

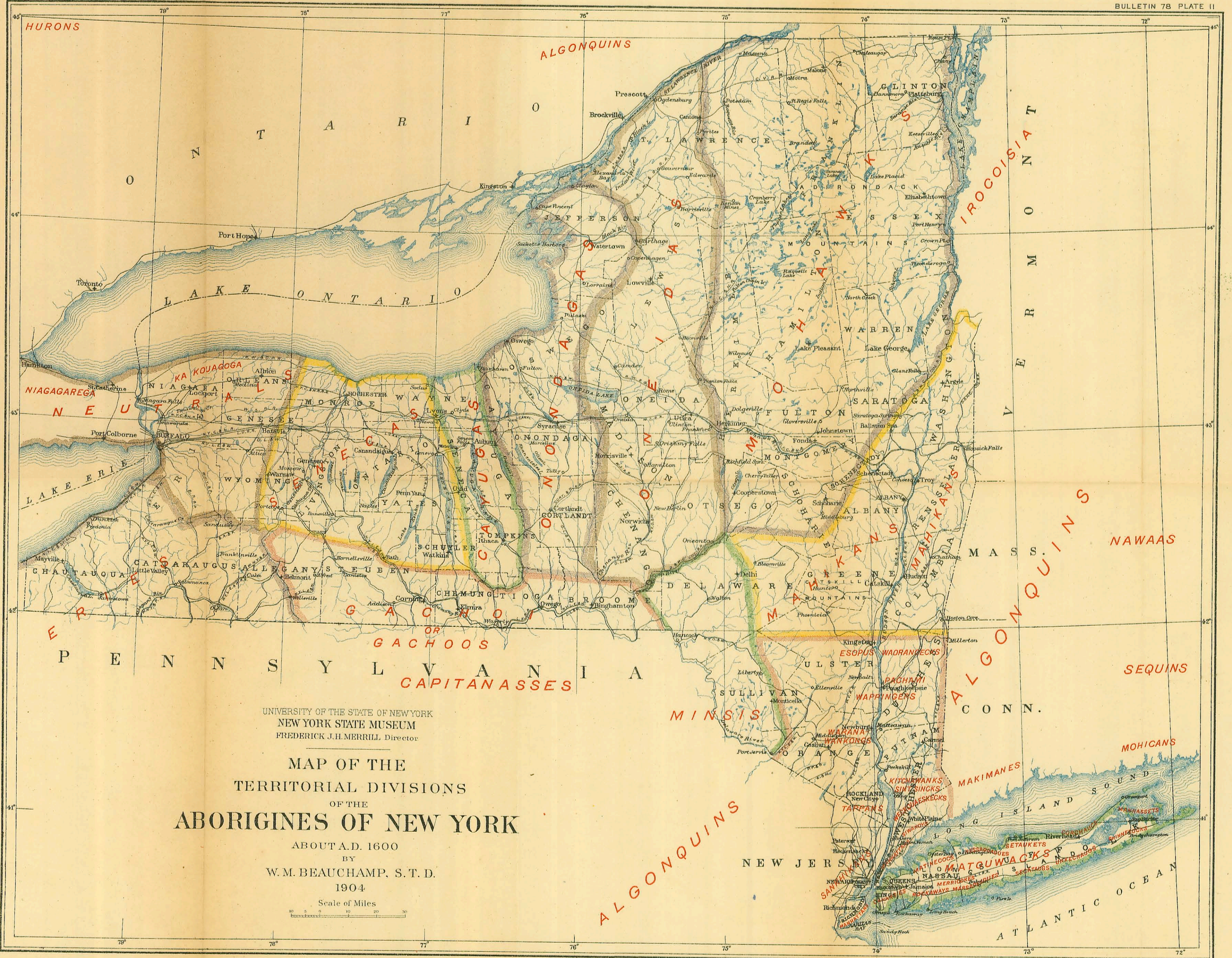
**Beyond Standing Rock:
The Intersection of Tribal and
Environmental Law**

**Presenters:
Joseph Heath, Esq.
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**Moderator:
Amy K. Kendall, Esq.**

**BEYOND STANDING ROCK: THE INTERSECTION OF INDIGENOUS
NATIONS AND ENVIRONMENTAL LAW
MATERIAL FOR PRESENTATION BY
JOSEPH J. HEATH, ESQ, ONONDAGA NATION GENERAL COUNSEL:**

- A. Wm. Beauchamp map of Indigenous territories in New York, before colonization:
- B. Red paper on Treaties;
- C. Red paper on Nations not tribes;
- D. 1st ¶ of 2005 Onondaga Nation Land Rights Action Complaint;
- E. Map of Superfund sites in and around Onondaga Lake;
- F. U. S. Fish & Wildlife article on Traditional Ecological Knowledge;
- G. NYS DEC Consultation with Indian Nations Policy.



UNIVERSITY OF THE STATE OF NEW YORK
NEW YORK STATE MUSEUM
FREDERICK J.H. MERRILL Director

**MAP OF THE
TERRITORIAL DIVISIONS
OF THE
ABORIGINES OF NEW YORK**

ABOUT A.D. 1600
BY
W.M. BEAUCHAMP, S.T.D.
1904

Scale of Miles
0 5 10 20 30

**A BRIEF HISTORY OF HAUDENOSAUNEE
TREATY MAKING
AND
THE OBLIGATIONS OF THE UNITED
STATES TO PROTECT HAUDENOSAUNEE
LANDS
AND TO NOT DISTURB THE FREE USE AND
ENJOYMENT THEREOF:**



March, 2012

In Article VI, the United States Constitution clearly mandates that: “[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . .” The United States Senate has recognized that the Constitution was heavily influenced by and modeled after the Haudenosaunee Confederacy’s founding principles, contained in the Great Law of Peace.

Before reviewing a more complete history of Haudenosaunee treaty making, we will begin with the most recent treaty: the 1794 Treaty of Canandaigua, which was pursued by President Washington, because he very much needed to ensure that Haudenosaunee warriors would not join in the Ohio Indian wars, in which his armies were being defeated. Washington summoned the Six Nations Chiefs to Canandaigua by sending out wampum strings, as required by Haudenosaunee diplomatic protocol. He also had Congress appropriate the funds necessary to create a wampum belt to commemorate the Treaty.

In Article IV of Canandaigua, after recognizing and affirming the territory of the Haudenosaunee Nations, the United States unequivocally committed to: “never to claim the same, not to disturb them, or any of the Six Nations, or their Indian Friends residing thereon, and united with them, in the free use and enjoyment thereof”

This commitment by the fledgling United States to not disturb the Six Nation, or the free use and enjoyment of their territories, was absolutely consistent with the history of Haudenosaunee treaty making with the European colonial powers and with the 13 colonies in the mid to late 18th

century.

The first treaty that the Haudenosaunee entered into with a European power was the Guswentha, or the Two Row Wampum, which was signed in 1613 with the Dutch, near Albany, New York. As with all treaties, it was fundamentally about trade and it clearly established an equal relationship, with both sides committing not to interfere with the other's government or laws; and it was commemorated with the making of a wampum belt.

The message of the Two Row Wampum Belt is important, as it contains two rows of purple wampum beads ruling parallel across a background of white beads. These two rows symbolize the two governments and cultures on an equal footing and their mutual commitment to respect each other and not to pass laws that would interfere with the other.

The Two Row is the fundamental basis of all Haudenosaunee diplomacy and treaty making which continued from 1613 right up to 1794 and Canandaigua. The Two Row also established a "covenant chain" to bind the two governments, cultures and peoples in peace, with the commitment to periodically polish this chain of peace and friendship, as the Haudenosaunee did in 1701 and 1768 with the British.

From the start, the Haudenosaunee unity of several Nations into one unified government was reflected in the thinking and actions of the Americans. In 1754 Benjamin Franklin proposed the Albany Plan of Union, which was one of the first salvos in the colonies' struggle for independence from British colonial rule. Franklin had visited the Haudenosaunee in 1744 and 1753 and the unification of the thirteen separate colonies proposed in the

Albany Plan of Union was modeled after the Haudenosaunee Confederacy, to the extent that Franklin proposed to call the new, unified legislature the “Grand Council.”

The importance of the Haudenosaunee to the Americans’ revolutionary struggle for independence and unity was again clearly reflected in 1775 in the Articles of Confederation and Perpetual Union, which Franklin proposed on May 10, 1775. This was after blood had been shed in Boston and after it was clear that independence would only be won with unity and with armed struggle. So, as the colonies prepared for this inevitable war with Britain’s colonial army, Franklin proposed this first version of the Articles that were later modified and adopted in 1777. In his 1775 proposal, Franklin included this statement in Article XI:

A perpetual alliance, offensive and defensive, is to be entered into as soon as may be with the Six Nation; . . . their land not to be encroached on, nor any private or Colony purchases make of them hereafter to be held good; nor any contract for lands to be made, but between the Great Council of the Indians at Onondaga and the General Congress.

