

Federal Indian Law and Policy

Understanding Jurisdiction, the Federal Trust
Responsibility and Consultation
Requirements

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Session Objectives

- Provide a basic overview of key principles of federal Indian policy and federal government relationship with tribes
- Provide a basic overview of key principles of federal Indian law (with focus on jurisdictional issues)
- Discuss application of legal and policy principles to EPA CAA programs

Indian Tribes

- Federal Recognition
 - U.S. Department of the Interior, Bureau of Indian Affairs list
 - Over 560 federally-recognized tribes
- Non-federally-recognized tribes
 - Some may be seeking federal recognition
 - Some may be recognized by states

Indian Country

- Legal term defined at 18 U.S.C. Section 1151
- Includes Reservations and other forms of Indian country
- Generally a principal area of tribal government operation

Some Important Eras in Federal Indian Policy

- Treaty-Making Among Governments
- Removal to Reservations
- Assimilation and Allotment
- Reorganization
- Termination
- Self-Determination (Current Era)

1984 EPA Indian Policy

- Support Tribal Self-Government
- Work Directly with Tribes on a Government-to-Government Basis
- Recognize Tribes as Primary Parties for Environmental Decision Making for Reservations
- Assist Tribes in Assuming Regulatory and Program Management Responsibilities for Reservations
- Reaffirmed by Administrator Jackson on 7/22/09

1994 Presidential Memorandum (59 FR 22951)

- Recognizes Government-to-Government Relationship Between Federal and Tribal Governments
- Calls for Consultation with Federally-Recognized Tribal Governments Prior to Actions that Affect Tribes

*Executive Order 13175 (65
FR 67249)*

- Establish Regular and Meaningful Consultation with Tribal Governments on Policies That Have Tribal Implications
 - Rules, Proposed Legislation, Other Actions that have Substantial Direct Effects
- Strengthen Government-to-Government Relationships with Tribes
- Reduce Imposition of Unfunded Mandates Upon Tribes

*Presidential Memo –
11/5/09*

- Commitment to regular and meaningful consultation and collaboration with Tribes
- Requirement for agency plans of action to implement EO 13175
- Designation of appropriate agency official to coordinate implementation of the plan

EPA Action Plan

- AA for OIA (now OITA) designated as EPA official with principal responsibility for EPA's implementation of EO 13175
 - Designation of actions that call for consultation
 - Evaluation of adequacy of consultation
- Preparation of EPA Consultation Policy
 - Broad view of EO 13175 and "policies that have tribal implications"
 - Consultation as process of meaningful communication and coordination with tribal officials on matters of interest to tribes and EPA

Draft EPA Consultation Policy

- Establishes national guidelines
- Program and Regional policies must be consistent with national policy
- Describes actions that call for consultation, the consultation process, roles and responsibilities, accountability
- Status

EPA Activities In Indian Country

- Capacity Building
- Authorization of Tribal Programs
- Direct Implementation By EPA
- Cooperative Approaches to Implementation

Tribes and EPA Statutes

- Statutes Authorizing EPA Approval of Tribal Programs
 - Explicit – CAA, CWA, SDWA
 - Implicit – TSCA, EPCRA
 - *Backcountry Against Dumps* RCRA Case
- Statutes Providing a Special Role for Tribes
 - CERCLA, FIFRA
- Statutes Authorizing Funding for Tribal Programs – IEGAPA, Media-specific

Tribal-Specific Eligibility Criteria

- Federal Recognition
- Government Exercising
Substantial Powers
- Jurisdiction
- Capability

What Is Jurisdiction

- Area of Authority
- Jurisdiction over Geographic
Area
- Jurisdiction over Subject Matter
- Jurisdiction over Persons

*Geographic Area:
Indian Country*

- Indian Country: Legal term defined at 18 U.S.C. Section 1151
- Includes Reservations (formal and informal); Dependent Indian Communities; Individual Indian Allotments
 - In total, an area about the size of New England
- What about Ceded Territory and Tribal Usufructuary Rights?

