional hunting sites and their traditional use of plants, and EPA was able to use this information when developing risk assessments and standards for safe consumption of fish and wildlife. For example, officials in EPA Region 9 told us that a tribe shared information with them about how tribal members hold reeds in their mouths as part of traditional basket making practices. These officials reported that after learning of the tribe's use of such reeds, the agency considered this information when determining how to evaluate contamination in the area where the reeds grow. EPA and tribal officials told us that, for confidentiality reasons, some tribes may be reluctant to share some traditional ecological knowledge; however, headquarters and EPA regional officials told us that this was relatively infrequent and that, in these situations, EPA was able to work with the tribe to find ways to use more general information to inform decisions regarding Superfund cleanups.

Conclusions

EPA has policies and procedures for consulting with tribes when its actions and decisions at NPL Superfund sites may affect tribal interests. To carry out these policies and procedures, EPA must be able to identify when its actions and decisions may affect a tribe. The agency has developed two systems—SEMS and TCOTS—that it uses to identify and track sites that are on tribal property or that affect tribes, and the agency's efforts to consult with affected tribes, respectively. However, based on our analysis of some of the data in these systems, these data are not reliable. Data on sites that are on tribal property are not accurate, and there is no regular, standardized review process officials can use to review the quality of these data. Without developing such a review process, EPA will not have reasonable assurance that regional officials have accurately identified the sites that are on tribal property. Additionally, data on sites that have NAI are not accurate or complete due, in part, to unclear guidance for how regions should determine whether a site has NAI.

[41]According to a 2017 EPA memorandum, traditional ecological knowledge is the evolving knowledge acquired by indigenous and local peoples over hundreds or thousands of years through direct contact with the environment. The memorandum also recognizes that consideration of a tribe's indigenous knowledge offers a way of bridging gaps in perspective and understanding.

Clarifying guidance to regional offices on how to determine whether sites have NAI can help provide EPA reasonable assurance that its data on tribes that are directly affected by hazardous releases at NPL sites are accurate and complete. Moreover, we found that the data tracking consultation with tribes at NPL sites were unreliable, and may not contain all invitations to consult. Clarifying guidance to clearly identify the circumstances under which the agency should consider consulting with tribes could improve the quality of EPA's data on consultation, and could help ensure EPA regions are applying the consultation policy consistently and uniformly. In addition, explicitly directing regional officials to document all invitations to consult with tribes, regardless of whether further consultation results after the invitation, would provide EPA greater assurance that its regional offices are accurately and consistently documenting invitations to consult, and that the data that EPA provides to OMB regarding tribal consultations are accurate and complete.

Recommendations for Executive Action

We are making the following four recommendations to EPA:

The Director of EPA's Office of Superfund Remediation and Technology Innovation should develop a regular review process to ensure the quality of SEMS data identifying NPL sites on tribal property and revise automated reports used to check the accuracy of SEMS data to include on tribal property data. (Recommendation 1)

The Assistant Administrator of EPA's Office of Land and Emergency Management should clarify guidance to regional offices on how to determine whether sites have NAI, including by adding criteria for when a site should be designated as having NAI in the SEMS database and how, if at all, to adjust SEMS data if a tribe is no longer interested in a site. (Recommendation 2)

The Director of EPA's Office of Superfund Remediation and Technology Innovation should clarify agency guidance regarding tribal consultation for the Superfund program to clearly identify the circumstances under which the agency should consider consulting with tribes. (Recommendation 3)

The Assistant Administrator of EPA's Office of International and Tribal Affairs should develop or revise existing guidance to clearly direct regional officials to document all invitations to consult with tribes in the TCOTS database and provide the guidance to those officials. (Recommendation 4)

Agency Comments and Third-Party Views

We provided a copy of this report to EPA, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the Kalispel Indian Community of the Kalispel Reservation, the Little Traverse Bay Bands of Odawa Indians, the Mashpee Wampanoag Tribe, the Pueblo of Laguna, the Saint Regis Mohawk Tribe, the Spokane Tribe of the Spokane Reservation, and the Wampanoag Tribe of Gay Head (Aquinnah) for review and comment. EPA generally agreed with our recommendations, and their comments are reproduced in appendix IV. EPA also provided technical comments, which we incorporated as appropriate. The Confederated Salish and Kootenai Tribes of the Flathead Reservation and the Pueblo of Laguna also provided written comments (reproduced in appendixes V and VI) and technical comments, which we incorporated as appropriate. The Kalispel Indian Community of the Kalispel Reservation, the Little Traverse Bay Bands of Odawa Indians, the Mashpee Wampanoag Tribe, the Saint Regis Mohawk Tribe, the Spokane Tribe of the Spokane Reservation, and the Wampanoag Tribe of Gay Head (Aquinnah) did not comment on our report.

EPA concurred with our recommendation to develop a regular review process to ensure the quality of SEMS data identifying NPL sites on tribal property and revise automated reports used to check the accuracy of these data. EPA stated that during the course of our work on this report, SEMS tribal data was reviewed for quality control and corrections were made to the existing data. In addition, EPA's Office of Superfund Remediation and Technology Innovation plans to create a schedule to review tribal data in SEMS and disseminate tribal data to Superfund regional coordinators annually for their quality assurance review starting in March 2019.

EPA generally agreed with our recommendation to clarify guidance to regional offices on how to determine whether sites have NAI, including by adding criteria for when a site should be designated as having NAI in SEMS and how, if at all, to adjust SEMS data if a tribe is no longer interested in a site. EPA noted that there are a variety of circumstances under which a tribe may have interest in a site, and the agency plans to identify relevant criteria in the Superfund Program Implementation Manual that may be used to support the decision of whether or not to apply the NAI indicator. Additionally, the agency plans to create a headquarters and regional workgroup to review and update tribal data collected in SEMS. The workgroup will provide guidance to clarify the NAI determination, including identifying criteria for designating a site NAI, and identifying a

process to update SEMS when a tribe is no longer interested in a site, as needed. EPA plans to complete this no later than October 2019.

EPA concurred with our recommendation to clarify agency guidance regarding tribal consultation on Superfund sites to clearly identify the circumstances under which the agency should consider consulting tribes. In its letter, EPA pointed out that our original recommendation did not specify that the recommendation was about guidance regarding tribal consultation on Superfund sites, so we adjusted the language of the recommendation accordingly. EPA plans to issue a memo to the regions that clarifies circumstances under which regions may consider tribal consultation for the Superfund program no later than March 2020.

EPA concurred with our recommendation that it should develop or revise existing guidance to clearly direct regional officials to document all invitations to consult with tribes in the TCOTS database and provide the guidance to those officials. EPA is planning four actions to respond to this recommendation: (1) issuing a memorandum from the Office of International and Tribal Affairs to EPA Regional Administrators on the importance of following EPA's Tribal Consultation and Coordination Policy and documenting consultation actions into TCOTS, estimated to occur in January 2019; (2) issuing a monthly TCOTS report to Deputy Assistant Administrators and Regional Assistant Administrators on the status of consultations recorded in TCOTS, starting in January 2019; (3) initiating trainings specifically targeted to EPA's Regional Superfund staff on when and how to document consultation actions in TCOTS, estimated to begin in February or March 2019; and (4) conducting training on tribal consultation topics, with a specific emphasis on entering consultation information into TCOTS, beginning in March or April 2019.

In their comments on our report, the Confederated Salish and Kootenai Tribes of the Flathead Reservation noted that our report is thorough and provides valuable insight into EPA's policies and procedures for tribal consultation at NPL sites. The tribe provided some additional detail on the Smurfit Stone Mill Frenchtown case study which we incorporated as appropriate. The tribe also noted that they had interest in a site not identified by EPA as having NAI, the Anaconda Aluminum Co. Columbia Falls Reduction Plant site. In response, we added this site to our list of NPL sites known to be on or affecting tribal land, shown in appendix I.

The Pueblo of Laguna commented that while the scope of the report was limited, the Pueblo appreciated GAO's efforts to study EPA's tribal consultation practices. The Pueblo emphasized their belief that EPA's duty to consult with tribes should be an active one, not a passive one, and presented three associated comments. First, the Pueblo believes EPA should affirmatively consider offering consultation at each stage of the Superfund process beginning with preliminary investigation and site assessment. Second, the Pueblo believes EPA should continue to contact potentially interested tribes throughout the life of an NPL site, even if the tribe had not expressed interest at a previous stage of the process to ensure that newly interested tribes are identified. Finally, the Pueblo believes EPA should document all offers to consult, including ones made orally. The Pueblo provided comments and edits on the Jackpile-Paguate Mine case study in their letter, which we incorporated. The Pueblo also provided technical comments on the report, which we incorporated as appropriate.

As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies of this report to the appropriate congressional committees, the Administrator of the Environmental Protection Agency, the Chairman of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the Chairman of the Kalispel Indian Community of the Kalispel Reservation, the Chairman of the Little Traverse Bay Bands of Odawa Indians, the Chairman of the Mashpee Wampanoag Tribe, the Governor of the Pueblo of Laguna, the Chiefs of the Saint Regis Mohawk Tribe, the Chairwoman of the Spokane Tribe of the Spokane Reservation, the Chairwoman of the Wampanoag Tribe of Gay Head (Aquinnah), and other interested parties. In addition, the report will be available at no charge on the GAO website at http://www.gao.gov.

If you or your staff members have any questions about this report, please contact me at (202) 512-3841 or gomezj@gao.gov. Contact points for our Office of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to the report are listed in appendix VII.

J. Alfredo Gómez
Director, Natural Resources and Environment

List of Requesters

The Honorable Bernard Sanders
Ranking Member
Committee on the Budget
United States Senate

The Honorable Tom Udall
Vice Chairman
Committee on Indian Affairs
United States Senate

The Honorable Raúl M. Grijalva
Chairman
Committee on Natural Resources
House of Representatives

The Honorable Ruben Gallego
Ranking Member
Subcommittee on Indian, Insular, and Alaska Native Affairs
Committee on Natural Resources
House of Representatives

The Honorable Peter Aguilar
House of Representatives

The Honorable Donald S. Beyer, Jr.
House of Representatives

The Honorable Tony Cárdenas
House of Representatives

The Honorable Yvette D. Clarke
House of Representatives

The Honorable William Lacy Clay
House of Representatives

The Honorable Keith Ellison
House of Representatives

The Honorable Jared Huffman
House of Representatives

The Honorable Daniel T. Kildee
House of Representatives

The Honorable Derek Kilmer
House of Representatives

The Honorable Ann Kirkpatrick
House of Representatives

The Honorable Alan S. Lowenthal
House of Representatives

The Honorable Ben Ray Lujan
House of Representatives

The Honorable Betty McCollum
House of Representatives

The Honorable Gwen Moore
House of Representatives

The Honorable Grace Flores Napolitano
House of Representatives

The Honorable Frank Pallone, Jr.
House of Representatives

The Honorable Jared Polis
House of Representatives

The Honorable Lucille Roybal-Allard
House of Representatives

The Honorable Raul Ruiz, M.D.
House of Representatives

The Honorable Linda T. Sanchez
House of Representatives

The Honorable Mark Takano
House of Representatives

The Honorable Norma J. Torres
House of Representatives

Appendix I: Site-wide Cleanup Status of National Priorities List Sites with Known Native American Interest

This appendix provides information on the site-wide cleanup status of National Priorities List (NPL) sites with known Native American Interest (NAI), as of December 2017. We worked with the Environmental Protection Agency (EPA) to correct inaccuracies in the Superfund Enterprise Management System (SEMS) data identifying sites as having NAI, and we identified 87 NPL sites—74 sites on the NPL, 8 deleted from the NPL, and 5 proposed for addition—known to have NAI. In addition, in providing technical comments on the draft of this report, the Confederated Salish and Kootenai Tribes of the Flathead Reservation identified one additional site, bringing the total to 88 NPL sites known to have NAI. Of these 88 sites known to have NAI out of the total 1,785 NPL sites that were proposed, final, or deleted as of December 2017, many have reached site-wide milestones that EPA uses to track the cleanup status of NPL sites. EPA measures four site-wide milestones, including one that measures the progress in the Superfund process and three that describe the management of the release, such as human exposure under control:

1. **Construction completion.** Indicates that the physical construction of the remedy EPA has selected to address the contamination is complete.
2. **Human exposure under control.** Measures the incremental progress EPA achieved in controlling unacceptable exposures to people at a site. A site may achieve this measure by reducing the level of contamination, preventing people from contacting the contaminants in-place, or controlling activities near the site (e.g., by reducing the potential frequency or duration of exposure of people to contaminants).
3. **Groundwater migration under control.** Assesses whether groundwater contamination is below protective, risk-based levels or, if not, whether the migration of contaminated groundwater is stabilized and there is not unacceptable discharge to surface water and monitoring will be conducted to confirm that affected groundwater remains in the original area of contamination. EPA only uses this in sites with known past or present groundwater contamination.
4. **Site-Wide Ready for Anticipated Use.** All cleanup goals that may affect current and reasonably anticipated future land uses of the site have been achieved, so that there are no unacceptable risks and all institutional or other controls have been put in place.

Table 1 below shows the site-wide cleanup status, according to EPA, of the 83 sites on or deleted from the NPL with known NAI. This table provides data on site-wide milestones obtained from EPA's SEMS database, as well as a brief overview of each site using information from publicly available EPA documents, the EPA website, and additional information provided by EPA officials. Table 2 below lists the 5 sites with known NAI that EPA has proposed for the NPL.

Table 1: Site-wide Cleanup Status of Active and Deleted National Priorities List (NPL) Sites with Known Native American Interest

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
AK	Salt Chuck Mine	Organized Village of Kasaan	2010	The Salt Chuck Mine site is an inactive former gold, silver, copper, and palladium mine on Prince of Wales Island in southeast Alaska. Operations at the site were suspended in 1941. The site includes abandoned mine workings and mine mill equipment. Contaminants include polychlorinated biphenyls (PCBs), copper, lead, and arsenic. In 2011, EPA started a remedial investigation of the upland and adjacent marine areas to evaluate potential risk to human health and the environment. The investigation was completed in March 2018, and EPA determined that there are currently no unacceptable human health risks identified for the site and that ecological risks are limited to copper in marine sediment in areas used for tailings disposal.	–	X	X	–
AZ	Tucson International Airport Area	Tohono O'odham Nation of Arizona	1983	The Tucson International Airport Area site comprises a 10-square-mile area in and next to Tucson, Arizona. The site includes the Tucson International Airport, portions of the Tohono O'Odham Indian Reservation, residential areas of Tucson and South Tucson, and the Air Force Plant #44 Raytheon Missile Systems Company. Former aircraft and electronics manufacturing activities, fire drill training activities, and unlined landfills have contaminated groundwater and soil with volatile organic compounds, metals and PCBs. Remedial activities include: groundwater pumping and treatment, soil removal, and soil vapor extraction. Groundwater cleanup actions, operation and maintenance activities, and site monitoring are ongoing. As of July 2018, EPA reports that water treatment systems have significantly reduced the groundwater plume size and chemical concentrations in groundwater.	–	X	X	–

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
CA	Iron Mountain Mine	Yocha Dehe Wintun Nation, California	1983	The 4,400-acre Iron Mountain Mine site near Redding, California produced iron, silver, gold, copper, zinc and pyrite. Though mining operations were discontinued, underground mine workings, waste rock dumps, piles of mine tailings, and an open mine pit remain at the site. Much of the acidic mine drainage is channeled into the Spring Creek Reservoir. About 70,000 people use surface water within 3 miles of the mine as their source of drinking water. The installation and operation of a full-scale neutralization system, capping of areas of the mine, and the construction and operation of a retention reservoir to collect contaminated runoff for treatment have significantly reduced acid and metal contamination in surface water at the site. Site investigations and cleanup are ongoing.	–	X	–	–
CA	Celtor Chemical Works[b]	Hoopa Valley Tribe, California	1983	The 3.2-acre Celtor Chemical Works site, located on the Hoopa Valley Indian Reservation, is the location of a former ore concentrating facility that processed sulfide ore. Wastes from the operations and processed ore generated acidic runoff and elevated metal concentrations in the soils throughout the site. The Trinity River flows along the site boundary and is the only local fish source for the Hoopa Indians. Cleanup included off-site disposal of contaminated materials; backfilling and contouring land; and revegetation and diversion of springs away from contaminated areas. After cleanup, EPA took the site off the NPL in 2003. According to EPA officials, in 2016, additional waste was discovered at the site, resulting in additional remedial investigation to determine the nature and extent of contamination.	X	X	–	X

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
CA	Leviathan Mine	Washoe Tribe of Nevada & California	2000	The Leviathan Mine is an abandoned open-pit mine near Markleeville, California, on the eastern slope of the Sierra Nevada Mountains at an elevation of 7,000 feet. The site is drained by Leviathan and Aspen Creeks, which are tributaries to the East Fork of the Carson River, a major western Nevada water supply source. The mine operated intermittently between 1863 and 1962. In the early days of mining, copper sulfate was mined from the property and utilized for processing silver ore at the Comstock Mines in Virginia City, Nevada. According to EPA officials, mine operations were originally underground, but surface mining of sulfur ore began in the 1950s. These officials told us that, mining operations disturbed and exposed existing mineral-rich rock and soil, which produced residual mine waste rock. Surface runoff from snowmelt and precipitation become contaminated by contact with the mineral-rich rock and associated waste rock. Officials told us that water capture and treatment plants at the site have improved the quality of downstream surface water and watershed health. These officials also noted that site assessment and cleanup is ongoing.	–	–	–	–
CA	Sulphur Bank Mercury Mine	Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria, California	1990	The 150-acre Sulphur Bank Mercury Mine site near Clearlake Oaks, California, is an abandoned open pit mercury mine located on the shoreline of Clear Lake. This mine operated intermittently between 1865 and 1957 and mined sulphur and mercury. Former mining activities at the site contaminated soils, sediment, and surface water with mercury and arsenic. Approximately 2 million cubic yards of mine wastes and tailings remain on the mine site. Mercury contaminates lake sediment and is bio-concentrated in the food web of Clear Lake. The levels of mercury in fish from the lake led the State to issue an advisory to limit consumption of local fish. Clear Lake is also a drinking water source for 4,700 people. Cleanup has included erosion control, soil removal from residential yards, and surface water diversion. After immediate actions to protect human health and the environment, site investigations and long-term cleanup planning are ongoing.	–	–	–	–

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
CO	Bonita Peak Mining District	Navajo Nation, Arizona, New Mexico and Utah; Ute Mountain Ute Tribe; Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado; Ute Indian Tribe of the Uintah & Ouray Reservation, Utah	2016	The Bonita Peak Mining District site consists of 48 historic mines or mining-related sources of contamination in unincorporated parts of Colorado. Historic mining operations have contaminated soil, groundwater, and surface water with heavy metals. Additionally, ongoing releases of metal-contaminated water and sediment are occurring within the Mineral Creek, Cement Creek, and Upper Animas River drainages in San Juan County, Colorado. EPA and other stakeholders conducted a remedial investigation and feasibility study in 2017. Ongoing cleanup activity includes an interim water treatment plant to treat acid mine drainage and management of non-hazardous sludge. EPA plans to use the remedial investigation to determine further cleanup options at the site.	–	–	–	–
ID	Idaho National Engineering Laboratory (Department of Energy)	Shoshone-Bannock Tribes of the Fort Hall Reservation	1989	The 890-square-mile Idaho National Engineering Laboratory site is located near Idaho Falls, Idaho. The site consists of a number of major facilities that contribute contaminants to and draw water from the Snake River Plain Aquifer. One of these facilities is a National Reactor Testing Station built by the Atomic Energy Commission in 1949 to build, test, and operate various nuclear reactors, fuel processing plants, and support facilities. Site activities also led to the discharge of liquid wastes to several unlined ponds and an earthen ditch. The site includes contaminated soil, sludge, and groundwater that contain hazardous chemicals, heavy metals, and radioactive constituents. The site is divided into several cleanup areas to better address site cleanup. Remedy construction has been completed in several of these areas, and remedial design and construction are underway at the remaining areas.	–	X	X	–

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
ID	Bunker Hill Mining and Metallurgical Complex	Coeur D'Alene Tribe	1983	Also known as the Coeur d'Alene Basin Cleanup, the Bunker Hill Mining and Metallurgical Complex site is located in northern Idaho and eastern Washington, in one of the largest historical mining districts in the world. The site spans 1,500 square miles and includes 166 miles of rivers. Mining operations began in the area in 1883 and continue today. Historical mining and milling methods led to disposal of tailings in rivers and streams, which resulted in the spread of contaminants throughout the floodplain of the South Fork Coeur d'Alene River. Smelter operations also resulted in emissions and piles of waste rock. Soil, sediment, groundwater, and surface water are contaminated with heavy metals such as lead, which pose serious risks to people and the environment. Since 1983, EPA and its partners have made progress in cleaning up contamination, including cleaning some mine and mill sites, and establishing waste repositories to securely contain contaminated soil to reduce impacts to people and the environment. Site remediation is ongoing.	–	–	–	–
ID	Eastern Michaud Flats Contamination	Shoshone-Bannock Tribes of the Fort Hall Reservation	1990	The 2,530-acre Eastern Michaud Flats Contamination site near Pocatello, Idaho, consists of two phosphate ore processing facilities that began operations in the 1940s. One facility continues to produce solid and liquid fertilizers using phosphate ore, sulfur, air, and natural gas. The other produced elemental phosphorus for use in a variety of products from cleaning compounds to foods. Cleanup at this facility is largely located within Fort Hall Indian Reservation boundaries. Operations at both plants contaminated groundwater and soil with metals including arsenic, lead, and cadmium. Cleanup includes capping contaminated soils, extraction and containment of contaminated groundwater, and groundwater monitoring. Site cleanup began in 2010 and is ongoing.	–	X	–	–

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
KS	Cherokee County	The Quapaw Tribe of Indians	1983	The Cherokee County Superfund site is a former mining area in southeast Kansas covering about 115 square miles. It is part of a larger regional mining area known as the Tri-State Mining District, where more than 100 years of mining for lead and zinc created piles of mine tailings covering more than 4,000 acres. The mine tailings contaminated groundwater with lead, zinc, and cadmium. Millions of cubic yards of mine tailings are present at the surface, in addition to impacted soils, surface water, sediment, and groundwater. Several cleanup activities have been completed and others are underway. Site-wide, nearly 3 million cubic yards of mining wastes have been remediated on nearly 2,000 acres, more than 700 residential yards have been remediated, and more than 500 homes have been supplied with a clean, permanent source of drinking water.	–	–	–	–
MA	Otis Air National Guard Base/Camp Edwards	Wampanoag Tribe of Gay Head (Aquinnah); Mashpee Wampanoag Tribe	1989	Otis Air National Guard Base and Camp Edwards together form Joint Base Cape Cod, a 22,000-acre property used for military training activities since 1911. It is the sole source aquifer for 200,000 year-round and 500,000 seasonal residents of Cape Cod. Parts of the aquifer have been contaminated by fuel spills, training activities, waste disposal, and other past activities at the base. Cleanup of a portion of the site is managed by the U.S. Air Force, which is addressing the sources of and groundwater contamination primarily on Otis Air National Guard under the authority of Superfund. Contaminated areas were the result of chemical and fuel spills, fire training activities, landfills, and drainage structures. Since 1984, when contaminants were first detected in monitoring wells, numerous investigations and cleanups have been undertaken and completed. Currently, nine groundwater plumes are undergoing extraction and treatment. The Air Force's land use control program ensures that groundwater remedies are protective until cleanup levels are met.	X	X	X	X

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
MA	Creese and Cook Tannery (Former)	Wampanoag Tribe of Gay Head (Aquinnah); Mashpee Wampanoag Tribe	2013	The Creese and Cook Tannery site is located in Danvers, Massachusetts. Leather tanning operations took place on-site from about 1903 through the 1980s. Solid tanning wastes were disposed of in two landfills at the site. Liquid waste was discharged to the Crane River until 1975 and later to sewers, while sludge waste was deposited in an on-site lagoon system. Operations led to contamination of surface and subsurface soils with tannery wastes, and contaminants, particularly arsenic, exceed state health-based standards in multiple locations. In 2012 EPA conducted a removal of contaminated surface soil and disposed of this soil off-site. EPA issued a proposed cleanup plan for the site in October 2018.	–	–	–	–
MA	New Bedford	Wampanoag Tribe of Gay Head (Aquinnah); Mashpee Wampanoag Tribe	1983	The New Bedford harbor is an 18,000-acre urban estuary with sediment highly contaminated with PCBs and heavy metals. From the 1940s until EPA banned the production of PCBs in the 1970s, two manufacturing facilities improperly disposed of industrial wastes containing PCBs, contaminating the harbor bottom for about 6 miles from the Acushnet River into Buzzards Bay. After extensive testing of water quality, harbor sediment, air quality, and locally caught fish and shellfish, EPA concluded that the PCBs in the sediment posed a serious risk to human health and the environment. EPA has placed restrictions on fishing, shellfishing and lobstering in and around the harbor. EPA has addressed approximately 450,000 cubic yards of contaminated sediment in the upper harbor as of April 2017 and plans to dredge and dispose of over 200,000 cubic yards of contamination from the lower harbor. According to EPA, the site cleanup will require an additional 5 to 7 years and significant funding to finish.	–	–	–	–

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ME	Loring Air Force Base	Aroostook Band of Micmacs	1990	The Loring Air Force Base site is located in Limestone, Maine. Loring Air Force Base was one of the first to be designed and built to accommodate high-speed aircraft, and construction ended in 1953. Activities at the site, including maintenance of jet engines, generated waste oils, recoverable fuels, spent solvents and cleaners. These wastes contaminated soil, groundwater, surface water, and sediment at a number of areas across the former base. Cleanup activities include relocation of contaminated soil, bioremediation of groundwater, and capping of disposal areas. The Air Force is leading the site cleanup until goals have been achieved. The Air Force is conducting operation and maintenance and long-term monitoring activities.	X	X	X	X
ME	Eastland Woolen Mill	Penobscot Nation	1999	The 25-acre Eastland Woolen Mill Superfund site is located in the Town of Corinna, Maine. Prior to closing in 1996, the mill manufactured dyed wool and blended woven fabric. The dyeing operation utilized various chemicals, including dyes and dye-aids that reportedly contained biphenyl and chlorinated benzene compounds. Liquid wastes were discharged to the ground beneath mill buildings until 1977. As a result, soil and bedrock underlying the mill were contaminated with chlorinated benzene compounds. Long-term cleanup and environmental monitoring are ongoing. In 2012, EPA completed a partial deletion action to remove 80% of the land area from NPL designation and facilitate reuse. EPA completed the second Five-Year Review in 2015.	X	X	X	–
ME	Eastern Surplus	Passamaquoddy Tribe	1996	The Eastern Surplus site is a 5 acre area in Meddybemps, Maine. From 1946 through the early 1980s, the Eastern Surplus Company, a retailer of army surplus and salvage items, operated on the site. Facility operations contaminated soil and groundwater with hazardous chemicals, including volatile organic compounds and calcium carbide. After immediate actions to protect human health and the environment, remediation activities included excavating soils, extracting and treating contaminated groundwater, and disposing of gas cylinders. Operation and maintenance activities and monitoring are ongoing.	X	X	X	X

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
MI	Velsicol Chemical Corporation (Michigan)	Saginaw Chippewa Indian Tribe of Michigan	1983	Velsicol Chemical Corporation produced various chemical compounds and products at its 54-acre plant in St. Louis, Michigan, from 1936 through 1978. Products included the fire retardant polybrominated biphenyl and the pesticide DDT. To address contamination on-site, Velsicol agreed to construct a slurry wall around the former plant and put a clay cap over it. The Pine River, which borders the former main plant site on three sides, was significantly contaminated. In response, the state of Michigan issued a no-consumption advisory for all fish species. Over 670,000 cubic yards of DDT-contaminated sediment were removed and disposed of off-site in an approved landfill. DDT levels in fish have been reduced by more than 98 percent. In the early 2000s, studies showed the slurry wall and clay cap at the main plant site were failing to keep contamination out of the river. In response, EPA and Michigan's Department of Environmental Quality (MDEQ) launched a remedial investigation and feasibility study at the main plant site and concluded that soil and groundwater were contaminated. In June 2006, EPA selected a remedy that included a comprehensive cleanup of the main plant site and a residential soil cleanup. During the residential cleanup, EPA excavated and disposed of 50,000 tons of contaminated soil at an off-site landfill. Currently, EPA and MDEQ are completing a remedial investigation in the Pine River downstream of the former chemical plant property.	X	–	–	–

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
MI	Allied Paper, Incorporated/Portage Creek/Kalamazoo River	Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Nottawaseppi Huron Band of the Potawatomi, Michigan	1990	The Allied Paper, Incorporated/Portage Creek/Kalamazoo River site affects Kalamazoo, Michigan, 80 miles of the Kalamazoo River (from Morrow Dam to Lake Michigan), and 3-mile stretch of Portage Creek. Paper mill properties, riverbanks and floodplains have been contaminated with PCBs. EPA has removed contaminated materials from the site, cleaned and restored 7 miles of the Kalamazoo River and banks and capped 82 acres worth of contaminated materials. In the portions of the site where cleanup has concluded, EPA conducts maintenance activities and monitors groundwater. For two areas contaminating the river that have not yet been cleaned up, EPA has decided on cleanup plans and has taken actions to prevent migration of contamination to the Kalamazoo River or Portage Creek. EPA has decided on cleanup plans for approximately a portion of the 80 mile stretch of the Kalamazoo River and Portage Creek that require remediation.	–	–	X	–
MI	Petoskey Manufacturing Company Groundwater	Little Traverse Bay Bands of Odawa Indians, Michigan	1983	The Petoskey Manufacturing Company, or PMC, contained a die casting plant from the 1940s and a painting operation from the mid- to late-1960s. Disposal of spent solvents and paint sludge onto the ground outside the PMC building contaminated soil and groundwater at the site with volatile organic compounds. Contaminated groundwater reached a nearby municipal well that provided drinking water to city residents. The city replaced the contaminated well with a new groundwater source. Currently, EPA and Michigan Department of Environmental Quality are evaluating the site for potential vapor intrusion issues into condominiums built on top of the former PMC source area.	X	X	X	X

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					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
MI	Grand Traverse Overall Supply Company	Grand Traverse Band of Ottawa and Chippewa Indians, Michigan	1983	Grand Traverse Overall Supply was a commercial laundering and dry cleaning facility opened in 1953. Activities at the site between 1955 and 1968 included construction of a dry well and seepage lagoons to collect waste. In 1977 the facility began discharging waste to the sewer. A year later, the Michigan Department of Environmental Quality discovered groundwater contaminated with volatile organic compounds such as trichloroethylene and perchloroethlyene that impacted at least 10 wells, including one that supplied water to an adjacent elementary school. Contaminated wells were abandoned and new wells drilled. Waste lagoons were drained and filled with gravel, and the contaminated soils around the dry well and on-site barrels of waste sludge were removed in the 1970s. In providing technical comments on a draft of this report, EPA officials told us that remedial actions at the site began with soil removal activities around 2009, and that a groundwater pump and treat system was installed in 2012 and improved in 2015. These officials told us the site is expected to reach cleanup goals within approximately 5 years.	X	X	X	–

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
MI	Cannelton Industries, Incorporated	Sault Ste. Marie Tribe of Chippewa Indians, Michigan; Bay Mills Indian Community, Michigan	1990	Northwestern Leather Company operated a tannery on the 75-acre Cannelton Industries Incorporated site in Sault Sainte Marie, Michigan from 1900 to 1958. A portion of the site is located within the 100-year floodplain of the St. Mary's River. Waste disposal operations contaminated soils, sediment and the river with heavy metals, including chromium, lead, cadmium, arsenic and mercury. EPA's initial long-term remedy for the site included the excavation and consolidation of contaminated waste material, soils, and river sediment into an on-site landfill, collection and treatment of groundwater, groundwater monitoring, and land use restrictions for the landfilled area. In commenting on a draft of our report, EPA officials told us the remedy was amended to include excavation and removal of contaminated soil and tannery waste and other waste materials from portions of the site, Construction of these remedies took place in 1999. In 2006 and 2007, additional dredging operations removed 40,000 cubic yards of contaminated sediment, about 500,000 pounds of chromium and 25 pounds of mercury from Tannery Bay and nearby wetlands. Subsequent sampling in 2014 showed mercury or chromium in Tannery Bay and an adjacent wetland. In providing technical comments on a draft of this report, officials noted that 2016 sampling also showed mercury in Tannery Bay surface water and adjacent wetland. EPA is reviewing the current monitoring requirements and protocols, as well as the cleanup goals. The monitoring portion of the operations and maintenance plan will be revised based on EPA's findings. EPA officials told us that the agency has initiated a partial deletion of the site from the NPL to enable reuse of some remediated site areas.	X	X	X	X