So, we see clearly that these principles of peace and friendship and non-interference into the Haudenosaunee territories were fundamental parts of the formation of the United States, and these principles remained the basis for the treaties with the Haudenosaunee after independence: the 1784 Treaty of Fort Stanwix, the 1789 Treaty of Fort Harmor and the 1794 Treaty of

Canandaigua. The oft repeated commitment by the young United States to the Haudenosaunee, not to disturb them in their territories and to protect their territories, was also the focus of President Washington's December 29, 1790 speech to Cornplanter and other Seneca Nation leaders. Washington was responding to an earlier speech by Cornplanter, and to statements made that summer to Timothy Pickering at Tioga by Haudenosaunee Chiefs, about the on-going disturbance caused by attempts to take and settle upon their land:

I the President of the United States, by my own mouth, and by a written Speech signed with my own hand Speak to the Seneka Nation, and desire their attention, and that they would keep this Speech in remembrance of the friendship of the United States. . . . That in future the United States and the Six Nations should be truly brothers, promoting each other's prosperity by acts of mutual friendship and justice. . . .

"Here then is the security for the remainder of your lands. No State nor person can purchase your lands, unless at some public treaty held under the authority of the United States. The general government will never consent to you being defrauded. But it will protect you in all your just rights.

Hear well, and let it be heard by every person in your Nation, That the President of the United States declares,

that the general government considers itself bound to protect you in all the lands secured you by the Treaty of Fort Stanwix. . . .

If however you should have any just cause of complaint . . . the federal Courts will be open to you for redress, as to all other persons. . . .

Remember my words Senekas, continue to be strong in your friendship for the United States, as the only rational ground of your future happiness, and you may rely upon their kindness and protection.”

Given all this history and all of these promises, how is it that

- the United States have not protected the treaty lands of the Haudenosaunee?
- the United States courts have refused to live up to the treaties and find justice for the illegal takings of Haudenosaunee lands?
- the United States continues to disturb the Haudenosaunee by passing laws that interfere with their trade and free use and enjoyment of their lands?

Honor the treaties.

Let us put our goods minds together to find solutions that are good for all and for the generations yet to come.

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NATIONS ARE SOVEREIGN; THEY ARE NOT “TRIBES”:

Over the past 35 + years since I have been fortunate enough to have served as General Counsel for the Onondaga Nation. In 1998, I was asked by the Onondaga Chiefs to author a law review article on their diplomatic resolution of the excise tax issue with then Governor Pataki over a year and a half period, which resulted in the May 1997 signing of a New York State/Haudenosaunee Trade and Commerce Agreement, (46 Buffalo Law Review 1011, 1998). Interestingly, despite over two centuries of difficulties in this area, in this historic Agreement the state accepted the Haudenosaunee as Nations and used that label, rather than *tribes*.

The last sentence in the first footnote on this article states: “The more substantive terms *nation* and *people* will be used collectively in their international law sense, rather than the pejorative term *tribe*.”; and the last sentence of the second foot note states: “In the past 25 years, as they have struggled to reaffirm their sovereign status, the Haudenosaunee have endeavored to reject these colonial and imperialist terms” (*Id.* at 1012.)

So it is important to understand that, to the Haudenosaunee, the use of the term *tribe* means that they are not be accepted as sovereign, independent Nations. However unintentional the continued use of the term *tribe* may be, its use will be interpreted as disrespectful and insulting by traditional Haudenosaunee.

The treaties of 1784, 1789 and 1794 were between sovereign Nations:

The fledgling federal government entered into three treaties with the “Six Nations”, the last of which was the 1794 Treaty of Canandaigua, which, in Charles J. Keppler’s book, *Indian Treaties, 1778-1883*, is entitled: “Treaty with the Six Nations, 1794”. Although this treaty has been repeatedly violated by the non-Native side, it remains in effect and is actively celebrated in Canandaigua, New York, by both sides each November 11th, its anniversary. The federal government knew and continues to know that the Haudenosaunee are Six

Nations.

Further, as we all know, the United State Constitution sets forth very clearly that "treaties are the supreme law of the land," because of the abundantly clear wording of Article VI, Section 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

With this wording, I would submit that the Constitution mandates that state officials honor the treaties, and particularly that they honor the Haudenosaunee requests to be referred to as Nations.

New York State's historical disregard for federal laws and deliberate policy to refuse to accept the Haudenosaunee as Nations:

Let us try to think back to 1783 and the Treaty of Paris with Great Britain which ended the Revolutionary War: New York State effectively only had settlements as far west as what is now Herkimer ("German Flats"). The state was broke from the war and could not even pay its soldiers. Therefore, the state had an insatiable thirst for Indian lands. This need was so great that New York knowingly violated the Constitution; clear federal laws, such as the 1790 Trade and Intercourse Act (today 25 USCA § 177); the treaties; and written warnings from George Washington's administration. These violations are the subject of the land rights litigation.

In this period, in July of 1784, a New York representative to the Continental Congress, James Duane, wrote a letter to then New York Governor, George Clinton. Duane advised that the State abandon the centuries old practice of diplomatic treaty making with the Haudenosaunee Nations, which had been employed by the Dutch, the French and the English. Duane went on to be a delegate to the Constitutional Convention and later to be Mayor of New York City.

In his July 1784 letter to Governor Clinton, Duane advised that New York should significantly alter the manner in which it related to the Haudenosaunee, because such an alteration would facilitate the taking of their vast holdings of

land. Duane wrote that Clinton should no longer use the ceremonies and protocol, such as wampum exchange, treaty councils, etc.: "*it would be wise to bring them to adopt, gradually, our forms.*" Duane continued: "*I would use neither Belts nor Strings [of wampum] in any communications. Instead, all messages or communications should be signed and sealed or both.*" ¹

Most importantly, for this discussion, Duane then advised:

I would never suffer the word "Nation" or "Six Nations" or "Confederates" or "Council Fire at Onondaga" or any other form which would revive or seem to confirm their former ideas of independence. . . . Treat them as though they were your citizens—therefore—subject to your authority. . . . The style by which the Indians are to be addressed is of moment also. They are used to be called *Brethren, Sachems and Warriors of the Six Nations*. I hope it will never be repeated.

They should rather be taught [that] . . . they have become wretched and destroyed themselves, and that public opinion of their importance had long since ceased.

These colonial period references may seem remote to us in the 21st century, but rest assured that the Haudenosaunee still refer to them constantly and to New York's historic pattern of referring to them in less-than-respectful terms such as "tribes".

Further support for this position is found in the United Nations Declaration on the Rights of Indigenous Peoples.

It is our hope and request that federal, state and local governmental leaders will take some time to reflect on this historical, treaty-based history and the Constitutional background, as you consider the difficulties which will most probably continue with the exclusive use of the pejorative term *tribe*. In the spirit of the Haudenosaunee mandate to "use the good mind" to find solutions, let us try to find a reasonable ground on this issue of such importance to the Haudenosaunee.