*Subject Matter: EPA
Programs*

- EPA generally interprets federal environmental programs to extend nationwide, including Indian country
- Implementation of many EPA programs requires jurisdiction/authority

Persons Residing in Indian Country

- Members of the Tribe
- Non-Members (Indian or Non-Indian) of the Tribe

Jurisdiction

- Tribal
- State
- Federal

Tribal Jurisdiction

- Over Members and Territory Generally
- Over Non-Members on Fee Lands
 - Inherent Authority – The *Montana* Test
 - Delegated Authority – The Clean Air Act
- Criminal Authority – Non-Indians; ICRA
 - TAR Sections 49.7(a)(6), 49.8

Inherent Tribal Authority over Non-Members on Fee Lands

- Supreme Court Case Law – Application of the *Montana* Test
 - *Hicks* issues
- EPA's Approach – Serious and Substantial Impacts
- Flathead Reservation Water Quality Standards Litigation; Other Cases

Delegated Tribal Authority

- Congressional Authority to Delegate
- Express Congressional Language
- Clean Air Act/Tribal Authority Rule Litigation

State Jurisdiction

- States Generally Lack Jurisdiction in Indian Country
- Congress Can Extend by Statute
 - SAFETEA (Oklahoma)
 - MICSA (Maine)
 - Puyallup (Washington)
- Non-members on Fee Lands?
- EPA's Approach to State Program Approvals
- Boundary Issues

Federal Jurisdiction

- Generally Broad Jurisdiction in Indian Country
- Federal Authority Over Tribal Members, Non-Members, Trust Land, Fee Land, Etc.

Cooperative Approaches to Jurisdiction

- Primacy Entity Needs a Source of Authority
- A Tribe Cannot Give Away its Jurisdiction to a State Simply Through A Cooperative Agreement
- Examples: Permitting; Others

Litigation

- Regarding EPA Actions on Tribal Program Applications
- Regarding EPA Actions on State Program Applications
- Regarding EPA Direct Implementation
- Others

Responsibility to Federally-Recognized Tribes

- Arises from Treaties, Statutes, Executive Orders, Historical Relations Between Federal Government and Tribes
- General Component of Trust Responsibility
- Specific Component of Trust Responsibility

Tribal Consultation

- Process of meaningful communication and coordination with tribal officials prior to EPA action
- Types of relevant EPA actions
- Timing of consultation
- Means of consultation
- Accountability

Application of Principles to CAA – Tribal Capacity Building

- Capacity Building
 - EPA Provides Funding to Tribes
 - EPA Provides Training to Tribes

*Application of Principles to
CAA – Authorization of
Tribal Programs*

- CAA Section 301(d); Tribal Authority Rule
 - Sections 110(o) TIPS; 164 (c) Redesignations
- Congressional Delegation for Reservations
- Tribal Programs Over Non-Reservation Areas
- Processing Tribal Program Applications: 40 C.F.R. Part 49 and EPA's TAS Strategy

*Application of Principles to
CAA – Direct
Implementation By EPA*

- CAA 301(a), (d)(4); Tribal Authority Rule § 49.11
- National Rules
- Regional Rules
- Source-Specific Approaches
- Relevance of CAA references to states

*Application of Principles to
CAA – State
Implementation*

- EPA Approach to State Program Approvals
- Washington/Puyallup
- Practical Considerations

*Application of Principles to
CAA – Cooperative
Approaches*

- Tribes Assist EPA with Implementation
- Tribal/State/EPA Approaches
- Southern Ute/Colorado

*Application of Principles to
CAA – Consultation With
Tribes*

- Policy and Legal Bases for Tribal Consultation
- Consider Impacts on Tribes Early in Action Development Process
- Work With EPA's Tribal Program Experts
- OITA Oversight

*OGC Indian Law
Contacts*

- Cross-Cutting Issues Law Office
- Air and Radiation Law Office