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
MI	Tar Lake	Grand Traverse Band of Ottawa Indians, Michigan	1983	The 200-acre Tar Lake site in Mancelona Township, Michigan was an iron works facility from 1882 through 1945. Disposal of tar waste contaminated soil and groundwater with hazardous chemicals, including tar waste and creosote. Cleanup activities included excavation and disposal of tar and contaminated soils, and groundwater extraction and treatment. After initial cleanup, operation and maintenance activities are ongoing. EPA has conducted several 5-year reviews of the site's remedy. EPA did additional sampling at the site in 2011 and 2012 and identified the need for additional soil excavation and expansion of the groundwater treatment system. In providing technical comments on a draft of this report, EPA officials told us that additional cleanup will begin in 2020 and last several years. EPA has deleted part of the site from the NPL.	X	X	–	–
MI	Torch Lake	Keweenaw Bay Indian Community, Michigan	1986	The Torch Lake site is located on the Keweenaw Peninsula in Michigan. The site includes several areas ranging in size from about 10 acres to more than 200 acres. Copper mining activities in the area from the 1890s through 1969 produced mill tailings that contaminated lake sediment and the shoreline. Cleanup included covering 800 acres of slag piles and tailings with soil and vegetation, and long-term monitoring of Torch Lake. After cleanup, operation and maintenance activities are ongoing.	X	X	X	–

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
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MN	St. Louis River Site	Minnesota Chippewa Tribe, Minnesota (Grand Portage Band and Fond du Lac Band); Lac du Flambeau Band of Lake Superior Chippewa Indians; Sokaogon Chippewa Community, Wisconsin.	1984	The St. Louis River site is located at the west end of Duluth, Minnesota, and includes several areas of land next to the St. Louis River, several boat slips, and a wide section of the river known as Spirit Lake. The site overall has been divided into two smaller sites, both managed by the state of Minnesota. The first area, known as the St. Louis River/Interlake/Duluth Tar (SLRIDT) site includes 255 acres of land, boat launch ramps and bays of the St. Louis River. From the 1890s through 1962, a variety of industrial plants operated at the site, including a coking plant, and tar and chemical plants. The second site, U.S. Steel comprises 500 acres of land and 200 acres of the St. Louis River. The area was contaminated by a steel mill that operated on-site between 1916 and 1981. Operations at both sites contaminated soil and underwater sediment with hazardous chemicals, including solid wastes, PCB liquids and drums. The sites are currently in different phases of cleanup. Cleanup of the land portion of the SLRIDT was substantially completed by 2001, and cleanup of the contaminated sediment by 2010. However, in its most recent 5-year review, the Minnesota Pollution Control Agency noted several smaller areas of contaminated materials that will require additional cleanup. U.S. Steel conducted multiple cleanups at their site since the 1990s and many of the actions required by EPA's record of decision have been completed. However, in its most recent 5-year review, the Minnesota Pollution Control Agency concluded that while some cleaned-up areas continue to be protective of human health and the environment, some areas of the site are not protective. EPA officials also told us that the U.S. Steel site has also contaminated a part of the St. Louis River known as Spirit Lake. According to these officials, the cleanup of Spirit Lake, including associated tribal consultation, is planned through a partnership led by EPA's Great Lakes National Program Office.	–	–	X	–

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MN	St. Regis Paper Company	Minnesota Chippewa Tribe, Minnesota (Leech Lake Band)	1984	The 125-acre St. Regis Paper Company site is located within the external boundaries of the Leech Lake Band of Ojibwe Indian Reservation in Cass Lake, Minnesota. The wood-treatment facility operated from the 1950s through the 1980s using creosote and pentachlorophenol (PCP). The facility's operations contaminated soil and groundwater with hazardous chemicals, including PCP, dioxin and polycyclic aromatic hydrocarbons (PAH). Remedies put in place include water treatment and soil containment. Subsequent assessment demonstrated unacceptable potential risks from groundwater and surface soil contamination. EPA proposed a cleanup plan in March 2016 to address soil contamination in residential areas. EPA has determined there are no current unacceptable human risks.	–	X	–	–
MT	Anaconda Company Smelter	Confederated Salish and Kootenai Tribes of the Flathead Reservation	1983	The 300-square-mile Anaconda Company Smelter site is near Anaconda, Montana. Anaconda operated a large copper concentrating and smelting operation on the north side of Warm Springs Creek until about 1901. Around 1902, ore processing and smelting operations began at a separate facility that is included in the site. Operations at the Anaconda Smelter ceased in 1980 and the smelter facilities were dismantled soon thereafter. More than a century of milling and smelting operations resulted in high concentrations of arsenic, lead, copper, cadmium, and zinc in groundwater and surface water. Cleanup included testing and remediation of domestic wells, removal of waste from the nearby community, construction of nearly 1,000 acres of wetland, and 30,000 feet of stream restoration. Operation and maintenance activities are ongoing in areas where cleanup is complete. In other areas, cleanup is still in progress. EPA has determined that remedies that have been completed are protective of human health and the environment. Where remedies are not complete, access is controlled to prevent human exposure to waste.	–	–	X	–

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					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
MT	Anaconda Aluminum Co. Columbia Falls Reduction Plant[c]	Confederated Salish and Kootenai Tribes of the Flathead Reservation	2016	The Anaconda Aluminum Co. Columbia Falls Reduction Plant site is located two miles northeast of Columbia Falls in Flathead County, Montana. The site includes approximately 960 acres north of the Flathead River, a fishery that includes the federally designated, threatened bull trout and the federally sensitive westslope cutthroat trout. From 1955 through 2009, an aluminum smelting plant operated at the site, and produced significant quantities of hazardous wastes as a byproduct of the aluminum smelting process. The types of hazardous wastes produced at the site are known to contain cyanide compounds that can leach into groundwater. In 1988, EPA requested a site investigation that revealed that there were high concentrations of polycyclic aromatic hydrocarbons at the site, primarily in soils and sediments, and that there had been a release of cyanide to groundwater and surface water; both of these findings were attributed to activities at the former smelting plant. The remedial investigation and feasibility study of the site is in progress, and the results of the investigation will determine cleanup needs and identify potential cleanup options at the site.	–	–	–	–
MT	Silver Bow Creek and Butte Area	Confederated Salish and Kootenai Tribes of the Flathead Reservation	1983	The Silver Bow Creek and Butte Area site is in Butte, Montana, and includes 26 miles of stream and streamside habitat. Since the late 1800s, mining wastes have been dumped into streams and wetlands near mining operations. These activities contaminated soil, groundwater, and surface water with heavy metals. From 1988 to 2005, EPA completed several removal actions to clean up areas around former smelter sites, mine waste dumps, railroad beds, stream banks and channels, and residential yards to address immediate human health and environmental risks. Operation and maintenance, sampling, and monitoring actions are ongoing. EPA agreed to future cleanup work at the site in January 2018, including removal of contaminated soils, removal of sediment and floodplain waste, and construction of stormwater basins and sedimentation bays.	–	–	X	–

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MT	Milltown Reservoir Sediments	Confederated Salish and Kootenai Tribes of the Flathead Reservation	1983	The Milltown Reservoir Sediments site near Missoula, Montana includes about 540 acres in the Clark Fork River and Blackfoot River floodplain and 120 miles of the Clark Fork River upstream of the Milltown Dam and Reservoir, which are located at the confluence of the Clark Fork and Blackfoot Rivers. From the 1860s until well into the 20th century, mineral- and arsenic-laden waste from mining activities in the region flowed into the Clark Fork River. As contaminated sediment and mine-mill waste moved downstream, about 6.6 million cubic yards of sediment accumulated behind the Milltown Dam. Mining activities and the downstream transport of mining-related wastes contaminated sediment, surface water, and groundwater with heavy metals. Remedy construction began in 2006, much of the site has been cleaned up, and remedy construction is underway to address remaining contamination. The site's long-term remedy includes construction of a bypass channel at the reservoir; removal of contaminated reservoir sediment; off-site disposal and use of contaminated sediment as vegetative cap material; removal of the Milltown Dam; continuation of a replacement water supply program and implementation of temporary groundwater controls until the Milltown aquifer recovers; and long-term monitoring of surface and groundwater. Remedy construction is ongoing.	–	X	X	–

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NC	Barber Orchard	Eastern Band of Cherokee Indians	2001	The 438-acre Barber Orchard site in Haywood County, North Carolina, includes the area where Barber Apple Orchard operated from 1908 through 1988. Facility operations resulted in contaminated groundwater and soil. Contaminants include arsenic, lead, and pesticides such as DDT, aldrin, and dieldrin that can be found in groundwater or soils on residential properties built on the former orchard. EPA removed soil in contaminated areas and, in a 2011 proposed cleanup plan proposed long-term monitoring of contaminated groundwater with the expectation that soil remediation will positively affect groundwater contamination. EPA has determined that the contaminated groundwater does not currently threaten people living and working near or on the site. EPA officials told us that in 2004, the town of Waynesville extended its municipal water system throughout the Orchard, and since the completion of the soil cleanup in 2011, new homes have been constructed within the boundaries of the Orchard.	X	X	X	X

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NC	Benfield Industries, Incorporated	Eastern Band of Cherokee Indians	1989	The 3.5-acre Benfield Industries site in Waynesville, North Carolina, includes the area where Benfield Industries mixed and packaged materials bought in bulk for resale in smaller amounts from 1971 through 1983. The facility handled and stored paint thinners, solvents, sealants, cleaners, de-icing solutions and wood preservatives. Between 1990 and 1992, EPA conducted the remedial investigation and feasibility study using federal funding. The cleanup included excavating and washing contaminated soil, biotreating contaminated slurries, and placing the cleaned soil and slurry in excavated areas. Following soil treatment, EPA graded and planted seed. According to EPA officials, a groundwater extraction system was installed and was operated between 2001 and 2007. However, a 2007 report concluded that it was no longer an effective groundwater remedy, and that monitored natural attenuation may be a more effective remedy. Consequently, EPA shut down the system in June 2007. Agency officials told us the agency recently completed a pilot scale treatability study in which chemicals were injected into the subsurface to destroy residual wood preservatives that were adversely impacting groundwater quality. According to EPA, the agency will be using the information gained from this treatability study in the forthcoming remedial design.	X	X	X	X
NM	Homestake Mining Company	Navajo Nation, Arizona, New Mexico and Utah; Pueblo of Acoma; Pueblo of Laguna	1983	The Homestake Mining Company site in Cibola County, New Mexico includes a former uranium mill demolished from 1993 through 1995 and the impacted portions of the underlying groundwater aquifers. Uranium milling operations began at the site in 1958 under a license issued by the Atomic Energy Commission. Site operations and seepage from two tailings impoundments contaminated soil and groundwater with hazardous chemicals including uranium, selenium, radium-226, radium-228, thorium-230 and nitrate. Nearly 4.5 billion gallons of contaminated water have been removed and 540 million gallons of treated water have been injected into the aquifer. An average of 2 feet of contaminated soil was removed from the mill area and placed in the tailings impoundments. Cleanup is ongoing.	X	X	X	–

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NM	United Nuclear Corporation	Navajo Nation, Arizona, New Mexico and Utah	1983	The 125-acre United Nuclear Corporation site near Gallup, New Mexico, includes a former uranium ore tailings disposal area and processing mill that operated from 1977 through 1982. The facility processed uranium ore using a combination of crushing, grinding and acid-leach solvent extraction methods. Milling produced acidic slurry of ground rock and fluid tailings. Disposal of about 3.5 million tons of tailings took place in on-site impoundments. Facility operations contaminated soil and groundwater. Surface reclamation stabilized the mill tailings and protected the Rio Puerco from contamination spills. However, EPA notes that groundwater treatment has been difficult due to low groundwater recharge rates and extraction wells proved to accelerate movement of contaminated water rather than contain it. Consequently, EPA installed additional extraction wells in 2010. Cleanup activities and monitoring are ongoing.	X	X	–	–
NM	Prewitt Abandoned Refinery	Navajo Nation, Arizona, New Mexico and Utah	1990	The 70-acre Prewitt Abandoned Refinery site is located near Prewitt, New Mexico. The refinery operated between 1938 and 1957. Refinery operations contaminated soil and groundwater with hazardous chemicals including asbestos and lead. Potentially responsible parties removed the refinery and other site structures; however, scattered demolished structures, foundations and exposed fill remained on-site. The remedy for surface soil is complete. The remedy for subsurface soil and water continues to be protective in the short term; however, EPA could not determine if the remedy is protective of human health and the environment in the long term, and the agency recommends new evaluations to characterize the quantity, composition and extent of various contaminants and exposure pathways at the site. EPA further recommends the evaluation of an alternative cleanup plan to enhance protectiveness at the site.	X	X	X	X

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NM	North Railroad Avenue Plume	Pueblo of Santa Clara, New Mexico	1999	The 58-acre North Railroad Avenue Plume site is a contaminated groundwater plume in Española, New Mexico. The Norge Town laundromat and dry cleaning operation contaminated groundwater with tetrachloroethylene, trichloroethylene, cis-1,2-dichloroethylene and trans-1,2- dichloroethylene. The contaminated groundwater aquifer is the sole-source drinking water aquifer for the residents of City of Espanola and, the Pueblo of Santa Clara, as well as individual water supply wells near the site. The remedy consists of enhanced on-site bioremediation. The areas targeted for cleanup are the source area, soils with high contaminant levels, and contaminated shallow groundwater. EPA indicated that the remedy has reduced contamination in shallow groundwater but has not been effective in the deep aquifer; consequently, EPA initiated additional analysis in 2015.	X	X	X	–
NM	Jackpile-Paguate Uranium Mine	Pueblo of Laguna, New Mexico	2013	The Jackpile-Paguate Uranium Mine site is located on the Pueblo of Laguna, New Mexico, reservation and consists of three former leases. The former leaseholder, Anaconda Minerals Company, mined and operated a uranium mine at the site from 1952 through 1982. Out of a total of 7,868 leased acres, 2,656 acres were disturbed by mining. This disturbance originally included three open pits, 32 waste dumps and 23 sub-grade ore stockpiles, 4 topsoil stockpiles, and 66 acres of buildings and roads. Mining operations detrimentally affected surface water with hazardous chemicals in quantities sufficient to support listing onto the EPA National Priorities List for Superfund cleanup. Atlantic Richfield is currently undertaking the remedial investigation and feasibility study at the site.	–	–	–	–

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NV	Carson River Mercury Site	Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada	1990	EPA officials told us that the Carson River Mercury site extends over more than a 130-mile length of the Carson River, beginning near Carson City, Nevada, and extending downstream to the Lahontan Valley. Contamination at the site is a legacy of the Comstock mining era of the late 1800s, when mercury was imported to the area for processing of gold and silver ore. The site includes mercury-contaminated soils at former mill sites; mercury contamination in fish and wildlife; and mercury contamination in waterways adjacent to the mill sites, including the water, sediment, and adjacent floodplain of the Carson River, Lahontan Reservoir, Carson Lake, Stillwater Wildlife Refuge, and Indian Lakes. Following excavation and removal of mercury-contaminated tailings and soils from the site to protect human health and the environment, site investigations and cleanup planning are ongoing.	–	–	–	–
NY	Hooker (Hyde Park)[b]	Seneca Nation of Indians	1983	The Hooker (Hyde Park) site is located in Niagara Falls, New York. The 15-acre area was used for the disposal of about 80,000 tons of waste, some of it hazardous material, from 1953 through 1975, resulting in sediment and groundwater contamination with hazardous chemicals, including Aroclor 1248, chloroform, phenol, benzoic acid and chlorendic acid. Cleanup included establishment of a drain system around the landfill; treatment of liquids leaching from the landfill; capping of the landfill; and removal of contaminated soils and sediment. Site construction finished in 2003. EPA has determined that, since cleanup, the site no longer poses a threat to nearby residents or the environment. Long-term groundwater treatment and monitoring are ongoing.	X	X	X	X

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NY	General Motors (Central Foundry Division)	Saint Regis Mohawk Tribe	1984	The General Motors (Central Foundry Division) site is located near Massena, New York. General Motors operated an aluminum diecasting plant on the site beginning in1959 and used PCBs in the manufacturing process through 1980. Contamination resulted from General Motors' waste disposal practices. Completed cleanup actions include the installation of a cap on an industrial landfill to prevent the surface flow of contaminants and reduce potential air exposure from contaminants; dredging of the St. Lawrence River and placement of a cap on remaining sediment; remediation of two inactive lagoons; and creation of a 150-foot landfill setback along the border with the Saint Regis Mohawk reservation. The final significant cleanup is a 10-million-gallon industrial lagoon. EPA has conducted three 5-year reviews at the site and the owner is actively marketing the property for re-use or redevelopment.	–	X	–	–
NY	Peter Cooper	Seneca Nation of Indians	1998	The Peter Cooper site in Gowanda, New York, was the location of an animal glue and industrial adhesive manufacturing factory. Contamination was caused by the improper disposal of wastes derived from chrome-tanned hides. The waste material has been shown to contain elevated levels of chromium, arsenic, zinc, and several organic compounds. Remedial activity for the landfill contained more than 8 million tons of waste and included capping the landfill, putting in a gas venting system, and controlling leachate. A retaining wall prevents contaminants from reaching Cattaraugus Creek. Site investigations and cleanup are complete, and monitoring is ongoing.	X	X	X	X

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NY	Onondaga Lake	Onondaga Nation	1994	The Onondaga Lake site includes a 4.6-square-mile lake bordering the City of Syracuse, New York, and four nearby towns and villages. The site also includes seven major and minor tributaries and upland sources of contamination from a 285-square-mile drainage basin. Onondaga Lake has been the recipient of industrial and municipal sewage discharges from the site for more than 100 years. Contaminants include chlorinated benzenes, mercury, and PCBs. Between 1998 and 2018 EPA selected cleanup remedies for several areas within the site. Cleanup activities include removing chlorobenzene from existing wells, cleaning storm drainage systems, construction of a lakeshore barrier wall, and groundwater collection and treatment systems. Site investigations and cleanup activities are ongoing in several areas of the site, including the Lower Ley Creek and Willis Avenue areas.	–	–	–	–
NY	Cayuga Groundwater Contamination Site	Cayuga Nation	2002	The Cayuga Groundwater Contamination site covers about 4.8 square miles extending from Auburn to Union Springs, New York. The site is the former location of a facility where General Electric Company and its partners manufactured semiconductors. The site includes residential properties mixed with farmland, woodlands, and commercial areas. Contaminated groundwater at the site contains volatile organic compounds that are potentially harmful contaminants that easily evaporate in the air. EPA conducted a remedial investigation and feasibility study to determine the sources, nature, and extent of site contamination and to evaluate remedial alternatives. Remediation will depend on the characteristics identified, but will include bioremediation for the most contaminated area as well as natural processes to reduce the level of contamination to meet groundwater standards. EPA is requiring periodic collection and analyses of groundwater samples to verify that the level and extent of contaminants is declining. EPA is deferring a decision on how to clean up the groundwater in Area 3, and intends to further investigate that area prior to issuing a final cleanup decision.	–	X	–	–

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NY	Eighteen Mile Creek	Tuscarora Nation, Tonawanda Band of Seneca	2012	The Eighteen Mile Creek site consists of contaminated sediment, soil, and groundwater along approximately 15 miles of creek in Niagara County, New York. The site has a long history of industrial use dating to the 19th century. Contamination, including PCBs and heavy metals, spans two areas: Eighteen Mile Creek corridor and the creek sediment to Lake Ontario. Possible sources of the contamination include releases from hazardous waste sites, industrial or municipal wastewater discharges, and disposal practices of manufacturers around the creek. EPA has demolished five contaminated residential properties and relocated the residents, completed the remedial investigation and issued a record of decision for the creek corridor in 2017, and is currently conducting the remedial investigation in the length of the river to Lake Ontario.	–	–	–	–
OK	Wilcox Oil Company	The Muscogee (Creek) Nation; Sac & Fox Nation, Oklahoma; Cherokee Nation	2013	The approximately 145-acre Wilcox Oil Company site in Bristow, Oklahoma includes the inactive and abandoned Lorraine and Wilcox Oil Refineries, which operated from approximately 1915 through 1963. The main components of the refinery included a skimming plant, cracking unit, and redistillation battery with a vapor recovery system and continuous treating equipment. Refinery operations contaminated soil and sediment and left behind refinery waste material such as oil waste and sediment skimmed from crude oil, and potentially lead. Planning and implementation of the site's remedial investigation and feasibility study is ongoing.	–	–	–	–

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OK	Hudson Refinery	Sac & Fox Nation, Oklahoma	1999	The 200-acre Hudson Refinery site housed an oil refinery from 1922 until 1982. The site included aboveground storage tanks, wastewater treatment impoundments, separators, stained soils, a land treatment unit, and loose and friable asbestos-containing material. Refinery operations contaminated soil, groundwater, surface water, and sediment. The site's long-term remedy, selected in 2007 and amended in 2010, included removal of asbestos-containing materials, coke tar, and scrap metal; soil and waste excavation with off-site disposal; excavation, stabilization, and off-site disposal of sediment from waste ponds and sumps; treatment of surface water from ponds with contaminated sediment; groundwater monitoring; and institutional controls, among others. Cleanup construction started in early 2010 and finished in October 2010. Operation and maintenance activities and monitoring are ongoing.	X	X	X	X
OK	Oklahoma Refining Company	Caddo Nation of Oklahoma	1990	The 160-acre Oklahoma Refining Company site in Cyril, Oklahoma contained an oil refinery operated by several different owners until 1984. Site operations contaminated soil, sediment, surface water, and groundwater with PAHs, volatile organic compounds, and metals. Long-term remedies included bioremediation; stabilization; neutralization, containment, and treatment of surface water and groundwater; and on-site disposal of excavated materials in a hazardous waste landfill. Remediation was completed in 2001 on the southern part of the site. Removal of hazardous waste was completed in 2006. EPA is currently evaluating long-term cleanup activities on the northern portion of the site.	–	X	–	–

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OK	Tar Creek (Ottawa County)	The Quapaw Tribe of Indians, Peoria Tribe of Indians of Oklahoma, Ottawa Tribe of Oklahoma, Wyandotte Nation, Seneca-Cayuga Nation, The Modoc Tribe of Oklahoma, Cherokee Nation, Eastern Shawnee Tribe of Oklahoma	1983	The Tar Creek site is located in Ottawa County, Oklahoma. According to EPA, the site itself has no clearly defined boundaries, but consists of areas within Ottawa County impacted by historical mining wastes. The site is part of the larger Tri-State Mining District that consists of historical lead and zinc mining areas in northeast Oklahoma, southeast Kansas, and southwest Missouri. The site first came to the attention of the State of Oklahoma and EPA in 1979, when water began flowing to the surface near Commerce, Oklahoma from underground mine areas, through abandoned boreholes. This surface discharge flowed into Tar Creek, and soon other discharge locations were observed near Tar Creek and the abandoned mining town of Douthat and Quapaw. As a result, Tar Creek and Beaver Creek were significantly impacted. EPA has defined five areas to focus on: surface water and groundwater; waste in residential areas that causes high blood lead levels in children; chemicals found in an office and laboratory complex; piles of mine and milling waste and smelter waste; and sediment and surface waters in seven watersheds within three states and nine tribal areas. Remedial efforts include plugging abandoned wells to prevent contamination of aquifers, cleanup of public areas and residences, removal of mining chemicals, and relocating mining waste on the surface. The Quapaw Tribe has led remedial efforts on portions of tribally owned properties located within Tar Creek. Cleanup is ongoing.	–	–	–	–
OK	Tulsa Fuel And Manufacturing	Ponca Tribe of Indians of Oklahoma	1999	The 61-acre Tulsa Fuel And Manufacturing site in Collinsville, Oklahoma, is the location of a former zinc smelter and lead roaster that operated from 1914 through 1925. Historical operations contaminated soil, sediment, and surface water with hazardous materials including zinc and lead. EPA selected a cleanup plan for the site that included on-site consolidation and capping of soil, sediment and waste material. Construction of the remedy began in August 2014 and is now completed.	X	X	X	–

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OR	McCormick and Baxter Creosoting Company (Portland Plant)	Confederated Tribes of the Grand Ronde Community of Oregon; Confederated Tribes of the Umatilla Indian Reservation; Confederated Tribes of the Warm Springs Reservation of Oregon; Nez Perce Tribe; Confederated Tribes and Bands of the Yakama Nation	1994	The McCormick and Baxter Creosoting Company site is a former creosote wood treating facility located on the east bank of the Willamette River in Portland, Oregon. The company was founded in 1944 and continued operations until October 1991.This site is located within the Portland Harbor Superfund site, but was not included in the January 2017 Portland Harbor record of decision. The site encompasses approximately 41 acres of land and an additional 23 acres of contaminated river sediment. Site investigations confirm releases of wood-treating chemical compounds to soils, groundwater, and sediment. Remedial investigations identified three plumes of contaminated groundwater migrating toward surface waters. Completed cleanup activities include demolition of the McCormick and Baxter plant; soil excavation, treatment, and disposal; upland soil capping; installation of a subsurface barrier wall; contaminant recovery; construction of a multi-layer sediment cap in the Willamette River; monitoring and engineering; and institutional controls. Construction of site remedies finished in September 2005.	X	X	X	–

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OR	Taylor Lumber and Treating	Confederated Tribes of the Grand Ronde Community of Oregon	2001	Taylor Lumber and Treating operated a wood-treating plant at the site near Sheridan, Oregon, from about 1946 until 2001. EPA found that wood-treating chemical spills, including creosote and pentachlorophenol, contaminated soil, roadside ditches, and groundwater at the site. In response, EPA constructed an underground slurry wall as part of the remedy beneath the wood-treating area to contain and extract the most contaminated groundwater to maintain hydraulic control within the barrier wall. The final cleanup included excavation of contaminated soils from 5 upland acres and from adjacent ditches flowing to the South Yamhill River; replacement of an existing asphalt cap in the wood-treating area with a new low permeability asphalt cap overlaying the underground slurry wall; disposal of material from stockpiled soil storage cells off-site; and upgrades to the storm water conveyance systems. EPA completed final cleanup in 2008. The property is now owned and operated by a private company, which has ongoing obligations related to property use restrictions, operations, and maintenance on the property. EPA conducted its second 5-year review in 2017.	X	X	X	X
OR	Harbor Oil Incorporated[b]	Confederated Tribes and Bands of the Yakama Nation	2003	The 4.2-acre Harbor Oil Incorporated site is located in Portland, Oregon, in an industrial area adjacent to Force Lake. A waste oil recycling facility currently operates on the site. Past site operations included a tank truck cleaning business, which was destroyed by a fire in 1979 that ruptured five 20,000-gallon aboveground used oil tanks. Site activities, the fire, and a large oil spill in 1974 contaminated soil, sediment and groundwater with metals, oil, pesticides, and PCBs. EPA ordered a previous operator to empty, clean, and dismantle a tank containing petroleum wastes. Remedial investigations determined that contamination does not pose an unacceptable risk to human health or the environment; therefore, no further cleanup is required.	X	X	X	X

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OR	Gould, Incorporated[b]	Confederated Tribes and Bands of the Yakama Nation	1983	The 10-acre Gould, Incorporated site in Portland, Oregon housed a lead smelter and lead oxide production facility from 1949 until 1981. Site activities included on-site disposal of about 87,000 tons of battery casings and discharge of about 6 million gallons of acid into a nearby lake, which resulted in contaminated soils and lake sediment. EPA transferred the contaminated soils and sediment into a lined containment area at the site as part of the cleanup. EPA monitored groundwater at the site to determine if historic wastes adversely impacted shallow groundwater at the site. Based on this data, in 2000, EPA determined that no further groundwater cleanup actions were necessary. Groundwater monitoring near the containment area continues to ensure that the containment area has no adverse impact.	X	X	X	X
OR	North Ridge Estates	Klamath Tribes	2011	The North Ridge Estates site is a residential subdivision 3 miles north of Klamath Falls, Oregon that is contaminated with asbestos as a result of the improper demolition of approximately 80 1940s-era military barracks buildings. Asbestos-containing materials and soil are being removed from the old military barracks site during three seasons of cleanup from 2016 through 2018. Additional contamination at the nearby Kingsley Firing Range, also part of the site, will be investigated and completed at a later time. According to EPA, cleanup and restoration will be completed by the end of 2018.	–	–	–	–
OR	Formosa Mine	Cow Creek Band of Umpqua Tribe of Indians	2007	The 76-acre Formosa Mine site is located on Silver Butte in Douglas County, Oregon. The site was originally mined for copper and silver from about 1910 through1937. The abandoned mine discharges millions of gallons of acid rock drainage and toxic metals into the upper reaches of Middle Creek and South Fork Middle Creek every year. These discharges have contaminated surface water, groundwater, soil, and sediment with heavy metals. EPA is currently designing the remedy for all mine-impacted material on the surface and will address risks to surface and groundwater separately. The remedy for surface contamination consists of excavating, contouring, or capping various areas to prevent leaching during precipitation events.	–	X	–	–

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OR	Portland Harbor	Confederated Tribes and Bands of the Yakama Nation; Confederated Tribes of the Grand Ronde Community of Oregon; Confederated Tribes of Siletz Indians of Oregon; Confederated Tribes of the Umatilla Indian Reservation; Confederated Tribes of the Warm Springs Reservation of Oregon; Nez Perce Tribe	2000	The Portland Harbor site includes portions in the Willamette River and about 12 river miles upstream of the Willamette River in and around Portland, Oregon, that have been contaminated from decades of industrial use. Areas of the site housed manufactured gas plants, a pesticide manufacturing facility, and boat maintenance facilities, among other industrial uses. Water and sediment at the site are contaminated with many hazardous substances, including PCBs, PAHs, dioxins/furans, pesticides, and heavy metals. The harbor is an international portal for commerce, and dozens of industries within the site provide economic sustainability to the community. The Lower Willamette is also a popular area for recreation, including fishing and boating. The river provides a critical migratory corridor and rearing habitat for salmon and steelhead, including endangered runs of steelhead and chinook. The area also holds great importance to several tribes as a natural and cultural resource. EPA issued its record of decision in January 2017 and finished its baseline sampling plan in December 2017. The record of decision specifies the remedy selected, which is designed to reduce risks to human health and the environment to acceptable levels and actively remediate (using dredging, capping, enhanced natural recovery, and monitored natural recovery) on 394 acres of contaminated sediment and 23,305 lineal feet of river bank. This final remedy is estimated to cost approximately $1.05 billion and take about 13 years to complete.	–	–	–	–

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OR	Black Butte Mine	Confederated Tribes of the Grand Ronde Community of Oregon; Cow Creek Band of Umpqua Tribe of Indians	2010	The Black Butte Mine site is located near Cottage Grove, Oregon. Mercury mining from the late 1880s through the late 1960s included extracting ore from the mine, crushing it on-site, roasting it in kilns to volatilize the mercury, and bottling and shipping the mercury. Mining operations, tailings piles left at the site, and erosion from Furnace Creek contaminated soil, sediment, surface water, and groundwater with mercury and other toxic metals. EPA and its contractors are working in the Furnace Creek area of the site to excavate mine tailings and contaminated soils/sediment for safe disposal in an off-site repository. Removing the mine tailings will reduce mercury leaking into Furnace Creek and reduce the potential for mercury leaching into groundwater. Site investigations for the long-term cleanup are under way.	–	–	–	–
RI	Newport Naval Education and Training Center	Narragansett Indian Tribe	1989	The Newport Naval Education/Training Center site was used by the U.S. Navy as a refueling depot from 1900 through the mid-1970s. The site encompasses 1,063 acres on the west coast of Aquidneck Island in Portsmouth, Middletown, and Newport, Rhode Island. The site includes multiple areas of contamination, including a landfill, a fire training area, a former shipyard, and five tank farms. The areas contain varying degrees of groundwater contamination. The Navy is the lead agency for site investigation and cleanup. Site cleanup has included installation of a soil cover, use of a groundwater pump and treat system, and removal of contaminated debris.	–	X	–	–