Respectfully submitted,

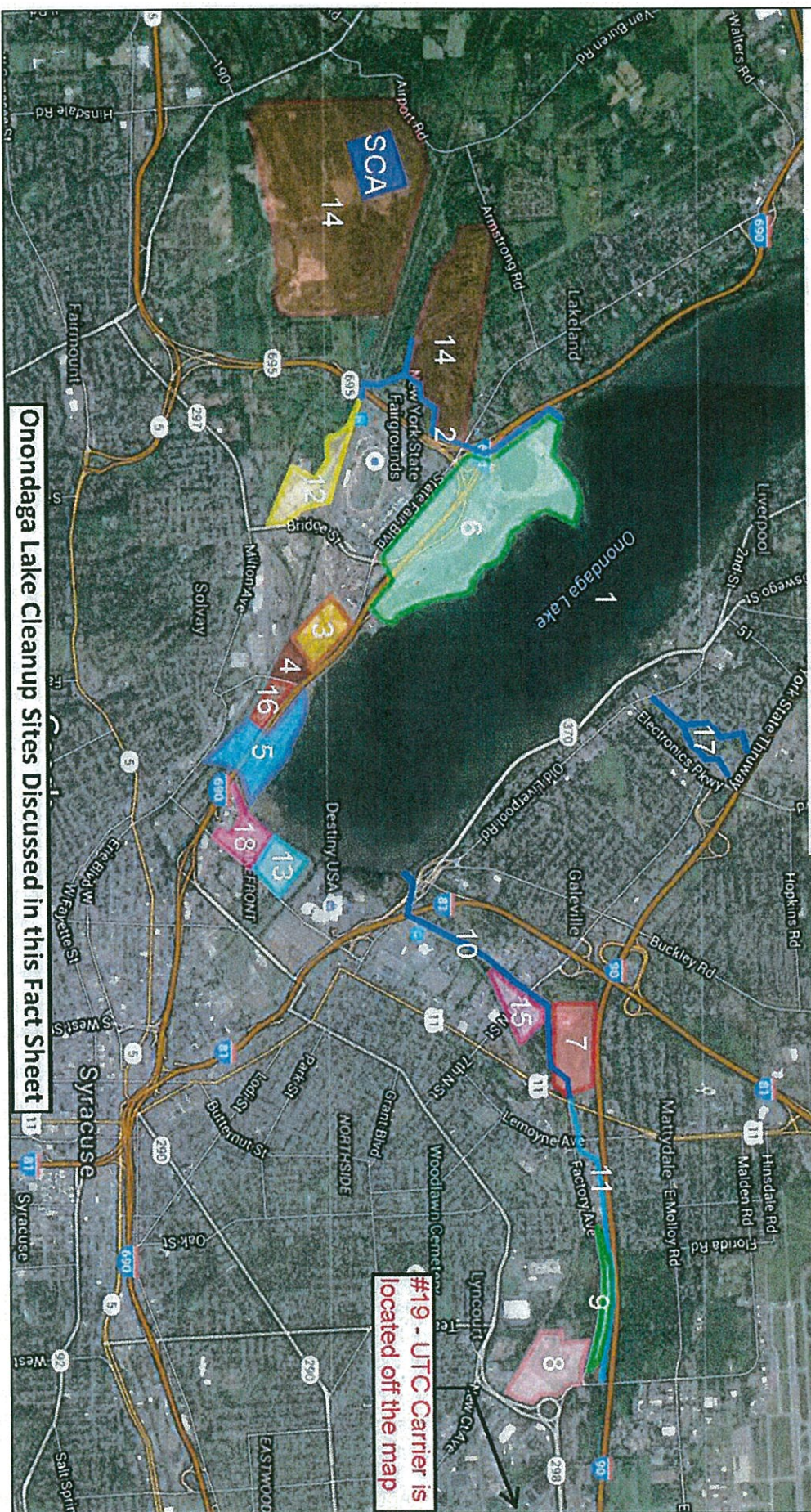
¹ Parenthetically, ten years later, when President Washington wanted to convene the treaty council at Canandaigua, he asked for and received money for Congress to purchase wampum, so that invitation strings could be properly delivered to all of the Haudenosaunee Councils of Chiefs, to invite their participation.

Joseph J. Heath
Joseph J. Heath, Esq.

FIRST ¶ OF ONONDAGA NATION'S LAND RIGHTS ACTION,
COMPLAINT, FILED March 11, 2005;
(This is the framework of all of the Nation's environmental work)

The Onondaga People wish to bring about a healing between themselves and all others who live in this region that has been the homeland of the Onondaga Nation since the dawn of time. The Nation and its people have a unique spiritual, cultural and historic relationship with the land, which is embodied in the Gayanashagowa, the Great Law of Peace. This relationship goes far beyond federal and state legal concepts of ownership, possession or legal rights. The people are one with the land, and consider themselves stewards of it. It is the duty of the Nation's leaders to work for a healing of this land, to protect it, and to pass it on to future generations. The Onondaga Nation brings this action on behalf of its people in the hope that it may hasten the process of reconciliation and bring lasting justice, peace and respect among all who inhabit the area.

- 1 - Onondaga Lake Bottom
- 2 - Geddes Brook/Ninemile Creek
- 3 - Semet Residue Ponds
- 4 - Willis Avenue
- 5 - Wastebed B/Harbor Brook
- 6 - Wastebeds 1-8
- 7 - Salina Landfill
- 8 - General Motors
- 9 - Ley Creek PCB Dredgings
- 10 - Lower Ley Creek
- 11 - Upper Ley Creek
- 12 - LCP Bridge Street
- 13 - Hiawatha Blvd MGP
- 14 - Wastebeds 9-15
- 15 - Crouse Hinds Landfill
- 16 - Willis Avenue Ballfield
- 17 - Bloody Brook
- 18 - Former Roth Steel
- 19 - UTC Carrier



Onondaga Lake Cleanup Sites Discussed in this Fact Sheet

#19 - UTC Carrier is located off the map

Traditional Ecological Knowledge

for Application by Service Scientists

Fishing at Ninepipe National Wildlife Refuge, Montana / USFWS

Working Definition of Traditional Ecological Knowledge

Traditional Ecological Knowledge, also called by other names including Indigenous Knowledge or Native Science, (hereafter, TEK) refers to the evolving knowledge acquired by indigenous and local peoples over hundreds or thousands of years through direct contact with the environment. This knowledge is specific to a location and includes the relationships between plants, animals, natural phenomena, landscapes and timing of events that are used for lifeways, including but not limited to hunting, fishing, trapping, agriculture, and forestry. TEK is an accumulating body of knowledge, practice, and belief, evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (human and non-human) with one another and with the environment. It encompasses the world view of indigenous people which includes ecology, spirituality, human and animal relationships, and more.

The Use of TEK is Nothing New and Continues to Evolve

Local biological knowledge, collected and sampled over these early centuries, most likely informed the early development of modern biology. For example, during the 17th century the German born botanist Georg Eberhard Rumphius benefited from local biological knowledge in producing his catalogue, *Herbarium Amboinense*.

Rumphius' index included the plant's name, illustrations, description for nomenclature, place, discussion of the plant's use to the local inhabitants, stories, folklore, and religious practices. During the 18th century, Carl Linnaeus referenced and relied upon Rumphius's work, and also corresponded with other people all around the world when developing the biological classification scheme that now underlies the arrangement of much of the accumulated knowledge of the biological sciences. In addition, during the 19th century, Charles Darwin, the 'father' of evolutionary theory, on his Voyage of the Beagle took interest in the local biological knowledge of peoples he encountered.

Contemporary naturalists and biologists also acknowledged the importance of TEK as it relates to Western science. For example, C. Hart Merriam was one of the great naturalists of his generation. In 1886, Merriam became the first chief of the Division of Economic Ornithology and Mammalogy of the United States Department of Agriculture, predecessor to the National Wildlife Research Center and the United States Fish and Wildlife Service. He was one of the original founders of the National Geographic Society in 1888 and developed the "life zones" concept to classify biomes found in North America. Although not widely

recognized, C. Hart Merriam was also an amateur anthropologist who spent decades of five to six months each year traversing the country interviewing Native Americans and writing down voluminous records of what they were still able to tell him. He recorded the distribution of words to ascertain the precise distribution of dialects, languages, tribes, families, and their beliefs and customs, similar to the way he recorded the distribution of song sparrows, grizzly bears, and wolves in order to delimit life zones. The idea that TEK has guided modern biology (or Western science) should encourage conservation biologists to investigate TEK more thoroughly.

U.S. Fish and Wildlife Service's Use of TEK

An increasing number of scientists and Native people believe that Western Science and TEK are complementary. Although an integration of indigenous and western scientific ways of knowing



Grizzly bear in Wyoming / USFWS



Polar bear / USFWS

and managing wildlife can be difficult to achieve, successful integrations have occurred. For example, during the 1989 Exxon Valdez oil spill in Prince William Sound, Alaska, Federal and state agencies recognized the vast traditional knowledge of the Native community who could provide detailed information on conditions in the years prior to the spill. The Native community had knowledge of the historic population sizes and ranges of many of the species injured by the spill as well as observations concerning the diet, behavior, and interrelationships of injured species. Optimal use of scientific data and traditional knowledge while increasing the involvement of communities in oil spill restoration enhanced the success of restoration effort.

Most recently, the U.S. Fish and Wildlife Service used both western scientific data and TEK to justify listing the polar bear (*Ursus maritimus*) as a threatened species under the Endangered Species Act. Ecological knowledge provided by Chukotka, Inuit, and other indigenous coastal residents with regard to polar bear habitat, density estimates and population numbers provided valuable data used in making the decision. The final listing rule stated that both traditional and contemporary indigenous knowledge recognized climate-related changes occurring in the Arctic, and these changes are negatively impacting polar bears.

In Alaska, the Service, as well as the State of Alaska Department of Fish and Game Subsistence Division, collect and use TEK for research and monitoring fish populations under the Federal Subsistence Management Program. The primary objective is to collect and catalogue TEK observations from local residents through interviews with local experts on the ecology, harvest, and use of salmon and non-salmon fish species. Another more recent objective has been to produce a drainage-wide portrait of climate and environmental change, emphasizing those that are related to subsistence fisheries. Use of TEK also contributes to local capacity building by utilizing a framework of community involvement in research.

Collection of TEK

Methods for documenting TEK derive from the social sciences and include ethnography. Social scientists and cultural anthropologists use a wide range of techniques to collect ethnographic data. Below are some of the methods that can be used, but they are not necessarily in the order TEK should be collected. Permission from the indigenous government should be received prior to beginning any research project.

