

D I A L O G U E

Environmental Protection in Indian Country: The Fundamentals

Summary

Tribes and Native villages are demonstrating reinvigorated environmental activism as they face new pressures on the natural resources many depend on for their economic and cultural livelihood. From the Standing Rock Sioux Tribe's protest against the Dakota Access Pipeline, to Alaska Native villages relocating their communities in the face of rising sea levels, to impacts to the Navajo Nation from the closure of a major coal plant, there is a growing role for environmental attorneys in Indian country. Yet this field is distinct, involving matters of sovereignty, reserved treaty rights, and religious freedom. On July 26, 2017, ELI held a seminar that explored key concepts of the trust relationship between tribes and the federal government, and the role tribes and Native villages play in managing their natural resources. The discussion covered a number of the legal tools uniquely available to tribes, and the speakers provided practitioners with the fundamentals of Indian law, application of federal environmental statutes to tribal lands, and the challenges to—and opportunities for—responsibly managing natural resources in Indian country. Below, we present a transcript of the discussion, which has been edited for style, clarity, and space considerations.

Cynthia Harris (moderator) is a Staff Attorney at the Environmental Law Institute.

Suzanne Schaeffer is Counsel at Dentons.

Ethan Shenkman is a Partner at Arnold & Porter Kaye Scholer.

Elizabeth Kronk Warner is a Professor of Law, Associate Dean, and Director of the Tribal Law and Government Center at the University of Kansas School of Law.

Cynthia Harris: We're excited to bring you this program on environmental protection in Indian country, and with an amazing expert panel. First, we have Suzanne Schaeffer, who is a counsel at Dentons, where she is a member of both the Public Policy and Regulation Practice Group and the Native American Law and Policy Practice Group. Her expertise is in Indian lands and environmental compliance.

We are also privileged to have Ethan Shenkman, a partner in the Environmental Practice Group at Arnold & Porter Kaye Scholer. He brings to this practice more than 16 years of government experience related to Native American communities and Indian tribes. He most recently served as deputy general counsel at the U.S. Environmental Protection Agency (EPA), where he supervised legal work pertaining to tribal issues.

Lastly, we're joined by Elizabeth Kronk Warner, professor of law, associate dean, and director of the Tribal Law and Government Center at the University of Kansas School of Law. She is also a member of and appellate judge for the Sault Ste. Marie Tribe of Chippewa Indians, and serves as a district judge for the Prairie Band Potawatomi Nation in Kansas.

To start off, we're going to give a bit of context on this issue—an area that's been generating a lot of interest lately, for a number of reasons. There have been recent changes in the law and policy. There has been increased pressure on natural resources from pollution, climate change, and economic development. There has been an ongoing movement over the past few decades in the area of tribal sovereignty and self-determination, with religious and cultural values playing a huge role, and also on food security due to these increasing pressures on natural resources. There's a historical context we have to keep in mind—a history of injustice, which includes exploitation of natural resources on tribal lands, and pollution as well.

To provide more context on what exactly "Indian country" is, there are about 6.6 million American Indians and Alaska Natives, and 22% live on reservations, on trust lands, or in Native villages. There are 567 federally recognized tribes, and more than 200 of those are Alaska Native villages. Thus, it's an extensive amount of land. There's actually a huge amount of natural resources located in Indian country, especially in Alaska—about 42% of the entire state—in often remote locations. Many reservations are small, isolated communities, although there are exceptions, such as the Navajo Reservation. One thing to note: statistically, this is the most disadvantaged and heavily regulated group in terms of policies, laws, and the percent of people living below the poverty line.

History is very important to understanding tribal laws as well as Indian law. We could spend several sessions discussing that, but to give you some highlights, during the early period, this was the history of colonization and conquest. After the American Revolution, it was more of

a relationship between equals. The United States was still impoverished coming out of that war, and in need of understanding the new lands. But as settlers expanded, there was increasing pressure on Indian tribes and the resources they had. That resulted ultimately in a policy of relocation, and we see the start of the reservation system. Most of you are probably familiar with the Cherokee Trail of Tears. There were actually several examples of this same forced removal played out across many tribes, including the Navajo.

Following that, we had the period of allotment. We'll learn a bit more about the General Allotment Act¹ and why that has had an impact on tribal jurisdiction, continuing until today. And then, there was a period of reorganization around the Great Depression when you saw a period of rejuvenated tribal self-government and economic development. You'll notice the pendulum really swings back and forth in terms of the government's relationship with the tribal nations. That's important to keep in mind because after that, we switched into the Termination and Relocation period. That essentially means that the United States terminated the status of the tribes as nations, which meant that it ended federal supervision, benefits, and support, and a lot of jurisdictional powers moved to the state. Now, the pendulum has swung back and we are in a Self-Determination and Self-Governance period, where we're really seeing a greater recognition of the government-to-government relationship between the federal government and the different tribal governments.

In the news, you see more of these issues involving tribes being discussed, everything from the Dakota Access Pipeline to the Antiquities Act² and what the future of the Act will be with the status of different national monuments, including Bears Ears in Utah. We have different developments regarding energy production: for example, in the Navajo Nation, coal mine closure is an issue. Hydraulic fracturing, always contentious, is significant to a number of the Indian nations. Recently, we have heard about the delisting of the Yellowstone population of grizzly bears, which is also generating interest and controversy among many of the tribes involved. And, of course, climate change, particularly in coastal areas and in the Arctic.

We're definitely going to be seeing more of these issues in the news and in our practice, so it's good to understand the background of tribal law and the federal Indian law. With that, it's my pleasure to turn to Suzanne, who will be giving you some basic fundamentals of federal Indian law.

Suzanne Schaeffer: Before I worked at Dentons, I worked at the U.S. Department of the Interior for a number of years in the Division of Indian Affairs, in the Environment, Land, and Minerals Section. I'm going to have to gloss over a little bit to give you basic concepts; you could spend a day talking about many of these basic principles and underlying concepts. In order to really do this, it's kind of an issue-spotting exercise. As you start coming across these issues in

practice, obviously, you're going to have to do a little bit of a deeper dive to understand the full concepts.

These are the things that I'm going to try to cover: federal Indian law versus tribal law, aboriginal title, sovereignty, treaties, Indian country, trust responsibility, canons of construction, jurisdiction, and consultation.

The first thing is *federal Indian law*. When we say "federal Indian law," we're talking about the relationship between Indian tribes and the federal government. Title 25 of the U.S. Code has the majority of statutes in it, as well as Title 25 of the *Code of Federal Regulations*. "Tribal law" is talking about the domestic law of each tribe. Professor Warner is going to talk more about tribal law. I'm going to primarily talk about federal Indian law.