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RI	Centredale Manor Restoration Project	Narragansett Indian Tribe	2000	The Centredale Manor Restoration Project site is located in North Providence, Rhode Island, where the main "source area" consists of about 9 acres down the Woonasquatucket River, south to the Lyman Mill Dam, and includes the restored Allendale Dam. The site was a chemical production and drum reconditioning facility from the 1940s to the 1970s that resulted in the release of dioxin and other contamination. Past site operations led to chemicals released directly to the ground, buried and emptied directly into the river. This resulted in contamination of soil, groundwater, surface water and sediment in the adjacent river and downstream ponds. A major fire in 1972 destroyed most structures at the site. Residential apartments were constructed at the site in the late 1970s and early 1980s and still occupy the site. To address immediate risks, EPA conducted several activities including fencing the site, capping contaminated soil, and reconstructing Allendale Dam. EPA developed the cleanup plan, with amendments, in 2012. EPA, the state of Rhode Island, and potentially responsible parties agreed in July 2018 on a plan to clean up contamination at the site.	–	–	–	–
SD	Whitewood Creek[b]	Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota	1983	The Whitewood Creek site covers an 18-mile stretch of Whitewood Creek in Lawrence, Meade, and Butte counties in South Dakota. Since the 1870s, gold mining operations in the area included the discharge of millions of tons of mine tailings into the creek. These mine tailings settled along the Whitewood Creek floodplain, contaminating soil, groundwater, and surface water with heavy metals. EPA excavated 4,500 cubic yards of contaminated soil from residential yards, disposed of contaminated soil, and established institutional controls and surface water monitoring. EPA took the site off the Superfund program's National Priorities List in 1996 when cleanup finished and affected counties restricted future development in impacted areas. Surface water monitoring is ongoing.	X	X	X	X

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SD	Gilt Edge Mine	Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota	2000	The 360-acre Gilt Edge Mine site is located about 6.5 miles east of Lead, South Dakota. The primary mine disturbance area encompasses a former open pit and a cyanide heap-leach gold mine, as well as prior mine exploration activities from various companies. Mining and mineral processing at the site began in 1876 and early gold miners developed extensive underground workings that wind through the central portion of the site. There was also some surface mining. Historical operations at the site contaminated surface water and groundwater with acidic heavy-metal-laden water. In 1986, mine owners commenced development of a large-scale open pit, cyanide heap leach gold mine operation. In the late 1990s, site owners abandoned the site and their responsibilities to address acidic heavy-metal-laden water generated from the exposed highwalls of the three open mine pits and from the millions of cubic yards of acid-generating spent ore and waste rock. Investigation and cleanup activities at the site are ongoing. Interim remedies are currently in place for the water treatment, Lower Strawberry Creek, and Ruby Gulch Waste Rock Dump; and remedial action construction is in progress for the primary mine disturbance area.	–	X	X	–
WA	Lower Duwamish Waterway	Muckleshoot Indian Tribe; Suquamish Indian Tribe of the Port Madison Reservation	2001	The Lower Duwamish Waterway site is a 5-mile segment of the Duwamish, Seattle, Washington's only river. The river flows between residential areas as well as through the industrial core of Seattle into Elliott Bay. The waterway has served as Seattle's major industrial corridor since the early 1900s, resulting in sediment contaminated with toxic chemicals from industrial practices, stormwater runoff, and wastewater. EPA has also found contamination in fish and shellfish, including PCBs, arsenic, polycyclic PAHs, dioxins, and furans. As a result, consumption of resident fish and shellfish, and contact with contaminated sediment pose a risk to human health. EPA signed the record of decision in 2014 that includes plans to clean up about 177 acres in the waterway, including dredging, capping, and natural sedimentation. By the end of 2015, 50 percent of PCB contamination in the river bottom was removed through these early action cleanups. Cleanup and monitoring activities are ongoing.	–	–	–	–

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
WA	Naval Undersea Warfare Engineering Station (4 Waste Areas)	Suquamish Indian Tribe of the Port Madison Reservation	1989	The 340-acre Naval Undersea Warfare Engineering Station site is located on a peninsula 15 miles west of Seattle. Site activities included torpedo maintenance, fuel storage, welding, painting, carpentry, plating, and sheet metal work. Site activities and waste disposal practices contaminated soil, sediment and groundwater with hazardous chemicals, including 1,4-Dioxane, chromium, and vinyl chloride. The site's long-term cleanup remedy included demolition of the plating shop building; removal and disposal of contaminated soil and sediment; removal of underground storage tanks; long-term monitoring of groundwater, sediment and shellfish; institutional controls; and phytoremediation to treat contaminated landfill soil. Remedy construction took place between 1995 and 2000. Site operation and maintenance activities, and site monitoring, are ongoing.	X	–	–	–
WA	Hanford 100-Area (Department of Energy)	Confederated Tribes and Bands of the Yakama Nation; Confederated Tribes of the Umatilla Indian Reservation; Nez Perce Tribe	1989	Four sites on the NPL are part of the 586-square-mile Hanford Nuclear Reservation near Richland, Washington, where waste was created as a by-product of producing plutonium from 1943 through1987. The 25-square-mile Hanford 100-Area site, also referred to as the River Corridor, is focused on cleanup of contamination that originated from nine nuclear reactors. Cooling water contaminated with radioactive and hazardous chemicals was discharged into both the adjacent Columbia River and on-site infiltration cribs and trenches. Site operations also included burying contaminated solid wastes on-site. These activities contaminated soil and groundwater with radioactive constituents, heavy metals, and other hazardous chemicals. Contaminants have been addressed by demolishing buildings, removing contaminated soil, and employing pump and treat systems for contaminated groundwater, among others. EPA has selected eight interim remedies for the 100-Area and remedial investigations are under way to support selection of final cleanup remedies.	–	X	–	–

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
WA	Hanford 200-Area (Department of Energy)	Confederated Tribes and Bands of the Yakama Nation; Confederated Tribes of the Umatilla Indian Reservation; Nez Perce Tribe	1989	Four sites on the NPL are part of the 586-square-mile Hanford Nuclear Reservation near Richland, Washington where waste was created as a by-product of producing plutonium and other nuclear materials for nuclear weapons from 1943 through 1987. The 79-square-mile 200-Area site is located 17 miles north-northwest of Richland, Washington. The 200-Area site is located in the center portion of the Hanford site, known as the Central Plateau, and contains former chemical processing plants and waste management facilities. During processing activities, massive quantities of carbon tetrachloride were discharged into the ground. Site activities also included processing, finishing and managing nuclear materials, including plutonium. About 1 billion cubic yards of solid and diluted liquid wastes (radioactive, mixed, and hazardous substances) were disposed in trenches, ditches, and in an on-site landfill. About 1,000 facilities and structures were built to support processing activities which contaminated soil, groundwater and surface water with hazardous chemicals and radioactive constituents. Thousands of containers and drums holding radioactive waste were placed in burial grounds. Remedial investigations, removal actions, and remedy design and construction are under way for more than 800 waste areas at the site. Cleanup actions included decontamination and demolition of contaminated structures; treatment of contaminated soil; excavation and off-site disposal of drummed wastes; institutional controls; and natural attenuation of groundwater contaminants. According to EPA, a remedy for one of the large canyon-type buildings is about halfway complete and is awaiting investigation and remediation of surrounding waste sites before it can be completed.	–	X	–	–

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
WA	Hanford 300-Area (Department of Energy)	Confederated Tribes and Bands of the Yakama Nation; Confederated Tribes of the Umatilla Indian Reservation; Nez Perce Tribe	1989	Four sites on the NPL are part of the 586-square-mile Hanford Nuclear Reservation near Richland, Washington where waste was created as a by-product of producing plutonium and other nuclear materials for nuclear weapons from 1943 through 1987. The 56 square mile Hanford 300 Area site was home to fuel manufacturing operations at Hanford as well as experimental and laboratory facilities. The 300-Area site includes an unlined liquid disposal area north of the on-site industrial complex area, landfills, and miscellaneous disposal sites associated with operations at the industrial complex. The 300-Area site contains about 27 million cubic yards of solid and diluted liquid wastes mixed with radioactive and hazardous wastes in ponds, trenches, and landfills. The areas used for liquid discharges had no outlets; therefore, liquids percolated through the soil into the groundwater and the Columbia River. Cleanup actions completed to date include decontamination and demolition of contaminated structures; natural attenuation of groundwater contaminants; and disposal of building rubble, contaminated soil, and debris. Remedy construction has been completed in several areas of the site and remedial investigations, removal actions, and remedy design and construction are under way at the remaining areas.	–	X	X	–
WA	Hanford 1100-Area (Department of Energy)[b]	Confederated Tribes and Bands of the Yakama Nation; Confederated Tribes of the Umatilla Indian Reservation; Nez Perce Tribe	1989	Four sites on the NPL are part of the 586-square-mile Hanford Nuclear Reservation near Richland, Washington where waste was created as a by-product of producing plutonium and other nuclear materials for nuclear weapons from 1943 through 1987. Waste areas in the 120-square-mile Hanford 1100-Area site include a landfill, drains, underground tanks and a sand pit where as many as 15,000 gallons of waste battery fluids may have been disposed. Past site activities and waste disposal practices contaminated soil and groundwater with heavy metals and hazardous chemicals such as PCBs and trichloroethene. Remedial activities include off-site disposal of PCB-contaminated soils, capping of the landfill, and establishing continuing institutional controls to prevent future exposure and contamination from buried asbestos.Following cleanup, EPA deleted the site from the NPL in 1996.	X	X	X	X

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
WA	Jackson Park Housing Complex (U.S. Navy)	Suquamish Indian Tribe of the Port Madison Reservation	1994	The 300-acre Jackson Park Housing Complex site is located in eastern Kitsap County, about 2 miles northwest of Bremerton, Washington. From 1904 through 1959, the facility operated as a Navy ammunition depot and included ordnance, manufacturing, processing, and disassembly. Residual ordnance powders were disposed of by open burning. Hazardous dust deposited on floors during ordnance handling was washed into floor drains that led into Ostrich Bay. The site also included incinerators; paint, battery, and machine shops; and a boiler plant. Site activities contaminated surface water and soil with hazardous chemicals and heavy metals. The site's long-term remedy included installation of a soil and vegetation cover over contaminated soil, shoreline stabilization, implementation of a shellfish sampling program, and signs along the shoreline to notify local residents of any harvest restrictions. Site cleanup also included the removal and off-site disposal of wooden pilings from abandoned Navy structures, excavation and disposal of contaminated soil, establishment of an environmental monitoring program, and subsurface placement of oxygen-releasing chemicals. Remedy construction began in 2000 and is ongoing.	–	–	–	–

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
WA	Old Navy Dump/Manchester Laboratory (EPA/ National Oceanic and Atmospheric Administration)	Suquamish Indian Tribe of the Port Madison Reservation; Port Gamble S'Klallam Tribe	1994	The 53-acre Old Navy Dump/Manchester Laboratory site is located north of Manchester, Washington, along the western shore of Clam Bay in Puget Sound. Federal ownership of this site started in 1898 with the U.S. Army. In 1924, the entire site was transferred to the U.S. Navy. From the 1940s through the 1960s, the Navy used the site primarily for construction, repair, maintenance, and storage of submarine nets and boats, but also used the site for firefighter training and as a dump for wastes generated at the site. Former firefighter training activities contaminated soil with dioxins and petroleum hydrocarbons. The Navy also dumped demolition debris and industrial waste, including asbestos, into a former tidal lagoon, contaminating soil, sediment, seep water, and shellfish in Clam Bay with PCBs and metals. Clam Bay has been used primarily for recreational shellfishing and is a known habitat for the bald eagle and chinook salmon, a threatened species under the Endangered Species Act. In the early 1970s, EPA and the National Oceanic and Atmospheric Administration (NOAA) acquired portions of the property. The site is currently occupied by an EPA analytical laboratory and a NOAA fisheries research laboratory. The Army Corps of Engineers established in the third 5-year review in 2014 that the remedy at this site is protective of human health and the environment. Operation and maintenance activities and monitoring are ongoing.	X	X	X	X

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
WA	Pacific Sound Resources	Muckleshoot Indian Tribe	1994	The 83-acre Pacific Sound Resources site, formerly known as the Wyckoff West Seattle Wood Treating facility, is located on the south shore of Elliott Bay on Puget Sound in Seattle, Washington. A wood-treating facility operated at the site between 1909 and 1994. Wood-preserving operations used creosote, pentachlorophenol, and various metal-based solutions of copper, arsenic, and zinc. Daily operations, as well as spills, leaks and storage of treated wood products resulted in soil and groundwater contamination. Direct discharge or disposal of process wastes and waste transport were the most likely sources of contamination to marine sediment. Over half of the site is located in either intertidal or subtidal lands. Cleanup actions included the placement of subtidal and intertidal caps over the 58-acre marine sediment area, including placement of at least 5 feet of cap material in the intertidal zone; dredging and removal of contaminated sediment for off-site disposal; and removal of marine pilings for off-site disposal. Construction of long-term cleanup remedies concluded in 2005 and, following cleanup, operation and maintenance activities, including periodic groundwater monitoring, are ongoing.	X	X	X	X

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
WA	Wyckoff Company/Eagle Harbor	Suquamish Indian Tribe of the Port Madison Reservation	1987	The Wyckoff Company / Eagle Harbor Superfund site is on the east side of Bainbridge Island in Central Puget Sound, Washington. The site was used for creosote wood treatment for more than 85 years, according to the Washington Department of Ecology. Environmental investigations revealed extensive contamination—including creosote, mercury, and other metals—in soils, groundwater, and in the sediment on the bottom of Eagle Harbor. EPA reports that extensive cleanup actions have been completed at the site, including operating a groundwater extraction and treatment system since 2012, capping sediment on more than 70 acres of Eagle Harbor, and hauling away contaminated soils and debris. Further cleanup actions are needed in the soil and groundwater at the former wood treatment facility and in adjacent beach sediment. In 2016 EPA released a proposed plan for additional cleanup actions at the site and, after a public comment period, divided the work into two cleanup decisions. The first was issued in May 2018 and the second is planned for issue near the end of 2018.	–	–	X	–
WA	Pesticide Lab (Yakima)[b]	Confederated Tribes and Bands of the Yakama Nation	1983	The 10-acre Pesticide Lab site is an active agricultural research laboratory located at the Yakima Agricultural Research Laboratory in Yakima, Washington, and has been in operation since 1961.The site is leased by the U.S. Department of Agriculture (USDA). Wastes from the formulation, mixing, and storage of pesticide were discharged into a septic tank disposal system at the site from 1965 through 1985. USDA addressed cleanup under the Resource Conservation and Recovery Act. The site has been cleaned up and is no longer a threat to human health. Long-term monitoring is not required because cleanup left no contaminants of concern on the site. EPA deleted the site from the NPL in 1993.	X	X	–	X

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
WA	Hidden Valley Landfill (Thun Field)	Puyallup Tribe of the Puyallup Reservation	1989	The 92-acre Hidden Valley Landfill site is located in Puyallup, Washington. The site contains a former landfill and gravel pit that operated from 1967 through 1985. The landfill accepted liquids, solids, industrial wastes, and heavy metal sludge. Waste disposal activities contaminated groundwater with hazardous chemicals and heavy metals. The site's long-term remedy included covering the waste with an impermeable barrier, collecting landfill gases, controlling surface water and soil erosion, and minimizing the lateral and vertical movement of contaminated groundwater. Remedy construction took place in 2000. Landfill gas and groundwater monitoring are ongoing.	X	X	X	X
WA	Tulalip Landfill[b]	Tulalip Tribes of Washington	1995	The Tulalip Landfill site, located within the boundaries of the Tulalip Indian reservation, is a former landfill located between Marysville and Everett, Washington. The site consists of a 147-acre landfill and 160 acres of wetlands. The Seattle Disposal Company operated the landfill from 1964 until 1979. The landfill received an estimated 3 million to 4 million tons of commercial and industrial waste. In 1979, landfill operators closed the landfill, added a soil cover, and constructed a perimeter barrier berm. However, insufficient grading of the soil cover resulted in poor drainage and allowed precipitation to collect and eventually infiltrate the landfill surface. As a result, the landfill contaminated groundwater, surface water and sediment with metals, pesticides, PCBs and polycyclic aromatic hydrocarbons. EPA's interim remedy for the landfill included capping the landfill and installing a landfill gas collection and treatment system, among other actions. EPA continued the interim remedy for the landfill and included institutional controls for the wetlands, such as placing and maintaining signs to warn of potential risk from harvest and consumption of resident fish and shellfish. The tribe is responsible for maintenance of the remedy, inspections, and sampling at the site.	X	X	X	–

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
WA	Harbor Island (Lead)	Muckleshoot Indian Tribe; Suquamish Indian Tribe of the Port Madison Reservation	1983	Harbor Island is a 420-acre manmade island in Elliott Bay in Seattle Washington. The site includes the entire island and associated sediment. Built in the early 1900s, the island housed businesses that conduct commercial and industrial activities, including oil terminals, shipyards, rail transfer terminals, cold storage, and lumberyards. Site operations contaminated groundwater, sediment and soil with lead, PCBs, arsenic, mercury, and other contaminants. Remedial activities include removal and treatment of contaminated soil, treatment of groundwater, removal of approximately 6,000 creosote treated piles, and dredging sediment. Most portions of the site have been cleaned up and are undergoing long-term monitoring.	–	–	X	–
WA	Commencement Bay, Near Shore/Tide Flats	Puyallup Tribe of the Puyallup Reservation	1983	The Commencement Bay, Near Shore/Tide Flats site is located in the City of Tacoma and the Town of Ruston at the southern end of Puget Sound in Washington. The site encompasses an active commercial seaport and includes 12 square miles of shallow water, shoreline, and adjacent land, most of which is highly developed and industrialized. EPA found widespread contamination of the water, sediment, and upland areas at the site and has divided the site into seven areas being managed as distinct cleanup sites. As part of this cleanup, EPA has remediated 2,436 properties with the worst contamination, restored 11 acres of shallow marine habitat, and restored 70 acres of estuarine habitat. The site's long-term remedy includes demolishing remaining buildings and structures, excavating soil and slag from the five most contaminated source areas on the site, depositing demolition debris in an on-site containment facility, and monitoring the impacts of cleanup on groundwater and off-shore marine sediment. Investigations and remedy construction are ongoing at the site.	–	–	–	–

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
WA	Midnite Mine	Confederated Tribes of the Colville Reservation; Spokane Tribe of the Spokane Reservation	2000	Midnite Mine is an inactive former uranium mine in the Selkirk Mountains of eastern Washington. Located within the reservation of the Spokane Tribe of Indians, the mine was operated from 1955 until 1981. The site includes two open pits, backfilled pits, a number of waste rock piles, and several ore/protore stockpiles. The site contamination has resulted in elevated levels of radioactivity and heavy metals mobilized in acid mine drainage, both of which pose a potential threat to human health and the environment. The site drains to Blue Creek, which enters the Spokane Arm of Franklin D. Roosevelt Lake. Contaminated water emerging below the waste rock and ore piles is currently captured for treatment in an on-site treatment system. Cleanup includes consolidation of mine waste rock, protore, and contaminated soils; backfilling these materials in lined pits; covering these pits to prevent water infiltration; and ongoing water treatment. According to EPA, significant cleanup is planned to occur between 2017 and 2024.	–	–	–	–
WA	Lockheed West Seattle	Muckleshoot Indian Tribe; Suquamish Indian Tribe of the Port Madison Reservation	2007	The 40-acre Lockheed West Seattle site is located in Elliott Bay near the mouth of the West Waterway in Seattle, Washington. The site includes about 7 acres of aquatic tidelands owned by the Port of Seattle and 33 acres of state-owned aquatic lands. Historic industrial practices at the former shipyard contaminated sediment with hazardous chemicals, including PCBs, dioxins, and furans. Industrial activities generated considerable quantities of sandblast grit and other industrial waste that discharged to sediment and accumulated beneath dry docks and shipways. The Lockheed Martin Corporation, as the potentially responsible party for the cleanup, will remove contamination from a 40-acre area in the northwest corner of the mouth of the West Waterway and north of the Port of Seattle's Terminal 5. An estimated total of 167,000 cubic yards of contaminated material will be removed over the course of the cleanup. According to EPA, the cleanup was to begin in 2018 and is anticipated to be completed in the spring of 2019.	–	–	–	–

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
WA	Makah Reservation Warmhouse Beach Dump	Makah Indian Tribe of the Makah Indian Reservation	2013	Makah Reservation Warmhouse Beach Dump is located within the Makah Indian Reservation at the northwest tip of the Olympic Peninsula in Washington. The site includes a former open dump on top of a ridge about 3 miles northwest of Neah Bay and two streams that originate within the dump and flow to East Beach and Warmhouse Beach. Municipal and household solid and hazardous wastes were disposed of at the dump from the 1970s until 2012. Elevated levels of metals, perchlorate and PCBs have been found in soil at the dump and in the sediment of both creeks. Mussels at the beach also contain elevated concentrations of lead; however, EPA has not determined whether this is from the dump or creeks. EPA is in the remedial investigation stage of the cleanup.	–	–	–	–
WA	Bremerton Gasworks	Suquamish Indian Tribe of the Port Madison Reservation	2012	Bremerton Gas Works is a former manufactured gas plant located about a mile and a half north of downtown Bremerton, Washington. It occupies about 2.8 acres of property along the Port Washington Narrows in Puget Sound. Two species of fish that are listed as threatened under the Endangered Species Act (steelhead trout and chinook salmon) live near the site. This portion of Puget Sound is used as a sport and commercial fishery, as well as for subsistence fishing by the Suquamish Indian Tribe. EPA is in the early stages of the cleanup process, conducting the remedial investigation and feasibility study, which EPA expects to complete in spring 2019.	–	–	–	–
WA	Hamilton/Labree Roads Groundwater Contamination	Cowlitz Indian Tribe	2000	The Hamilton/Labree Roads Groundwater Contamination site is located about 2 miles southwest of Chehalis, Washington. According to EPA, past site activities included spilling and dumping tetrachoroethene in Berwick Creek and burying drums and other containers of assorted hazardous chemicals on-site. The release at the site has contaminated soil, sediment, groundwater, and surface water. EPA's selected interim remedy includes rerouting Berwick Creek around contaminated areas, thermally treating tetrachoroethene-contaminated soil and sediment, and treating contaminated groundwater. Remedial design is under way.	–	–	–	–

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
WI	Penta Wood Products	St. Croix Chippewa Indians of Wisconsin	1996	Penta Wood Products site is located in the town of Siren in Burnett County, Wisconsin. A wood treatment facility operated at the site from 1953 until 1992, and used pentachlorophenol (PCP) to treat wood posts and telephone poles. Facility operations contaminated soil and groundwater with PCP and arsenic. During cleanup, EPA removed about 28 storage tanks containing liquid and sludge. Also, 43,000 gallons of a PCP/oil mixture and sludge were disposed of off-site. The treatment building was demolished and contaminated soil was cleaned on-site or disposed of off-site. Cleanup was completed in 2000, and operation and maintenance activities and monitoring are ongoing. In September 2014, the State of Wisconsin took over operations and maintenance activities at the site.	X	X	X	X

State	Final or deleted site name	Tribe or tribes with known interest in the site	Year listed on NPL	Site overview[a]	Site-wide Cleanup Status			
					Construction completion (CC)	Human exposure under control (HEUC)	Groundwater migration under control (GWMUC)	Site-wide ready for anticipated use (SWRAU)
WI	Ashland/Northern States Power Lakefront	Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin; Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan	2002	The Ashland/Northern States Power Lakefront site is located on the shore of Chequamegon Bay, which is part of Lake Superior, in northern Wisconsin. The site consists of several properties, including those owned by Northern States Power Co. of Wisconsin, Canadian National Railroad and the city of Ashland. 16 acres of contaminated lake sediment just off-shore are also part of the site. The near-shore portion of the site was formed by the placement of fill consisting of sawdust, wood, and wood waste; demolition debris; and other waste materials. Contaminants including tar, oil, PAHs, volatile organic compounds, and metals have been found in sediment, groundwater, and soil. Contamination has also been found in an adjacent residential area. Because groundwater is contaminated at levels of health concern, two artesian wells have been closed as a precautionary measure. Access to a portion of the bay and shore is restricted for boats and swimmers because when sediment is agitated, oil and tar can be released causing a slick to form. Cleanup at the site is ongoing and is being overseen by the Wisconsin Department of Natural Resources and EPA. Phase 1,soil and groundwater cleanup under portions of the site was completed in 2016. This entailed removing contaminated soil, covering the area with clean material, and installing barriers to stop groundwater from migrating. Phase 2, the full-scale wet dredge in the Chequamegon Bay, was completed in 2018. EPA is conducting the first five-year review of the site.	–	X	X	–

Legend: X denotes the milestone was reached at the site

– denotes that the milestone has not been met according to EPA data

Source: GAO analysis of EPA data. I GAO-19-123

[a]All site overview information, unless otherwise attributed, is from publicly available EPA records of decisions or other sources, as of September 2018.

[b]These are deleted National Priorities List (NPL) sites, but there is ongoing tribal interest.

[c]In providing technical comments on a draft of this report, the Confederated Salish and Kootenai Tribes of the Flathead Reservation identified this additional site.

Table 2: Proposed National Priorities National Priorities List (NPL) Sites with Known Native American Interest

State	Name of Site Proposed to the NPL[a]	Site Overview[b]	Tribe or Tribes with Interest in the Site
ID	Blackbird Mine	Blackbird Mine is located 25 miles west of the town of Salmon in the Salmon-Challis National Forest in east-central Idaho. Cobalt, silver, and copper ore were extracted from underground and open-pit mining operations. Contaminated soil, sediment and tailings were released from the mine site during high water flows from thunderstorms and snowmelt. Acid rock drainage and leachate from the mining tunnels, waste piles, and tailings contaminated soil, sediment, surface water, and groundwater with heavy metals such as copper, cobalt, and arsenic. Affected surface waters include Blackbird Creek, the South Fork of the Big Deer Creek, Big Deer Creek, and Panther Creek. Since 1995, cleanup actions have collected contaminated runoff water in the mine area and treated it for copper and cobalt. Cleanup actions have also stabilized waste-rock piles at the mine. Remedy construction is complete except for determining whether to divert Bucktail Creek. Post-construction monitoring of these cleanup activities is ongoing.	Shoshone-Bannock Tribes of the Fort Hall Reservation
MA	General Electric-Housatonic River	Since the early 1900s, General Electric operated a large-scale industrial facility that manufactured and serviced power transformers, defense and aerospace materials, and plastics, and used numerous industrial chemicals at its Pittsfield facility. Years of PCB and industrial chemical use, and improper disposal, led to extensive contamination around Pittsfield, Massachusetts as well as down the entire length of the Housatonic River, which is approximately 150 miles from its source on the East Branch in Hinsdale, Massachusetts and flows through Connecticut into Long Island Sound. After testing groundwater, river sediment, soil, and wildlife, EPA determined that the contamination needed to be addressed and that the greatest concern in the area is the possibility of direct contact or ingestion of PCB contamination. Since 1977, there has been a ban on fishing and consumption of fish from areas of the Housatonic River. These restrictions will remain in place until PCB levels decrease. Data are collected to ensure that the current restrictions protect human health. EPA collects information regarding PCBs in fish and shellfish. In addition to PCBs, other industrial compounds present at the site pose an unacceptable risk to people and the environment.	Wampanoag Tribe of Gay Head (Aquinnah); Stockbridge Munsee Community, Wisconsin

State	Name of Site Proposed to the NPL[a]	Site Overview[b]	Tribe or Tribes with Interest in the Site
MT	Smurfit-Stone Mill Frenchtown	The Smurfit-Stone Mill Frenchtown site is located 11 miles northwest of Missoula, Montana. The 3,200-acre site formerly housed a pulp mill that operated from 1957 through 2010. The core industrial footprint of the mill site covers about 100 acres, and there are more than 900 additional acres containing a series of unlined ponds used to store treated and untreated wastewater from the mill, as well as sludge recovered from untreated wastewater. The site also includes landfills used to dispose of solid wastes, including general mill refuse and asbestos. Various hazardous substances were used or produced on-site, including bleaching chemicals that produced dioxins and furans that may have been released into the environment. A screening investigation by EPA determined that the site's primary contamination sources include four sludge ponds, an emergency spill pond, an exposed soil pile adjacent to a landfill, a wastewater storage pond, and a soil land farming area. The results of the investigation will determine cleanup needs and identify potential cleanup options at the site.	Confederated Salish and Kootenai Tribes of the Flathead Reservation
NV	Anaconda Copper Mine	The Anaconda Copper Mine site covers more than 3,400 acres of the Mason Valley, near the city of Yerington, Nevada. Portions of the site are owned by a company, while other areas are public lands managed by the U.S. Bureau of Land Management. Nevada Department of Environmental Protection and EPA have conducted several emergency removal actions at the site to address immediate concerns. Remedial investigations and feasibility studies will be conducted to determine the extent of contamination and potential cleanup options for other areas at the site.	Walker River Paiute Tribe of the Walker River Reservation, Nevada; Yerington Paiute Tribe of the Yerington Colony & Campbell Ranch, Nevada

State	Name of Site Proposed to the NPL[a]	Site Overview[b]	Tribe or Tribes with Interest in the Site
WI	Fox River Natural Resource Damage Assessment/Polychlorinated Biphenyls Releases	The Lower Fox River, located in northeastern Wisconsin, begins at the Menasha and Neenah channels leading from Lake Winnebago and flows northeast for 39 miles to where it discharges into Green Bay and Lake Michigan. The Fox River Natural Resource Damage Assessment / Polychlorinated Bisphenyls Releases site addresses releases caused by operations of several pulp and paper mills that, during the 1950s and 1960s, routinely used PCBs in their operations that resulted in contamination of the river. Samples from the site also indicate the presence of polycyclic aromatic hydrocarbons resulting from manufactured gas plant processes co-mingled or underneath the PCB contamination. Approximately 270,000 people live in the communities along the river. 2018 is the 10th year of dredging in the Lower Fox River, and EPA estimates 450,000 cubic yards of PCB-contaminated sediment will be removed before the end of the year. In addition, about 2.1 acres of sediment will be capped and 179 acres will be covered with sand. EPA plans to oversee a second 5 year review in 2019.	Oneida Nation; Menominee Indian Tribe of Wisconsin; Little Traverse Bay Bands of Odawa Indians, Michigan

Source: GAO analysis of EPA data. I GAO-19-123

[a]These sites are proposed for the NPL and have not completed Superfund's public comment and review process to be formally listed on the NPL. Of these sites, only Blackbird Mine has met a site-wide performance measure; it has groundwater migration under control.

[b]All site overview information, unless otherwise attributed, is from publicly available EPA records of decisions or other sources, as of September 2018.

Appendix II: Objectives, Scope, and Methodology

This report (1) examines the extent to which the U.S. Environmental Protection Agency (EPA) has reliable data identifying National Priorities List (NPL) sites that are located on tribal property or that affect tribes, (2) examines the extent to which EPA has reliable data on the agency's consultation with tribes and (3) describes what actions, if any, EPA has taken to address the unique needs of tribes when making decisions about cleanup actions at NPL sites.

To examine the extent to which EPA has reliable data identifying NPL sites that are located on tribal property or that affect tribes, we reviewed relevant provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 as amended and policies and guidance regarding EPA's identification and clean-up of NPL sites. We obtained and evaluated EPA data from the Superfund Enterprise Management System (SEMS) on proposed, final, and deleted NPL remedial sites that have tribes associated with them or that EPA has designated as having Native American Interest (NAI). We limited our review to examining proposed, final, and deleted NPL sites because they represent sites with the highest national priority due to the significance of releases, or threatened releases, of hazardous substances. EPA also indicated whether such sites may be located within 10 miles of known tribal property by comparing the sites' coordinates to the tribal geographic location as recorded in publicly available EPA data. We also obtained information about whether a site was considered a federal facility because other federal agencies may have different consultation policies than EPA. We did not determine whether EPA has information about consultation with tribes for sites considered federal facilities.