Literature review is an important component in any research project. All most all of the Tribes in the United States have been studied by an anthropologist at one time or another. During a literature search, ethnographies as well as collections of stories/myths/legends and songs will be instrumental to one's research for information on societies, clans, keepers of knowledge, ceremonies, uses, processes, and interactions.

The semi-directive interview is a standard ethnographic method for gathering information and can use both an open-ended and close-ended (yes or no questions) format. A skilled and experienced ethnographer can help a novice to determine the appropriate reach

of the interview questions. For example, questions about a species may include such topics as the species itself, its habitat, interactions with other species, traditions and ceremonies surrounding the species or its parts, identification of who or what positions hold knowledge and rights to the species, taboos, cyclical events, and vocabulary.

Focus groups have also been used to provide direction for additional subject matter and identification of experts. Focus groups can be helpful to determine who within an indigenous Tribe holds the knowledge for the species being studied.

Participant Observation is another research method used, which involves extensive time in a culture watching and recording what people do. Participant Observation can be a source of information to verify that which has been spoken and a source of information for that which the Tribe forgets to tell because it is considered either universally known or assumed.

In addition, Linguistics can provide insight into a culture and its view of the natural world. Some Tribes now have written dictionaries for their languages. A native speaker can provide information about words, their meanings, associations and similarities. For example, the Yupik language on Nelson Island in Alaska is very intrinsically tied to the environment – there are words to describe plants, activities, and elements in the Yupik language that are non-existent in other languages. These words help Yupik people to



Alaskan salmon / USFWS

determine how they interact with their immediate environment.

Ethnography is the process which non-indigenous people interpret indigenous people's lifeways. The ethnographic process for collecting TEK results in a wealth of information that must be carefully considered for its use in a specific project. The researcher will get more than he needs and should accept all that is given during the collection phase. The one providing the information during an interview will be sharing lifeway surrounding the topic. Only afterwards should the researcher begin to decide on what is relevant to the project and what is not needed at the time. To try to edit the one speaking would be considered a lack of respect and would potentially stymie the researcher from obtaining information that on second consideration could be instrumental to the project. Retaining all of this information is important because it may be helpful for another project, although it may be more appropriate for a tribal college or other tribal institution to retain the interview transcripts. The researcher could retain those data needed for the project. Ethnographers are experts in this process.

Better Partnerships with Native American Communities

Although the collection of TEK is not government-to-government consultation, TEK is one way federal employees can honor the federal trust responsibility to tribes with regard to resources of mutual interest. Using TEK allows a mutually beneficial relationship to be created between conservation biologists and local people. Indigenous scholars and the scientific community can benefit by mutual exchange of information and interpreting the information collaboratively. A critical aspect of conservation biology and associated environmental management is acquiring information that is not only accurate, but trusted by those

who make and abide by decisions based on that information. In cross-cultural settings, the latter is often difficult. The use of TEK offers one way of bridging gaps in perspective and understanding, especially when used in conjunction with knowledge derived from the scientific method.

TEK and Climate Change

As mentioned above, the Service often uses TEK in Alaska. For example, comments from Yukon River subsistence users in Alaska are beginning to identify a suite of environmental changes attributed to climate change that impact fish, fish habitats, and fishing activities. Observations include the drying-up of wetland areas, lakes, and waterways, as well as changes in weather patterns, which in turn affect river levels and average dates of freeze-up and break-up. What is currently needed is a directed, systematic, drainage-wide effort to collect and understand these changes and their impacts. Traditional Ecological Knowledge is particularly well suited for identifying environmental changes attributable to climate change at the local and regional level. Understanding the potential impacts of climate change on landscapes, wildlife, and subsistence users is important for Federal managers in order for them to carry out the mandates for which the various conservation units were established and to build flexibility

into formal management structures to address a changing environment.

TEK in Journals and Professional Organizations

Interest in TEK has been growing in recent years, partly due to a recognition that such knowledge can contribute to the conservation of biodiversity and sustainable resource use in general. In 2000, the journal *Ecological Applications* produced an invited feature which focused on the subject of TEK in order to encourage the discussion of TEK in environmental management.

The Ecological Society of America has a Traditional Ecological Knowledge Section. The purpose of this Section is to: (1) promote the understanding, dissemination and respectful use of traditional ecological knowledge in ecological research, application and education; (2) to encourage education in traditional ecological knowledge; (3) to stimulate research which incorporates the traditional knowledge and participation of indigenous people and; (4) to increase participation by indigenous people in the Ecological Society of America (see <http://www.esa.org/tek/>).

In addition, The Wildlife Society has a Native Peoples' Wildlife Management Working Group which promotes improved relationships between state/provincial/federal



Yukon River, Alaska / USFWS

wildlife managers and tribal wildlife managers through improved communications. The Working Group provides a forum for tribal and agency wildlife professionals to discuss wildlife management on reservations and aboriginal lands and to share viewpoints on proposed policies affecting wildlife management on those lands. The Working Group also works to enhance wildlife management on and off reservations through joint activities (see <http://joomla.wildlife.org/Native>). The Wildlife Society has a Native Peoples' Wildlife Management Working Group recently held a half day symposium titled; "Implementation of Traditional Ecological Knowledge in Natural Resource Management" at their annual conference in 2010. Another whole day symposium on TEK will be hosted again during The Wildlife Society's 2011 annual conference.

How can I learn more?

Collecting TEK is not for a novice without research and guidance. Reading literature about TEK and speaking with professionals or those experienced in the field can help one determine if one would like to directly pursue collection of TEK. It is a good idea to have a professional mentor for several projects before attempting such work independently. In addition, even though one's intent in the collection of TEK may be altruistic, how the information is used can have unintended consequences. It is important to contact the Regional Tribal Liaison if TEK is pursued. The liaison may have experience with TEK and/or will be able to provide insight when working with Tribes. Indigenous ways of understanding and interacting with the natural world are characterized as TEK, which derives from emphasizing relationships and connections among species. There are a number of books and publications that examine TEK and its strengths in relation to Western ecological knowledge and evolutionary philosophy. Some of these books address the scientific basis of TEK, focusing on differ-

ent concepts of communities and connections among living entities, the importance of understanding the meaning of relatedness in both spiritual and biological creation, and a careful comparison with evolutionary ecology. They may examine the themes and principles informing this knowledge, and offer a look at the complexities of conducting research from an indigenous perspective.

Once TEK is collected, combined with western knowledge, and decisions are being considered for managing the resources, take time to think about what the long-term impacts of these decisions could be beyond addressing the most pressing issue. New methodologies or technologies can have unintended consequences. Case studies are a way of learning to think beyond the hoped for result to the sometimes unintended consequences. The Suggested Reading List below provides information on the topics expressed in this Fact Sheet from several authors.

Reference and Reading List

Agar, Michael H. 1980. *The Professional Stranger, An Informal Introduction to Ethnography*. Academic Press, Inc. San Diego, CA.

Anderson, M. K. 2005. *Tending the Wild - Native American Knowledge and the Management of California's Natural Resources*. Berkely: University of California Press.

Berkes, Fikret. 2008. *Sacred Ecology*, 2nd Edition. New York, NY: Taylor & Francis.

Berkes, F., J. Colding, and C. Folke. 2000. Rediscovery of traditional ecological knowledge as adaptive management. *Ecological Applications* 10:1251-1262.

Berkes, F. 1993. Traditional Ecological Knowledge in perspective. Pages 1-10 in Inglis, J. T., (ed.). *Traditional ecological knowledge: concepts and cases*. International Program on Traditional Ecological Knowledge and International Development Research Centre, Ottawa.

Brettell, Caroline B. 1993. *When They Read What We Write, The Politics of Ethnography*. Bergin and Garvey, Westport, CT.
Cajete, Gregory and Leroy Little Bear. 1999. *Native Science: Natural Laws of Interdependence*. Clear Light Publishers.

Dove, Michael R. and Carol Carpenter. 2008. *Environmental Anthropology: A Historical Reader*. Malden, MA: Blackwell Publishing, Ltd.

Drew, J.A. 2005. Use of traditional ecological knowledge in marine conservation. *Conservation Biology* 19(4):1286-1293.

Fienup-Riordan, A. 1988. A problem of translation: animals as infinitely renewable or finite resource? The writing of culture and the culture of writing. Alaska Anthropological Association 15th Annual Meeting. Fairbanks, Alaska.

Gadgil, M., F. Berkes, and C. Folke. 1993. Indigenous knowledge for biodiversity conservation. *Ambio* 22:151-156.

Handwerker, W.P. 2001. *Quick ethnography*. Alta Mira Press. Lanham. 299pp.

Heizer, R.F. 1979. *Contributions to Native California ethnology from the C. Hart Merriam collection*. University of California, Berkeley.