Starting with a case, *Johnson v. McIntosh*³ was one of the big trilogy of cases from Justice John Marshall in the early days. Basically, in those days, the Europeans had come and were starting to assert dominion and control over tribal lands, acting as the "big sovereign." They were trying to figure out what to do with Native Americans and how to deal with them because they were here. They were sovereign. They have this inherent sovereignty. And so, this case and the other two that I'm going to talk about, I see as the U.S. Supreme Court trying to figure out how to fit Indian tribes into the legal and political life of the new nation.

So, in *Johnson*, basically, the proposition is that Indian tribes had no power to grant lands to anyone other than the federal government. They couldn't grant lands to private citizens. The case talks a lot about the doctrine of discovery, the effects of European discovery. It's a very Eurocentric view of how things work. I want to read a quote from it, which I think encapsulates Justice Marshall's view. He says:

The rights of the original inhabitants [Indian tribes] were in no instance entirely disregarded, but were necessarily to a considerable extent impaired. They were admitted to be the rightful occupants of the soil . . . but their rights to complete sovereignty as independent nations were necessarily diminished, and their power to dispose of the soil at their own will to whomsoever they please was denied by the original fundamental principle that discovery gave exclusive title to those who made it.⁴

So, basically, title to the lands that Indians occupied moved to the United States as the big sovereign, and was acquired through conquest and discovery. But the tribes continued to have the right to occupy and use those lands. Their title is valid against everyone except the United States. It could only be extinguished through an affirmative act of the U.S. Congress. One of the interesting components of this is that the taking of aboriginal title or Indian title is not compensable under the Fifth Amendment. In the *Tee-Hit-Ton Indians v. United States* case,⁵ which is a later case, they talked about how that interest was not in effect a compensable property interest.

1. Pub. L. No. 49-119, 24 Stat. 387 (1887).

2. Pub. L. No. 59-209, 34 Stat. 225 (1906).

3. 21 U.S. (8 Wheat.) 543 (1823).

4. *Id.* at 574.

5. 348 U.S. 272 (1955).

I'm going to segue here to talk about *aboriginal title versus recognized title*. In fact, I would say, *Tee-Hit-Ton* today has limited relevance because most title now in Indian lands is recognized title. It's recognized by statute or by treaty. And also, there are remedies through breach of trust, and so on. The United States does have to pay compensation for taking of recognized title. But this was just one of the principles that came out of this case and some later cases.

Aboriginal rights in land can be defeated through laches. This was seen in the New York land claims, the *City of Sherrill v. Oneida Indian Nation of N.Y.* case,⁶ which was relatively recent and kind of was the death knell for the New York land claims, which a lot of us worked on when we were at Interior. Basically, in the *City of Sherrill* case, the Oneida Indian Nation had purchased a number of parcels to which Oneida had aboriginal title within the boundaries of its former reservation and tried to argue that those parcels were exempt from taxation, because its purchase of those lands revived the Tribe's sovereignty over those lands.

The *City of Sherrill* Court decided that the Tribe had let its rights fall dormant, and because of laches and, basically, the extended period of time over which the state government had exercised jurisdiction, that it had lost its distinctly Indian character and, therefore, the Tribe's claim failed. But this was an equitable issue. Damages were still being invoked.

You have to separate equitable relief from damages relief. I think the Court was worried about disruption and piecemeal jurisdiction and things of that nature. So, ultimately, in that case, the fact that the Tribe hadn't done anything for several hundred years to assert its rights led the Court to decide that those claims were barred by laches.

The last historical but still important piece of legislation was the Non-Intercourse Act (also known as the Indian Trade and Intercourse Act). There were a couple of these, with the first in 1790.⁷ Basically, it bars the sale of tribal land without acquiescence of the federal government. So, that's another important, early principle about the nature of tribal interest in land and sovereignty.

Moving on to the other two cases in the trilogy of Justice Marshall, let's talk about *tribal sovereignty* and the nature of tribal interest in land. *Cherokee Nation v. Georgia*⁸ was a very important case and the first time that they talked about the idea of domestic dependent nations. Georgia kept trying to apply state laws to the Cherokee Nation, which was being treated as another sovereign by the federal government. The Cherokee Nation had a treaty, had these lands, but Georgia kept interfering. In this particular case, it was a criminal case, they convicted a Cherokee Nation member and, ultimately, hanged him because they refused to acknowledge the writ from the Supreme Court to review the ruling. So, the chief of the Cherokee Nation filed an original action in the Supreme Court basically saying that

the Cherokee Nation is like a foreign nation. And Justice Marshall said, "No. It's not a foreign nation so we don't have jurisdiction."

But in the course of doing that, he talked about bedrock principles of Indian law. Tribal sovereignty is inherent. Tribes are part of the United States. They're domestic dependent nations, not foreign nations. And he talked about a protectorate relationship with tribes, that ward-to-guardian relationship that you may have heard about. He also made clear that there were acts of the federal government recognizing the Cherokee Nation basically as a state, another smaller sovereign. The courts are bound by those acts of the United States.

*Worcester v. Georgia*⁹ is the third case. This was a case where there were some white missionaries living on the Cherokee Nation. Georgia had passed these laws that said a person couldn't live on Indian land unless he or she had a permit or license or something from the state of Georgia. So, they went after these missionaries and the trial court convicted them. But the Supreme Court reversed and basically said that the dominion over Indian-U.S. relations is vested in the federal government and the state does not have jurisdiction on Indian lands. It's the "federal supremacy in Indian law" principle and it's really important.

Preemption analysis is a little different in the Indian context. The presumption is that state law does not apply in Indian country on Indian lands, kind of relying on this *Worcester* principle. One of the leading cases on preemption is *White Mountain Apache Tribe v. Bracker*.¹⁰ That case talks about balancing federal and state interests. That case was basically about a tax on a timber company that was doing business with the Tribe. It was an individual logging company, a non-Indian business, doing business with the Indian Tribe on the reservation. The state was trying to impose taxes, a fuel tax and license tax.

The Court looked at balancing the competing interests at stake and basically said that there is a comprehensive federal regulation and that the state policy was interfering with the comprehensive federal relationship. There wasn't a basis for the taxes except that the state wanted to make some money. So, in that case, they could not impose the tax. That's the basic way preemption analysis works in the Indian context.

Sovereign immunity is another important principle that comes from this trilogy of cases and the ones that have followed for many years. Essentially, tribal sovereign immunity can only be waived by the tribal council or abrogated by Congress. That's a very complicated subject that I won't be talking about in more than just this cursory way.

But there was a recent case, *Lewis v. Clarke*,¹¹ in the Supreme Court, which talked about sovereign immunity. A tribal employee was sued in his individual capacity and he tried to claim sovereign immunity, relying on Mohegan tribal immunity. The Court said no, he was not entitled

6. 544 U.S. 197, 35 ELR 20065 (2005).

7. The Act, as modified in 1834, is codified at 25 U.S.C. §177. 25 U.S.C. §177 (1976) (originally enacted as Act of July 22, 1790, ch. 33, §4, 1 Stat. 137, 138, as amended by Act of June 30, 1834, ch. 161, §12, 4 Stat. 730).