EPA initially identified 265 NPL Superfund sites that were on tribal property, had NAI, had a tribe or tribes with potential interest in the site, or may have been within 10 miles of tribal property. We then worked with EPA headquarters officials and each regional office to perform data quality checks and identify any errors or omissions, in order to develop a revised list of a total of 87 NPL sites—of which 11 were federal facilities—known to affect tribes or to be located on tribal property. As an example of the data quality checks, officials from each EPA regional office reviewed the list of sites for their respective regions and made corrections to the sites' designation as having NAI or tribes with interest in the sites. As another example, we compared data from EPA's Tribal Consultation Opportunity Tracking System (TCOTS) database with the list of sites EPA provided us and determined that a tribal consultation had occurred for a site that EPA had not identified as having NAI. We checked with officials from the appropriate EPA regional office and they told us that the site

should have been designated as having NAI, so we added it to our list. We also interviewed officials from EPA's headquarters and regional offices to better understand the agency's management, use, and the reliability of these data. In providing comments on a draft of this report, the Confederated Salish and Kootenai Tribes of the Flathead Reservation identified an additional site that was not included in EPA's data, which we reviewed with EPA and added to our list of NPL sites known to be on tribal property or that affect tribes, bringing the total to 88 sites. We recognize that there may be additional sites at which there is tribal interest but determined that the data were sufficiently reliable to provide information on NPL sites known to be on tribal property or that affect tribes, and to select six sites for nongeneralizable case studies for our work. We did not select case studies from sites located on federal facilities because federal agencies may have different tribal consultation policies. For the case studies, we selected sites based on geographic diversity, and in order to represent sites that have been listed since the publication of EPA's tribal consultation policy in 2011. We also selected sites that had at least two assessments or inspections performed according to EPA data so the tribes would have sufficient information to share with us about their experiences. In one of the case studies, we had to change to a different site from the same region when the tribe associated with the site we had initially selected did not wish to participate. We chose a replacement site in the same EPA region that was at a similar point in the cleanup process as the site we originally selected.

To examine whether EPA has reliable data regarding its consultation with tribes about NPL sites, we reviewed EPA-specific guidance that applies to tribal consultation on NPL sites. We evaluated data from EPA's TCOTS, reviewed related agency documentation, interviewed knowledgeable agency officials, and compared TCOTS data with other information EPA provided. Specifically, we compared data from TCOTS with information that officials from EPA headquarters and each EPA region provided to us regarding consultation for each of the nonfederal sites that had NAI. In order to determine the frequency with which EPA consults with tribes on cleanup actions of NPL sites, we examined and compared available data on consultation from the TCOTS system with other information provided by EPA in light of EPA's consultation guidance. We also interviewed officials from EPA and selected tribes from our six nongeneralizable case studies regarding consultation. While we selected case studies based on nonfederal NPL sites EPA has identified as being on tribal property or affecting tribes, our interviews with tribal and EPA officials covered a broader range of sites and included officials' views about any Superfund

activities in which they had been involved. For each case study, we requested information documenting EPA's consultation with tribes as well as any materials that demonstrated whether and how agency decisions took into account unique tribal needs associated with the site. We also conducted semi-structured interviews with officials from the tribe or tribes involved at each of our case study sites, as well as EPA regional officials for the region in which the site is located. We visited the Jackpile-Paguate Uranium Mine site and conducted interviews with tribal officials in person. We evaluated EPA and tribal officials' experiences with consultation at our selected case study sites based on EPA's consultation policies.

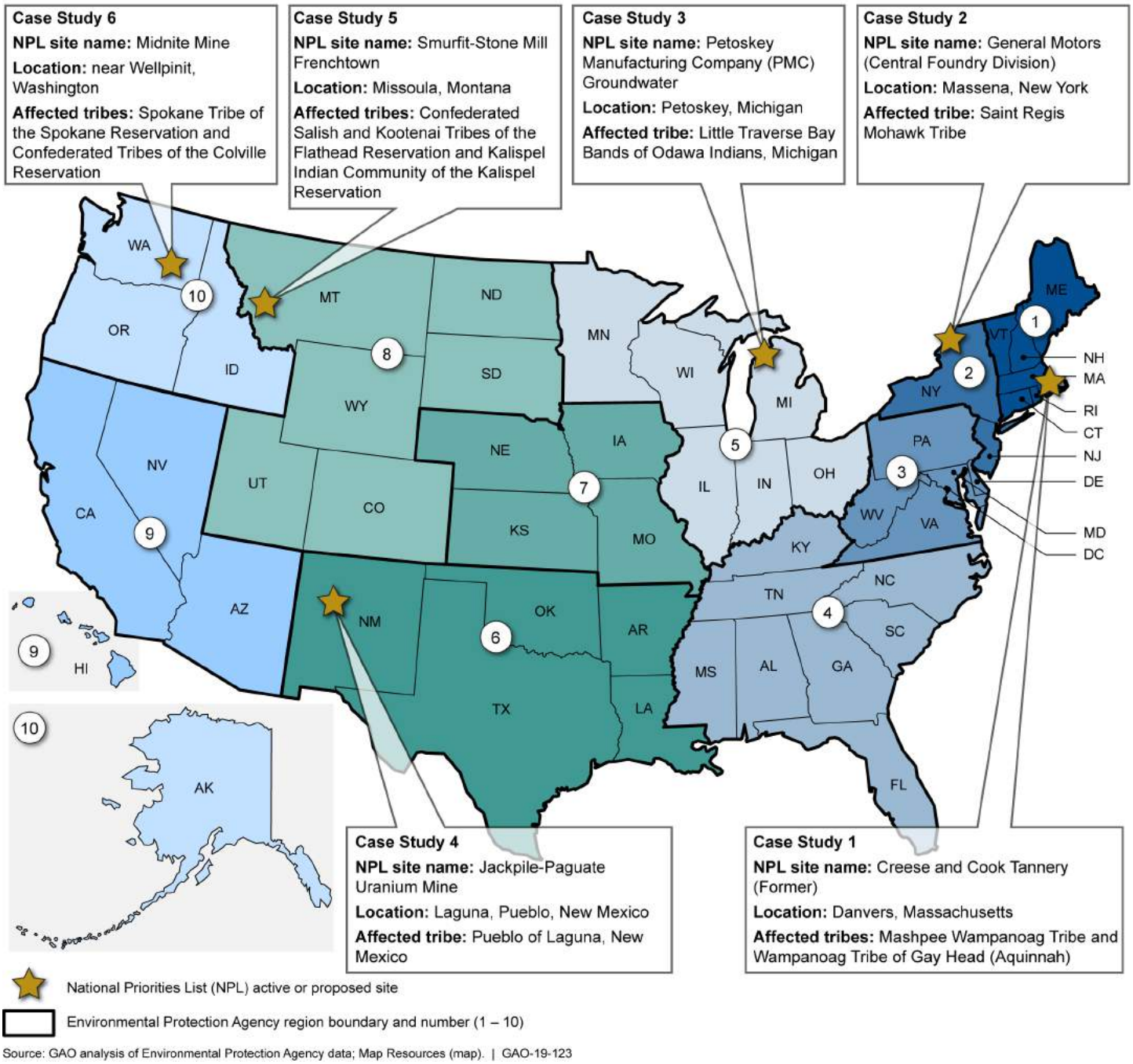
To describe what actions EPA has taken to address the unique needs of tribes when making decisions about cleanup actions at NPL sites, we interviewed EPA officials from the regional offices associated with our selected case study sites about consultation regarding our case study sites, as well as at other NPL sites that affect tribes in their region. We also conducted semi-structured interviews with tribal officials who had consulted or coordinated with EPA regarding each of the selected sites in our review. We asked the tribes to describe the effects of the site on any unique needs such as subsistence fishing and gathering, and whether EPA has explored or addressed these needs during the agency's cleanup actions.

We conducted this performance audit from May 2017 to January 2019 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix III: Description of Case Study Sites

To analyze examples of consultation and better understand the tribal perspective on consultation with the Environmental Protection Agency (EPA), we conducted six nongeneralizable case studies of final or proposed National Priorities List (NPL) sites with Native American Interest (NAI). We selected these case studies on the basis of geographic diversity and in order to represent sites that have been listed since the publication of EPA's tribal consultation policy in 2011. For each of these case studies, we collected documentation and interviewed the relevant tribal and EPA regional officials. Figure 2 provides an overview of these case studies.

Figure 2: Overview of the Six NPL Case Studies



Source: GAO analysis of Environmental Protection Agency data; Map Resources (map). | GAO-19-123

Case Study 1: Creese and Cook Tannery (Former)—EPA Region 1

General Information on the Site

According to EPA, the Creese and Cook Tannery site is located on the Crane River in Danvers, Massachusetts. According to an October 2018 proposed cleanup plan, several businesses operated at the site, including leather tanneries that operated from the late 1800s until the early 1980s and a former railroad station. Use of arsenic and chromium at tanneries resulted in these chemicals contaminating soil at the site. Other soil contaminants include dioxins, furans, and polycyclic aromatic hydrocarbons from railroad operations, combustion, and use of asphalt pavement. In the mid-1980s, the Massachusetts Department of Environmental Protection conducted an initial investigation to determine the nature and extent of contamination and evaluate the potential remedial options under state law. The department then reviewed and approved, pursuant to state law, a plan for excavation of the waste and its placement in a containment cell. EPA began investigations in 2010 and found arsenic in surface soils. As a result, in 2012 EPA removed 450 tons of contaminated soil from the site. EPA conducted six site assessments, including an archaeological assessment, and placed the site on the NPL in 2013.

Site Status in Cleanup Process

The site is in the early stages of the cleanup process. The feasibility study for the site was completed in September 2018, and EPA issued a cleanup proposal for comment in October 2018. According to information provided by EPA, the site has not yet reached any Superfund site-wide milestones because the remedial action has not begun.

Tribal Interest in the Site

EPA officials stated that both the Mashpee Wampanoag Tribe and Wampanoag Tribe of Gay Head (Aquinnah) have expressed interest in the site due to possible adverse impacts on significant cultural resources in the contaminated area. EPA officials told us they notified both tribes of the site concurrently with notification to the Massachusetts Historical Commission in August 2014. In a consultation response form dated September 2014, the Mashpee Wampanoag Tribe indicated that the cleanup has the potential to have adverse effects on historical or cultural

resources important to the tribe and requested that the tribe be notified prior to any archaeological activity on-site, and that they be provided any archaeological assessment documents.

EPA's Consultation and Coordination with the Tribes for the Site

The National Historic Preservation Act requires federal agencies to take into account the effects of their undertakings on historic properties, including properties to which Indian tribes attach religious and cultural significance.[1] According to EPA Region 1 officials, they are consulting with both tribes under the act. EPA sent an archaeological survey to the tribes in June 2017. Officials from the Mashpee Wampanoag Tribe indicated that they agree with the survey's findings and required that consultation continue. EPA officials told us that the Wampanoag Tribe of Gay Head (Aquinnah) did not comment on the assessment. Both tribes have asked EPA to inform them of cleanup status for the site and share any reports.

Perspectives of Tribal and EPA Officials on Consultation and Coordination for the Site

EPA officials told us they were consulting with both tribes under section 106 of the National Historic Preservation Act. Officials also told us that EPA will negotiate a memorandum of understanding with both tribes once the final cleanup is selected, if it is determined that the selected remedy will have an adverse effect on any resources that are eligible for the National Register of Historic Places. With regard to coordination, both tribes noted that resource constraints prevent their further involvement with the site cleanup process. Officials from the Wampanoag of Gay Head (Aquinnah) tribe indicated that EPA has been available for discussions if the tribe raises an issue.

[1]In particular, agencies must complete a process mandated in regulations implementing section 106 of the National Historic Preservation Act issued by the Advisory Council on Historic Preservation. EPA sent the archaeology survey to the tribe as part of the section 106 process.

Case Study 2: General Motors (Central Foundry Division)—EPA Region 2

General Information on the Site

The General Motors (Central Foundry Division) site is located on the St. Lawrence River in Massena, New York, adjacent to the Saint Regis Mohawk Tribe's reservation. According to an EPA document, General Motors operated an aluminum die casting plant on the site beginning in 1959 and used polychlorinated biphenyls (PCB) in the manufacturing process through 1980. EPA found contamination in soils and industrial lagoons on the General Motors site property, in groundwater, in the St. Lawrence and Raquette Rivers, in Turtle Cove, and in soils and sediment within the Saint Regis Mohawk reservation. After General Motors' bankruptcy, ownership of the site was transferred to a trust. This General Motors site was placed on the Superfund NPL in September 1983.

Site Status in Cleanup Process

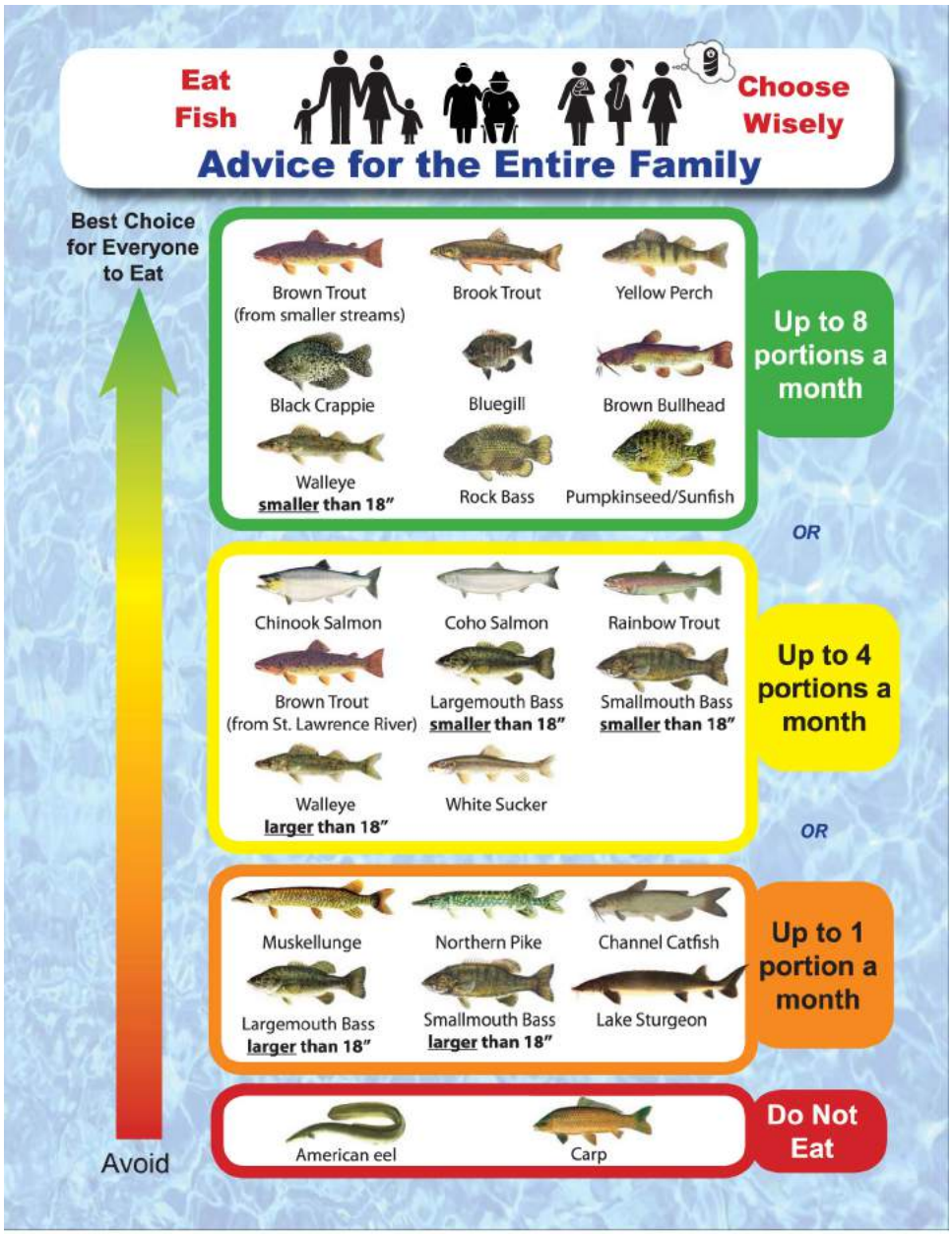
According to information provided by EPA, the cleanup of the General Motors site is ongoing, with the last substantial cleanup of the Remedial Design and Remedial Action phase focused on a 10-million-gallon industrial lagoon. To date, contractors have dredged sediment in the St. Lawrence River, Turtle Cove, and Raquette River systems. EPA officials told us that, in addition to these dredging activities, they have completed other significant cleanup work, including installation of a groundwater collection system, installation of a multi-layer cap on the industrial landfill on-site, and demolition of the 1-million-square-foot factory building, EPA officials stated that consultation with the tribe led to excavating a portion of the industrial landfill in order to establish a 150-foot buffer between a landfill on the site and the tribe's reservation. EPA declared human exposure to contaminants at the site under control in 2008. EPA officials told us there is no requirement to consult with tribes to determine that site-wide milestones have been reached, and that the Saint Regis Mohawk Tribe was not consulted regarding the designation of human exposure under control. Tribal officials do not agree with this determination and stated that EPA has not asked the tribe for any input on this measure. EPA officials responded that while EPA did not consult with the tribe on the human exposure under control environmental

indicator, they coordinated extensively with the tribe with respect to cleanup status, strategy, and site-wide milestones prior to making the designation.

Tribal Interest in the Site

Tribal officials noted concern regarding contamination of tribal property and the effect on subsistence fishing in the St. Lawrence River and tribal member health. The Saint Regis Mohawk Tribe is concerned that PCB contamination from the site is airborne and affecting the health of tribal members. Further, the tribe is concerned that PCB accumulation in fish tissue results in fish that are unsafe to eat in the quantities typically consumed by tribal members who rely on subsistence fishing. See figure 3 below for a fish consumption advisory issued by the tribe because of PCB contamination concerns. Tribal officials also told us the tribe is concerned that PCBs may be transferred through breast milk, exposing future generations to the contamination. Tribal officials told us that tribal members also complain of a strong odor emanating from the site, and have advocated for the tribe to take a more active role in the site cleanup.

Figure 3: Saint Regis Mohawk Family Guide to Eating Locally-Caught Fish



Saint Regis Mohawk Family Guide to Eating Locally-Caught Fish

Source: © Saint Regis Mohawk Tribe. | GAO-19-123

Note: This figure was published by the Saint Regis Mohawk Tribe in 2013 as part of a guide to eating locally-caught fish; however, fish consumption advisories were in effect prior to publication of this figure.

EPA's Consultation and Coordination with the Tribe for the Site

According to EPA, the agency sent an official consultation letter to the tribe in 2011, as directed by EPA's 2011 Policy on Consultation and Coordination with Indian Tribes. Consultations with the tribe focused on the tribal role in the cleanup process at the General Motors (Central Foundry Division) site, as well as the Alcoa Aggregation and Reynolds Metals sites, which also affect the tribe.[2] EPA officials told us they have responded to tribal concerns, in part, by agreeing to a stricter treatment threshold for maximum allowable PCB contamination (10 parts per million instead of 500 parts per million), based on the tribe's objection to the originally-proposed plan. EPA officials also told us that they have responded to tribal concerns by adopting practices to mitigate air contamination during response activities, such as minimizing the size of excavation areas to reduce potential exposure and wetting contaminated soils before removal. EPA officials told us that coordination with the tribe began in the 1980s, and that the region coordinates extensively with the Saint Regis Mohawk Tribe. Additionally, these officials told us that, through annual meetings with tribes in the region and periodic visits to individual tribes, they coordinate with all tribes in the region, including the Saint Regis Mohawk Tribe, at least once a year. In technical comments provided in response to the draft of this report, EPA officials told us that the Saint Regis Mohawk Tribe has been treated as a support agency, equivalent to the state of New York, since 1995, and that the tribe has been asked to concur on all records of decision for the site as early as 1990, though they have not always concurred.

Perspectives of Tribal and EPA Officials on Consultation and Coordination for the Site

Tribal and EPA officials have differing perspectives on the effectiveness or utility of consultation. Saint Regis Mohawk Tribe officials noted that they have met repeatedly with EPA over the years but the consultation has felt perfunctory and like a "box checking exercise." Tribal officials stated that EPA did not consider their input as seriously as General Motors' input, and they believe that EPA is over-reliant on the initial research conducted by scientists from the company, and has not sufficiently considered updated and independent research. Saint Regis Mohawk tribal officials noted that EPA did not recognize tribal members' stronger reliance on the environment and exposure to contamination. The tribe also provided us with examples of less formal coordination with EPA,

[2]The Alcoa Aggregation and Reynolds Metal sites are not NPL sites.

including a letter from EPA responding to tribal officials' requests for additional air monitoring at the site.

EPA Region 2 officials stated that consultation with the Saint Regis Mohawk Tribe has become more extensive and sophisticated since the issuance of the 2011 tribal consultation policy. The region held a consultation with the tribe in 2011 to address coordination with the tribe about three Superfund sites. In a summary of that consultation, EPA noted that they will take steps to further the tribe's partnership role with respect to the three sites by providing as much time and opportunity as feasible for consultation, consistent with the mutual desire to move the cleanups forward expeditiously; continuing to share, for advance review, drafts of pertinent documents; consulting with the tribe prior to taking actions or implementing decisions that may affect the tribe's interests; inviting tribal officials to technical meetings where potentially responsible parties and other trustees are present; and informing the tribe of the results of meetings or substantive decisions with any potentially responsible party. Further, EPA officials noted that they cannot fulfill some requests made by the Saint Regis Mohawk Tribe; however, EPA officials stated that tribal activism led to a more stringent 10 parts-per-million treatment threshold for PCBs on the site, rather than the originally proposed 500 parts-per-million standard. EPA also provided documentation of less-formal coordination with the tribe, including correspondence regarding approaches to addressing the tribe's concerns of PCB air impacts during cleanup.

Case Study 3: Petoskey Manufacturing Company (PMC) Groundwater—EPA Region 5

General Information on the Site

According to information provided by EPA, the PMC Groundwater site is located in a former industrial area on the shores of Lake Michigan's Little Traverse Bay in Petoskey, Michigan. PMC was established in 1946 as a small fabricating and painting business that later produced parts for the automotive industry until 2000. During this period PMC improperly disposed of solvents used in plant operations, contaminating groundwater and Petoskey's municipal well with volatile organic compounds and inorganic contaminants.

Site Status in Cleanup Process

According to EPA officials, the agency has gone through several rounds of cleanups at PMC Groundwater. EPA initially listed the PMC Groundwater site on the NPL in 1983. The City of Petoskey completed construction of a new municipal water source in 1996. EPA began cleanup in 1999 and declared the site as ready for anticipated use in 2007; the site was subsequently redeveloped with condominiums. In the site's 2014 5-year review, EPA noted that the remedies they had put in place, including excavation and off-site disposal of contaminated soil, installation and operation of a system to remove volatile organic compounds from subsurface soil, and a groundwater monitoring plan, were protective of human health and the environment in the short term, but that an effective long-term remedy would require additional steps. According to EPA officials, EPA is conducting a remedial investigation and feasibility study to determine the nature and extent of soil and groundwater contamination, which is expected to be completed in 2019. According to EPA officials, in 2016, EPA fieldwork indicated that trichloroethene concentrations exceeded acceptable levels under some condominiums' slab foundations, and in 2017, EPA conducted an emergency removal action to address the intrusion of the vapors.

Tribal Interest in the Site

Little Traverse Bay Bands of Odawa Indians officials told us the tribe's interest in the site is due to potential exposure of tribal members and the effects on nearby surface waters. Tribal members rely on subsistence fishing in the Bear River in close proximity to the site. These officials also told us the tribe also conducts commercial fishing in Lake Michigan. Tribal members residing in Petoskey relied on the contaminated municipal well. Additionally, tribal officials told us that they want to understand the status of the site because they may be interested in future land acquisitions in the area and the U.S. Department of the Interior may not be willing to take contaminated land into trust for the tribe.

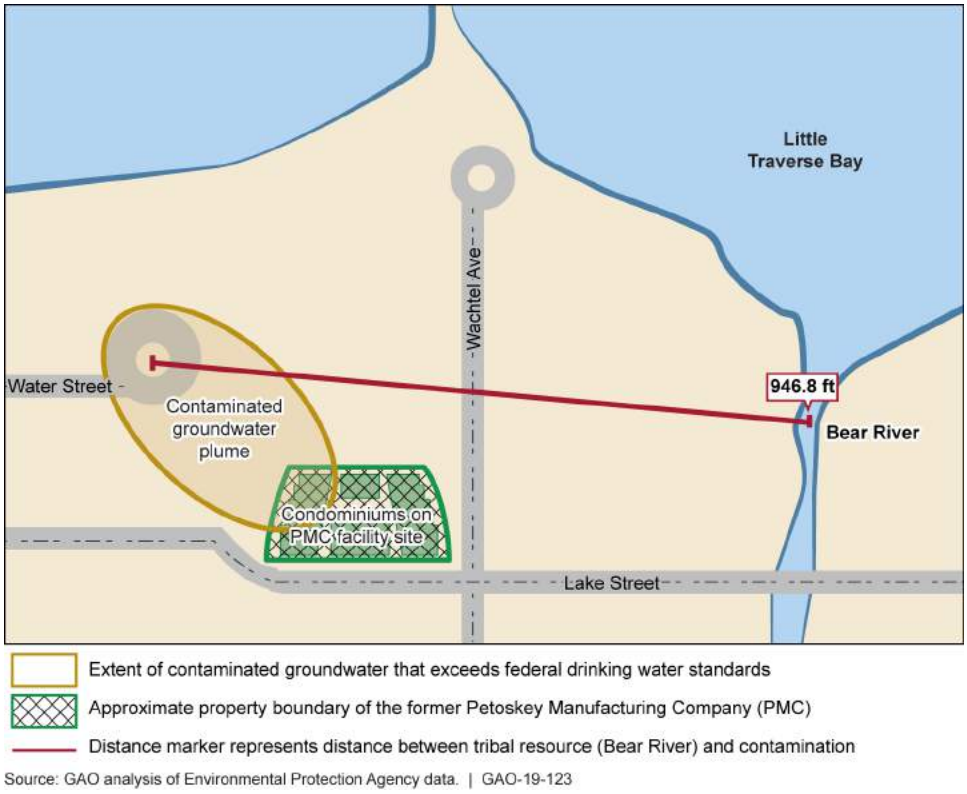
EPA's Consultation and Coordination with the Tribe for the Site

According to tribal officials, the tribe contacted EPA officials in 2017 when local news reported vapor intrusion issues into condominiums built on the site. Neither tribal officials nor EPA have found any indication of previous consultation or coordination for the site. Since the tribe's initial contact, EPA officials have shared relevant information and spoken with the tribe regarding the site. EPA officials told us that representatives from the tribe attended a public meeting about the site in June 2018 and that EPA is in close contact with an official from the tribe and will provide him with reports as appropriate.

Perspectives of Tribal and EPA Officials on Consultation and Coordination for the Site

According to EPA and tribal officials, EPA has not consulted with the tribe about the site. With respect to coordination, tribal officials told us that they were satisfied with EPA's response following the tribe's initial contact. EPA officials told us that the tribe is aware that consultation is available if the tribe desires it, and officials will coordinate with the tribe. EPA officials stated that the relationship with tribes in the region has evolved considerably since the 1990s and that coordination with tribes in the region has improved.

Figure 4: Proximity of Petoskey Manufacturing Company Groundwater Site to Tribal Fishing Resource



Source: GAO analysis of Environmental Protection Agency data. | GAO-19-123

Case Study 4: Jackpile-Paguate Uranium Mine—Region 6

General Information on the Site

According to information provided by EPA, the Jackpile-Paguate Uranium mine is a 2,656-acre site located on the Pueblo of Laguna, New Mexico, about 40 miles west of Albuquerque. Anaconda Copper Mining and The Anaconda Company, predecessors to the Atlantic Richfield Company, moved more than 400 million tons of rock within the mine between 1952 and 1982 area in addition to 25 million tons of uranium ore off-site for additional processing. Mining operations contaminated surface water with hazardous substances. Additionally, according to a report by the U.S. Department of Health and Human Services, people living in villages near the site could be exposed to contamination through radioactive materials from the site being used in home construction, or through contact with mine contaminants suspended in air or present in dust blown or tracked from the mine. Reclamation of the mine began in 1990 and was closed out in June 1995; however, EPA was not involved in the initial reclamation prior to the site being listed on the NPL. Figure 5 is a photograph of Gavalon Mesa, one of the major mining areas at the site, and erosion typical to a previously reclaimed area.

Figure 5: Erosion of Remediated Mountainsides at the Jackpile-Paguate Uranium Mine

Source: GAO. | GAO-19-123

Site Status in Cleanup Process

EPA listed the site on the NPL in 2013. EPA officials conducted four assessments at the site. The site is currently in its remedial investigation and feasibility study stage, and the site has not met any site-wide milestones.

Tribal Interest in the Site

The site is located within the boundaries of the Pueblo of Laguna's reservation. Pueblo of Laguna officials stated that the site impacted the Pueblo in several ways, including radon contamination in homes due to use of contaminated mining debris in home construction, contamination of water sources, and dust from mining operations reaching homes and gardens.

EPA's Consultation and Coordination with the Pueblo for the Site

EPA officials stated that neither EPA nor the Pueblo of Laguna have initiated consultation for the Jackpile-Paguate Uranium Mine under the 2011 consultation policy. EPA consulted with the tribe for the site in 2009, which resulted in a memorandum of understanding (MOU) to facilitate coordination in performing removals and site assessments for the site. According to EPA officials, once the remedial investigation and feasibility study is complete, they will seek to consult with the tribe before making a decision about cleanup goals. EPA officials noted that the agency has consistently coordinated with the tribe, including regular briefings to the tribe and working closely with the tribe's Environmental and Natural Resources Department since EPA became involved at the site. In addition, the tribe is a support agency for the site—which means EPA must provide the tribe substantial and meaningful involvement in the initiation, development, and selection of the remedial action at the site. The Pueblo has a Superfund support contract with EPA to facilitate its support agency work helping EPA perform oversight of the response work, and reviewing and commenting on EPA documents, according to EPA officials.

Perspectives of Pueblo and EPA Officials on Consultation and Coordination for the Site

Pueblo officials told us that they have been satisfied with the coordination for the site, and they prefer that coordination be face-to-face when possible. Officials told us that consultation requires a senior EPA official to present in person to the Pueblo Council, and all other interactions are considered coordination. According to the Pueblo, coordination with EPA has been effective, in part, because EPA acknowledges that site contamination extends beyond the mine lease boundaries.

EPA officials told us that they are in frequent communication with the Pueblo. EPA officials noted that they hold regular briefings with tribal officials, as well as through routine electronic and phone communication. EPA officials noted that coordination with the tribe early in the Superfund cleanup process facilitates their work. For example, since the site is on tribal property, EPA worked with the Pueblo to gain site access to investigate the extent of the contamination.

Case Study 5: Smurfit-Stone Mill Frenchtown—Region 8

General Information on the Site

According to information provided by EPA, the Smurfit Stone Mill-Frenchtown site is a 3,200-acre area located northwest of Missoula, Montana. The site was originally a pulp mill operated from 1957 through 2010. It includes more than 900 acres of unlined ponds that were used to store wastewater effluent from the mill, as well as sludge recovered from untreated wastewater. Contamination includes dioxins and furans produced through bleaching of pulp, as well as PCBs.

Site Status in Cleanup Process

EPA proposed to add the site to the NPL in 2013 and is evaluating public comments on the proposal before making a final decision. EPA negotiated an administrative settlement agreement and order on consent in 2015 with three potentially responsible parties to conduct a remedial investigation and feasibility study at the site. EPA officials told us that these parties have completed several site tasks contributing to the remedial investigation and feasibility study for the site.

Tribal Interest in the Site

Both the Confederated Salish and Kootenai Tribes of the Flathead Reservation and the Kalispel Indian Community of the Kalispel Reservation (hereafter Kalispel or Kalispel Indian Community) have interest in the site. Officials from the Confederated Salish and Kootenai Tribes of the Flathead Reservation stated that their interest in the site is drawn from the Hellgate Treaty of 1855. According to these officials, the site is located on land where the tribes retain treaty hunting, fishing, and gathering rights in portions of the Clark Fork River that are potentially contaminated by the site. The two tribes are concerned about adverse health impacts on tribal members due to exposure through consumption of fish from near and downstream from the site and ensuring that tribal cultural and historical resources are protected during cleanup activities. Officials from the Kalispel Indian Community believe that contaminants from the site and throughout the watershed have reached its reservation in Northeast Washington. These contaminants may affect tribal members' nutrition and exercise of their culture. The tribe would like EPA to sample

for contamination from Smurfit Stone Mill further down the Clark Fork River to the areas where the Kalispel have interest.