Holling, C.S. 1978. *Adaptive environmental assessment and management*. Wiley, London, UK.

Hunn, E. 1993. What is traditional ecological knowledge. Pages 13-15 in N.M. Williams, and G. Bains, eds. *Traditional ecological knowledge*. Centre for Resource and Environmental Studies, Australian National University.

Huntington, H. P. 1997. Observations on the utility of the semi-directive interview for documenting traditional ecological knowledge. *Arctic*, 51(3), 237-242.

Huntington, O. H., & Watson, A. May 2008. They're here - I can feel them: the epistemic spaces of Indigenous and Western Knowledges. *Social & Cultural Geography*, Vol. 9, No. 3, 257-281.

Johnson, M., ed. 1992. Lore: Capturing Traditional Environmental Knowledge. Dene Cultural Institute, International Development Research Centre, Ottawa.

Kroeber, A.L. 1955. C. Hart Merriam as Anthropologist. Pp. vii-xiv In C. Hart Merriam and the staff of the Department of Anthropology of the University of California (eds.). Studies of California Indians. University of California Press. Berkeley.

Longley-Cochran, P. 2002. Ethical guidelines for the use of Traditional Knowledge in research and science. AFN Youth and Elders Conference 2002.

Menzies, Charles. 2006. Traditional Ecological Knowledge and Natural Resources Management. Board of Regents, University of Nebraska.

Mihesuah, D. A. 1993. Suggested guidelines for institutions with scholars who conduct research on American Indians. American Indian Culture and Research Journal, 17(3), 131-139.

Miraglia, R. A. 1998. Traditional Ecological Knowledge Handbook: A training manual and reference guide for designing, conducting, and participating in research projects using traditional ecological knowledge. Alaska Department of Fish and Game, Division of Subsistence.

McCracken, Grant. 1988. The Long Interview. Sage Publications, Inc. Newbury Park, CA.

Nadasdy, Paul. 2003. Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-State Relations in the Southwest Yukon. Vancouver, BC: UBC Press.

Nakashima, D.J. 1993. Pages 99-110 in Inglis, J. T., ed. Traditional ecological knowledge: concepts and cases. International Program on Traditional Ecological Knowledge and International Development Research Centre, Ottawa.

Nielsen, M.O., & Gould, L. A. 2007. Non-Native scholars doing research in Native American communities: a matter of respect. The Social Science Journal 44, 420-433.

Oleksa, F. M. 2005. Another Culture/ Another World. Juneau: Association of Alaska School Boards.



Mexican gray wolf / USFWS

Pierotti, Raymond. 2011. Indigenous Knowledge, Ecology, and Evolutionary Biology. Routledge, Taylor and Francis Group. New York.

Punch, Maurice. 1986. The Politics and Ethics of Fieldwork. Sage Publications, Inc. Newbury Park, CA.

Sahota, Puneet Chawla. Research Review Checklist for American Indian and Alaska Native Communities. http://www.fws.gov/nativeamerican/graphics/Research_Review_Checklist_for_AIAN_Communities.pdf

Spicer, Edward H. 1952. Human Problems in Technological Change, A Casebook. Russell Sage Foundation, New York.

Spradley, James. 1979. The Ethnographic Interview. Harcourt Brace Jovanovich College Publishers, United States.

Taylor, J. 2008. The voyage of the Beagle: Darwin's extraordinary adventure aboard FitzRoy's famous survey ship. Naval Institute Press, Annapolis.

U.S. Fish and Wildlife Service. 2008. Endangered and threatened wildlife and plants: determination of threatened status for the polar bear (*Ursus maritimus*) throughout its range; final rule. Federal Register 28212-28303.

U.S. Fish and Wildlife Service. 2010. 2010 Fisheries Resource Management Plan. Anchorage, Alaska.

Wildcat, Daniel R. 2010. Red Alert, Saving the Planet with Indigenous Knowledge. Fulcrum Publishing, Golden, CO.

Wohlforth, C. 2004. The Whale and the Supercomputer - On the Northern Front of Climate Change. New York: North Point Press.

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CP-42 / Contact, Cooperation, and Consultation with Indian Nations

New York State Department of Environmental Conservation

DEC Policy

Issuing Authority: Alexander B. Grannis, Commissioner

Date Issued: March 27, 2009

Latest Date Revised:

I. Summary

This policy provides guidance to Department staff concerning cooperation and consultation with Indian Nations on issues relating to protection of environmental and cultural resources within New York State. Specifically, this policy (i) formally recognizes that relations between the Department and Indian Nations will be conducted on a government-to-government basis; (ii) identifies the protocols to be followed by Department staff in working with Indian Nations; and (iii) endorses the development of cooperative agreements between the Department and Indian Nations to address environmental and cultural resource issues of mutual concern.

II. Policy

It is the policy of the Department that relations with the Indian Nations shall be conducted on a government-to-government basis. The Department recognizes the unique political relations based on treaties and history, between the Indian Nation governments and the federal and state governments. In keeping with this overarching principle, Department staff will consult with appropriate representatives of Indian Nations on a government-to-government basis on environmental and cultural resource issues of mutual concern and, where appropriate and productive, will seek to develop cooperative agreements with Indian Nations on such issues.

III. Purpose and Background

A. General

Nine Indian Nations reside within, or have common geographic borders with New York State: the Mohawk, Oneida, Onondaga, Cayuga, Seneca, Tonawanda Seneca, Tuscarora, Unkechaug, and Shinnecock. The United States formally recognizes all but the Unkechaug and Shinnecock Nations. The State of New York recognizes all nine Nations.

The Mohawk, Oneida, Onondaga, Cayuga, Seneca, Tonawanda Seneca, and Tuscarora are known as the Six Nations or Haudenosaunee. Relations between the Department and the Haudenosaunee will be conducted in the spirit of Peace and Friendship established in the 1794 Treaty of Canandaigua.

All nine Indian Nations and their diverse governments and governmental entities may share mutual interests with the Department concerning environmental and cultural resources. For the purposes of this policy, the Department will communicate with representatives from any Indian Nation government where there are environmental or cultural resource issues of mutual concern.

The Department interacts with Indian Nations in two critical areas of mutual importance: the environment (including air, land use, water, fish and wildlife) and cultural resources (including sacred sites, traditional cultural properties, artifacts, ancestral remains, cultural items, and pre- and post-contact historic sites). It does so in several capacities, including, but not limited to, permit application review, site remediation, hunting and fishing regulation, and the development, implementation, and enforcement of regulations.

It also has care, custody and responsibility for 13 percent of the State's land area, and, as such, is its largest single steward of archaeological resources. The Department wishes to ensure that its actions with respect to the environment and cultural resources are sensitive to the concerns of Indian Nations, and that the perspective of the recognized Indian Nations is sought and taken into account when the Department undertakes an action having implications for Indian Nations or their territories.

B. Consultation

Close consultation ensures that the Department and Indian Nations are better able to adopt and implement environmental and cultural resource protection policies and programs in a manner that is cognizant of shared concerns and interests. Additionally, mutually beneficial cooperation and the appropriate resolution of occasional disagreements or misunderstandings can best be achieved if there is a commitment to regular consultation on environmental and cultural resource issues of mutual concern. While successful intergovernmental communication and cooperation are not guarantees of agreement on every issue, communication and cooperation will ensure a durable, effective working relationship between the Department and Indian Nations.

Communication between the Department and Indian Nations should be direct and involve two-way dialogue and feedback. Meetings between Indian Nation representatives and Department policy and/or technical staff, as appropriate, can increase understandings of any proposed actions and enhance the development of effective outcomes and solutions. Face-to-face meetings are generally desirable; however, phone calls, correspondence, and other methods of communication are also encouraged.

Identifying the need for consultation and making the decision to consult may be difficult to determine in some cases and will vary among the diverse Indian Nation governments. The main guide, though, and one that requires further delineation, is that consultation is required for any Department decision or action which could foreseeably have Indian Nation implications. Consultation can be initiated by either the Department or an Indian Nation. The Department understands that its planning and permitting processes may not be familiar to the Nations and shall take that into account when initiating consultation. To ensure sufficient time for input before decisions are made and actions taken, early involvement of Indian Nations is essential.

Good faith efforts should be undertaken to involve Indian Nations. The Department should strive to ensure that appropriate communication and response for any particular Indian Nation government or governmental entity is provided to any request for consultation.

C. Protection of Environmental Resources

Since all the natural world is interconnected and interrelated, environmental issues transcend geographic boundaries. As such, there are numerous unexplored opportunities

for the Department and Indian Nations to pursue programs and policies through partnership for the betterment of all of our communities and citizens.

The Department and Indian Nations share key roles in protecting and preserving natural and cultural resources important to all citizens, and early consultation and cooperation between the Department and Indian Nations will foster more comprehensive protection and preservation of those resources.