8. 30 U.S. (5 Pet.) 1 (1831).

9. 31 U.S. (6 Pet.) 515 (1832).

10. 448 U.S. 136 (1980).

11. 137 S. Ct. 1285 (2017).

to claim tribal sovereign immunity as he was acting in his individual capacity. He was the person in interest, and the Tribe really didn't have anything to do with it. He was just a tribal employee driving on a highway. It's an interesting case and there are a lot of really interesting sovereign immunity cases that are worth looking at.

Another component of basic federal Indian law principles is *treaties*. Treaties were made during about a 100-year period, from 1778 to 1871. It ended with the Indian Appropriation Act on March 3, 1871.¹² Basically, the United States was trying to get Indian land to give to non-Indian settlers through treaties. That was generally what was at stake. So, there were a lot of land cessions from tribes in exchange for a variety of things. Typically, tribes would have some reserved lands for their use that would be protected, although they were not always protected. But that was what they agreed to. One of the key things in the environmental context is hunting, fishing, and gathering rights reserved as part of the treaties. Those rights can have an impact in the environmental context.

It's clear that you can't just intimate that a treaty right is abrogated—there must be a clear expression of congressional intent to abrogate. Congress has to clearly consider the issue, clearly look at it, and resolve the issue in favor of abrogation. *United States v. Dion*¹³ was a case involving the Bald and Golden Eagle Protection Act,¹⁴ where the Court looked at what regulations Congress knew were in effect to determine that Congress had intended to waive treaty rights regarding these treaty hunting rights. But it's a strict standard and it's fairly difficult to meet.

Treaties also give plenary power over Indian land, but, as I've said before, that's recognized title so you have to give compensation for it. Congress has paramount authority over and can take Indian property, but it's got to provide compensation if it does that.

Reserved treaty rights belong to the tribes. One of the *United States v. Washington*¹⁵ cases discusses the argument that the United States somehow waived the fishing rights under the Stevens treaties, because it had funded and approved some of these state culverts that were being put in and that impeded the fish hatchery, and so on. The U.S. Court of Appeals for the Ninth Circuit basically said the United States cannot waive the treaty rights, they belong to the Tribe, not the United States. Again, unless there's some clear expression from Congress that it abrogated the underlying treaties or treaty rights, which it did not—so there was no waiver of the Tribe's treaty rights.

The 1887 General Allotment Act¹⁶ basically provided for the breaking up of tribal lands, encouraging farming, assimilation, and so on. About two-thirds of Indian lands were lost as a consequence of the General Allotment Act. As a result, there were a lot of reservations that were checker-boarded with tribally owned lands and non-Indian

owned lands, because a lot of the lands that were allotted to individual Indians ultimately passed out of Indian ownership for a variety of reasons, like inability to pay taxes on non-trust land, sale of lands because they were not usable for farming, and the like.

Ultimately, in 1948, a law was passed to try to clear up criminal jurisdiction. But the *definition of Indian country* in 18 U.S.C. §1151 includes all lands within the limits of any Indian reservation—and that includes individually owned lands, tribal lands, including if there's a right-of-way—all lands within the boundaries of the limits of any Indian reservation or Indian country, and dependent Indian communities. A dependent Indian community has to be land set aside by the federal government for the use of Indians and it has to be under federal supervision. So, the pueblos, trust land—significantly, are all part of Indian country. When Ethan talks about EPA's regulatory authority, Indian country plays a significant role in that. Allotments are also included within Indian country.

The gist of the *trust responsibility* is that the government has an obligation to act fairly in its dealings with Indian nations. It originates in terms of treaties, statutes, and regulations. There's a lot of good case law talking about the government's moral obligation. Essentially, the government is the trustee and tribes are beneficiaries. And like in a normal trust, you need to deal with the trustee's property in a manner that's of the highest ethical obligations, carefully, the way you would treat your own property.

The *United States v. Mitchell* case¹⁷ was the first time that the Supreme Court talked about recovering money damages for breach of a trust responsibility. There have been a number of cases since that time, like *United States v. Navajo Nation*¹⁸ and *White Mountain Apache*, which happened while I was at Interior, where the contours of the compensable trust responsibility were fleshed out a little bit. The *Mitchell* cases also involved the Tucker Act,¹⁹ which we don't have time to get into, but the Tucker Act and the Indian Tucker Act²⁰ basically provide a waiver of the federal government's sovereign immunity to allow money damages. But the substantive right to recover has to be found in other laws. So, in the *Mitchell* case, it was, again, the timber statutes²¹ and regulations that created the compensable right to recover money damages.

12. 16 Stat. 544.

13. 476 U.S. 734, 16 ELR 20676 (1986).

14. 16 U.S.C. §§668-668d.

15. 827 F.3d 836, 46 ELR 20115 (9th Cir. 2016).

16. 25 U.S.C. §§331 et seq.

17. 463 U.S. 206 (1983) (*Mitchell II*); see also *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*) (holding that General Allotment Act created only a bare trust, no duty to control timber resources, no right to money damages). The case was remanded to the Court of Claims to consider other grounds for recovery, which ultimately resulted in the Supreme Court's decision in *Mitchell II*.

18. 537 U.S. 488 (2003) (*Navajo I*) (Indian Mineral Leasing Act does not provide the Secretary of the Interior with sufficient obligations to manage the Tribe's mineral resources to entitle the Tribe to recover money damages); see also *United States v. Navajo Nation*, 556 U.S. 287 (2009) (additional sources of authority cited by Tribe do not create compensable trust obligation); *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (United States had compensable trust obligation to maintain trust property of Tribe being used by the United States pursuant to 1960 statute).

19. 28 U.S.C. §1491.

20. 28 U.S.C. §1505.

21. See 25 U.S.C. §§406, 407, 466; 25 U.S.C. Part 163.

The *canons of construction* concept is also very important. It started out based on treaties, saying you need to construe treaties in favor of tribes and construe them so that the Indians would have understood them at the time they were made—so all ambiguities are to be resolved in favor of the Indians. This has been applied to statutes, agreements, and Executive Orders. Basically, we use it all the time in litigation to try to get the benefit of the treaty, statute or regulation at issue. But it has to be ambiguous in the first place, before the canon kicks in.

There are also cases that say canons of construction are great, but you can't use that to change something that's clear on its face. Frankly, most things are not clear on their face. But when you're litigating, the other side is always saying, it's clear on its face. So, ambiguity should be resolved in favor of the Indians.

There are also some really good cases talking about treaty obligation. One of them is *Minnesota v. Mille Lacs Band of Chippewa Indians*,²² where there was a later treaty that didn't say anything specific, but generally that the Tribe agreed to fully and entirely relinquish, and convey to the United States, any and all title and right. But an earlier treaty had reserved hunting and fishing rights. The Court said, wait a minute, the later treaty doesn't say anything specifically about those rights, so it does not do away with them. It looked at the historical context, and that was partly the canons of construction resulting in that decision.