EPA's Consultation and Coordination with the Tribes for the Site

According to EPA officials, EPA has not consulted with the tribes but has coordinated with the natural resource trustees, which include the Confederated Salish and Kootenai Tribes, and told us they have also coordinated with the Kalispel Indian Community. EPA officials told us that coordination with the Kalispel Indian Community differs from coordination with the Confederated Salish and Kootenai Tribes because the Kalispel do not have treaty rights at the site. Region 8 notified the Confederated Salish and Kootenai Tribes about the site in 2014, but told us they did not send corresponding notification to the Kalispel Indian Community because they had not been identified as having tribal interest during the preliminary assessment and site investigation. EPA officials told us the reason they have not yet consulted with the tribes under the 2011 policy is that the site is still being characterized. According to officials from the Confederated Salish and Kootenai Tribes, they were first informed of the site by the Missoula County Water Quality district in 2012. Officials from this tribe told us that in December 2012, they sent a letter to the state Governor supporting NPL listing for the site, and also indicated their support of NPL listing to EPA when responding to a Federal Register notification indicating EPA's intent to add the site to the NPL. EPA officials told us that the agency wants to improve communication with the tribes by scheduling quarterly calls, site visits, and offering opportunities to review and comment on documents produced during the remedial investigation process.

Perspectives of Tribal and EPA Officials on Consultation and Coordination for the Site

Officials from the Confederated Salish and Kootenai Tribes have been dissatisfied with the extent of coordination with EPA. Specifically, they told us that EPA has not provided the tribes with sufficient information to engage in the cleanup process in a meaningful way. For example, officials stated EPA did not involve them when EPA entered into the administrative settlement agreement and order on consent to conduct the remedial investigation and feasibility study. Tribal officials told us that this experience is inconsistent with other Superfund sites where EPA has given the tribes greater opportunity for meaningful input.

EPA officials told us they coordinated with the interested tribes through communications with the natural resources trustees in the region as a

whole.[3] EPA officials told us that they officially notified the tribes about the site after the preliminary assessment and site investigation, and that they typically do not issue a trustee notification letter or invite tribes to consult until after EPA completes a preliminary assessment. Officials told us that the Confederated Salish and Kootenai Tribes was notified at the same point as other natural resource trustees, and that this was sufficiently early to allow for meaningful input because it occurred prior to any major decisions.

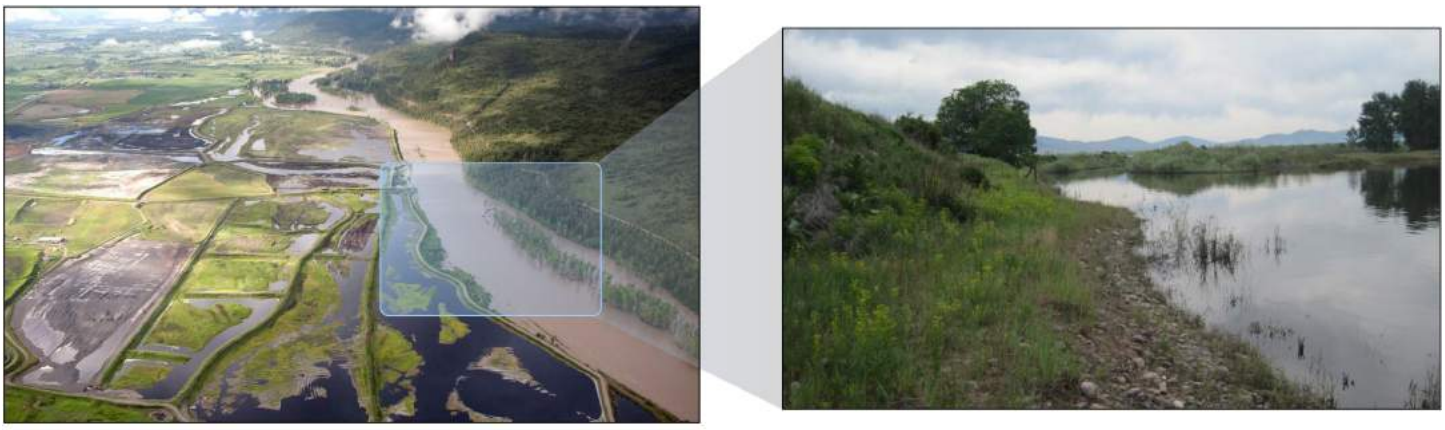
According to Kalispel tribal officials, coordination with EPA has been limited. Kalispel tribal officials told us that they have faced some difficulties coordinating with EPA about the site because they are located in EPA Region 10, while the site is managed by EPA Region 8. One tribal official we spoke with expressed that he felt EPA may be trying to exclude the Kalispel Indian Community from cleanup decisions at the site. For example, this official told us that the tribe had requested that EPA Region 8 extend their water sampling area further downstream on the Clark Fork River to determine the extent of releases from the site, but that EPA issued its sampling plan without taking the tribe's concerns into account. However, these officials told us that they are developing their relationship with EPA region 8. They also told us that coordination with EPA is valuable, and that they consider consultation as a tool to be employed when coordination is insufficient.

Region 8 officials acknowledged the letter from the natural resource trustees requesting a stronger role in decision-making and highlighted improvements EPA has made to communication. Further, officials cited several actions to demonstrate their commitment to working with the tribes: evaluating the berms at the site, as the Confederated Salish and Kootenai Tribes requested; evaluating contamination's impact on tribal health through fish consumption patterns; and responding in writing to natural resource trustee letters. However, EPA considers the role of the Kalispel Indian Community in the cleanup to be different because that

[3]CERCLA requires the President to seek to coordinate assessments, investigations, and planning for response actions with natural resource trustees, which can include federal agencies, states, and tribes. Tribal natural resources may include resources on tribal trust, restricted, or fee lands as well as resources on lands held in trust or restricted status for tribal members and resources, such as water and hunting rights, the tribe exercises governmental control over. Trustees often have information and technical expertise about the biological effects of hazardous substances, the location of sensitive species and habitats and other information that can assist EPA in characterizing the nature and extent of site-related contamination and impacts.

tribe does not have treaty rights within the site boundaries. EPA officials stated that they keep the tribe informed of meetings and invite them to site visits. Figure 6 shows the berms during a high-water event in 2011 and a portion of a berm indicated to be in poor condition by the work plan for the remedial investigation and feasibility study in 2017.

Figure 6: Images Showing Berms Along the Clark Fork River



Source: Gary Matson and NewFields. | GAO-19-123

Case Study 6: Midnite Mine—Region 10

General Information on the Site

The Midnite Mine site is a former open-pit uranium mine located in eastern Washington state on the Spokane Indian Reservation, near Wellpinit, Washington. According to information from EPA, Dawn Mining Company and Newmont USA Limited operated an open-pit uranium mine intermittently between 1955 and 1981. During mining operations, over 33 million tons of rock was blasted and excavated to access uranium ore. The waste was dumped in piles, used to fill mine pits, or spread on the surface. About 2.4 million tons of ore and near ore-grade rocks were also stockpiled at the mine in anticipation of later processing. The former mine site includes approximately 350 acres directly affected by mine operations, as well as affected groundwater, surface water, and sediment. Hazardous substances released at the site as a result of mining include numerous metals and radio-nuclides. Key contaminants of concern that EPA identified in the human health risk assessment for the site include uranium, radium, lead, and manganese.

Site Status in Cleanup Process

According to EPA, construction of the remedies is currently under way for the site. EPA listed the site on the NPL in 2000 and performed the remedial investigation and feasibility study from 1998 through 2006. In 2012, the potentially responsible parties and the United States agreed to a consent decree that required the potentially responsible parties to develop a design for and implement the remedial action at the site. No site-wide milestones have been met.

Tribal Interest in the Site

According to tribal officials, the Spokane Tribe of Indians is interested in the effect of contamination from the site on subsistence hunting and fishing, particularly elk and rainbow trout, respectively. Tribal officials stated that contamination from the mine flows into Blue Creek, which impacts the tribe's ability to conduct traditional practices such as sweat lodges. Tribal officials stated their ultimate goal would be for the site to be sufficiently clean for wildlife to safely live on the site, for fish to thrive in

water adjacent to the site, and for the tribe to resume its traditional hunting and gathering activities in the area.[4]

EPA's Consultation and Coordination with the Tribe for the Site

EPA consulted with the Spokane Tribe of Indians in June 2013 regarding a potential change to water treatment practices. Tribal officials stated the tribe is pleased that the new water treatment plant will operate year-round and will discharge treated water via a pipe into Lake Roosevelt, which is a larger body of water with less direct impact on the tribe's natural resources. In addition, tribal officials stated that EPA invited the tribe to consult at other times but the tribe did not think it was necessary.

Perspectives of Tribal and EPA Officials on Consultation and Coordination for the Site

Tribal officials told us that their coordination with EPA has resulted in more consideration of the natural resources and hopefully a fuller remediation of the site. For example, EPA applied the tribe's more stringent water quality standards to discharge from the site, which EPA supported by providing technical assistance to the tribe during the development and approval processes. Spokane tribal officials stated that during the Remedial Investigation and Feasibility Study phase, EPA's program manager offered to consult with the tribe at various points, which the tribe declined because the tribe felt they had sufficient interactions with EPA. The Superfund cleanup process has been a learning process for tribal officials but, overall, the tribe is pleased with the result and the open exchange of information with EPA.

Speaking generally, EPA officials noted that the 2011 consultation policy has had a positive effect on the frequency of consultation with tribes in the region. The policy has led Superfund remedial project managers to more routinely invite tribes to consult.

[4]The Confederated Tribes of the Colville Reservation is also included in EPA's data as having NAI for the Midnite Mine site; however, an official from the tribe told us that the tribe has had no direct involvement in the site. This official also told us that the tribe's primary point of interest has been the discharge of radioactive elements into the Columbia River via Blue Creek on the Spokane Indian Reservation, and that there are no significant concerns with the proposed discharge limits or site remediation activities.

Appendix IV: Comments from the Environmental Protection Agency

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 20 2018

Mr. Alfredo Gomez
Director
Natural Resources and Environment
U.S. Government Accountability Office
Washington, DC 20548

Dear Mr. Gomez:

Thank you for the opportunity to review and comment on the U.S. Government Accountability Office's (GAO) draft report, *EPA Should Improve the Reliability of Data on National Priorities List Sites Affecting Indian Tribes*. This letter provides the U.S. Environmental Protection Agency's (EPA) response to GAO's draft report findings, conclusions and recommendations. The draft report: (1) examines the extent to which EPA has reliable data identifying National Priorities List (NPL) sites that are located on tribal property or that affects tribes; (2) examines the extent to which EPA has reliable data on the agency's consultation with tribes regarding NPL sites; and (3) describes the actions EPA has taken to address the unique needs of tribes when making decisions about cleanup actions at NPL sites.

The EPA appreciates the GAO's work on this subject area and your collegial working relationship and dialogue with our staff. EPA understands the need for complete and accurate data for tracking sites on tribal property, sites with Native American interest (NAI), and tracking consultations with tribes. EPA extensively coordinates and consults with tribes at Superfund sites across the country and better documentation of that work is in the interests of both EPA and tribes. The EPA generally agrees with the GAO's findings, conclusions, and recommendations and is providing technical comments we believe will improve the accuracy and clarity of the final report.

Below are EPA's comments on the GAO recommendations.

GAO Recommendation 1
The Director of EPA's Office of Superfund Remediation and Technology Innovation [OSRTI] should develop a regular review process to ensure the quality of SEMS [Superfund Enterprise Management System] data identifying sites on tribal property and revise automated reports used to check the accuracy of SEMS data to include on tribal property data.

EPA Response
EPA agrees with this recommendation. During the course of the GAO engagement, SEMS tribal data was reviewed for quality control and corrections were made to the existing data. OSRTI will create a schedule to review tribal data in SEMS.

To support fulfilling the first recommendation, OSRTI is planning the following action:

- Annual dissemination of SEMS tribal data to Superfund regional tribal coordinators for Quality Assurance/Quality Control review. (March 2019 and annually thereafter)

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GAO Recommendation 2
The Assistant Administrator of EPA's Office of Land and Emergency Management [OLEM] should clarify guidance to regional offices on how to determine whether sites have NAI, including by adding criteria for when a site should be designated as having NAI in the SEMS database and how, if at all, to adjust SEMS data if a tribe is no longer interested in a site.

EPA Response
EPA generally agrees with this recommendation. The NAI indicator is part of the Superfund Program Implementation Manual (SPIM) (OLEM 9200.3-152). There are a variety of circumstances under which a tribe may have interest in a NPL site. OLEM/OSRTI will identify relevant criteria that may be used to support the NAI indicator in the SPIM.

To support fulfilling the second recommendation, OLEM/OSRTI is planning the following actions:

- OSRTI has created a headquarters/regional workgroup to review and update tribal data collected in SEMS.
- Workgroup will (no later than October 2019):
  - Provide guidance to clarify the NAI determination, including:
    - Identification of criteria for when a site should be designated as having NAI.
    - As needed, identify a process to update SEMS when a tribe is no longer interested in a site.

GAO Recommendation 3
The Director of EPA's Office of Superfund Remediation and Technology Innovation should clarify agency guidance regarding tribal consultation to clearly identify the circumstances under which the agency should consider consulting tribes.

EPA Response
EPA believes that this recommendation is intended to clarify guidance for consulting specifically on NPL sites rather than clarifying agency-wide guidance which would not be within OSRTI's purview. If this interpretation is consistent with the intent of GAO's recommendation, the Director of OSRTI will clarify circumstances under which Regions may consider tribal consultation for the Superfund program.

To support fulfilling the third recommendation, OSRTI is planning the following action:

- Issue a memo to the Regions that clarifies circumstances under which regions may consider tribal consultation for the Superfund program (no later than March 2020).

GAO Recommendation 4
The Assistant Administrator of EPA's Office of International and Tribal Affairs [OITA] should develop or revise existing guidance to clearly direct regional officials to document all invitations to consult with tribes in the TCOTS [Tribal Consultation Opportunities Tracking System] database and provide the guidance to those officials.

EPA Response
OITA agrees with the fourth recommendation. Overall, we see this GAO Report as an opportunity to engage the new leadership on the importance of consultation and to gain greater consistency and reliability on EPA's consultation efforts.

To support fulfilling the fourth recommendation, OITA is planning the following actions:

- Issue a memorandum from OITA's Assistant Administrator or OITA's Principle Deputy Assistant Administrator to EPA Regional Administrators on the importance of following EPA's Tribal Consultation and Coordination Policy and documenting consultation actions into TCOTS (January 2019).
- Begin to issue a monthly TCOTS report to Deputy Assistant Administrators/Regional Assistant Administrators on the status of consultations recorded in TCOTS (January 2019).
- Initiate OLEM and OITA-led trainings specifically targeted to EPA's Regional Superfund staff on when and how to document consultation actions into TCOTS (February-March 2019).
- Conduct OITA and Agency's designated Tribal Consultation Advisors-led training on tribal consultation topics, with a specific emphasis on entering consultation information into TCOTS (March - April 2019).

Thank you for the opportunity to review the draft report. We believe there is useful information in this report that will strengthen EPA's efforts to work with tribes within the Superfund program and we appreciate the opportunity to comment. EPA has enclosed technical comments on the draft report. If you have any questions or need additional information, please contact Christine Poore (OSRTI) at 703-603-9022, Amanda Van Epps (OSRTI) at 703-603-8855, or Dona Harris (AIEO) at 202-564-6633.

Sincerely,

for

Barry Breen
Acting Assistant Administrator
Office of Land and Emergency Management

Jane Nishida
Principal Deputy Assistant Administrator
Office of International and Tribal Affairs

Enclosure

cc: James Woolford, OSRTI
Felicia Wright, AIEO
EPA GAO Liaison Team
EPA Superfund Regional Tribal Coordinators

3

Appendix V: Comments from the Confederated Salish and Kootenai Tribes of the Flathead Reservation

THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD NATION
P.O. BOX 278
Pablo, Montana 59855
(406) 275-2700
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A Confederation of the Salish,
Pend d' Oreille
and Kootenai Tribes

A People of Vision

TRIBAL COUNCIL MEMBERS:
Ronald Trahan - Chairman
Leonard W. Gray - Vice Chairman
Shelly R. Fyant - Secretary
Anita Matt - Treasurer
Len TwoTeeth
James Steele Jr.
Carole Lankford
Dennis Clairmont
Charmel R. Gillin
Myrna L. DuMontier

December 13, 2018

Emily Norman
Senior Analyst, Natural Resources & Environment
U.S. Government Accountability Office – Atlanta Field Office

Re: Draft report GAO-19-123 (102047) – EPA Should Improve the Reliability of Data on National Priorities List Sites Affecting Indian Tribes (December 2018)

Dear Ms. Norman,

Thank you for the allowing the Confederated Salish and Kootenai Tribes (Tribes) the opportunity to provide advance comment on Draft report GAO-19-123 (102047). The study is very thorough and provides valuable insight into Environmental Protection Agency policy and procedures for consultation with Indian Tribes affected by National Priority List Sites.

Case Study 5: Smurfit-Stone Mill Frenchtown – Region 8

The case study accurately represents the Tribes perception of the EPA's consultation and coordination regarding the Tribes interests related to the Smurfit Site. However we would like to again note that during the pendency of this report senior EPA and Tribal officials met to discuss expectations and requirements for government-to-government communication, coordination and consultation regarding the Tribes interests affected by the Smurfit Site[1].

The Tribes request the following correction to paragraph 1 on page 73. In December 2012 CSKT sent a letter to Governor Brian Schweitzer supporting NPL listing for the Smurfit Site. Then in response to a Federal Register notification of the EPA's intent to add the Smurfit Site to the NPL

[1] Meeting between CSKT and EPA, October 29, 2018 at Tribal headquarters, Pablo, MT.

list. The Tribes then sent a second letter In July 2013 to the EPA supporting NPL listing of the Smurfit Site.

Appendix 1: Table 1 - NPL Sites with Known Native American Interests in Appendix 1

The Tribes request that the GAO add the Anaconda Aluminum Co. Columbia Falls Reduction Plant NPL Site[2] to Table 1 because the Site has known Native American Interests associated with the Confederated Salish and Kootenai Tribes. The Anaconda Aluminum Co. Site is located along the Flathead River in Columbia Falls, Montana. Pursuant to Article III of the Hellgate Treaty of 1855, 12 Stat. 975, the Tribes reserved the right to take fish at all usual and accustomed places within their aboriginal territory, both on and off the Flathead Reservation. The Flathead River is within the Tribes' aboriginal territory and Tribal members continue to harvest fish there. The Flathead River is the largest tributary flowing into Flathead Lake. The southern half of Flathead Lake is within the boundaries of the Flathead Reservation. The Flathead River and Flathead Lake are Treaty protected resources of the Tribes. The Columbia Falls NPL Site has surface water and groundwater pathways to the Flathead River and to Cedar Creek (a tributary of the Flathead River). There have been observed releases of hazardous substances to the Flathead River (cyanide, manganese, sodium, zinc, fluoride) and Cedar Creek (copper, cyanide, potassium). The Flathead River is an important native habitat for bull trout, a listed species under the Endangered Species Act, and westslope cutthroat trout. Both fish are Treaty protected trout species of historical, cultural and biological importance to the Tribes.

Again, thank you for the opportunity to participate in the GAO's study of Superfund sites affecting Tribes. Please do not hesitate to contact me or May Price, Legal Department Staff Scientist if we can be of further assistance

Sincerely,

Ronald Trahan, Chairman

Confederated Salish and Kootenai Tribes

[2] https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0800392

Appendix VI: Comments from the Pueblo of Laguna

PUEBLO OF LAGUNA

December 13, 2018

BY ELECTRONIC MAIL
Mr. J. Alfredo Gómez
Director, Natural Resources and Environment
Government Accountability Office
441 G St. N.W.
Washington, DC 20548
gomezj@gao.gov

Dear Mr. Gómez:

On behalf of the Pueblo of Laguna ("Pueblo"), I write to thank you for forwarding for comment the draft of the report "SUPERFUND: EPA Should Improve the Reliability of Data on National Priorities List Sites Affecting Indian Tribes," and respond with the Pueblo's observations.

While the scope of the report is limited, the Pueblo appreciates GAO's efforts to study and identify the strengths and weaknesses in EPA's consultation practices with tribes in the context of NPL sites. For tribes confronting Superfund sites, particularly on tribal lands, the sheer scope and complexity of CERCLA issues can be taxing. Effective consultation, in connection with less formal coordination, is one way of lessening that burden.

The Pueblo has few comments on the general discussion in the report, including the quantitative analysis and audit of EPA's consultation practices, although the attached markup does identify a few minor issues. We do, however, raise one overarching point that affects the qualitative impact of consultation: EPA's duty to consult is an active, not a passive, one. This observation leads the Pueblo to comment on three related themes that appear in the report.

First, it is important that EPA affirmatively consider, and err on the side of proposing, consultation at each of the nine stages identified graphically on page 20 of the draft, and more frequently if appropriate. This practice would accord with the affirmative duty in EPA policy and the underlying trust responsibility. There is also a practical reason. As the report discusses throughout, effective informal coordination is very important to a functioning relationship between EPA and a tribe regarding a site. A tribe could readily be concerned that asking for consultation may be seen as "going over the head" of the EPA representatives with whom they have established, or hope to establish, a good working relationship. Having EPA offer consultation minimizes any chance of this dynamic. It also ensures that a tribe that is unfamiliar with the process will not lose this opportunity simply because they fail to request consultation.

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Second, the measure of "tribal interest" in EPA's databases must not be overly simplistic. In determining a tribe's interest, it is important that EPA contact potentially interested tribes throughout the life of an NPL listing even if a tribe at some single point states it has no interest. Information developed during the process, for example during the RI/FS stage, regarding the scope or type of contamination may highlight a tribal interest that was not apparent at an earlier stage. New tribal land acquisitions, new tribal leadership, evolving tribal expertise, and other intervening changes may also affect a tribe's objective interest and/or its assessment of its interest in a site. Especially given the long lifespan of many NPL listings, continual inquiry from EPA to tribes is important.

Finally, given the importance of consultation, an oral invitation to consult by EPA should be memorialized in writing. This not only should improve data-tracking on EPA's end, it may result in more meaningful responses from tribes.

Comments Specific to the Pueblo of Laguna

The Jackpile-Paguate Mine is described in the table on page 39. The Pueblo would delete "the tribe made" from the description because the United States both approved the leases under statute and was a staunch proponent of uranium mining, particularly early in the Mine's history.[1]

The Jackpile-Paguate Mine is Case Study 4 in the draft report. We propose a number of revisions to the draft text in the attached markup. The most significant, on page 69, seeks to replace language that is incorrect. To illustrate, while BIA and BLM prepared the EIS, EPA did participate. For example, EPA did radon surveys in 1976. EIS at 2-37. Atlantic Richfield did not pay the Pueblo, it paid the United States, which then paid the Pueblo (and ultimately Laguna Construction Co.) through contractual arrangements. Especially because the matter is still in litigation, we would prefer to minimize the characterization of facts. Simpler is better in this context.

[1] This raises an issue that is beyond the scope of the report as defined by GAO but complicates Superfund issues in the tribal context. Tribes are not Potentially Responsible Parties under CERCLA, *see Pakootas v. Teck Cominco Metals, Ltd.*, 632 F. Supp. 2d 1029 (E.D. Wa. 2009)(regarding the Midnite Mine, Case Study 6 in the report), a conclusion which the United States has consistently supported. In contrast, the United States can be a PRP and often is in the context of tribal-interest sites because the United States is logically considered an "owner" of tribal sites for cleanup cost allocation purposes. However, this puts EPA at odds with the federal agency PRP(s) and may also result in EPA treating the federal agency PRP(s) differently than the private PRP(s). It is not uncommon for the United States to wear two or more hats, but it is particularly common in Indian country matters. In the Superfund context, the United States may be the enforcing regulatory agency (EPA), a PRP (e.g., BIA, BLM), and a trustee (the United States generally). Tribes must continually wrestle with situations in which its trustee is torn by has conflicting interests.

The removal of "typical" in the next sentence is for a similar reason. The remainder of the changes, most of which change "tribe" or "tribal" to Pueblo, are not intended to change the underlying meaning.

Conclusion

Again, thank you for your and your colleagues' efforts in preparing the draft. Please contact me with any questions or concerns. The Pueblo of Laguna wishes you and your families happy holidays.

Sincerely,

PUEBLO OF LAGUNA

Virgil Siow

Virgil Siow
Governor

Enclosures:
1. Marked-up version of GAO Draft

Appendix VII: GAO Contact and Staff Acknowledgements

GAO Contact

J. Alfredo Gómez, (202) 512-3841 or gomezj@gao.gov

Staff acknowledgements

In addition to the individual named above, Barbara Patterson (Assistant Director), Emily Norman (Analyst-in-Charge), Matthew Bond, John Delicath, Justin Fisher, Andrew Furillo, Jeanette Soares, Ruth Solomon, Sara Sullivan, and Kiki Theodoropoulos made significant contributions to this report.

H

Report on Effects of a Changing Climate to the Department of Defense

January 2019

Office of the Under Secretary of Defense
for Acquisition and Sustainment

As required by Section 335 of the National Defense Authorization Act for Fiscal Year 2018
(Public Law 115-91).

The estimated cost of this report or study for the Department of Defense is approximately $329,000 in Fiscal Years 2018 - 2019. This includes $58,000 in expenses and $271,000 in DoD labor.
Generated on 2018Dec18 RefID: 9-D30BE5A

January 2019

Elements of Request for Report
This report responds to section 335 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91). Specifically, this report provides an assessment of the significant vulnerabilities from climate-related events in order to identify high risks to mission effectiveness on installations and to operations. In developing this report, we discussed the approach with staff from the House and Senate Armed Services Committees, both majority and minority, on more than one occasion.

This report is organized into three primary sections:

I. Summary of Climate Effects and Resulting Vulnerabilities

II. DoD Efforts to Increase Installation Resiliency & Operational Viability

III. Conclusions

Background

The effects of a changing climate are a national security issue with potential impacts to Department of Defense (DoD or the Department) missions, operational plans, and installations. Our 2018 National Defense Strategy prioritizes long-term strategic competition with great power competitors by focusing the Department's efforts and resources to: 1) build a more lethal force, 2) strengthen alliances and attract new partners, and 3) reform the Department's processes.

To achieve these goals, DoD must be able to adapt current and future operations to address the impacts of a variety of threats and conditions, including those from weather and natural events. To that end, DoD factors in the effects of the environment into its mission planning and execution to build resilience.

For this report, the Office of the Secretary of Defense requested information and inputs from the Military Departments, Joint Staff, Geographic Combatant Commands, and other organizations.

Planning Handbook on Climate Change Installation Adaptation and Resilience – In January 2017, Naval Facilities Engineering Command released a handbook for use by planners in assessing climate impacts and evaluating adaptation options to consider in the existing Installation Development Plan (Master Plan) process. The Handbook contains an extensive set of worksheets to be used in documenting the results of planners' assessment and evaluation, including economic analyses of adaptation alternatives.

Updated United Facilities Criteria (UFCs) – In October 2017, DoD UFC 1-200-02, *High Performance and Sustainable Building Requirements,* was updated to ensure appropriate incorporation of climate-related impacts, amongst other updated/new areas. The UFC provides minimum requirements, and guidance for planning, designing, constructing, renovating, and maintaining high performance and sustainable buildings that will enhance DoD mission capability by reducing total ownership costs.

U.S. Army Corps of Engineers (USACE) Tools – Providing support to civilian and military infrastructure projects, USACE continues to develop assessment and adaptation tools useful in adapting to risks associated with potential changing weather patterns.

DoD Directive 4715.21 – In January 2016 the Department issued Department of Defense Directive 4715.21 *Climate Change Adaptation and Resilience*, assigning responsibilities to many levels and DoD components for incorporating climate considerations into planning for infrastructure and operations in order to assess and manage risks associated with the impacts of a changing climate.

I. Summary of Climate Effects and Vulnerabilities

INSTALLATIONS & INFRASTRUCTURE

Methodology for Installation Effects

The Office of the Secretary of Defense requested information from the Military Departments for climate-related events. To ensure connection to mission impacts, DoD focused on 79 mission assurance priority installations based on their operational role. The Office of the Secretary of Defense requested Military Departments analyze the climate-related events at these installations. The installations break down by organization as follows:

Air Force	35
Army	20
Navy	19
Defense Logistics Agency (DLA)	2
Defense Financing and Accounting Service (DFAS)	1
National Geospatial-Intelligence Agency (NGA)	1
Washington Headquarters Service (WHS)	1

The Military Departments noted the presence or not of current and potential vulnerabilities to each installation over the next 20 years, selecting from the events listed below. Note that the congressional request established the 20-year timeframe.

Climate-Related Events

- Recurrent Flooding
- Drought
- Desertification
- Wildfires
- Thawing Permafrost

Military Department input on the 79 installations is included in the Appendix, which is sorted by Military Service. In preparing input for the Appendix, the Military Services were free to select information sources they deemed relevant[1].

[1] Data sources used include: Screening Level Vulnerability Assessment Survey (SLVAS) responses included in the January 2018 *Climate-Related Risk to DoD Infrastructure Initial Vulnerability Assessment Survey (SLVAS) Report*; USGS Coastal Vulnerability Index (CVI); FEMA National Flood Hazard Layer; US Drought Monitor; USDA Global Desertification Vulnerability Map; USDA layer - 2010 Wildland Urban (continued) Interface (WUI) of the Conterminous US – Intermix and Interface classes; USGS Volcano Hazards Program; USGS Seismic Information

Summary Table of Current & Potential Effects to 79 Installations

The following tables provide a summary of current and future (20 years) vulnerabilities to military installations.

		Recurrent Flooding		*Drought*		*Desertification*		*Wildfires*		*Thawing Permafrost*	
Service	# Installations	Current	Potential	Current	Potential	Current	Potential	Current	Potential	Current	Potential
Air Force	35	20	25	20	22	4	4	32	32	-	-
Army	20	14	16	4	4	2	2	4	4	1	1
Navy	19	16	16	18	18	-	-	-	7	-	-
DLA	2	2	2	-	2	-	-	-	-	-	-
DFAS	1	-	-	-	1	-	-	-	-	-	-
NGA	1	1	1	1	1	-	-	-	-	-	-
WHS	1	-	-	-	-	-	-	-	-	-	-
Totals	79	53	60	43	48	6	6	36	43	1	1

A review of the chart above indicates that recurrent flooding, drought, and wildfires are the primary concerns at the 79 installations included in the analysis.

Examples of Vulnerabilities to DoD Installations and Infrastructure

The sections below provide examples of impacts to the selected military installations. Each section below includes a brief general description of the vulnerability factor and possible impacts to military installations or infrastructure followed by examples.

Recurrent Flooding

Vulnerabilities to installations include coastal and riverine flooding. Coastal flooding may result from storm surge during severe weather events. Over time, gradual sea level changes magnify the impacts of storm surge, and may eventually result in permanent inundation of property. Increasing coverage of land from nuisance flooding during high tides, also called "sunny day" flooding, is already affecting many coastal communities.

Joint Base Langley-Eustis (JBLE-Langley AFB), Virginia, has experienced 14 inches in sea level rise since 1930 due to localized land subsidence and sea level rise. Flooding at JBLE-Langley, with a mean sea level elevation of three feet, has become more frequent and severe.

Navy Base Coronado experiences isolated and flash flooding during tropical storm events, particularly in El Niño years. Upland Special Areas are subject to flash floods. The main installation reports worsening sea level rise and storm surge impacts that include access limitations and other logistic related impairments.

Navy Region Mid-Atlantic and the greater Hampton Roads area is one of the most vulnerable to flooding military operational installation areas in the United States. Sea level rise, land subsidence, and changing ocean currents have resulted in more frequent nuisance flooding and increased vulnerability to coastal storms. As a result, and to better mitigate these issues, the Region has engaged in several initiatives and partnerships to address the associated challenges.

Drought

Drought can negatively impact U.S. military installations in various ways, particularly in the Southwest. For example, dry conditions from drought impact water supply in areas dependent on surface water. Additionally, droughts dry out vegetation, increasing wildfire potential/severity. Specific to military readiness, droughts can have broad implications for base infrastructure, impair testing activities, and along with increased temperature, can increase the number of black flag day prohibitions for testing and training. Drought can contribute to heat-related illnesses, including heat exhaustion and heat stroke, outlined by the U.S. Army Public Health Center. Energy consumption may increase to provide additional cooling for facilities.

Several DoD sites in the DC area (including Joint Base Anacostia Bolling, Joint Base Andrews, U.S. Naval Observatory/Naval Support Facility, and Washington Navy Yard) periodically experienced drought conditions –extreme in 2002 and severe from 2002 through 2018. In addition, Naval Air Station Key West experienced drought in 2015 and 2011, ranging from extreme to severe, respectively. These examples highlight that drought conditions may occur in places not typically perceived as drought regions.