D. Protection of Cultural Resources

The preservation of Native American sacred sites, pre- and post-contact historic sites, and traditional cultural properties, and the preservation, disposition, and repatriation, when appropriate, of Native American ancestral remains, funerary objects, artifacts, cultural items, and cultural property (“Native American Sites and Objects”) displays respect for Indian Nations, and preserves the historical, ancestral, and cultural heritage of Indian Nations and all New Yorkers. Actions approved, undertaken, or funded by the Department may have the unintended and inadvertent result of disturbing or adversely affecting Native American Sites and Objects. Accordingly, early consultation with Indian Nations connected to such Native American Sites and Objects is necessary to ensure proper and respectful treatment and to avoid any irreplaceable loss.

The careful consideration of the preservation, disposition, and repatriation of Native American Sites and Objects is consistent with the State Historic Preservation Act, State Environmental Quality Review Act, the federal Native American Graves Protection and Repatriation Act, and the National Historic Preservation Act.

IV. Responsibility

The Department’s Office of Environmental Justice in the Office of General Counsel will provide oversight to ensure compliance with this policy. It shall assess the policy's effectiveness and initiate changes as needed, and shall appoint an individual to serve as Indian Nations Affairs Coordinator for all matters concerning this policy. The Office of Environmental Justice will maintain a list of current contacts for each Indian Nation, and will provide the contact list and any updates to the list to regional and central office staff.

All the Department's divisions and regional offices will fully cooperate and work closely with the Office of Environmental Justice in the implementation of this policy. Each division and regional office will appoint a single point of contact for Indian Nation matters; and each will identify that individual to the Office of Environmental Justice. Each division and regional office may issue its own guidance to further the implementation of this policy. Such guidance shall be developed in consultation with the Office of Environmental Justice to ensure consistency with this policy and uniformity of application throughout the Department.

The Commissioner and Department staff will strive to meet with representatives of each Indian Nation on an annual basis to continue to foster this cooperative, government-to-government policy.

V. Procedure

This policy is intended solely for the purpose of facilitating intergovernmental cooperation between the Department and recognized Indian Nations and may not serve as a basis for any legal claim against the Department or its employees, agents, or contractors. Nothing in

this policy shall or is intended to modify, diminish, or alter any rights and is not intended to create any right, benefit, obligation, or cause of action, whether direct or indirect, for any person or entity.

A. Contact

Department staff are encouraged to engage in regular contact with representatives of Indian Nations, especially program counterparts, in order to facilitate a cordial and cooperative working relationship. Informal contacts (e.g., telephone calls and in-person meetings) should be conducted on an as-needed basis, without the necessity of prior review or approval. Formal written contacts or contacts resulting in commitments should be coordinated with the appropriate Department executive, Office of Environmental Justice and, if deemed necessary, legal staff.

B. Consultation

Department staff shall consult with appropriate Indian Nation representatives on a government-to-government basis regarding matters affecting Indian Nation interests, with the goal of creating durable intergovernmental relationships that promote cooperative partnerships on environmental and cultural resource issues of mutual concern. As used herein:

- “Consultation” means open and effective communication in a cooperative process that, to the extent practicable and permitted by law, works toward a consensus before a decision is made or an action is taken. Consultation should begin as early as practical, and, where appropriate, consultation should continue through the implementation of such decision or action. Consultation means more than simply informing affected Indian Nations about what the Department is planning. Consultation is a process, not a guarantee of agreement on outcomes. Consultation should not be limited to specific issues or actions, but applied broadly in order to achieve mutually beneficial priorities, programs and interests.
- “Affecting Indian Nation interests” means a proposed action or activity, whether undertaken directly by the Department or by a third party requiring a Department approval or permit, which may have a direct foreseeable, or ascertainable effect on environmental or cultural resources of significance to one or more Indian Nations, whether such resources are located on or outside of Indian Nation Territory.
- “Indian Nation Territory” means all lands within the exterior boundaries of any Indian reservation and all lands held in trust by the federal government for any Indian Nation.

It is expected that Department staff will work with each Indian Nation to identify categories of actions or activities that will likely require consultation. As this policy is implemented, the Department will cooperatively establish with affected Indian Nations the manner and time frame for consultation, and will strive to accommodate the differences in deliberative processes. When a regulatory or policy change is planned that may affect Indian Nation interests, the Department will invite interested Indian Nations to consult on a government-to-government basis. The Department will be receptive to requests from Indian Nations for intergovernmental consultation on actions, policies, and issues within the Department’s authority.

To further achieve proper contact and consultation the Department will develop and conduct sensitivity training of all staff who will or may implement this policy. To the

extent that it is achievable, the development and conduct of such training shall include Indian Nation representation.

C. General Consultation Subjects

1. Environmental Resources

The Department is committed to working cooperatively with Indian Nations to address issues of mutual concern involving environmental resources, whether located on or outside of Indian Nation Territory. The Department recognizes that environmental resources transcend these boundaries, and that protection and preservation of those resources requires close cooperation between the Department and Indian nations. The Department also recognizes that environmental impacts transcend these boundaries and remediation and reduction of impacts should be addressed cooperatively.

Where appropriate, the Department may consider entering into a written cooperative agreement or agreements with one or more Indian Nations where it will achieve protection, preservation, or remediation of such environmental resources. With respect to environmental matters occurring wholly or partly on Indian Nation Territory, the Department shall seek to achieve protection, preservation or remediation of such resources through development of a cooperative agreement or agreements with that Indian Nation.

2. Hunting, Fishing, and Gathering

The Department recognizes that hunting, fishing, and gathering are activities of cultural and spiritual significance to the Indian Nations. The Department is committed to collaborating with Indian Nations to develop written cooperative agreements that protect the rights of such Nations to engage in these activities consistent with the Department's interest in protection and management of the State's natural resources.

3. Cultural Resources

The Department recognizes the importance of Native American Sites and Objects to Indian Nations. Specifically, for example, the Department recognizes the profound connection Indian Nations and their citizens have with their ancestors and their preeminent desire, therefore, to protect them from disturbance. The Department also recognizes that there are locations within the State that have great cultural and pre- and post-contact historical significance to Indian Nations that require similar protection.

The Department, in consultation with each Indian Nation and with the Office of Parks, Recreation and Historic Preservation, will develop a map showing the area of aboriginal occupation of each Indian Nation within the State. When the Department undertakes an action that might affect a Native American Site or Object, including but not limited to a known or potential burial, or pre- or post-contact historic site, or traditional cultural property or sacred site, it will use this information to notify and consult with any Indian Nation claiming interest in the site location, including Nations that formerly resided within the State. Similarly, the Department will

consult with the Indian Nations before it takes any action with respect to any law, regulation or policy that relates to Native American Sites and Objects.

VI. Related References

- State Historic Preservation Act [Article 14, Parks, Recreation and Historic Preservation Law]
- National Historic Preservation Act [16 U.S.C. 470 et seq.]
- State Environmental Quality Review Act [ECL Article 8]
- Native American Graves Protection and Repatriation Act [25 USC 3001 et seq.]

**Annual Meeting of the Environmental and Energy Section
of the New York State Bar Association**

**“BEYOND STANDING ROCK: THE INTERSECTION OF TRIBAL
AND ENVIRONMENTAL LAW”**

Presented by:

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I. Introduction

a. Standing Rock

The building of the Dakota Access Pipeline (“DAPL”), and resulting protests by Native Americans, have highlighted the tumultuous relationship between the United States and Native American tribes. The pipeline is intended to carry oil 1,172 miles from the Bakken oil field in North Dakota to existing pipeline infrastructure in Patoka, Illinois. The DAPL’s projected completion date was the end of 2016, but protests on the Standing Rock Sioux Reservation delayed its completion. The protests were prompted by the potential for oil pollution to contaminate the tribe’s water supply and kill fish and wildlife necessary for tribal members’ subsistence and the alleged lack of adequate environmental assessment of the pipeline by the Corps of Engineers and the owner of the pipeline. In addition to a lawsuit brought by the tribe against the U.S. Army Corps of Engineers, there was extensive media coverage, federal agency involvement and the intervention by Presidents Obama and Trump. The pipeline was completed in April 2017 and the first oil was delivered in May 2017.¹

b. Focus of Presentation

This presentation focuses on the limitations on the authority of tribes in a litigation context relating to environmental threats and damage, and exceptions to those limitations. The presentation will provide a background for a recent decision in which a tribal court found it had subject matter jurisdiction to adjudicate claims involving environmental harm inflicted upon tribal property by energy companies.

¹ Robinson Meyer, *The Standing Rock Sioux Claim ‘Victory and Vindication’ in Court*, *The Atlantic*, June 14, 2017, at 3, 5-6; Walter H. Mengden IV, *Indigenous People, Human Rights, and Consultation: The Dakota Access Pipeline*, 41 *Am. Indian L. Rev.* 441, 442, 452—57 (2017).