Elizabeth is going to talk about this further, but there's *tribal jurisdiction and state jurisdiction*; the *Montana v. United States*²³ test is a case that talks about the civil jurisdiction of tribes over fee land and dealing with non-members on fee land and tribal authority to regulate. The general rule is that tribes retain inherent power to protect self-government and control internal relations. But to the extent of tribal authority beyond that, that's considered inconsistent with the dependent status of tribes. So, unless there's express congressional delegation, they don't have that authority.

However, there are two exceptions where tribes retain that inherent sovereign power even on fee lands, and they are the consensual relationship test and the substantial interest test. This is a key issue in environmental regulation and protection in Indian country.

I'm going to pass over state regulation. But there's Public Law No. 280,²⁴ which basically gave certain states criminal and some limited civil jurisdiction. Not regulatory authority, but some civil jurisdiction.

There's also an *obligation to consult* with Indian tribes—the William Clinton Executive Order from 2000²⁵ and then the Barack Obama Presidential Memorandum from 2009.²⁶ The Obama Memorandum relied heavily upon the

Clinton Executive Order. Basically, the federal government has to consult and coordinate with tribes before it takes federal actions that impact tribes. As a consequence, all federal agencies have consultation policies. Some are better and more detailed than others. Interior has a very extensive policy, and so does EPA.

Ethan Shenkman: I was Deputy General Counsel at EPA for three years working on tribal issues. Before that, I worked for about 13 years at the U.S. Department of Justice in the Environment and Natural Resources Division, which is the part that handles all civil Indian-related cases—both where Indian tribes sue the United States and where the United States is representing the interests of Indian tribes and tribal rights and resources in court.

So, what do all of these basic principles of Indian law have to do with environmental issues in Indian country? I'm going to focus on EPA's role in Indian country and why the geographic jurisdictional issues are so important—the ability of tribes to implement environmental programs in Indian country, which is referred to as “treatment as a state” (TAS) status. EPA tries to implement a lot of these principles and policies, not just in its tribal program, but throughout its mission in implementing all of the environmental statutes. That comes out, in particular, in how EPA applies its tribal consultation policy and its environmental justice policies. Finally, I'm going to talk about how EPA has made an effort over many years, but a pretty concentrated effort recently, to integrate these principles, including treaty rights, into the Agency's decisionmaking on environmental issues.

One of the most important concepts to take away today is that Indian country is the boundary line between tribal and federal jurisdiction on the one hand and state jurisdiction on the other. Indian country can include reservations, as Susi mentioned, but it can also include other kinds of land, like land that's taken into trust and held by the United States for the benefit of tribes. Reservations and trust lands are the two main categories of Indian country, where either the tribes and/or the federal government have authority and the states do not.

It is either the federal government's responsibility or the tribe's responsibility to protect the environment and to implement environmental programs in Indian country. States can't. It's an oversimplification, but, generally speaking, states do not have authority within Indian country. Outside of Indian country, it's the normal jurisdictional situation where you have both EPA representing the federal authority and states often implementing environmental statutes.

In some cases, EPA has the ability to delegate authority for running those programs to tribes. EPA also has the authority and responsibility for environmental enforcement and ensuring compliance with federal environmen-

22. 526 U.S. 172, 29 ELR 20557 (1999).

23. 450 U.S. 544 (1981).

24. Pub. L. No. 83-280 (1953) (codified at 18 U.S.C. §1162, 28 U.S.C. §1360, and 25 U.S.C. §§1321-1326).

25. Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000).

26. Memorandum on Tribal Consultation From President Barack Obama, to the Heads of Executive Departments and Agencies (Nov. 5, 2009), *available at*

<https://www.cms.gov/Outreach-and-Education/American-Indian-Alaska-Native/AIAN/Downloads/PresidentialMemoTribalConsultationNov2009.pdf>.

tal laws within Indian country. EPA has a robust program of providing assistance to tribes to build their capacity, so they can assume more responsibility for implementing environmental programs and making decisions about environmental protection within their territories.

In 1984, EPA issued a fundamental Indian policy²⁷ on how it was going to handle its relationship with its tribal partners under all of its environmental statutes—it's a bed-rock policy for EPA. It continues to set EPA policy today, and it's been a model for other federal agencies in how they work with Indian tribes. By the way, the policy was issued during the Ronald Reagan Administration by Administrator William Ruckelshaus, which is just an interesting historical fact. But if you look at the key principles, it covers everything that Cynthia and Susi talked about: how EPA will work with tribes on a government-to-government basis, that EPA recognizes and will respect the fact that tribes have sovereignty and self-government, that EPA encourages tribes to take responsibility for making policy decisions and implementing programs to the extent they wish to within their territories.

Two other key principles: first, EPA believes it has responsibility to work closely with its sister agencies within the federal government to have the agencies coordinate and cooperate in working with tribes; second, EPA seeks to integrate these principles, not just within its tribal program, but within the administration of all programs at EPA. So, whether you're talking about water, air, hazardous waste, chemicals, or pesticides, EPA integrates these principles within its decisionmaking processes.

One of the most important mechanisms is "treatment as a state" or "TAS," and let me back up and explain how this came to be. The major environmental statutes were passed in the early 1970s, the Clean Air Act (CAA)²⁸ and the Clean Water Act (CWA),²⁹ among others, and these statutes were based on a model of cooperative federalism. It's a model where the federal government or EPA sets minimum standards and has oversight responsibility, but much of the time, it's the states that have the ability to actually implement the programs on a day-to-day basis. It's the states that are issuing permits, setting various kinds of standards, and even handling enforcement in the first instance, and so forth.

This cooperative federalism model doesn't really work in Indian country, because states don't have jurisdiction, so states can't implement these programs for tribes in Indian country. They don't have the authority to do that. This was a major gap or flaw in the way these environmental statutes were created. So, in the late 1980s and early 1990s, Congress amended some of these environmental statutes to allow for tribes to assume basically the same status as states. And if tribes wanted to, they could apply for this

status, and then become the entity within their territory to implement the environmental laws.

The two statutes that are the most important in this regard are the CAA and CWA. Under both of these statutes, tribes have a set of criteria that they have to meet if they want to take responsibility for implementing these programs, and, generally speaking, tribes can decide which aspects of the programs they wish to administer. It's not an all-or-nothing proposition. They have to show, obviously, that they're a federally recognized tribe, that they have a governing body with governmental powers that have the capacity to carry out these kinds of functions. And then the issue of jurisdiction, and questions about whether tribes need to make a case-by-case showing that they have jurisdiction over non-Indian entities within their territory, or whether this is something that we assume tribes have because Congress delegated that authority to them.