Drought conditions have caused significant reduction in soil moisture at several Air Force bases resulting in deep or wide cracks in the soil, at times leading to ruptured utility lines and cracked road surfaces.

Desertification

Desertification poses a number of challenges related to training and maneuvers. Desertification results in reductions in vegetation cover leading to increases in the amount of runoff from precipitation events. Greater runoff contributes to:

- higher erosion rates
- increased stream sediment loads
- deposition of sediment in unwanted areas

This reduces the effectiveness of flood risk management infrastructure while increasing the potential for siltation of water supply reservoirs. Following rain, eroded soil may be less suitable for native vegetation, resulting in bare land or revegetation with non-native, weedy species. In cases where this results in the expansion of shrub-lands, this could affect the suitability of the landscape for military maneuvers and off-road use.

Army installations Camp Roberts in San Miguel, California, and White Sands Missile Range in New Mexico were identified as vulnerable to current and future desertification, which

accelerates erosion and increases soil fragility, possibly limiting future training and testing exercises. Air Force bases in western states, including Kirtland, Creech, Nellis, and Hill were also identified as vulnerable to current and future desertification.

Wildfires

Due to routine training and testing activities that are significant ignition sources, wildfires are a constant concern on many military installations. As a result, the DoD spends considerable resources on claims, asset loss, and suppression activities due to wildfire. While fire is a key ecological process with benefits for both sound land management and military capability development, other climatic factors including increased wind and drought can lead to an increased severity of wildfire activity. This could result in infrastructure and testing/training impacts.

In March 2018 two related wildfires broke out in Colorado during an infantry and helicopter training exercise for an upcoming deployment. Later determined to be due to live fire training, gusty winds and dry conditions allowed the fire to spread, reaching about 3,300 acres in size, destroying three homes, and causing the evacuation of 250 homes.

A wildfire in November 2017 burned 380 acres on Vandenberg Air Force Base in southern California. While no structures were burned, the fire prompted evacuation of some personnel. Firefighters from the U.S. Forest Service, Santa Barbara County, and other localities assisted the Vandenberg Fire Department in managing the fire. The Canyon Wildfire at Vandenberg in September 2016 burned over 10,000 acres and came very close to two Space Launch Complexes. A scheduled rocket launch had to be delayed. Several facilities on the south part of the base were operating on generators due to the loss of electrical power lines.

Thawing Permafrost

Permafrost presents risks for critical built infrastructure. Soil strength, ground subsidence, and stability are primarily affected by the phase change of ground ice to water at or near 0°C and when the soil thermal regime changes (by human activity, infrastructure emplacement, or systemic shifts related to weather). Such subsidence may be rapid and catastrophic (days), very slow and systematic (decades), or somewhere in between. Whether rapid or slow, thawing permafrost decreases the structural stability to foundations, buildings, and transportation infrastructure and requires costly mitigation responses that disrupt planning, operations, and budgets. In addition, thawing permafrost exposes coasts to increased erosion.

Permafrost underlays about 85 percent of Alaska; it is thickest north of the Brooks Range and gradually diminishes southward. Permafrost thaw is relevant to DoD training and testing needs. Thermokarst, which is a type of landscape that results from thawing permafrost, increases wetland areas and creates more challenging terrain. In Fort Greeley, Alaska, Army training ranges are built on, or are being planned in permafrost-dominated areas. Predicting where this phenomenon occurs and how permafrost might change is vital to maintaining training operations and assessing impending environmental management challenges.

OPERATIONS

A changing climate can impact DoD's operations through:

- Changes in the manner in which DoD maintains readiness and provides support.
- Changes to what DoD may be asked to support.

Vulnerabilities to Mission Execution and Operational/Posture Plans

The National Defense Strategy sets the strategic priorities for the Department and, in turn, the Combatant Commands (CCMD). The CCMD missions may be affected by timing and severity of climate events, which may affect mission in some cases.

> "When I look at climate change, it's in the category of sources of conflict around the world and things we'd have to respond to. So it can be great devastation requiring humanitarian assistance — disaster relief — which the U.S. military certainly conducts routinely."
> Chairman of the Joint Chiefs of Staff General Dunford, November 2018

Country Instability Issues: In the United States Africa Command (USAFRICOM) Area of Responsibility (AOR), rainy season flooding and drought/desertification are very important factors in mission execution on the continent. Flooding and earthquake-induced tsunamis in Indonesia contribute to instability in the Indo-Pacific Command (INDOPACOM).

Logistics and Mission Support Issues: Weather conditions over the Mediterranean Sea currently impact intelligence, surveillance, and reconnaissance (ISR), personnel recovery/casualty evacuation and logistics flights from Europe to the African continent; potentially increasing no-go flight days.

At Naval Base Guam, recurrent flooding limits capacity for a number of operations and activities including Navy Expeditionary Forces Command Pacific, submarine squadrons, telecommunications, and a number of other specific tasks supporting mission execution.

Additionally, recurrent flooding impacts operations and activities of contingency response groups at Andersen Air Force Base, as well as mobility response, communications, combat, and security forces squadrons.

Arctic Region Issues: Climate-related effects impact accessibility and activity in the Arctic. The Northern Sea Route generally opens for four weeks each year – usually the month of September – and has the potential for increased Arctic maritime traffic. The demand for Arctic-specific search and rescue (SAR) resources will grow as Arctic activity increases.

There is need for further military support to civil authorities to enable the peaceful opening of the Arctic as access increases. The role of United States Europe Command (USEUCOM) in the high north will expand with enhanced opportunities for cooperation with

allies and partners and growth in the number and frequency of live training exercises in the region.

In the Arctic, acquisition and supply chain requirements are considerably longer and are much costlier. DoD will continue to partner with Federal departments and agencies, state, local, and tribal agencies, other nations, and the private sector on services as appropriate.

Humanitarian Assistance/Disaster Relief

Geographic Combatant Commands regularly conduct humanitarian assistance and disaster relief initiatives to improve the resiliency of the partner nation to natural and manmade disasters.

DoD conducts foreign disaster relief at the request of the U.S. Agency for International Development (USAID) and the State Department. USAID's Office of U.S. Foreign Disaster Assistance is the lead federal agency for coordinating the U.S. Government foreign disaster relief response. DoD does not develop its force structure for foreign disaster relief missions, but supports USAID with available unique military capabilities and assets, such as transportation, logistics, engineering assessments, air traffic control, and water.

DoD focuses its humanitarian assistance program on building capacity of partner nations for health-related activities and activities that promote sustainable public health capacity-building, disaster preparedness, risk reduction, and relief response. Examples include: emergency management training; construction/renovation of emergency operations centers and disaster relief warehouses; assistance with planning for disaster response and recovery; and country baseline assessments for vulnerabilities to disasters, including vulnerabilities from weather and climate impacts. Global health engagement activities such as disease mitigation and prevention initiatives address the basic survival needs of the population, promote stability and capacity, and thus also climate resiliency.

Defense Support of Civil Authorities

Domestically, DoD provides disaster assistance at the request of the Federal Emergency Management Agency (FEMA) and other federal Departments and Agencies. DoD always operates in support of civil authorities and is not the lead federal agency for domestic disaster relief missions, unless so designated by the President. DoD will maintain command and control over Federal military forces and Governors of responding States will maintain command and control over State National Guard forces. FEMA's ten regions are responsible for writing All Hazard Plans (AHPs) that guide response efforts to disasters including floods and hurricanes. DoD works to support these AHPs as requested.

Testing and Training

The Department conducts training in realistic field environments to achieve and sustain proficiency in mission requirements. Similarly, the Department conducts testing in realistic field environments in anticipation of the military's use of weapons, equipment, munitions, systems, or their components. As such, access to the land, air, and sea space that replicate the operational

environment is critical to the readiness of the Force. Climate effects to the Department's training and testing are manifested in an increased number of suspended/delayed/cancelled outdoor training/testing events and increased operational health surveillance and health and safety risks to the Department's personnel. Specifically, installations in the Southeast and Southwest lose significant training and testing time due to extreme heat.

Climate effects lead to increased maintenance/repair requirements for training/testing lands and associated infrastructure and equipment (e.g., roads, targets, buildings). In addition to the loss of use of training and test ranges, these impacts result in increased land management requirements due to stressed threatened/endangered species and related ecosystems on and adjacent to DoD installations. Recent specific examples include:

- Wildfires in the western United States affecting Vandenberg AFB and operations at the Western Range and Point Mugu Sea Range.
- Hurricanes resulting in damage to infrastructure and delays in training, testing programs, and space launches at Tyndall Air Force Base, at the Atlantic Undersea Test and Evaluation Centers, and the Eastern Range.
- Permafrost thawing at Cold Region Test Center, Fort Greely, Alaska, impacting cold weather testing activities.
- Rising seawater wash-over and contamination of freshwater on atoll installations.

Mitigation efforts for unplanned climate events necessitate contingency planning for training and test events and the minimization of planned range/facility use during historical adverse climate condition seasons of the year. Other climate and non-climate related facility maintenance and contingency of operations efforts are included in installation mitigation plans.

II. DoD Efforts to Increase Installation Resiliency & Operational Viability

INCREASE INSTALLATION RESILIENCY

The Department considers climate resilience in the installation planning and basing processes to include impacts on built and natural infrastructure. To ensure that DoD facilities better withstand flooding and severe weather events, DoD makes appropriate changes to installation master planning, design and construction standards.

To continue missions in the event of loss or damage to critical energy and water infrastructure, the Department uses the Mission Assurance process (DoD 3020.40, *Mission Assurance Strategy*) to plan and conduct mitigation and remediation actions to improve the resilience of critical assets and capabilities to reduce risk to critical missions. In May 2016, DoD updated Directive 4170.11 on *Installation Energy Management* and developed Installation Energy Plan guidance that included a focused goal of increased energy resilience and critical energy infrastructure requirements. In February 2017, the Army added water to this effort and released guidance to establish requirements for Army energy and water security to enhance resilience on Army installations.

The Department has published several issuances to ensure that the Military Services and Joint Staff integrate climate scenarios and long-term projections into planning, including DoDD 4715.21 (*Climate Change Adaptation and Resilience*) to establish roles and responsibilities and DoDI 4715.03 (*Natural Resources Conservation Program*) requiring consideration of climate impacts during development of Installation Natural Resources Management Plans (INRMPs).

Unified Facilities Criteria, or UFCs, provide planning, design, construction, sustainment, restoration, and modernization criteria, and apply to the Military Services, the Defense Agencies, and the DoD Field Activities. In June 2018, the UFC on *High Performance and Sustainable Building Requirements* was updated to include and strengthen climate considerations. The UFC 20-100-1, *Master Planning*, also includes language requiring Master Planners to consider changes in climatic conditions that may impact new and existing facilities and infrastructure. The UFC on *Landscape Architecture* is being updated to support installation water resilience. Additionally, UFC 3-400-02 directs installation planners to request engineering weather data (EWD) from Air Force's 14th Weather Squadron (WS) that focuses on climatic variables of temperature, humidity, precipitation, and winds. Recently the 14th WS moved from a 10 to 5 year update cycle to ensure climate impacts are captured.

DoD is also updating various built and natural infrastructure design standards to better adapt to climate impacts. The Coastal Assessment Regional Scenario Working Group released a report in April 2016 that provided a database with regionalized sea level scenarios for three future time horizons (2035, 2065, and 2100) for 1,774 DoD sites worldwide. The database also contains extreme water levels statistics (storm surge without waves and wave run up) for four types of annual chance events (1, 2, 5 and 20 percent) based on historical tide gauge data. This information can be used to establish base flood elevation and potential future flood inundation areas of concern for installations in coastal and tidal areas.

The Military Services and the Defense Logistics Agency approach installation resiliency through the integration of weather and climate considerations into existing plans and processes, using partnerships with other federal agencies, state governments, local governments, non-governmental organizations, and local communities to increase preparedness and resilience. Examples:

- Patrick Air Force Base imposes strict Florida Building Code hurricane requirements and finished floor elevations for all new construction based on flood plain and storm surge data. Base staff coordinates with state, county, and academic institutions to ensure these requirements are implemented.
- As mentioned earlier in this report, flooding at JBLE-Langley Air Force Base has become more frequent and severe. JBLE-Langley is using a flood visualization tool to understand flooding impacts across the base. By modeling different storm flooding elevations, they were able to determine where to install door dams, which require less time and less labor than sandbags. The base reduced the number of required sandbags by 70 percent. JBLE-Langley also requires that all new development is constructed at a minimum elevation of 10.5 feet above sea level with some projects planned for higher elevation due to high communication intensity and need for greater hardening. Additionally, the City of Hampton recently adopted a Resiliency and Adaptation Addendum to their original 2010

Joint Land Use Study. This addendum will help solidify a path forward for the City of Hampton and JBLE-Langley to identify and implement resilience strategies that support continued feasibility of base operations.

- Eglin and MacDill Air Force Bases in Florida partnered with local groups to address persistent coastal erosion around their installations. Oyster shells collected from local restaurants became the foundation for oyster reefs to create a living shoreline, bolstering natural protection of critical historic sites, stabilizing shoreline, protecting the riparian and intertidal environment, thereby creating habitat for aquatic/terrestrial species.

- Navy Region Southwest leadership have adopted decisive measures to evaluate climate impacts on shore infrastructure, and are pursuing a strategy to mitigate vulnerabilities through local agency collaboration, adaptive planning and implementation of innovative design techniques. This initiative will improve upon the Navy's scientific data, facilitate assessment of various sea level rise (SLR) scenario impacts, and help identify sustainable infrastructure strategies to offset stressors from flooding, beach erosion, and loss of wetlands and habitat.

- Navy Region Southwest facility planning efforts now incorporate adaptive planning measures from a variety of government agency sources, including NAVFAC's *Climate Change Installation Adaptation and Resilience Planning Handbook*. Regional planners are working with the National Oceanic and Atmospheric Administration and the Scripps Institute of Oceanography to study potential vulnerabilities at the Naval Amphibious Base. Sea level rise data for 2100 was used during the environmental planning and design phases of the Coastal Campus project. The design configuration of five buildings was modified to resist a moderate sea level rise event over their forecasted life cycle.

- The greater Hampton Roads area is very vulnerable to flooding caused by rising sea levels and land subsidence. Navy Region Mid-Atlantic is working with several academic, local community, non-profit organizations, and state and federal agencies to increase understanding of current and future risks to inform discussions on possible adaptation strategies for communities and military bases. In addition, the cities of Norfolk and Virginia Beach are currently engaged in a Joint Land Use Study to identify specific conditions, including recurrent flooding, coastal storms, and erosion, outside of the military footprint that have the potential to impact Navy operations in the Hampton Roads area.

- Fort Hood, Texas, endured severe flash flooding in June 2016. A training exercise that involved a low river crossing resulted in the death of several soldiers. In response, the installation replaced the two most dangerous low water crossings with bridges, installed stream and depth gauges at critical locations on the west side to better monitor and predict flash flooding, and focused on clear signage and training.

- To address wildfire risk, Navy Region Southwest successfully worked with the California Department of Forestry and Fire Protection (CALFIRE) to promote joint training opportunities in an effort to protect key infrastructure and communities within San Diego County. Navy squadrons conduct semiannual joint training with CALFIRE to ensure interoperability and an immediate response capability in support of local authorities for

emergency events. At the installation level, natural resource managers work to evaluate the threat of wildfires to key resources and promote sustainable management practices, such as the development and implementation of fire management plans for major facilities and aligned special areas.

- DLA is upgrading its data center layout and mechanical equipment to ensure provision of the cooling needed for processors and servers to operate efficiently in warmer temperatures. All data centers will eventually migrate to a cloud server following the Data Center Optimization Initiative.

- Other DLA approaches to increase installation resilience involve relocation of assets from flood-prone areas to safer areas. For example, at two flood-prone sites, DLA installed backup power generators and other mechanical equipment like chillers on a higher elevation or mounted on concrete pads in accordance with building codes. Other mechanical rooms were located in building rooftops, which helps prevent flood water damage to equipment. In addition, other measures control rainwater flow, such as the use of retention swales to divert storm water, green roofs to absorb rainfall, and cisterns to store rainfall during downpours.

RESEARCH

Current Efforts

DoD's Strategic Environmental Research and Develop Program (SERDP) and Environmental Security Technology Certification Program (ESTCP) invest in research focused on improving DoD understanding of environmental risks to installations and mission. SERDP and ESTCP investments support the development of the science, technologies, and methods needed to manage and enhance the resilience of DoD installation infrastructure with the goal of maximizing mission readiness. The following are a few examples of SERDP research efforts related to infrastructure and mission resiliency:

- In response to drought risk, SERDP initiated a study to understand and assess environmental vulnerabilities on installations in the desert southwest. This research seeks to detect and assess drought response of sensitive riparian forests to drought stress over recent decades and will be carried out within three DoD bases in the Southwest, with widely applicable results.

- In response to wildfire risk, SERDP developed a Fire Science Strategy in 2014 focused on the following: improved characterization, monitoring, modeling, and mapping of fuels to support enhanced smoke management and fire planning at DoD installations; enhanced smoke management using advanced monitoring and modeling approaches; and research to quantify, model, and monitor post-fire effects.

- SERDP and ESTCP investments seek to understand changes to the arctic terrestrial environment relevant to DoD infrastructure. Permafrost degradation can impact soil, vegetation, buildings, roads, and airfields. SERDP and ESTCP investments are leading to tools for making arctic infrastructure more "aware" of permafrost changes before

costly failures occur. An example is Lawrence Berkeley National Laboratory's fiber-optic geophysical sensing package capable of providing real-time information on subsurface conditions relevant to infrastructure performance and failure in Arctic environments.

At the Military Service level, the Air Force's 14th Weather Squadron provides authoritative data sets and tailored decision aids to the Combatant Commanders, or CCMDs. This same information is available to installation managers/planners. Additionally, the Air Force is pursuing more accurate North Slope Alaska shoreline erosion prediction models that take into account warming water near the shore, increasing air temperatures, longer periods when sea ice is gone, increasing spatial extent of open water, increasing wind speeds, storm surges, wave height, and thawing permafrost.

The U.S. Army Cold Regions Research and Engineering Laboratory maintains a Permafrost Tunnel Research Facility in Fox, Alaska, for several types of research, including studies to better understand permafrost terrains for engineering, military planning, and science. In addition, the Cold Regions Research and Engineering Laboratory, together with the Construction Engineering Research Laboratory and Geotechnical and Structures Laboratory, developed solutions for damage caused by thawing permafrost at Thule Air Base in Greenland. A new technology incorporating buried extruded foam insulation boards was used for about 18 percent of the runway during a repaving project in the summers of 2015 and 2016; the existing white paint on the remainder of the runway was deemed sufficiently protective. New mitigation techniques were proposed to stabilize critical buildings that had re-settled after previous modifications and remodeling projects.

The Office of Naval Research (ONR) Arctic and Global Prediction Program is motivated by the need to understand and predict the environment at a variety of time and space scales in geographical areas of interest to DoD such as the Arctic. ONR is actively working to extend the capability to skillfully predict environmental conditions and disruptive weather events to several weeks and months in advance. The ability to provide useful forecasts of the operational environment, such as the location of the sea ice edge, the characteristics and evolution of sea ice, and the wind and wave conditions at the surface will be critical to enable safe and efficient naval operations in the Arctic.

Future Efforts

DoD realizes the need to better understand rates of coastal erosion, natural and built flood protection infrastructure, and inland and littoral flood planning and mitigation. To address this, we are focusing on the following in current SERDP Statements of Need that communicate the types of research we are interested in pursuing:

- Continued work to apply, evaluate, and improve scenarios and other tools for projecting interactions of sea level rise, storm surge, precipitation/land-based flooding at U.S. Military Installations.
- Research and products that fuse climate science, design, and decision sciences methods in the context of current DoD/Service planning, operations, and management.

- Research on materials fragility and implications for infrastructure/building design.

ENSURE MISSION RESILIENCY

DoD is continuing to work with partner nations to understand and plan for future potential mission impacts. This is a global issue and a number of Ministries of Defense across the world are beginning to plan now for future impacts, as well. The Department has funded cost-effective climate related MIL-to-MIL engagements between the Combatant Commands and partner nations through the Defense Environmental International Cooperation (DEIC) program. DEIC projects have included:

- United States Africa Command (USAFRICOM) water security engagements in the Chad Basin and Tanzania,
- United States Europe Command (USEUCOM) water workshop in the Czech Republic, and
- United States Northern Command (USNORTHCOM) Arctic mission analysis with the Scandinavian countries.

Within the Geographic Combatant Commands, there is a standard review process that includes assessing manpower, operations, logistics, cyber, and resourcing operations through a resilience lens. This review also includes ensuring that risk assessment and mitigation, diversity, connectivity, reserves, and adequate redundancy are part of our major operations.

At United States Central Command, current and historic climate conditions are factored into theater campaign plans, including water scarcity which is a recurring issue in the region. Warning indicators are part of the deliberate planning process. United States Northern Command routinely includes severe weather-driven scenarios in training and exercise events and has developed planning tools to guide operational response efforts to these scenarios. United States Indo-Pacific Command (USINDOPACOM) focuses their training on readiness to respond to and be resilient to natural disasters, as well as sustainable resource management toward critical resources scarcity. This command has also established Pacific Augmentation Teams around its Area of Responsibility to identify quickly immediate needs that can be met with military assets.

United States Southern Command funded a National Preparedness Baseline Assessments to include a gap analysis as well as a five-year plan to build capability and capacity within the countries in the region. The collection of sub-regional data will provide a more nuanced depiction of each country's risks and vulnerabilities to disasters that may be influenced by climate as well as their readiness to respond to them. This command will also seek appropriate resources to fund assessments to determine the effects of its most serious and likely climate-related risks.

At USAFRICOM, climate impacts and drivers of instability and factional conflict are fully integrated into planning efforts. Planners must consider the impacts of drought and desertification as high potential instability areas and how these two hazards impact bases and

missions. USAFRICOM's capacity-building efforts are nested within its security cooperation programs and will adapt to a variety of trends and projections.

The Arctic Security Forces Roundtable is USEUCOM's engagement effort for nations that have security forces within the Arctic region. It is a forum in which senior military leaders from Arctic nations and other stakeholders confer and agree upon actions that can support stability and peaceful commercial activity in the region. Lessons learned from our Arctic allies and partners are used to enhance operational safety. In response to melting ice and newly accessible areas of the Arctic, USEUCOM sponsors the ARCTIC ZEPHYR series of table-top exercises focused on search and rescue operations in the Arctic.

III. Conclusions

This report represents a high-level assessment of the vulnerability of DoD installations to five climate/weather impacts: recurrent flooding, drought, desertification, wildfires, and thawing permafrost. From a resources perspective, DoD is incorporating climate resilience as a cross-cutting consideration for our planning and decision-making processes, and not as a separate program or specific set of actions.

Some impacts are closely related or intensify the effects of each other (e.g., drought, desertification, wildfire), whereas others are somewhat related (e.g., coastal flooding driven by changing sea level can impact river conveyance, compounding riverine flood levels for tidally-influenced rivers). Taken together, however, these impacts help describe the overall vulnerabilities to DoD installations from changing future conditions.

About two-thirds of the 79 installations addressed in this report are vulnerable to current or future recurrent flooding and more than one-half are vulnerable to current or future drought. About one-half are vulnerable to wildfires. It is important to note that areas subject to wildfire may then experience serious mudslides or erosion when rains follow fires. Impacts are dispersed around the country. Not surprisingly, impacts vary by region for coastal flooding, with greater impacts to the East coast and Hawaii than the West coast. Desertification vulnerabilities are limited to the sites on the list with arid soils; these are in California, New Mexico, and Nevada. Drought vulnerabilities are more widely dispersed across the country. Wildfire and recurrent flooding impacts are the most widely dispersed.

For the most part, if an installation was currently vulnerable to a specific factor, it will generally be deemed vulnerable to that same factor in the future. In a few instances, locations considered not currently vulnerable were deemed to be vulnerable in the future. Seven installations not currently vulnerable to impacts from recurrent flooding were estimated to be vulnerable in the future. Five sites not currently vulnerable to drought were deemed vulnerable in the future. Seven sites not currently vulnerable to wildfires were considered vulnerable in the future. A number of installations are subject to more than one vulnerability, most notably recurrent flooding, drought, and wildfires.

It is relevant to point out that "future" in this analysis means only 20 years in the future. Projected changes will likely be more pronounced at the mid-century mark; vulnerability

analyses to mid- and late-century would likely reveal an uptick in vulnerabilities (if adaptation strategies are not implemented.)

The Department considers resilience in the installation planning and basing processes to include impacts on built and natural infrastructure. This includes consideration of environmental vulnerabilities in installation master planning, management of natural resources, design and construction standards, utility systems/service, and emergency management operations.

Climate and environmental resilience efforts span all levels and lines of effort, and are not framed as a separate program. Additionally, resources for assessing and responding to climate impacts are provided within existing DoD missions, funds, and capabilities and subsumed under existing risk management processes. The Military Departments provide most of the resources for on-the-ground activities in the Geographic Combatant Commands.

Part IV. Appendix

APPENDIX - Report on Effects of a Changing Climate to the Department of Defense January 2019

ARMY			Recurrent Flooding		Drought		Desertification		Wildfires		Thawing Permafrost	
#	Installation	State	Current	Potential	Current	Potential	Current	Potential	Current	Potential	Current	Potential
1	Fort Greely	AK	No	No	No	No	No	No	No	No	Yes	Yes
2	Reagan Operations Center-Huntsville	AL	Yes	Yes	No	No	No	No	No	No	No	No
3	Pine Bluff Arsenal	AR	Yes	Yes	No	No	No	No	No	No	No	No
4	Camp Roberts	CA	No	Yes	Yes	Yes	Yes	Yes	No	No	No	No
5	Military Ocean Terminal Concord (MOTCO)	CA	Yes	Yes	Yes	Yes	No	No	No	No	No	No
6	U.S Southern Command Headquarters-Miami	FL	Yes	Yes	No	No	No	No	Yes	Yes	No	No
7	Fort Gordon	GA	No	No	No	No	No	No	Yes	Yes	No	No
8	Fort Shafter	HI	Yes	Yes	No	No	No	No	No	No	No	No
9	Fort Detrick	MD	Yes	Yes	No	No	No	No	No	No	No	No
10	Fort Meade	MD	Yes	Yes	No	No	No	No	No	No	No	No
11	Lake City Army Ammunition Plant (AAP)	MO	Yes	Yes	No	No	No	No	No	No	No	No
12	Fort Bragg	NC	No	No	No	No	No	No	Yes	Yes	No	No
13	Military Ocean Terminal Sunny Point (MOTSU)	NC	Yes	Yes	No	No	No	No	No	No	No	No
14	White Sands Missile Range	NM	No	No	Yes	Yes	Yes	Yes	No	No	No	No
15	Watervliet Arsenal	NY	Yes	Yes	No	No	No	No	No	No	No	No
16	McAlester Army Ammunition Plant (AAP)	OK	Yes	Yes	No	No	No	No	No	No	No	No
17	Holston Army Ammunition Plant (AAP)	TN	No	Yes	No	No	No	No	No	No	No	No
18	Fort Hood	TX	Yes	Yes	Yes	Yes	No	No	Yes	Yes	No	No
19	Fort Belvoir	VA	Yes	Yes	No	No	No	No	No	No	No	No
20	Radford Army Ammunition Plant (AAP)	VA	Yes	Yes	No	No	No	No	No	No	No	No

AIR FORCE			Recurrent Flooding		Drought		Desertification		Wildfires		Thawing Permafrost	
#	Installation	State	Current	Potential	Current	Potential	Current	Potential	Current	Potential	Current	Potential
21	Clear Air Force Station (AFS)	AK	No	No	No	No	No	No	Yes	Yes	No	No
22	Joint Base (JB) Elmendorf Richardson	AK	Yes	Yes	No	No	No	No	Yes	Yes	No	No
23	Maxwell Air Force Base (AFB) Gunter Annex	AL	No	Yes	No	No	No	No	No	No	NA	NA
24	Beale Air Force Base (AFB)	CA	Yes	Yes	Yes	Yes	No	No	Yes	Yes	NA	NA
25	Vandenberg Air Force Base (AFB)	CA	Yes	Yes	Yes	Yes	No	No	Yes	Yes	NA	NA
26	Buckley Air Force Base (AFB)	CO	No	Yes	No	No	No	No	Yes	Yes	NA	NA
27	Cheyenne Mountain Air Force Station (AFS)	CO	Yes	Yes	No	Yes	No	No	Yes	Yes	NA	NA
28	Greeley Air National Guard Station (ANGS)	CO	Yes	Yes	Yes	Yes	No	No	Yes	Yes	NA	NA
29	Peterson Air Force Base (AFB)	CO	No	No	No	Yes	No	No	Yes	Yes	NA	NA
30	Schriever Air Force Base (AFB)	CO	No	No	Yes	Yes	No	No	Yes	Yes	NA	NA
31	Cape Canaveral Air Force Station (AFS)	FL	Yes	Yes	No	No	No	No	Yes	Yes	NA	NA
32	Eglin Air Force Base (AFB)	FL	Yes	Yes	Yes	Yes	No	No	Yes	Yes	NA	NA
33	MacDill Air Force Base (AFB)	FL	Yes	Yes	No	No	No	No	Yes	Yes	NA	NA
34	Patrick Air Force Base (AFB)	FL	Yes	Yes	Yes	Yes	No	No	Yes	Yes	NA	NA
35	Warner Robins Air Force Base (AFB)	GA	Yes	Yes	No	No	No	No	Yes	Yes	NA	NA
36	Scott Air Force Base (AFB)	IL	Yes	Yes	No	No	No	No	Yes	Yes	NA	NA
37	Barksdale Air Force Base (AFB)	LA	No	Yes	No	No	No	No	Yes	Yes	NA	NA
38	McConnell Air Force Base (AFB)	KS	No	No	Yes	Yes	No	No	Yes	Yes	NA	NA
39	Cape Cod Air Force Station (AFS)	MA	No	No	Yes	Yes	No	No	Yes	Yes	NA	NA
40	Joint Base (JB) Andrews	MD	Yes	Yes	Yes	Yes	No	No	Yes	Yes	NA	NA
41	Selfridge Air National Guard Base (ANGB)	MI	No	Yes	No	No	No	No	Yes	Yes	NA	NA
42	Whiteman Air Force Base (AFB)	MO	No	No	Yes	Yes	No	No	Yes	Yes	NA	NA
43	Malmstrom Air Force Base (AFB)	MT	Yes	Yes	Yes	Yes	No	No	Yes	Yes	NA	NA
44	Cavalier Air Force Station (AFS)	ND	No	No	No	No	No	No	No	No	NA	NA
45	Minot Air Force Base (AFB)	ND	Yes	Yes	Yes	Yes	No	No	No	No	NA	NA
46	Offutt Air Force Base (AFB)	NE	No	No	Yes	Yes	No	No	No	No	NA	NA
47	Kirtland Air Force Base (AFB)	NM	No	No	Yes	Yes	Yes	Yes	Yes	Yes	NA	NA
48	Creech Air Force Base (AFB)	NV	No	No	No	No	Yes	Yes	Yes	Yes	NA	NA
49	Nellis Air Force Base (AFB)	NV	No	No	Yes	Yes	Yes	Yes	Yes[1]	Yes[1]	NA	NA

[1] Air Force Note: Answers only for installation sites within the main base. When associated ranges are included, answer is Yes.

AIR FORCE			*Recurrent Flooding*		*Drought*		*Desertification*		*Wildfires*		*Thawing Permafrost*	
#	*Installation*	*State*	Current	Potential	Current	Potential	Current	Potential	Current	Potential	Current	Potential
50	Wright Patterson Air Force Base (AFB)	OH	No	Yes	Yes	Yes	No	No	Yes	Yes	NA	NA
51	Tinker Air Force Base (AFB)	OK	Yes	Yes	Yes	Yes	No	No	Yes	Yes	NA	NA
52	Shaw Air Force Base (AFB)	SC	Yes	Yes	Yes	Yes	No	No	Yes	Yes	NA	NA
53	Joint Base (JB) San Antonio (aka JB Lackland / Sam Houston / Randolph)	TX	Yes	Yes	Yes	Yes	No	No	Yes	Yes	NA	NA
54	Hill Air Force Base (AFB)	UT	Yes	Yes	Yes	Yes	Yes	Yes	Yes[1]	Yes[1]	NA	NA
55	Joint Base (JB) Langley-Eustis	VA	Yes	Yes	No	No	No	No	Yes	Yes	NA	NA
56	F.E. Warren AFB	WY	Yes	Yes	No	No	No	No	Yes	Yes	NA	NA

[1]Air Force Note: Answers only for installation sites within the main base. When associated ranges are included, answer is Yes.