II. Tribal Sovereignty

Indian tribes were sovereigns well before the exploration and settlement of North America by Europeans and Americans. Some tribes have histories spanning centuries. Because of their preexisting sovereignty, Indian tribes have governmental powers that derive entirely from that status and not from any affirmative grant of authority by Congress,² referred to as “inherent tribal authority.”³ However, that inherent tribal authority is limited by the Supreme Court through federal common law standards for determining the extent to which the inherent tribal authority has been retained despite the tribes’ dependent status.⁴ The situation giving rise to these standards has been the exercise of tribal regulatory or adjudicative authority over nonmembers. The seminal, “pathmarking case” in that regard is *Montana v. United States*,⁵ which established a presumption that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe, except in certain limited categories of situations.

III. *Montana v. United States*

In 1981, the Supreme Court established the federal principles that govern tribal civil jurisdiction over nonmembers in *Montana v. United States*,⁶ which remains “the ‘pathmarking case’ on the subject.”⁷ The Court essentially found that the existence of tribal sovereign authority over nonmembers was the exception, not the rule. *Montana* involved a claim by the United States and the Crow Tribe that the tribe possessed exclusive jurisdiction within its reservation to regulate nonmember hunting and fishing on nonmember-owned fee lands. Finding no express treaty or

² *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985).

³ *Montana v. United States*, 450 U.S. 544, 565 (1981).

⁴ *National Farmers Union*, 471 U.S. at 851—52.

⁵ 450 U.S. 544.

⁶ *Id.*

⁷ *Nevada v. Hicks*, 533 U.S. 353, 358 (2001) (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997)).

statutory right to such regulatory authority, the Court upheld “the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”⁸ However, it also carved out two possible exceptions to this “general proposition,” commonly referred to as the “*Montana* exceptions:” (1) tribes retain the inherent civil authority to “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;”⁹ (2) a tribe “may also retain inherent power to exercise civil authority over the conduct of non-Indians” if “that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”¹⁰ The Court found neither exception applicable in that case.

Because “efforts by a tribe to regulate nonmembers . . . are presumptively invalid,” a tribe bears the burden of showing that its assertion of jurisdiction falls with one of the *Montana* exceptions when jurisdiction is challenged.¹¹

IV. Supreme Court Cases After *Montana*

Significantly, in *Montana*, the Supreme Court “readily agree[d]” that the tribe had jurisdiction to bar nonmembers from tribal land and recognized that the tribe may place conditions on nonmembers’ entry onto tribal land over and above the authority that tribes have to regulate nonmember conduct on reservation land in general.¹² Since *Montana*, the Court has reaffirmed the concept that “a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands.”¹³ And it has relied on the principle that a tribe can “assert a landowner’s right to occupy and

⁸ 450 U.S. at 565.

⁹ *Id.*

¹⁰ *Id.* at 566.

¹¹ *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008).

¹² *Montana*, 450 U.S. at 557.

¹³ *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982).

exclude.”¹⁴ In *Plains Commerce Bank v. Long Family Land and Cattle Co.*,¹⁵ the Court reiterated that tribes may “exclude outsiders from entering tribal land.”¹⁶ In discussing the *Montana* exceptions, it stated that “the tribe’s sovereign interests are now confined to managing tribal land, protecting tribal self-government, and controlling internal relations.”¹⁷ The regulations permitted in *Montana* “all flow directly from these limited sovereign interests.”¹⁸ “The tribe’s ‘traditional and undisputed power to exclude persons’ from tribal land, for example, gives it the power to set conditions on entry to that land via licensing requirements and hunting regulations.”¹⁹

In light of these repeated affirmations of tribes’ right to exclude nonmembers from tribal lands, tribal courts arguably possess jurisdiction over tribes’ claims for trespass and other invasion and interference of property claims. The Court has described the right to exclude as within the regulatory, rather than adjudicative, authority of tribes.²⁰ But tribal court jurisdiction “turns upon whether the actions at issue in the litigation are regulable by the tribe.”²¹ And “where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts.”²²

V. Cases Interpreting *Montana* in Trespass and Environmental Damage Contexts

a. General Trespass Claims

Several courts have applied *Montana* to situations involving trespass or other invasions of tribal property. Significantly, the notions of trespass and invasions of property have supported tribal jurisdiction in environmental claims, including claims involving the energy industry.

¹⁴ *Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997).

¹⁵ 554 U.S. 316 (2008).

¹⁶ *Id.* at 328.

¹⁷ *Id.* at 334 (quotations, citation, and alterations omitted).

¹⁸ *Id.* at 335.

¹⁹ *Id.* (quoting *Duro v. Reina*, 495 U.S. 676, 696 (1990)).

²⁰ See, e.g., *Plains Commerce Bank*, 554 U.S. at 335.

²¹ *Hicks*, 533 U.S. at 367 n.8.

²² *Strate*, 520 U.S. at 453 (quotation and alteration omitted).

i. *Norton v. Ute Indian Tribe of the Uintah and Ouray Reservation*

In *Norton v. Ute Indian Tribe of the Uintah and Ouray Reservation*,²³ nonmember police shot and killed a Ute tribal member following a pursuit on the Uintah and Ouray Indian Reservation.²⁴ A Ute tribal member and certified law enforcement officer arrived shortly thereafter, but the nonmember officers prevented the tribal officer from accessing the scene.²⁵ The decedent’s parents, his estate and the Ute Indian Tribe of the Uintah and Ouray Reservation sued the officers in Tribal Court, asserting tort claims.²⁶ The Tribal Court complaint claimed that the officers interfered with tribal authority over tribal trust lands. Specifically, it asserted that the nonmember police officers prevented a tribal member and certified law enforcement officer from accessing the site of the shooting or attending to the tribal member as he bled to death.²⁷ The Tenth Circuit found that, “in addition to impinging upon a ‘hallmark of Indian sovereignty’ by trespassing, . . . the officers colorably threatened the ‘political integrity’ of the tribe . . . by improperly asserting their own authority as superior to that of a tribal official on tribal lands.”²⁸

ii. *Attorney’s Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*

In *Attorney’s Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*,²⁹ the Eighth Circuit concluded that a tribal court possessed jurisdiction over a similar trespass claim.³⁰ There, a group of nonmembers from a corporation that provided security and consulting services to casino operators, acting at the directive of a tribal government faction, forced their way into the

²³ 862 F.2d 1236 (10th Cir. 2017).

²⁴ *Id.* at 1241.

²⁵ *Id.* at 1241-42.

²⁶ *Id.* at 1242.

²⁷ *Id.* at 1246.

²⁸ *Id.* at 1246 (citations omitted). The court stressed that it was not deciding whether the tribal court possessed jurisdiction, but merely whether it could “make a colorable claim that it has jurisdiction.” *Id.*

²⁹ 609 F.3d 927 (8th Cir. 2010).

³⁰ 609 F.3d at 940.

tribe's casino and tribal government offices located on tribal trust lands during an intratribal governance dispute.³¹ The tribe brought its tort action against the corporation in tribal court, alleging, among others, a claim for trespass to tribal land and chattels.³² The Eighth Circuit concluded that the tribe's trespass claim sought to regulate the nonmembers' "entry and conduct upon tribal land" and "accordingly stem[med] from the tribe's landowner's right to occupy and exclude."³³ Because the nonmembers' trespass on government offices "directly threatened the tribal community and its institutions," the court held that the actions "threatened the political integrity, the economic security, and the health and welfare of the Tribe."³⁴

b. Trespass and Environmental Claims

i. *Elliott v. White Mountain Apache Tribal Court*

Similarly, in *Elliott v. White Mountain Apache Tribal Court*,³⁵ the Ninth Circuit held that exhaustion of tribal remedies³⁶ was necessary for a trespass claim brought in tribal court against a nonmember who started a forest fire on the reservation.³⁷ The fire merged with an existing forest fire and the combined conflagration destroyed 400,000 acres of land and caused millions of dollars in damage.³⁸ The Ninth Circuit considered the extent of the alleged damages before deciding that a tribe had colorable jurisdiction to enforce regulations prohibiting trespass and requiring a permit to make a fire on tribal land. The court noted that "[t]respass regulations plainly concern a property

³¹ *Id.* at 931-32.

³² *Id.* at 932.

³³ *Id.* at 940 (quotation omitted).

³⁴ *Id.* at 939, 940 (quotation omitted); *see also Plains Commerce Bank*, 554 U.S. at 337 (tribes retain "inherent sovereign authority to set conditions on entry, preserve self-government, [and] control internal relations").

³⁵ 566 F.3d 842 (9th Cir. 2009).