For a long time, EPA distinguished between the CAA and CWA and interpreted the CAA as a delegation of authority to tribes. So, tribes were assumed automatically to have this jurisdiction under the CAA and did not need to make a case-by-case showing; whereas under the CWA, tribes had to show, under the *Montana* test, that they met one of two exceptions—a consensual relationship or an effect on the political integrity or health and welfare of the tribe—in order to be eligible for assuming these programs under the TAS provision.³⁰

In 2016, EPA issued a new interpretation harmonizing the CAA and the CWA, and making clear that EPA, from this point forward, interprets both statutes as embodying a direct delegation of authority from Congress to the tribes. And so, as of 2016, when tribes apply for TAS status under both the CAA and the CWA, they do not have to make an individual showing under *Montana* that they have jurisdiction—that's assumed as a delegation.

Why did EPA do this? Why was this important? Because not that many tribes have taken advantage of these TAS provisions. That's one of the big picture takeaways. Cynthia talked about 567 federally recognized tribes, and 300-something have reservations or other areas of Indian country, and thus could potentially implement these programs under TAS status.

Under the CWA, only 54 tribes have taken advantage of that authority. Of the 54 tribes that have taken advantage of the legal capacity to issue water quality standards, only 42 have actually issued their own CWA-approved water quality standards for waters within their territories. So, that's 42 out of 300-something tribes that could potentially take advantage of this.

EPA believed that having to prove jurisdiction on a case-by-case basis was an unnecessary burden that could lead to litigation and was maybe a deterrent for some tribes to apply for this status. By harmonizing the CAA and the CWA, EPA wanted to make it easier for tribes to apply for this status and assume more responsibility for implementing these programs within their territories.

27. EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (1984), available at <https://www.epa.gov/sites/production/files/2015-04/documents/indian-policy-84.pdf>.

28. 42 U.S.C. §§7401-7671q; ELR STAT. CAA §§101-618.

29. 33 U.S.C. §§1251-1387; ELR STAT. FWPCA §§101-607.

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

Under the CAA, there are about 49 tribes that have TAS status for some aspect of the Act. Most of those 49 tribes have only assumed responsibility for nonregulatory aspects of the CAA, either for funding mechanisms or for the ability to comment or petition on permits that are issued by states or EPA. Only a few have actually taken on permanent authority, but the ability is there. The takeaway is that environmental statutes are unique in the federal code for giving tribes this ability to step into the shoes of states for purposes of implementing federal programs.

One case in particular highlights many of the principles that were talked about earlier and how all of these various Indian law principles can come into play in EPA programs, and serves as a cautionary note for tribes that are interested in assuming TAS status. This is a recent case out of Wyoming, where the two Tribes that shared the Wind River Reservation—the Northern Arapaho, and the Eastern Shoshone—applied for TAS status under the CAA.³¹ As part of their application, they needed to delineate the boundaries of their reservation, the territory within which they would be implementing these programs.

Well, the state of Wyoming did not agree with what the Tribes asserted as the reservation boundary. So, there was, all of a sudden, in the context of this environmental issue, a reservation boundary dispute. And EPA gave a very lengthy opinion, supporting the Tribes' view of the reservation status. The state challenged it, and the U.S. Court of Appeals for the Tenth Circuit recently ruled against the Tribes. That was an unfortunate result for the Tribes that came out of applying for TAS status.

There are many other statutes that have these TAS provisions. I want to caution you that they're all different. The other statutes tend not to be as robust as the CAA or the CWA. So, it's important that you understand the specifics of the statute at issue.

Other concepts that come up in EPA's role in Indian country include consultation. There is an Executive Order on tribal consultation issued by President Clinton.³² And there was a follow-up memorandum issued by President Obama.³³ One of the things they require is for every federal agency to adopt its own tribal consultation policy, and most federal agencies have.

EPA has issued a tribal consultation policy, and it's quite robust. It goes beyond what is required under the Executive Order; in general, for any major decision that EPA makes that could affect Indian country, EPA has committed to consult with tribes on a government-to-government basis in a meaningful way to get tribal input; in other words, to make that input part of the decision process, and to do so before the decision is made.

Environmental justice has been a big issue at EPA, and I would be remiss if I didn't mention that EPA has also strived to implement these precepts in environmental justice when dealing with Indian country issues. The big difference between tribal consultation and environmental justice—again, to speak in generalizations—is that under the consultation policy, EPA is dealing with the tribal government on a government-to-government basis, sovereign-to-sovereign. But EPA is also dealing directly with issues of concerns to communities, communities that are disproportionately affected by pollution.

Those communities may see eye-to-eye with their government, or they may not. They may be part of a federally recognized tribe, or they may not. It's a different lens through which to see these environmental issues. But in a lot of these controversial issues that Cynthia mentioned, like the Dakota Access Pipeline and the Keystone XL Pipeline, and the Pebble Mine in Alaska, there are both government-to-government consultation issues and environmental justice issues at play. It's important to understand that they're interrelated, but they're different.

Susi talked about the treaty era from 1778 to 1871. A key example of how the issue of treaty rights plays out in environmental issues, and in EPA's programs, is the fishing rights under the Stevens Treaties that dozens of tribes in the Pacific Northwest have. In general, the tribes with Stevens treaty fishing rights have the right to 50% of the harvestable catch at their usual and accustomed fishing places outside of their reservations. So, these are off-reservation fishing rights. They have the same authority that other tribes have within their reservations, but they have something special and unique in addition to off-reservation fishing rights.

This example brings together the concepts we have been discussing today. Inside the reservations, inside Indian country, the tribe and EPA have authority, and the state does not. Outside of reservations, these programs are implemented by the states, with EPA oversight. So, here's the big question. When a state is setting water quality standards, like in Washington where there are off-reservation fishing rights, to what extent does the state need to take tribal fishing rights into account when it's setting water quality standards?

This comes into play, for example, in something called the fish consumption rate, which is one criterion that EPA applies in setting or reviewing water quality standards, taking into account the amount of fish that is being consumed by the population, and taking into account the level of pollution that might be contained in those fish. EPA's view as of the last administration has been that the states do need, when they're setting that fish consumption rate, to take into account if there are tribal populations with federally reserved fishing rights that give them the right to catch and consume that fish. That might require the state to adopt somewhat of a more stringent level of protection under its water quality standards.

So, that issue has now been teed up in the state of Washington. It may well be teed up in other states, like

31. *Wyoming v. Environmental Prot. Agency*, Nos. 14-9512 and 14-9514 (10th Cir. Feb. 22, 2017).

32. Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000).

33. Memorandum From President Obama on Tribal Consultation to the Heads of Executive Departments and Agencies (Nov. 5, 2009), available at <https://energy.gov/sites/prod/files/Presidential%20Memorandum%20Tribal%20Consultation%20%282009%29.pdf>.