DEPARTMENT OF NAVY			Recurrent Flooding		Drought		Desertification		Wildfires		Thawing Permafrost	
#	Installation	State	Current	Potential	Current	Potential	Current	Potential	Current	Potential	Current	Potential
57	Naval Base (NB) Coronado	CA	Yes	Yes	Yes	Yes	No	No	No	No	No	No
58	Naval Base (NB) San Diego	CA	Yes	Yes	Yes	Yes	No	No	No	No	No	No
59	Joint Base (JB) Anacostia Bolling	DC	Yes	Yes	Yes	Yes	No	No	No	No	No	No
60	U.S. Naval Observatory / Naval Support Facility (NSF) Naval Observatory	DC	No	No	Yes	Yes	No	No	No	No	No	No
61	Washington Navy Yard	DC	Yes	Yes	Yes	Yes	No	No	No	No	No	No
62	Naval Air Station (NAS) Key West	FL	Yes	Yes	Yes	Yes	No	No	No	Yes	No	No
63	Naval Submarine Base (NSB) Kings Bay	GA	Yes	Yes	Yes	Yes	No	No	No	Yes	No	No
64	Joint Base (JB) Pearl Harbor Hickam	HI	Yes	Yes	Yes	Yes	No	No	No	Yes	No	No
65	Wahiawa Annex	HI	Yes	Yes	Yes	Yes	No	No	No	Yes	No	No
66	Naval Support Facility (NSF) Indian Head	MD	Yes	Yes	Yes	Yes	No	No	No	No	No	No
67	Naval Air Station (NAS) Oceana	VA	Yes	Yes	Yes	Yes	No	No	No	No	No	No
68	Naval Support Activity (NSA) Hampton Roads - Northwest / (former) Naval Security Group Activity (NSGA) Chesapeake	VA	Yes	Yes	Yes	Yes	No	No	No	No	No	No
69	Naval Station (NS) Norfolk	VA	Yes	Yes	Yes	Yes	No	No	No	No	No	No
70	Naval Support Activity (NSA) Hampton Roads	VA	Yes	Yes	Yes	Yes	No	No	No	No	No	No
71	Naval Magazine Indian Island	WA	Yes	Yes	Yes	Yes	No	No	No	Yes	No	No
72	Naval Base (NB) Kitsap Bangor (Naval Submarine Base (NSB) Bangor)	WA	No	No	Yes	Yes	No	No	No	Yes	No	No
73	U.S Territory - Naval Base Guam	Guam	Yes	Yes	Yes	Yes	No	No	No	Yes	No	No
74	U.S. Territory - Andersen AFB	Guam	Yes	Yes	Yes	Yes	No	No	No	No	No	No

OTHER

#	Installation	State	Service	Recurrent Flooding		Drought		Desertification		Wildfires		Thawing Permafrost	
				Current	Potential	Current	Potential	Current	Potential	Current	Potential	Current	Potential
75	Defense Finance and Accounting Service (DFAS) Indianapolis	IN	DFAS	No	No	No	Yes	No	No	No	No	No	No
76	Defense Finance & Accounting Service (DFAS) Columbus	OH	DLA	Yes	Yes	No	Yes	No	No	No	No	No	No
77	Defense Distribution Depot (DDD) Susquehanna	PA	DLA	Yes	Yes	No	Yes	No	No	No	No	No	No
78	National Ground Intelligence Center (NGIC) Charlottesville	VA	NGA	Yes[2]	Yes	Yes	Yes	No	No	No	No	No	No
79	Pentagon	VA	WHS	No	No	No	No	No	No	No	No	No	No

[2]Although the site did not experience flooding, flooding in the local area caused temporary loss of commercial water supply to the site.

Columbia River Boundary Water Treaty Negotiations Between US and Canada

Tribal Seminar; Exercising Governmental Sovereignty
March 27-28, 2019 Seattle, WA

DR Michel

Executive Director

and

John E. Sirois, say'ay'

Committee Coordinator

UCUT
UPPER COLUMBIA UNITED TRIBES

Upper Columbia United Tribes

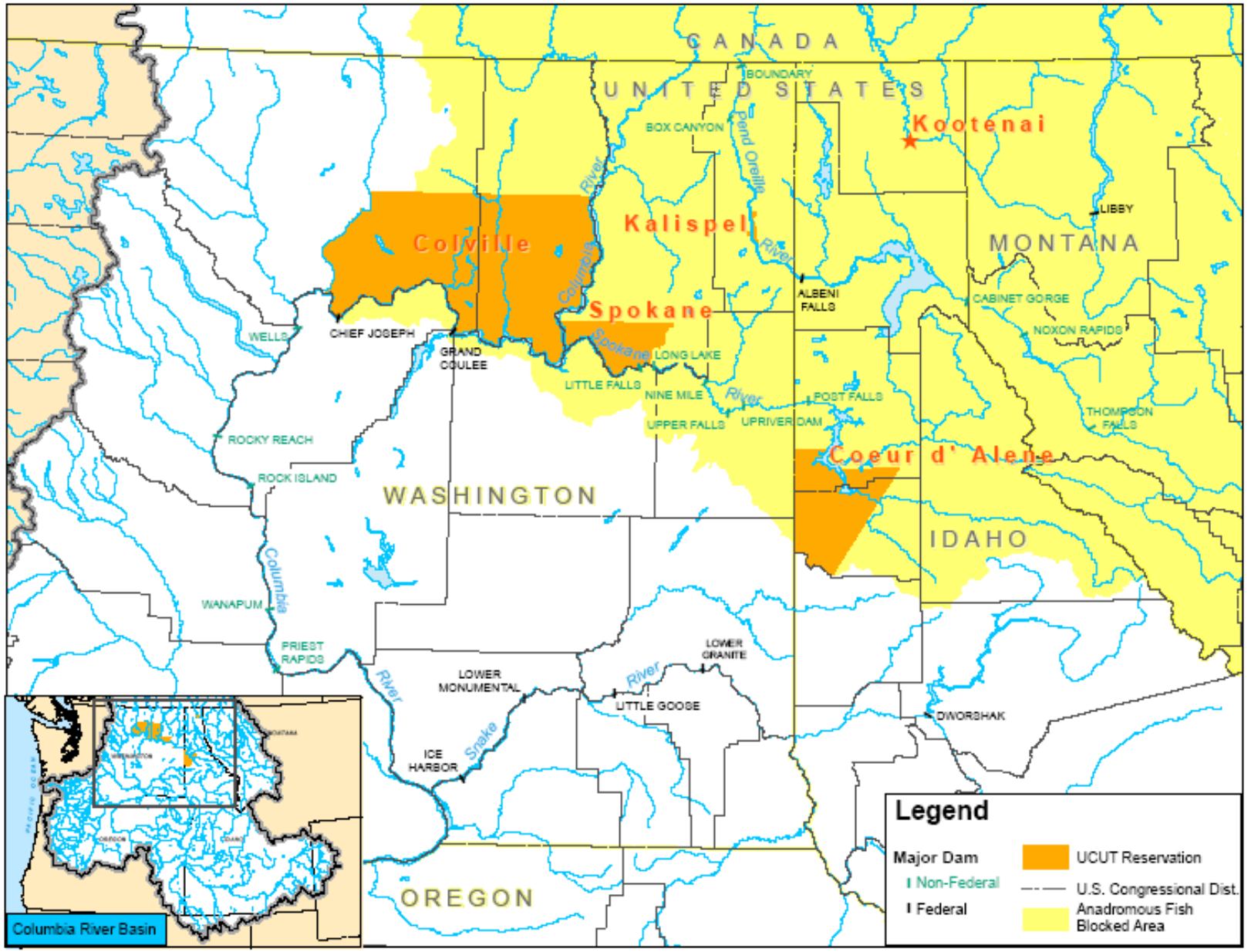
Coeur D'Alene Tribe of Indians

Confederated Tribes of the Colville Reservation

Kalispel Tribe of Indians

Kootenai Tribe of Idaho

Spokane Tribe of Indians



The Columbia River Hydropower System

n’pta’kw’ “The Big River”

Photo by Philip Bouchard

mus il'mithm
Four Chiefs

All begins with **<u>water</u>**

Water is Life

Four Chiefs;

salmon, bear, bitterroots, service berry

Source of nourishment; physical/spiritual

First Scientists who knew the seasons and harvested what the land provided

Photo by Suzanne Long

Courtesy of Pacific Northwest National Laboratory.

Kettle Falls Fishermen

Salmon Ceremony

Indigenous Peoples' Cultural teachings and framework

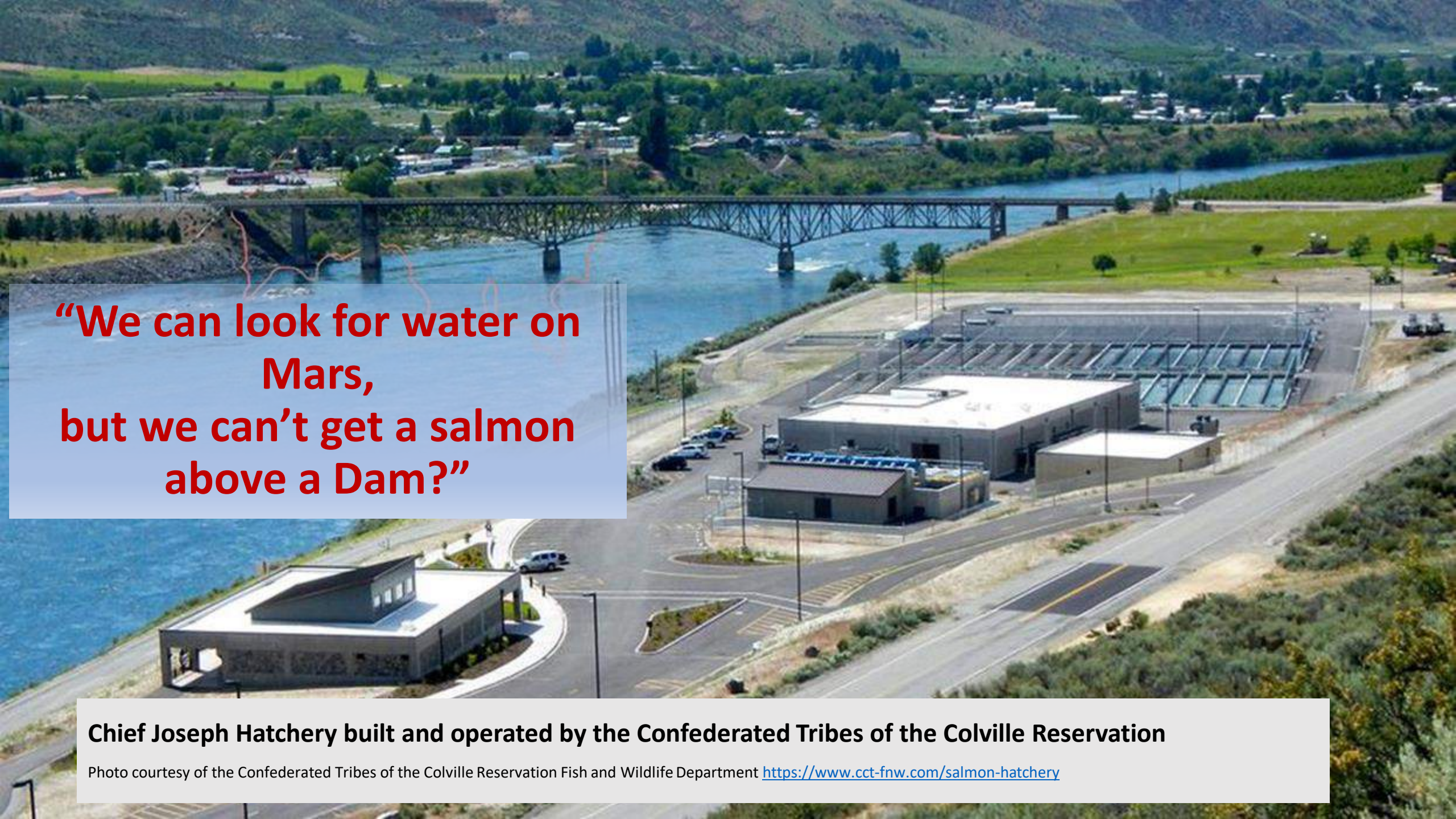
Salmon Survival Today!

Salmon severely impacted by:

- Hydropower Dams
- Columbia River Treaty Operations
- Legacy and Current Pollution
- Cost and Legal Implications

Nearly 80 years without salmon is too long for Tribes and the ecosystem

UCUTs strive to make a difference



Chief Joseph Hatchery built and operated by the Confederated Tribes of the Colville Reservation

Photo courtesy of the Confederated Tribes of the Colville Reservation Fish and Wildlife Department https://www.cct-fnw.com/salmon-hatchery

Policy, Equity and Environmental Justice Issues

- **Current Policy** is to **permanently** flood upriver to protect flooding downriver
- There was at least a **40%** loss of salmon from above Grand Coulee
- Salmon spawn inland, but harvest is in the ocean & lower river
- 2013 BPA mitigation funding: **$461 million**
- **Current Policy**: **70%** of BPA mitigation funds goes to downriver projects
- BPA funding to blocked areas: just over **16% of total funding.**
- FERC requires Fish Passage at private dams; not Grand Coulee or Chief Joseph Dams

UCUT Objective: Generate Policy to Support Salmon Moving Past the Dams

- **Access to habitat and cold refugia in those Canadian waters, <u>especially with effects of climate change</u>!**
- **Phase 1 Study completed: All studies show that there still is enormous capacity for salmon production, viable salmon stocks, technology available and acceptable risks.**
- **Moreover, restoring these habitat areas can deliver cultural and economic benefits for all;**

UCUT's Economic Analysis

Columbia Basin Benefits Valuation Report 2017

The UCUT partnered with other Tribes and NGOs to:

Understand the natural capital evaluation of Columbia River Basin EbF for modernization of the Columbia River Treaty.

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

https://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

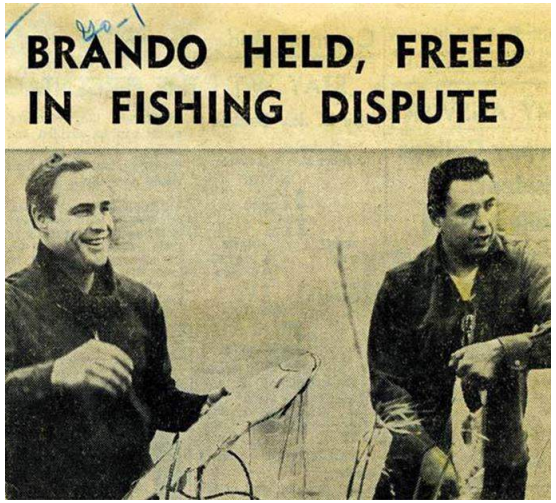
1. The Columbia River Basin holds immense natural capital value.
2. The Columbia River Treaty could modernize in a way that recognizes natural capital value.
3. A 10 percent increase in ecosystem-based function would add $19 billion to the Basin's natural capital values

Columbia River Treaty Adopted 1964

Originally, the Treaty addressed very little;

1. **Hydropower Production;** Constructing & Operating
2. **Assured Flood Storage by Canadian Dams**
    1. 9 MAF Assured, One time payment of $64M
    2. After 2024 - Called-Upon/Effective Use
    3. Canadian Entitlement - 50% of the power that US produces from “Canadian” water; Average annual now $150-250M value

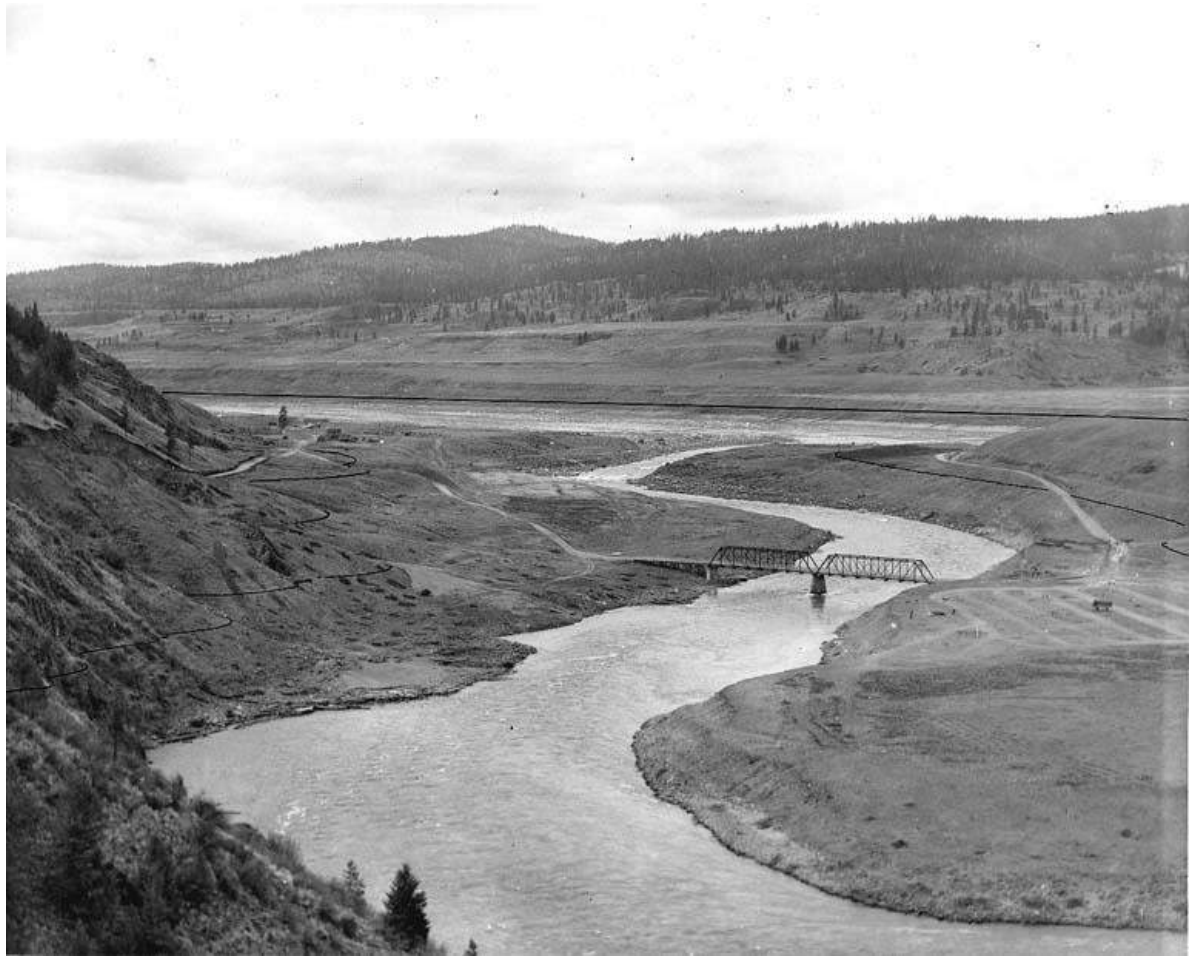
***No consideration for Ecosystem Function or the rights and interests of Tribal Nations**



1964 – Columbia River Treaty Signed

Prevent flooding in Portland

The Vanport Flood



Permanent and **Annual** flooding Upriver

Modernize the Columbia River Treaty; Years of Work & Preparation

Indigenous Voices Continue to Impact the Process

- 15 Tribes Coalition started in 2009; Common Views Document 2010
- **Fish Reintroduction into the U.S. And Canadian Upper Columbia River-Feb. 2014, Joint Fish Passage Paper**
- **Eco-based System Function Definition 2013**
- US Regional Recommendation was developed in a multi-year process by federal agencies, communities, tribes and NGOs; Endorsed by **ALL** Congressional Representatives from the PNW
- Circular 175; Official State Department Position finalized in 2014
- AND **it includes Ecosystem Based Function** (EbF) as an equal pillar by which a modernized Treaty will stand;

Columbia River Treaty; Modernize? Negotiations Are Underway

US and Canada began formal negotiations; 5 meetings so far; Federal reps are BPA, BOR, COE, NOAA along with DoS

Chief Negotiator; Jill Smail, appointed by current Administration, a career appointee, supports the Regional Recommendation.

DoS decided **Tribes will not** be a part of the negotiation team. Federal Agencies *will carry* Tribes' interests and eco-system based function.

AND, US Chief Negotiator **ENDED** the Collaborative Water Modeling Group on 2/2/18

Columbia River Treaty; Tribal Actions

Several Tribes have requested G-2-G consultation; Warm Springs had a visit from DoS, Colville and others have requested the same

Columbia River Basin Tribes have developed a Tribal Participation Framework

Tribes receive a briefing conference call before negotiation meeting and another following the negotiation

Tribes working on a Mutual Benefits document that can assist in negotiations

Challenges and Opportunities to Columbia River Treaty Outcomes

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 Hydroprojects.
4. Renewable Energy and impacts of PacWest Smelter.
5. House Bill 3144; still a threat?
6. Spokane River Water Quality Standards
7. Digital Agriculture; server farms near CR for cheap power

***Historic and contemporary! What are we going to do about it?**

Beginning:
The Legacy of Our Generation

“What will we have done to garner the admiration of our grandchildren?” –Chief Dan George

- We have the knowledge and ability to achieve fish passage, ecosystem health! **We can use Best Available Science!**
- We can come together to address climate change impacts, and provide habitat for all species; our relatives.
- The river and salmon **deserve our informed action!**
- We must modernize the Columbia River Treaty to benefit all for all possible ecosystem needs; quality of life!

Many Thanks!

Way’ lim’limpt’

Questions?

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John E. Sirois

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Historic Canoe Journey – Kettle Falls 2016-;
Exercise Cultural Ways

Update on *Pakootas v. Teck Cominco Metals, Ltd.*

An example of Tribal litigation furthering environmental protection

Brian S. Epley

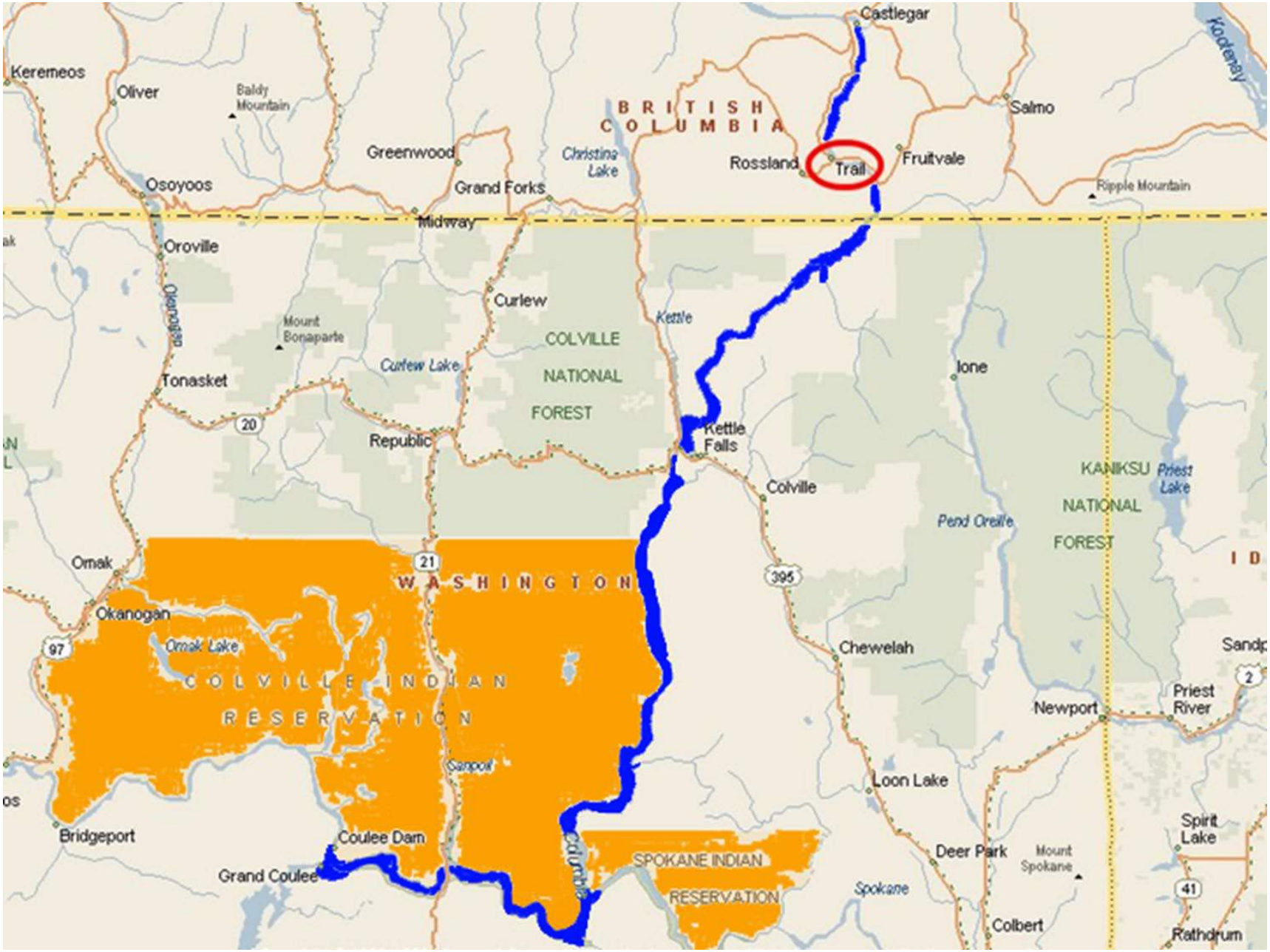
OGDEN MURPHY WALLACE
ATTORNEYS

Update on *Pakootas v. Teck* Litigation

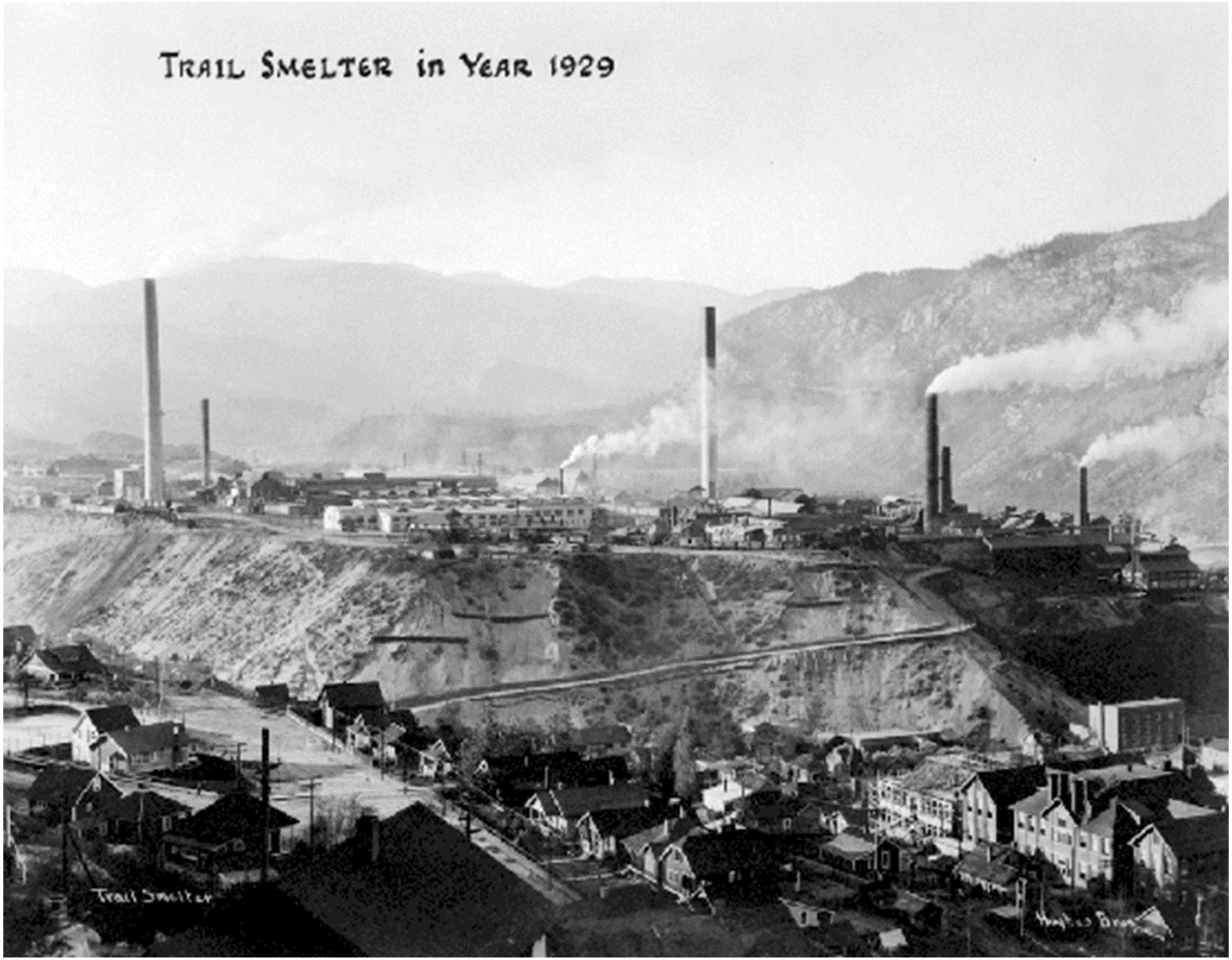
- Factual background
- CERCLA
- Early Litigation
  - Can CERCLA be applied to a Canadian company's smelting operations outside of the United States?
  - Can Teck be a CERCLA "arranger" if it didn't arrange with another party to dispose of its waste?
- Phase I
  - Is Teck liable as an "arranger"
  - Is Teck jointly and severally liable for all costs incurred at the Site?
- Phase II
  - Must Teck compensate the Tribes for response costs it incurred?
- Ninth Circuit Appeal (2018)
- Supreme Court Appeal (2019)

Setting: The Upper Columbia River

- Lake Roosevelt created by Grand Coulee Dam in 1942
- Colville Reservation west of Lake Roosevelt
- Spokane Reservation east of Lake Roosevelt
- From the Grand Coulee Dam to the U.S./Canada border is 150 miles
- Teck Metals, Ltd. operates the world's largest lead-zinc smelter in Canada,10 miles upstream from the U.S./Canada border in Trail, British Columbia


Castlegar
Kootenay
Keremeos
Oliver
Baldy Mountain
BRITISH COLUMBIA
Salmo
Greenwood
Christina Lake
Rossland
Trail
Fruitvale
Osoyoos
Grand Forks
Ripple Mountain
Midway
Oroville
Okanogan
Curlew
Kettle
Mount Bonaparte
COLVILLE NATIONAL FOREST
Curlew Lake
Tonasket
20
Republic
Kettle Falls
Ione
KANIKSU NATIONAL FOREST
Priest Lake
Colville
Pend Oreille
Omak
21
WASHINGTON
395
Okanogan
97
Omak Lake
COLVILLE INDIAN RESERVATION
Chewelah
Sanpoil
Newport
Priest River
Loon Lake
Bridgeport
Coulee Dam
Grand Coulee
Columbia
SPOKANE INDIAN RESERVATION
Deer Park
Mount Spokane
Spirit Lake
Spokane
Colbert
41
Rathdrum

Teck's Trail Smelter (Historical)



Teck's Trail Smelter (Historical)

Teck’s Trail Smelter (Historical)

Teck’s Trail Smelter (Current)

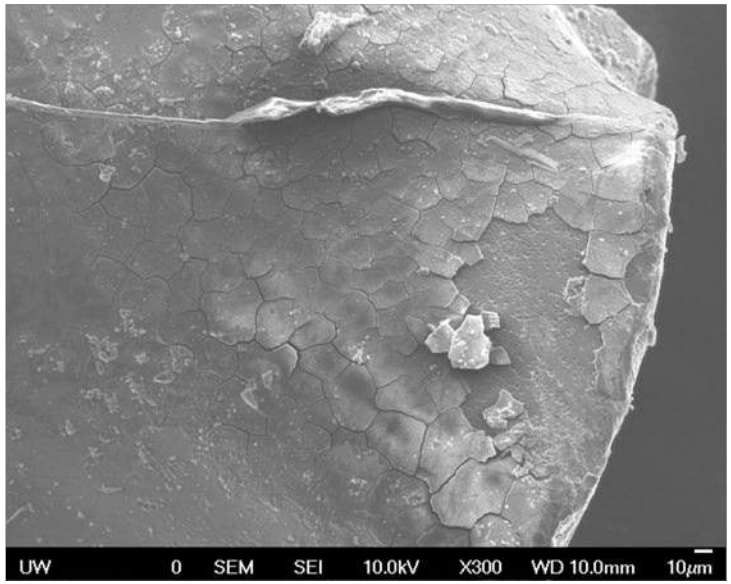
Teck's Hazardous Substance Disposal Practices

- Teck produced and discarded hazardous substances in the form of solid "slag" and liquid effluent directly into the Columbia River
- Teck ultimately admitted (stipulated) to the disposal between 1930 to 1995 of:
  - 9,970,000 tons of slag; and
  - Effluent containing lead, zinc, cadmium, arsenic, copper, mercury, thallium, and other hazardous substances
- The slag and effluent were both transported downstream and hazardous substances were released into the United States environment

Teck's Slag

Slag collected at Black Sand Beach, two miles downstream of US-Canada border

Scanning electronic microscope (SEM) image of slag just downstream of US-Canada border



CERCLA – Primer on the law

- Place within constellation of Federal environmental statutes
- Governments can recover two types of damages
  - Response costs
  - Natural resource damages
- Liability for response costs:
  - (1) Covered Person
  - (2) “Release” or threatened release of hazardous substances
  - (3) Release or threatened release occurs at a “facility”
  - (4) Government incurs costs responding to Site and conducting removal or remedial action
- Four types of “covered persons”
  - Owner/operator of facility
  - Former owner/operator of facility
  - Arranger
  - Transporter

Pre-Litigation – Timeline

- 1999 Confederated Tribes of the Colville Reservation petitioned U.S. Environmental Protection Agency for a CERCLA Preliminary Assessment
- 2001 EPA conducted sampling/analysis of sources of hazardous substances
- 2003 EPA issued a Unilateral Administrative Order to Teck, a Canadian corporation

Early Litigation

•Teck rejects the 2003 EPA Order and asserts that EPA does not have jurisdiction. EPA does not enforce its outstanding Order.