³⁶ Non-Indians may bring a federal common law cause of action under 28 U.S.C. § 1331 to challenge tribal court jurisdiction, *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 485, 850-53 (1985), but a plaintiff must first exhaust tribal remedies. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987); *Nat'l Farmers*, 471 U.S. at 856-57.

³⁷ *Id.* at 849-50.

³⁸ *Id.* at 844.

owner's right to exclude, and regulations prohibiting destruction of natural resources and requiring a fire permit are related to an owner's right to occupy.”³⁹ The court further noted that “the regulations at issue are intended to secure the tribe’s political and economic well-being, particularly in light of the result of the alleged violations of those regulations in this very case: the destruction of millions of dollars of the tribe’s natural resources.”⁴⁰ Because the trespass destroyed the tribe’s natural resources, the court found that the suit was “intended to secure the tribe's political and economic well-being” and thus fit within the second *Montana* exception. *Id.*

ii. *Rincon Mushroom Corp. v. Mazzetti*

Also, in *Rincon Mushroom Corp. v. Mazzetti*,⁴¹ the corporate owner of a five-acre parcel within a tribal reservation sought to enjoin Rincon tribal officials from enforcing tribal environmental and land-use regulations on its property. The tribe offered declarations explaining how activities on the corporation’s property could contaminate the tribe’s sole water source and increase the risk of forest fires that could jeopardize its casino, its principal economic investment.⁴² The court found that the threats set forth in the declarations were sufficient to make the tribe’s assertion of jurisdiction “colorable” or “plausible.”⁴³

iii. *Pawnee Nation of Oklahoma v. Eagle Road Oil, LLC*

(a) Background Facts

The Pawnee Nation is a Plains Indian tribe, with its headquarters located on the Pawnee tribal reserve at Pawnee, Oklahoma. Its tribal jurisdiction covers all Indian and tribal trust land

³⁹ *Id.* at 850.

⁴⁰ *Id.*

⁴¹ 490 Fed. Appx. 11 (9th Cir. 2012).

⁴² *Id.* at 13. The Ninth Circuit noted that it has “held that both forest fires and contamination of a tribe’s water quality are threats sufficient to sustain tribal jurisdiction. *Elliott*, 566 F.3d at 850 (forest fires); *Montana v. EPA*, 137 F.3d 1135, 1139-40 (9th Cir. 1998) (water quality).” *Rincon Mushroom*, 490 Fed. Appx. at 13.

⁴³ *Id.* at 13.

within the boundaries of the original Pawnee Indian Reservation in Pawnee County and part of Payne County, Oklahoma.

The Pawnee Nation has a history spanning more than 700 years. Early in the 18th century, more than 60,000 members of the Pawnee Tribe inhabited the area along the North Platt River in Nebraska. Although dominating the Missouri and Platte areas for centuries, they later suffered from increasing encroachment and attrition by their intruding enemies. In addition, the tribe suffered many losses due to diseases brought by the expanding Europeans. By 1900, their population had decreased to an astonishingly low 636.

After encroachment by white settlers, the Pawnees ceded their territory to the U.S. Government in the 1800s and were removed from Nebraska to an area of Indian Territory in Oklahoma in what is now Pawnee County in 1875. Thereafter, the Pawnee Indian Agency and an Indian boarding school, named the Pawnee Industrial School, were established just east of the present site of the City of Pawnee to impose tribal assimilation, viewed as a nefarious and disdained goal by the Nation over the years. However, the school was closed in 1958 and the land was returned to the Pawnee Nation in 1968. Today, many of the former Industrial School buildings serve as tribal offices and as a home for the Pawnee Nation College. The area is on the National Register as a Historic District and the Nation uses the buildings for governmental and administrative functions, community meetings, cultural meetings and education on a daily basis.

On September 3, 2016, a magnitude-5.8 earthquake shattered the areas around the Pawnee Nation. This is the largest earthquake that has ever hit Oklahoma. The earthquakes in Pawnee since September 3, 2016 have caused substantial cracks to interior and exterior walls, plaster, mortar, ceilings, and windows of the Pawnee Nation's governmental buildings. Normal daily administrative, educational and cultural functions and activities in certain Pawnee buildings were

disrupted or suspended from the damage and the subsequent need for and conduct of inspections and repair work. Tribal members and leaders who use the buildings experienced and continue to experience emotional distress on a daily basis on account of the quakes. Safety concerns exist every time a quake or aftershock hits. Operations must be interrupted or suspended to inspect for possible damage or safety risks. The Pawnee Nation estimates its damages to its buildings caused by the earthquakes to be in the multiple hundreds of thousands of dollars.

(b) Procedural Background

In March 2017, the Pawnee nation sued two oil and gas companies in tribal court alleging that the earthquake damage the Nation sustained was caused by the high-volume injection of fracking wastewater by the two defendants in the surrounding area, awakening fault lines that had been dormant for millennia. Defendants contested subject matter jurisdiction.

Because the Nation lacked any licensing, contractual or other consensual relationship with the defendant oil companies, it argued that the defendants' trespass and invasions of the Nation's property,⁴⁴ through concussions and reverberations resulting from earthquakes caused by their fracking wastewater disposal, impinged upon a hallmark of Indian sovereignty. Because the oil companies' trespass and invasions of property have destroyed and/or severely damaged the tribe's governmental, administrative, educational and cultural buildings, disrupted the functions of tribal members using those buildings and directly threatened the tribal government, tribal community, its economic and financial institutions and the health and welfare of tribal government officials and employees who daily use the tribe's governmental buildings, the Nation's claims fit within the

⁴⁴ The Nation's petition asserts causes of action for trespass, private nuisance, negligence and ultrahazardous activities. At the heart of each cause of action, the Nation argued, is some invasion of or interference with the Nation's property interests.

second *Montana* exception: the “conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”⁴⁵

However, the second *Montana* exception may be invoked only if the challenged conduct could “fairly be called catastrophic for tribal self-government.”⁴⁶ The Nation argued that the conduct at issue more than fairly could be called catastrophic for tribal self-government. The earthquakes in Pawnee since September 3, 2016 have caused substantial cracks to interior and exterior walls, plaster, mortar, ceilings, and windows of the Pawnee Nation’s governmental buildings, creating many health and safety risks and concerns. Normal daily administrative, educational and cultural functions and activities in the Nation’s buildings were disrupted or suspended from the damage and the subsequent need for and conduct of inspections and repair work. In addition, the emotional well-being of those tribal members and leaders who use the buildings on a daily basis have been harmed on account of the repeated and ongoing quakes. Safety concerns exist every time a quake hits. Operations must be interrupted or suspended, at a minimum, to inspect for possible damage or safety risks.

Moreover, the Nation pointed out that Oklahoma courts have considered intangible invasions or intrusions, such as noise, odor, light or electric and magnetic fields, and found that they may constitute trespass if there has been damage to another’s property caused by the intangible invasion or intrusion.⁴⁷

⁴⁵ *Montana*, 450 U.S. at 566.

⁴⁶ *Plains Commerce Bank*, 554 U.S. at 341.

⁴⁷ See *Beal v. Western Farmers Elec. Coop.*, 228 P.3d 538 (Okla. Ct. App. 2009) (“intangible invasions or intrusions, such as noise, odor, or light, *without damage*, may be dealt with as nuisance cases, but usually not trespass”) (emphasis added). *Beal* found that “intangible intrusions on land, such as electric and magnetic fields emitted from power lines, are not actionable as trespasses, *unless they cause physical damage to the real property.*” *Id.* at 541 (quoting 75 Am. Jur. 2d *Trespass* § 27 (2009) (emphasis added)). The court affirmed the lower court’s dismissal implicitly because the plaintiffs failed to show physical damage to their property. *Id.*; see also *Walker v. Apex Wind Constr., LLC*, No. CIV-14-914-D, 2015 WL 348778, at *5 (W.D. Okla. Jan. 26, 2015) (relying on *Beal* to find that plaintiffs did not allege facts to demonstrate physical damage to their real property from noise, an intangible intrusion, so as to constitute an invasion of plaintiffs’ possessory interests sufficient to support a claim for trespass but instead alleged only that

A hearing before the tribal court on defendants' motions to dismiss for lack of subject matter jurisdiction was held on October 27, 2017, and the tribal court found that it did possess subject matter jurisdiction. The case is now moving forward.

VI. Conclusion

Although Native American tribes' inherent sovereign authority is limited, their adjudicatory authority over environmental threats and harm may be exerted depending on whether the elements of the second *Montana* exception are satisfied, i.e., whether the conduct threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe.

wind farm will interfere with their ability to use their property as they see fit); *accord Willams v. Invenergy, LLC*, No. 3:13-cv-01391-AC, 2014 WL 7186854, at *19 (D. Or. Dec. 16, 2014) (applying Oregon law to dismiss trespass claim where plaintiff alleged no physical consequence to his property but instead alleged only that wind farm's vibrations, lights and noise affected his personal comfort and convenience).