Idaho. It's also been teed up in the state of Maine. There's litigation. There's potential reconsideration of these issues in this administration. But it is a clear example of how treaty rights, reservation and off-reservation implementation of EPA's programs, and water quality standards all come together.

In 2016, EPA issued a new policy³⁴ on treaty rights, where it basically committed to considering treaty rights in its decisionmaking. It did so by supplementing its tribal consultation policy. So, when EPA has to consult with tribes on an environmental issue that could affect tribal rights or resources or tribal communities, EPA is required under this guidance to at least raise a series of treaty rights questions before making its decision. Are there treaty rights there? What resources do the treaty rights cover and how might the decision being made affect those treaty rights? There have been other federal agencies that have adopted similar policies, but EPA has been in the vanguard of this issue.

Elizabeth Kronk Warner: So far, we've focused on federal Indian law. It's really important to know, and this was mentioned earlier, that tribes possess tribal sovereignty, and that persistence test has been reaffirmed more recently in *Santa Clara Pueblo v. Martinez*,³⁵ where the Supreme Court said that tribal sovereignty is strongest over its members.

As a result, tribes have a lot of ability to innovate under their own tribal sovereign laws, and there's a lot of flexibility there to develop environmental laws. So, while it's great to be aware of federal laws, and that's a good place to start, one thing to remember is that tribes have inherent sovereignty and tribes have the ability to develop their own environmental laws under that tribal sovereignty. So, that can be a great tool to effectuate a client's goals. As held by the federal courts, the federal laws that Ethan talked about are all laws of general applicability. But beyond those laws, the tribes have a lot of flexibility in what they want to accomplish and that's under tribal law, which is the domestic laws of specific tribes.

Now, obviously, I can't speak about all the laws of the 567 federally recognized tribes. But I want to give you an introduction to tribal law so that you're aware of the fact that it exists, and that outside of federal environmental laws, you may be able to accomplish your clients' goals through use of tribal environmental law.

First, we'll start by looking at some common-law options, then we'll look at tribal environmental code provisions. We'll look at how tribes were innovating in the field of environmental law. It's important to note that the federal government has been relatively stagnant in its innovation in environmental law. We really haven't seen any federal innovations since the 1990s, with the CAA Amendments. Yet there are new environmental challenges such as climate change, and as a result, there is a need for innovation in the

field of environmental law. Tribes have really stepped into this void and have been doing some innovative, wonderful things, and it's important to acknowledge that. Then, last but not least, I want to briefly touch on international law, because in the environmental context, many tribes have started to turn to international law to accomplish some of their environmental goals.

The first general takeaway when you're talking about tribal environmental law is the fact that common-law principles apply for many tribes. Just as common-law principles were used by the United States and the states prior to the development of federal environmental law in the late 1960s, and the emergence of EPA in the 1970s, so too can common law be a good tool to use to accomplish tribal goals.

Many tribes have explicitly recognized the existence of tribal common law. Good examples of that are the Pueblo of Laguna and the Ho-Chunk Nation, both of which have constitutional preambles that explicitly mention the existence of common law. Many tribes have even incorporated that into their own code provision. For example, Chapter 33-01-01 of the Sisseton-Wahpeton Sioux Tribal Code specifically addresses how customary law has developed in that regard. The Supreme Court has also recognized the existence of the customary and common law of tribes.

So, again, it's a great place to start. Even if a tribe doesn't have a code provision, or maybe hasn't taken advantage of the TAS provisions previously discussed, it will still have common law, and it will still have customary law, so it's very probable that law will exist that will be helpful in accomplishing environmental standards.

For example, some common law that tribes have developed is similar to Anglo-American law on trespass and a lot of tribes have trespass provisions that have been incorporated. Again, this has been acknowledged by the Ninth Circuit, which said that tribes have the right to bring trespass actions, therefore recognizing that tribes have that under their common-law rights.³⁶ A lot of environmental goals can be accomplished through common-law principles. So, trespass and other common law could be a good place to start, depending on the goals of the tribe.

Let's talk about other types of tribal environmental law applicable in Indian country. Again, a great place to start looking is at your private nuisance claims, your trespass claims, and the customary law of the tribe, to see if there's any law that might be helpful in accomplishing environmental goals. Then, you can go a little bit deeper to see what the tribe may have enacted by virtue of its constitution or its code provisions that might help with environmental law or environmental challenges.

This brings us back to the discussion of the *Montana* test, a 1981 decision that looked at whether or not the Crow Nation had the right to regulate non-Indians on non-Indian land within the Crow Reservation. The Crow Nation really wanted to do this because there was a prime

34. EPA POLICY FOR CONSULTATION AND COORDINATION WITH INDIAN TRIBES (2016), available at https://www.epa.gov/sites/production/files/2016-02/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf.

35. 436 U.S. 49 (1978).

36. *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 849-50 (9th Cir. 2009).

fishing area that ran through the reservation, so that was very important to the Tribe to be able to regulate those non-Indians who came in to go fishing. Ultimately, in the *Montana* decision, the Supreme Court says the presumption is that tribes do not have civil jurisdiction over non-Indians on non-Indian land, unless one of two exceptions applied: either a consensual relationship or a relative threat to the health and safety of the tribe. Both of these exceptions are very important in the environmental context.

First, in the consensual relationship, we've seen tribes, for example, the Navajo Nation, taking on permitting authority under the CAA and TAS status. One of the things that they do in their permits is specifically require a consensual relationship with anybody who's coming onto the reservation to do permitting under the CAA, which gives them jurisdiction over non-Indians under that first consensual relationship test.

That's a great option that a tribe has if it is very concerned about having jurisdiction over non-Indians on non-Indian land. They can, if there's an opportunity, require through a permit or perhaps a memorandum of understanding that the non-Indian agree through the first *Montana* exception to the tribe's jurisdiction.

But where we more commonly see it come up in the environmental context is under that second exception, the threat to the health and safety of the tribe. Obviously, when you're dealing with environmental challenges, these oftentimes are threats to health and safety, so we do see a lot of references in tribal codes to the second *Montana* exception. As a result, when you look at tribal codes, you'll oftentimes see preambulatory language that talks about how a particular environmental pollutant is a threat to the health and welfare of the tribe.

For those working with tribes who want to ensure that the tribe has jurisdiction over non-Indians, it's very important include some reference to the second *Montana* test into the tribal environmental code. It could help establish tribal jurisdiction if there is a jurisdictional challenge. So, again, as Suzanne and Ethan both mentioned, the *Montana* test is very important, something to be very thoughtful about when developing tribal environmental law.

Next, as Ethan mentioned, a tribe as a state is something that comes under the federal environmental statutes, but what's really interesting about this is that it is a tool that tribes can use where they have to adopt the federal minimum, but they're not held to the federal minimum. They can go above and beyond.