•In 2004 two members of the Confederated Tribes of the Colville Reservation (Tribe) filed a CERCLA citizen suit against Teck seeking to enforce the Order issued by EPA.

- Citizen suit plaintiffs: (1) DR Michel, Chair of the Natural Resources Committee; (2) Joe Pakootas, Chair of the Colville Business Council

•In 2005 the Tribe and the State of Washington join the litigation as co-plaintiffs.

Early Litigation – Take Away

- Citizen suits may be pursued under various Federal environmental statutes
- Tribal governments can fund citizen suits brought by a citizen proxy to further the Tribes' interests
- Citizen suits often provide for fee shifting, which permits prevailing plaintiffs to be awarded their attorney's fees

First Appeal (Interlocutory)

Immediately after suit was filed Teck moved to dismiss because:

- (1) Extraterritorial application of CERCLA to a Canadian smelter was improper
- (2) Teck could not be held liable as an “arranger” without arranging with another party to dispose of its waste

First Appeal – Interlocutory

2006 – Ninth Circuit rules in Tribes' favor

- This was an entirely domestic application of U.S. law
- Teck could arrange for disposal of its own waste and therefore be held liable

- 2008 – U.S. Supreme Court denies Teck's request for it to review the Ninth Circuit's decision
  - Not the end of this story

Phase I – Liability, Personal Jurisdiction, Divisibility

- Phase I issues
  - Does a Washington court have personal jurisdiction over a Canadian company
    - Different from whether CERCLA is being applied domestically or extraterritorially
    - Does Court have power, under the Constitution, to hear a case involving Teck?
  - Is Teck liable as an “arranger”
  - If Teck is liable, is it jointly and severally liable for all response costs incurred at the Site, or only those costs attributable to its wastes?
- Teck vigorously contests arranger liability
  - Argues there were no “releases” to the environment
    - Slag is inert and, even if located in UCR, does not release the hazardous substances contained in the glassy particles
    - Effluent that contained hazardous substances and was discharged to Columbia River in Canada was transported through the UCR Site on river currents before exiting the Site when it flowed through the Grand Coulee Dam – no effluent remains in UCR Site

Phase I – Liability, Personal Jurisdiction, Divisibility

- Does a Washington court have personal jurisdiction over a Canadian company
  - Jurisdiction generally: Subject matter jurisdiction vs. Personal jurisdiction
    - Subject matter jurisdiction – Does a court have the ability to hear this type of case?
      - Claim arises under a federal statute
      - The parties are diverse (not from same state) and amount in controversy exceeds $75,000
    - Personal jurisdiction – Can the court exercise jurisdiction over the defendant?
      - Due process clause of 14th Amendment limits State's authority to bind a nonresident defendant to a judgment
      - Defendant must have certain "minimum contacts" such that maintaining the suit does not "offend traditional notions of fair play and substantial justice"
      - Two types
        - » General jurisdiction – company has systematic and continuous contacts with state and therefore can be sued in that state, even if suit has nothing to do with those contacts
        - » Specific jurisdiction – defendant's suit-related conduct creates a substantial connection with the forum state (not just a plaintiff residing in the state)
    - Specific jurisdiction analyzed under 3-part test:
      - (1) nonresident defendant must purposefully direct his activities at the forum state, or purposefully avail itself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws
      - (2) claim must be one which arises out of or relates to the defendant's forum-related activities
      - (3) exercise of jurisdiction must comport with fair play and substantial justice, in that it must be reasonable

Phase I – Liability, Personal Jurisdiction, Divisibility

- Does a Washington court have personal jurisdiction over a Canadian company
  - Court applied *Calder* "effects test" to assess whether it had specific jurisdiction over Teck
    - (1) Defendant committed an intentional act;
    - (2) expressly aimed at the forum state;
    - (3) Causing harm that the defendant knows is likely to be suffered in the forum state
  - Teck purposefully directed its activities at Washington, where it caused negative effects
    - Teck intentionally disposed of waste into the Columbia River (intentional act)
    - Teck expressly aimed its waste at Washington
      - Teck documents showed that it knew its waste was reaching Washington
      - Teck acknowledged it was essentially using the UCR as a "free" and "convenient disposal facility"
    - Teck knew the harm caused by its dumping of waste would be felt in Washington
      - Teck knew its slag was toxic to fish and leached hazardous substances
      - Yet it still persisted in dumping waste knowing these harms would occur in Washington

Phase I – Liability, Personal Jurisdiction, Divisibility

- Is Teck liable as an “arranger”?

- Based on 9th Circuit decision, Teck has to assume that it can be held liable without arranging with another entity to dispose of its waste
- Teck initially argues there were no “releases” to the environment
  - Slag is inert and, even if located in UCR, does not release the hazardous substances contained in the glassy particles
  - Effluent that contained hazardous substances and was discharged to Columbia River in Canada was transported through the UCR Site on river currents before exiting the Site when it flowed through the Grand Coulee Dam – no effluent remains in UCR Site

Phase I – Liability, Personal Jurisdiction, Divisibility

- Is Teck liable as an “arranger”?
- Ultimately, after years of litigation and substantial scientific expert work, Teck stipulated to certain facts that satisfied the elements of CERCLA liability
  - Facility – CERCLA hazardous substances are found in the reaches of Columbia River from international border to Grand Coulee Dam.
  - Covered Person
    - Discharges
      - Between 1930 and 1995, Teck discharged at least 9.97 million tons of slag into Columbia River
      - Teck discharged effluent into the Columbia River
    - Hazardous substances have come to be located in UCR
      - At least 8.7 million tongs of slag transported into Washington, and some of it is located in the UCR Site
      - Nearly all of Teck’s effluent transported across border into Washington, and some portion is located in UCR Site
  - Release –
    - Hazardous substances have and continue to leach from Teck’s slag located in the UCR Site to the UCR environment
    - Hazardous substances in Teck’s effluent have and continue to leach or otherwise move into the waters and sediments found in the UCR Site
  - Response Costs – State and Tribes have each incurred at least $1 in response costs

Phase I – Liability, Personal Jurisdiction, Divisibility

- If Teck is liable, is it jointly and severally liable for all response costs incurred at the Site, or only those costs attributable to its wastes?
- Typically, a PRP is jointly and severally liable for response costs
- However, PRP only liable for its share of response costs attributable to its contamination if it can prove the harm is divisible
- Test
  - (1) Is the harm theoretically capable of apportionment?
  - (2) If yes, does the evidence show a reasonable basis for apportioning the harm

Phase I – Liability, Personal Jurisdiction, Divisibility

- District Court dismissed Teck's divisibility defense on summary judgment
  - Teck failed to show harm (contamination) at the UCR Site was theoretically capable of apportionment
    - Teck limited its divisibility case to just 6 metals that it had allegedly discharged – BUT these were not all the contaminants found in the UCR
    - Teck did not address the "harm" because it failed to consider the synergistic effects that its metals may have when located alongside other hazardous substances, which might increase or alter the harm
  - Teck also failed to provide a rational basis for apportioning harm
    - Teck's expert's apportionment theories were also volumetric – BUT Teck did not provide evidence that the volume of waste has a proportional relationship to the harm at the Site
      - Ignores geographic factors
      - Ignores passage of time and its effect on contamination present in UCR

Phase II – Recovery of response costs

- 42 U.S.C. 9607(a) allows “United States government or a State or an Indian tribe” to recover “all costs of removal or remedial action” that are “not inconsistent with the national contingency plan”
- Issues
  - Do Tribes need to be granted “enforcement authority” by the Federal government before they can recover response costs incurred?
  - Can the Tribes recover their expert and attorney fees costs incurred during this litigation as “response costs”
  - Were the Tribes’ response costs “not inconsistent” with the NCP

Ninth Circuit Appeal (2018)

- Phase I and Phase II final judgments now on appeal – all issues ripe for appeal
- Teck appeals following issues:
  - (1) Is this the proper time for appeal, or should it wait until final phase (NRD) is complete?
  - (2) Does Court have personal jurisdiction over Teck?
  - (3) Did Court properly award response costs to Tribes?
  - (4) Did trial court err in dismissing Teck's divisibility defense on summary judgment?
  - (5) Is CERCLA being applied extraterritorially?
    - Placeholder. Prior 9th Circuit decision binding on this 9th Circuit panel as law of the case. Teck preserving issue for appeal to Supreme Court.
  - (6) Can Teck be held liable as an "arranger" without arranging with another entity to dispose of its waste
    - Placeholder. Prior 9th Circuit decision binding on this 9th Circuit panel as law of the case. Teck preserving issue for appeal to Supreme Court.

Supreme Court - 2019

- Teck filed petition for writ of certiorari on March 4, 2019
- Teck raises three issues for why Supreme Court should accept review:
  - (1) CERCLA is being applied extraterritorially
  - (2) Court lacks personal jurisdiction over Teck
  - (3) Teck cannot be an "arranger" if it did not arrange with another person or entity to dispose of its hazardous substances
- State and Tribes have opportunity to respond
  - Explain to Court why these issues are not worthy of Supreme Court review
- If Supreme Court grants review
  - Parties will submit additional briefs on the merits
  - Oral argument – likely in the 2019-2020 term
  - Decision – likely by June 2020
- If Supreme Court denies review
  - Response cost claim complete
  - Natural resource damages – next stage

Questions or comments?

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The Culverts Case: The Power of Treaty Rights

Tribal Environmental Seminar 2019

Nicholas Thomas

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ATTORNEYS

Introduction and Overview

Provide a Background on treaties with Tribes

Provide an overview of affecting environmental policy through treaty rights

Discuss United States v. Washington as an instance of the policy implications of treaty rights

Discuss the potential implications of U.S. v. Washington in the future

Discuss the application of US v. WA principles in other contexts

Background on treaties with Tribes

Hundreds of agreements have been entered into between the United States and Indian Tribes from the first treaty with the Delawares in 1787 until the end of treaty-making in 1871. Thereafter, the United States issued Executive Orders to establish reservations and define the relationship between the United States and Tribes.

Provisions of the treaties differed widely, but it was common to include the following:

A guarantee of peace;

A delineation of boundaries (often with a cession of specific lands from the tribe to the federal government);

A guarantee of Indian hunting and fishing rights;

A statement that the tribe recognized the authority or placed itself under the protection of the United States;

An agreement regarding regulation of trade and travel of persons in the Indian territory.

Background on treaties with Tribes

A treaty is a contract between two sovereigns, and the rights and obligations **primarily** bind the contracting parties.

However, because treaties are the supreme law of the land (U.S. Const., Art. VI, cl. 2; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)) they can provide equitable relief against a non-party when that relief is essential to fulfillment of the treaty's undertaking. *Skokomish Indian Tribe v. United States*, 410 F.3d 506 (9th Cir. 2005).

A tribe need not be federally recognized to establish that it is the beneficiary of a treaty. *United States v. Suquamish Tribe*, 901 F.2d 772 (9th Cir. 1990).

Rather, in the Ninth Circuit anyway, it is enough that a group establish that it has preserved an organized tribal structure that it can trace back to the treaty. United States v. Oregon, 29 F.3d 481, amended 43 F.3d 1284 (9th Cir. 1994).

Affecting Environmental Policy Through Treaty Rights

Asserting Treaty rights to stop proposed on or off reservation actions can be an effective tool in influencing environmental policy

- Language of Treaty is key

Reservations Created by Treaties vs. Executive Orders

The Power of Treaty Rights – *US v. WA*

United States v. Washington (Culverts Case)

- Parties
  - Plaintiffs: 21 Tribes + United States
  - Defendant: State of Washington

Facts

- 1854 and 1855 – Stevens Treaties – Tribes relinquish large swaths of land in exchange for guaranteed right to off-reservation fishing
  - “Fishing clause” guaranteed "the right of taking fish, at all usual and accustomed grounds and stations…in common with all citizens of the Territory."

The Power of Treaty Rights – *US v. WA* cont'd

1974 – Boldt decision

- Tribes entitled to take up to 50% of harvestable fish
- Court interpreted Fishing Clause as promising protection for the Tribes' supply of fish, not merely their share of fish

1976 – Ninth Circuit

- 9th Circuit ruled that the issue of human-caused environmental degradation, and resulting declines in fish supply, must be resolved in context of particularized disputes

The Power of Treaty Rights – *US v. WA* cont'd

2001 – 21 Tribes file complaint against State; U.S. joins.

Contend that State had violated and continued to violate its duties under the Stevens Treaties by building and maintaining culverts that:

- Prevented mature salmon from returning to spawning grounds
- Prevented smolt from moving downstream and out to sea
- Prevented young salmon from moving freely to seek food and escape predators

The Power of Treaty Rights – *US v. WA* cont'd

Washington culvert – fish passage barrier

Affecting Environmental Policy Through Litigation – Treaty Rights – *U.S. v. Washington*

2007 – Federal district court holds that in building and maintaining the culverts, State had caused the size of salmon runs to diminish, thereby violating State's obligation to not interfere with Tribes' treaty rights

2009-10 – Court conducts bench trial to determine appropriate remedy

2013 – After failed settlement efforts, Federal district court issues permanent injunction ordering State to correct offending culverts

The Power of Treaty Rights – *US v. WA* cont'd

Ninth Circuit decision (2015)

- Rejects State's argument and affirms that 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 Power of Treaty Rights – *US v. WA* cont'd

U.S. Supreme Court accepted review

Issues

- Whether a treaty right to take fish at usual and accustomed stations guaranteed that number of fish would always be sufficient to provide a moderate living for Tribes
- Whether dist. ct. erred in dismissing State's equitable defenses against Fed. govt. where Fed. govt. signed Treaties, for decades told State to design culverts in particular way, and then alleged said culverts violated Treaties
- Whether dist. ct.'s injunction violates federalism and comity principles where expensive culvert replacement will in many cases have no impact on salmon, and where Tribes showed no clear connection between culvert replacement and tribal fisheries

Outcome before the Supreme Court

On June 22, 2018, the U.S. Supreme Court affirmed the Ninth Circuit in a 4-4 decision.

It was a tie because Justice Kennedy recused himself, which may have been a blessing given that he has traditionally been a skeptic of tribal rights.

When the Supreme Court ties, the lower court's ruling stands

BUT

That does not mean the lower court's decision becomes the law of the land.

The Ninth Circuit's decision is binding in that Circuit and persuasive authority in other Circuits where a dispute involves similar facts and/or issues.

What about SCOTUS' current composition?

If a similar case were heard by the Supreme Court, the decision will be influenced by recent changes to the makeup of the Court.

One of President Trump's appointees replaced the recused Justice Kennedy.

Kavanaugh's views on Indian Law and tribal rights are relatively unknown – he has written less than 10 relevant opinions addressing tribal issues, and of those none are overtly pro-Indian or anti-Indian.

Justice Gorsuch authored 18 legal opinions and heard approximately 60 cases involving Indian law and tribal interests while on the Tenth Circuit.

Gorsuch has typically turned to canons of statutory construction in interpreting treaties. Unclear how Justice Gorsuch voted in the Culverts case.

Application of US v. WA principles in Other Contexts

Water rights?

Air Quality?

Safe enjoyment of Reservation lands?

Where do we go from here? – Bringing claims

Could be used to support the ability of tribes to protect both their direct resources (e.g. the right to hunt and fish) and indirect resources (protection of habitat that ensures continued access to the right).

Could have broad implications for other government and private entities that own, manage, and/or control barriers, including tide gates, floodgates, and dams, if it can be demonstrated that those things block or diminish a treaty guaranteed right.

Applying the claim outside of Washington.

1837 Treaty with the Chippewa Tribes explicitly states the tribes retain the privilege of hunting, fishing, and gathering the wild rice upon the lands, the rivers, and the lakes included in the territory ceded (but such privilege is at the pleasure of the president).

Application under CERCLA

US v. Washington can be interpreted to establish treaty-related ARARs that prohibit the diminishment of treaty-reserved tribal resources.

Treaties may be found to establish ARARs because treaties to which the US is a party are equivalent in status to federal legislation forming part of the US Constitution calls “the supreme Law of the Land.”

Could help ensure that cleanup of contaminated sites, either on or off the reservation, is performed to a standard that is protective of their direct and indirect treaty-based resource rights.

Application under the Clean Water Act

US v. Washington may provide a tool for tribes to push for the establishment of more stringent water quality standards based on the federal and state obligation to protect the indirect resources (e.g. water, invertebrates) that support treaty-reserved resources.

Where a proposed water quality standard fails to protect those resources, that standard would be violative of treaty based obligations

Particularly justified given generally higher fish consumption rates of tribal members.

Application under procedural environmental statutes

Proactive application of US v. Washington: add a requirement into NEPA / SEPA environmental checklists requiring applicants to demonstrate that their proposed development will not diminish a reserved or implied tribal right.

Efficient way of ensuring treaty rights are protected at the beginning of a project that will have environmental impacts.

Creates a place for tribes at the negotiating table and provides an opportunity for cooperation, which could preemptively avoid protracted, uncertain and costly litigation

Limitations to be Mindful of

Court expressly narrowed the decision to the facts of the case

“Moderate living” standard is still rather amorphous and resource-dependent

Remedies can be incredibly difficult to ascertain and implement

Laches

Treaties are capable of being abrogated

Questions ?

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OGDEN MURPHY WALLACE
ATTORNEYS

20th ANNUAL TRIBAL ENVIRONMENTAL SEMINAR FOR TRIBAL LEADERS, TRIBAL ENVIRONMENTAL PROGRAM MANAGERS & IN-HOUSE COUNSEL

What is Tribal Consultation and Does it Work?

Andrew Fuller, OMW Tribal Practice Group

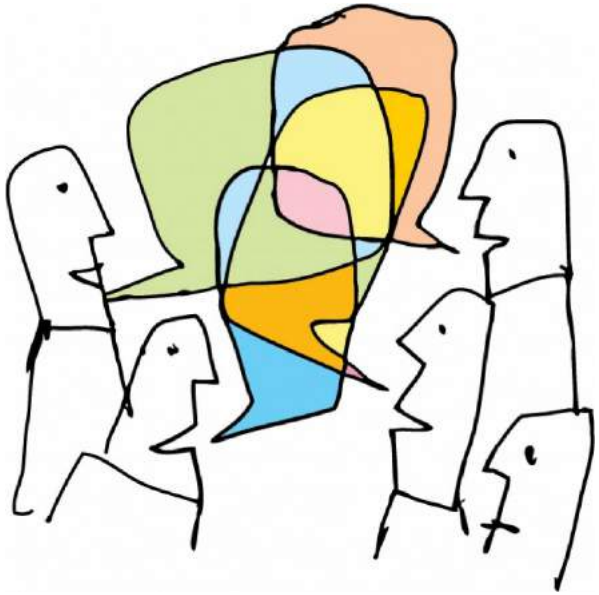
What is Tribal Consultation and Does it Work?

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 between federal or state officials and tribal officials that should occur before federal or state officials take actions or implement decisions that may affect tribal interests.



Consultation requirements are set forth in:

- Executive Order 13175 (2000)
- 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.)*
- Agency Regulations
  - National Environmental Policy Act
  - Indian Self-Determination and Education Assistance Act Implementing Regulations
- Agency Policies
  - EPA Region 5
  - EPA Region 10
- State Statutes/Policies

*Links to summaries of consultation requirements and specific documents are included in electronic version

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.

- Prevents agencies, to the extent practicable and permitted by law, from promulgating regulations with tribal implications, that include substantial direct compliance costs on tribal governments, and that is not required by statute unless the agency has consulted with tribal officials.

- 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 the government for its failure to consult.

Presidential Obama's Memorandum re: Tribal Consultation (Nov. 5, 2009)

- During his first year in office, President Obama issued a memorandum to the heads of Executive Departments and Agencies noting the importance of tribal consultation for a sound and productive Federal-tribal relationship and recommitting his Administration to the guidance in EO 13175.

- The memo directed each agency head to submit "a detailed plan of actions the agency will take to implement Executive Order 13175" and to issue annual progress reports on the status of each action included in its consultation implementation plan.

- The memo also directed OMB to prepare a report on implementation of EO 13175 across the executive branch and include recommendations for improving agency plans and the consultation process.

President Trump Statements re Tribal Consultation

President Trump has not directly endorsed Executive Order 13175, but when he proclaimed November 2017 as National Native American Heritage Month he signaled that consultation will remain a priority under his administration:

> "My Administration is committed to tribal sovereignty and self-determination. A great Nation keeps its word, and this Administration will continue to uphold and defend its responsibilities to American Indians and Alaska Natives. The United States is stronger when Indian Country is healthy and prosperous. As part of our efforts to strengthen American Indian and Alaska Native communities, my Administration is reviewing regulations that may impose unnecessary costs and burdens. This aggressive regulatory reform, and a focus on government-to-government consultation, will help revitalize our Nation's commitment to Indian Country.

"Tribal Implications" that trigger consultation:

Executive Order 13175 defines a 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

Consultation is conducted in four phases:

- Identification
- Notification
- Input
- Follow-up

Does it Work?

Successful consultation is predicated on:

- Proper timing
- Well managed expectations
- Addressing the specific needs of the parties involved

Proper Timing

Consultation must occur prior to a decision to implement any proposed action. The impacts on Tribal interests must be scoped and raised early enough to allow for the identification and resolution of potential problems.

Expectations

Consultation includes several methods of interaction that may occur at different levels.

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.

Consultation Outcomes

Agencies may face significant consequences where consultation is not appropriately conducted:

Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707 (8th Cir. 1979)

- BIA internal consultation guidelines were found to create a justified expectation of Tribes that they would be provided a meaningful opportunity to express their views before BIA policy was made. BIA's failure to provide that opportunity a violation of general principles of administrative decision-making, and violation of government's trust obligation.

Consultation Outcomes

Political concerns may outweigh statutory/policy requirements

Standing Rock Sioux and the Dakota Access Pipeline

- Tribe's challenge regarding sufficiency of consultation was denied, even though Army Corps intentionally withheld key information regarding potential project impacts during consultation. Obama administration (DOJ, Army, Interior) put hold on construction despite ruling to ensure compliance with NEPA and other federal laws. Trump administration promptly ordered permits granted. Legal challenges continue but pipeline remains operational.

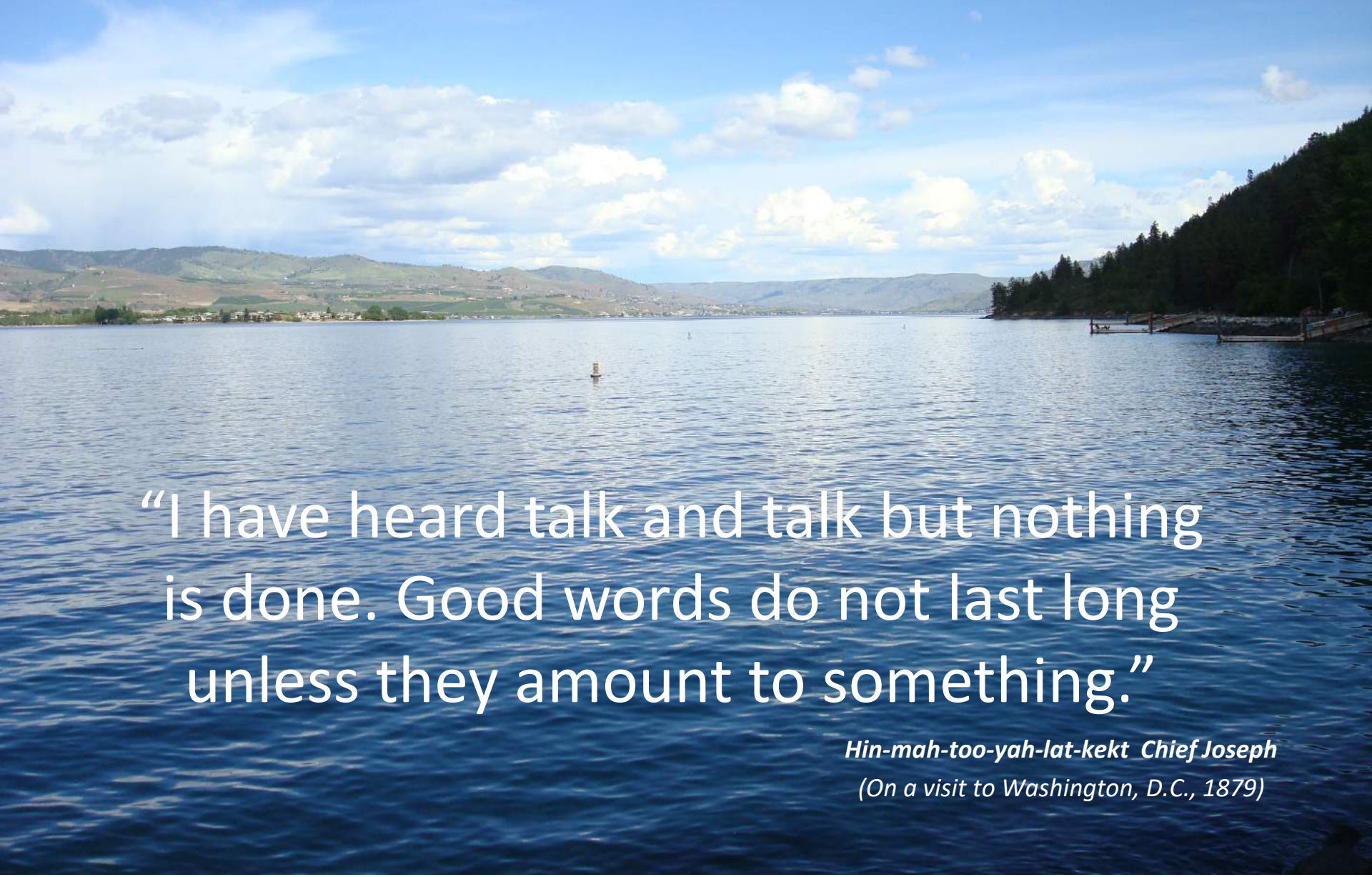
Food for Thought

- **Consultation can be used by Tribes as both a shield and a sword.**
- **The expectations of the parties involved have a huge role in whether the consultation will be considered a success.**
- **Consultation alone may not be enough, so look for other opportunities to amplify the message.**

What is Tribal Consultation and Does it Work?

Participant Experiences?

- Who has participated in a consultation?
- What was the context?
- Was it successful?
- What worked and what did not?
- Suggestions for the group?



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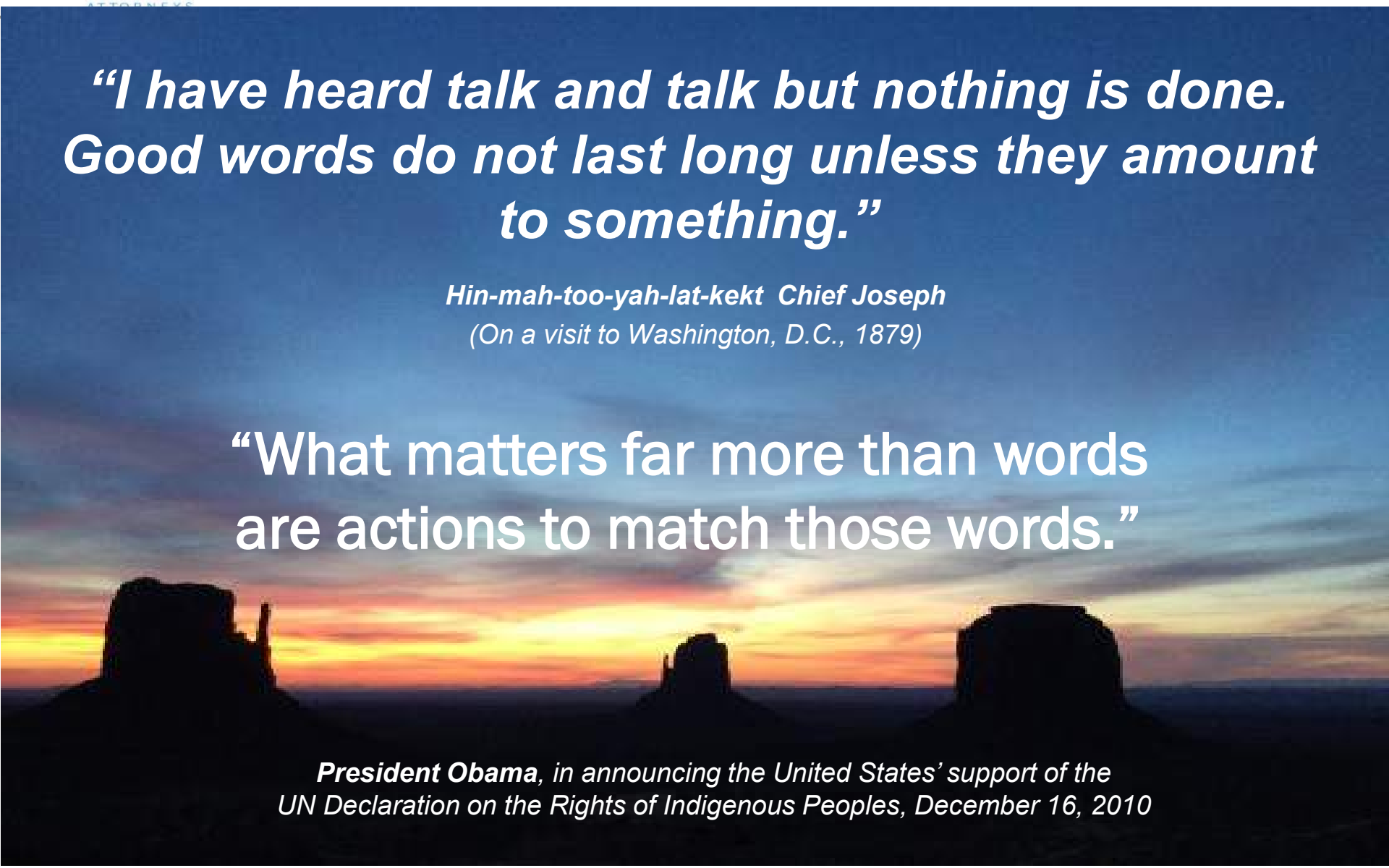
"I have heard talk and talk but nothing is done. Good words do not last long unless they amount to something."
Hin-mah-too-yah-lat-kekt Chief Joseph
(On a visit to Washington, D.C., 1879)
"What matters far more than words are actions to match those words."
President Obama, in announcing the United States' support of the UN Declaration on the Rights of Indigenous Peoples, December 16, 2010


"We did not inherit the Earth from our ancestors,
we borrow it from our children."
THANK YOU FOR ATTENDING!
Safe travels home