And that's what you'll see in the *Albuquerque v. Browner*³⁷ decision, where the Pueblo just downstream from the city of Albuquerque had more restrictive water quality criteria than the city of Albuquerque did. Ultimately, EPA approved those more restrictive criteria, and they were upheld despite the fact that they were more restrictive than the city of Albuquerque. So, the TAS provisions are a really wonderful starting point to help tribes meet what might be

their environmental goals because they can take the federal minimum and make it more restrictive, as appropriate.

We haven't, however, seen a lot of innovation in the CAA TAS context. A lot of tribes are not engaging in permitting, and those tribes that are doing permitting are largely, in my opinion, cutting and pasting a lot of the federal standards. But where we are seeing some really interesting innovations is in the CWA TAS context, where tribes that have established water quality criteria are being very thoughtful about where they might want more protective water standards—and more protective water standards for culturally important purposes. Again, even though it's technically a federal law, it is a really nice way that a tribe can effectuate its own individual tribal purposes and adapt the law in a way that really works with the tribe. We've seen a lot of tribes doing that in positive ways.

Also, remember that tribal sovereignty persists. So, while the federal environmental laws are applicable to tribes unless they're explicitly excluded, because environmental laws or federal environmental laws are laws of general application, if there isn't an applicable federal environmental law, then there's an area for innovation. Given the federal government is not developing new environmental laws to address emerging environmental challenges, this presents significant opportunity for tribal innovation within the environmental field.

Most tribes are not relying on TAS provisions of federal statutes to accomplish their environmental goals. As a result, when you look at tribal environmental laws, the vast majority are being promulgated by virtue of tribal sovereignty. It's very important to focus on tribal environmental law, and see if you can accomplish your client's goals through usage of tribal law.

A great example of this is adaptation planning. We know that the federal government does not have a nationwide adaptation plan. I don't think we're going to get one anytime soon. Tribes have really stepped into the void and have been innovative in the absence of any type of federal guidance. A good example is the Confederated Salish and Kootenai Tribes, which are located on the Flathead Reservation in Montana. They've got a great innovative adaptation plan, which is a good example of how tribes have incorporated what is important to them into their adaptation plans.

The plan in general talks about how they're going to adapt to the impacts of climate change, but they do it in a really culturally relevant way. There are pages and pages of traditional ecological knowledge contained within this adaptation plan, where they actually went out and interviewed their tribal elders and had the elders talk to them about what resources were important, how these resources would be impacted by climate change, and then they incorporated that into their plan. It has been hugely successful in terms of having a hierarchy of what resources to protect, and how to go about protecting them in a culturally responsible way. This shows a tribe that is innovating using its own tribal sovereignty to protect its environment,

37. 865 F. Supp. 733, 25 ELR 20422 (D.N.M. 1993).

and it is a good example of what tribes can do under their inherent sovereignty.

That was a really brief introduction to tribal environmental law. So again, the broad takeaways are if you're trying to protect a tribal environment in working with a tribal client, you want to look at the common law that the tribe has adopted; you want to look at the tribe's customary law, what are the laws that are specific to that tribe and that nation; you want to look at the tribal code provisions—many tribes have environmental code provisions that are unique; you want to look at how, if at all, the tribes have taken advantage of TAS provisions, and if they have taken advantage of TAS provisions, have they innovated? If they haven't yet taken advantage of the TAS provisions, which the vast majority of tribes have not, then talk to them about how innovating and how using TAS might help them accomplish some of their environmental goals. Taken together, the tribal law can be a really powerful tool to accomplish environmental goals within Indian country, but it is not the only tool.

We've talked about federal law, we've talked about tribal law, now let's briefly talk about international law. Increasingly, since about 2005, tribes have started turning to international law and international tribunals as a way of protecting and advancing their environmental rights. Two documents that are a good starting point to consider indigenous rights under international law are the International Labour Organization (ILO) Number 169,³⁸ and the U.N. Declaration on the Rights of Indigenous Peoples.³⁹ Neither one of these documents is directly applicable to the United States, because the United States has not signed on to ILO Number 169 and the U.N. Declaration on the Rights of Indigenous Peoples is an aspirational document. However, there are rights contained within both documents, such as the right to self-determination, which many scholars and countries have argued have risen to the level of customary international law. If that's true, that is then binding on all nations.

A lot of indigenous scholars are making this argument that the right to self-determination has risen to the level of customary international law and is therefore binding on the United States. That's contained in Article 3 of the U.N. Declaration on the Rights of Indigenous Peoples. There are other protections in the Declaration on Rights of Indigenous Peoples that are helpful to a lot of environmental claims, such as the right to not have forced assimilation or destruction of indigenous culture.

As Cynthia mentioned, a lot of the environmental challenges, such as the Standing Rock Sioux situation with the Dakota Access Pipeline, threaten cultural

resources as well as environmental resources. Also, the Declaration requires that we're not to be forcibly removed from our lands or territories, and that we have a right to our land territories and resources. Even though the Declaration is aspirational under international principles, the United States is not supposed to undermine those principles as a signatory. These are principles that could be very helpful in supporting a tribe's argument and potentially be binding in an international tribunal depending whether or not Article 3, the right to self-determination, is customary international law, and therefore binding on nation states.

But we're definitely seeing tribes increasingly looking to these international documents, and looking to international fora as well. For example, here in the Americas, we have the Inter-American Commission on Human Rights, and the Inter-American Court. Starting in 2005, we saw indigenous groups in the United States and throughout the Americas—the United States and Canada—going to the Inter-American Commission.

A good example of this is the Inuit petition to the Inter-American Commission on Human Rights.⁴⁰ It is really interesting because they filed against the United States, which at the time, 2005, was the largest emitter of greenhouse gases. The argument was that the emission of greenhouse gases was causing climate change, which as a result was literally destroying the Arctic environment upon which the Inuit relied. So therefore, many of the human rights of the Inuit were being violated, thus this was the complaint against the United States.

Now, ultimately, they were not successful in their complaint, but that was not the goal of the Inuit. The Inuit knew at the time, in 2005, that their likelihood of success in front of the Inter-American Commission was low because there was a real nexus problem of demonstrating that U.S. greenhouse gas emissions were contributing to their loss of habitat in the Arctic, so they knew that going in. But what they hoped to accomplish was drawing international attention to this question of human rights and environmental pollution and the linkage of the two, specifically focusing on climate change. In that regard, they were successful, because the Commission held a hearing in March 2007 to directly look into this connection of greenhouse gas emissions and climate change and the violation of human rights. We've seen a dramatic uptick in focusing on that connection internationally since that petition.

Since the time of this decision, we've seen several other tribes go to the Inter-American Commission on Human Rights, and then, if a party is not happy with the decision from the Commission, the party can appeal to the Inter-American Court to get some sort of remedy for environmental challenges. For example, we've seen the Dann

38. International Labour Organization, *Indigenous and Tribal Peoples Convention (C 169)*, June 27, 1989, 28 I.L.M. 1382 (1989), available at <http://www.refworld.org/docid/3ddb6d514.html>http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.

39. *Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007), available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

40. *Petition to the Inter American Commission on Human Rights Seeking Relief From Violations Resulting From Global Warming Caused by Acts and Omissions of the United States* (Dec. 7, 2005), <http://www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/finalpetitionicc.pdf>.

sisters⁴¹ and their claims to the right to have land access for grazing their horses. More recently, we've seen the Navajo Nation bring their complaint⁴² against the United States for uranium mining within the Navajo Nation and the resulting pollution to the Inter-American Commission. We've seen many other indigenous groups throughout the Americas, not just the United States, take advantage of the commission and the court.

This is a growing area of interest for many tribes. It's something we should keep an eye on, because there is potentially this international option to pursue depending on what the tribe's environmental goals may be.

Cynthia Harris: We have a few minutes for questions.

Audience Member: For the majority of tribes that haven't accepted TAS, isn't that a case for the federal government to start and approve a federal implementation plan under the CAA and the CWA, or is there any hope for the states coming in in those situations?

Ethan Shenkman: Typically, if it's Indian country, there's not a role for states, and it would be EPA's responsibility. There are various programs that EPA has for various kinds of permitting regimes under the CAA and CWA in Indian country.

Audience Member: What barriers are tribes expressing in not completing or applying for TAS, and does EPA have any capacity to address any of those barriers?

Ethan Shenkman: I want to caveat my previous answer, which is that there are statutes that sometimes give states authority in Indian country that they don't normally have. When they're operating on one of those special regulatory regimes that Congress has set up for states to have power in Indian country, then there might be a different answer.

With respect to why more tribes have not taken advantage of the ability to assume program responsibility under TAS provisions, there are probably a slew of factors at play. Tribes may not have the resources to run a program. They may not have the capacity in terms of the staff, the expertise, or the legal and regulatory infrastructure. I think there are probably tribes that don't want to assume this responsibility. Obviously, this is not something that they're required to do. It's an optional authority that tribes can take advantage of.

There could also be legal impediments in terms of what's involved in the application process. And I think sometimes tribes are understandably nervous about teeing up issues that relate to their authority in Indian country or the scope

of their Indian country, or other things that might come out of the application process. They're being risk-averse. And I assume there are some tribes who do their own internal cost-benefit analysis and would rather devote their resources to other things.

Elizabeth Kronk Warner: I agree with all of that. Every tribe is in a different situation, but those are all explanations that I've heard from various tribes. I've also heard that a lot of tribes wish they had done their TAS status after the fact, Standing Rock being a good example of that. But that was a good overview of the obstacles a lot of tribes face.

Suzanne Schaeffer: I think what Ethan mentioned about changing the CWA, TAS guidance, to eliminate extensive *Montana* analysis, hopefully, will help. In fact, I'm working with a tribe now on CWA and TAS status. But there are all kinds of reasons, and I think it's largely resource issues.

Cynthia Harris: Here's a question that's a little more general. An audience member asks about the mandate for meaningful consultation policy, and if there's any further guidance on what that means, maybe an example of when it was or wasn't enough. Then, she specifically asks if consultations ever changed an EPA decision, specifically because of consultation with the tribe.

Ethan Shenkman: My advice to a tribe is to think carefully about the timing of when you request consultation, and the level at which you request consultation to make sure, first of all, that you're early enough in the process so that your consultation occurs well before decisions are made. Tribal consultation needs to be meaningful. If you're coming in very late in the decisionmaking process or after the fact, it's much less likely to have an influence.

I think you also don't want to go in, necessarily, too early, because you want to learn from the federal agencies what they're thinking and where they are in the process. You also want to think carefully about at what level you are seeking consultation. Sometimes, tribes will want to speak directly with the Administrator of EPA, but I think you want to target your consultation to either the region or headquarters at the right level for the situation. Make sure all the right decisionmakers are there, *and* make sure that you're involving other federal agencies who may potentially have a say in that decision in the consultation process.

Suzanne Schaeffer: I agree with that. We have a situation where it's a couple different federal agencies, not EPA in this case, where we really need to have consultation on behalf of this tribal client. We're actually using Interior to try to help us with this other agency that has less experience in consultation. Even though they have a good consultation policy, they haven't used it yet. We're very concerned that they're kind of thinking about and considering decisions, and they haven't consulted with tribes.

41. *The Dann Case Before the Inter-American Commission on Human Rights: A Summary of the Commission's Report and Its Significance for Indian Land Rights* (July 2006), available at <http://www.msubillings.edu/cas/NAMS/taliman/1%2015%20Dann%20Case%20Inter-American%20Comm%20on%20Human%20Rights%20summary.pdf>.

42. April Reese, *Navajo Group to Take Uranium Mine Challenge to Human Rights Commission*, N.Y. TIMES (May 12, 2011), <http://www.nytimes.com/gwire/2011/05/12/12greenwire-navajo-group-to-take-uranium-mine-challenge-to-33718.html?pagewanted=all>.

So ultimately, consultation doesn't give you a right to sue upon. But you really have to do everything you can to try to get in there before they make the decision. We basically meet with people at headquarters. We try to meet with people in the regions. We try to make sure we get as many people as possible understanding where our client's coming from.

Elizabeth Kronk Warner: I would add that Standing Rock is a cautionary tale on what not to do in terms of consultation. We'll see how much of a victory it really was on their National Environmental Policy Act (NEPA)⁴³ claims. But up until then, they've been completely unsuccessful in all of their emergency injunction claims. The reason is because of this really damning decision from the District Court of D.C.,⁴⁴ where in about 20 pages, the court outlines all of the meetings that the Tribe missed in consultation with the U.S. Army Corps of Engineers, how the Tribe failed to show up again and again and again, and didn't show up really until 2015. At that point, the Corps

was really far along, and it was difficult for the Tribe and Corps to engage in effective consultation.

So, you don't want your tribal client to be like Standing Rock, and then get 20 pages of meetings that your tribal client did not show up to. Of course, Standing Rock's argument was, well, the method of consultation wasn't the method the Tribe desired. But I think the takeaway is you have to show up and make that argument, that it is not how you want to consult and explain how you do want to consult.

It's not enough to just miss meetings, but they missed meetings for years. So, it's really important to show up, and if the method of consultation isn't what the tribe wants, explain what the tribe wants, but you have to show up and actually make that argument.

Ethan Shenkman: I would say from the perspective of tribes, consultation is an art form, and that you want to be strategic about how you engage. It can really have an impact on agency decisionmaking if you do it right.

Cynthia Harris: Thank you all so much.

43. 42 U.S.C. §§4321-4370h; ELR STAT. NEPA §§2-209.

44. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534, 2016 U.S. Dist. LEXIS 121997, 47, 20035 (D.D.C. 2016).