



# Indian Law Newsletter



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## A WELCOME FROM OUR CHAIR DREW POLLOM



*Hello, fellow Section Members!*

**I** am honored to announce our first Indian Law Section newsletter since spring 2020. By restarting this vital resource, we hope to provide a forum to discuss not only essential topics in Indian Country but also to highlight each other and our future colleagues in Indian law.

In this newsletter, you will learn about important topics in Indian employment law from Shelby Stoner, energy law from Greg Guedel and Philip Viles, intellectual property from Carmen Bremer, and cumulative environmental impacts in post-World War II Alaska Native communities from student Justin Mack. I am grateful to the authors of this spring 2025 newsletter, who are partners in the relaunch of the ILS newsletter.

The Executive Committee has been busy, rising to the membership's challenge to support the next generation of Native lawyers and Indian law practitioners. In November, the Executive Committee voted to expand its scholarship budget from \$25,000 to \$60,000. That money was then divided into grants that will go to support the Native American Law Student Associations at the University of Washington, Seattle University, and Gonzaga; scholarships for Native students at the University of Washington and Seattle University; the Northwest Indian Bar Association; and aspiring Native law students at Heritage University and the Northwest Indian College. These grants were not possible without the wisdom and leadership of prior Executive Committee

chairpersons, including but not limited to, Brenda George, Bree Black Horse, Dani Bargala, and Ann Tweedy. These grants, and both the breadth and the amounts in them, were not possible without the continued support of the Section members, both in the renewal of Section dues and attendance at the annual CLE. The Executive Committee commits to financially supporting these and other programs in the future.

Finally, I am pleased to announce that the 37th annual Indian Law Section CLE will happen this year on May 15–16 at the Tulalip Tribes of Washington administration building. This is the first time the Section will host the CLE outside of Seattle, let alone in Indian Country. The Executive Committee hopes that

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**BY RESTARTING THIS VITAL RESOURCE, WE HOPE TO PROVIDE A FORUM TO DISCUSS NOT ONLY ESSENTIAL TOPICS IN INDIAN COUNTRY BUT ALSO TO HIGHLIGHT EACH OTHER AND OUR FUTURE COLLEAGUES IN INDIAN LAW.**

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this year's success will lead to hosting the CLE in other parts of the state. We raise our hands in gratitude to the Tulalip Tribes for hosting the Section, and we look forward to seeing everyone at the CLE!

Hy'shqe, and thank you!

Drew Pollom  
*Chairperson, Indian Law Section*

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# THE MODEL TRIBAL ENERGY CODE: ENERGY SOVEREIGNTY FOR NATIVE AMERICAN NATIONS

by Greg Guedel, Ph.D., J.D. & Philip H. Viles, Jr., J.D., M.B.A., M.L.I.S.

Energy is fundamental to the quality of life of families, communities, and nations. Native American communities possess tremendous energy resources, including oil and natural gas reserves, solar, wind, geothermal, and water energy potential. Despite the crucial role of energy in the well-being of Native American communities, most Tribal Governments do not have laws to regulate the activities of the energy industry within their lands.

The Tribal Energy Consortium has developed the first Model Tribal Energy Code in the United States. The Model Tribal Energy Code combines and adapts provisions from existing federal, state, and Tribal laws governing the energy industry, and incorporates new provisions designed for the specific conditions affecting Native American energy development. The Code can be adapted by Tribal governments at no cost to support the specific needs and goals of their respective Nations, creating energy governance laws consistent with each Nation's unique conditions, culture, and priorities.

The Tribal Energy Consortium, a Native American-led 501(c)(3) nonprofit organization, has created the first Model Tribal Energy Code for the self-governance of energy resources by Native American Nations.<sup>1</sup> Developed in partnership with Tribal governments, Tribal energy enterprises, and Tribal law experts throughout the United States, the Model Tribal Energy Code provides a starting point for Native American Nations to create a comprehensive, “best-of-all-worlds” set of Tribal energy laws to establish self-governance over energy development and distribution within their jurisdictions.


The Model Tribal Energy Code provides Native American Nations with:

1. A full legal code for Tribal self-regulation of energy development activities;
2. Legal terms that are recognized and accepted

by the energy industry and by the federal government, enabling Tribes to assume direct control of energy resources and policies within their jurisdictions;

3. Provisions that operationalize Native American sovereignty and replace state and federal control over Tribal resources; and
4. Streamlined procedures and partnering opportunities to create competitive advantages for Tribal economic development.


The Model Tribal Energy Code presents a pathway for the advancement of Native American energy development from being under federal regulatory authority to being under sovereign Tribal governance. Utilizing efficient legal procedures and the strategic application of sovereignty to create commercial advantages, the Model Tribal Energy Code offers a new approach for the management of Native American energy resources and creates new sustainable energy opportunities for the long-term benefit of Tribal communities.

			
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Tremendous Resources,  
Inadequate Federal  
Management

Native American lands are extraordinarily rich with mineral

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## The Model Tribal Energy Code: Energy Sovereignty for Native American Nations

energy resources such as coal, oil, gas, and radioactive elements.<sup>2</sup> Tribal lands contain 30 percent of America's coal reserves west of the Mississippi River, 50 percent of America's uranium reserves, and 20 percent of America's known oil and gas deposits.<sup>3</sup> In addition to these extractive energy resources, the National Renewable Energy Laboratory has documented thousands of gigawatts of wind and solar potential present within Tribal communities.<sup>4</sup> With appropriate management, Native American Nations possess ample resources to not only become 100% self-sufficient in energy production, they could readily export surplus energy for economic gain and thereby support American energy security.

However, the potential of Native American energy resources has not yet been realized, due primarily to failures by federal agencies responsible for their development. Nearly every Tribe in the United States currently has its energy resources under Bureau of Indian Affairs management, which the Inspector General of the Department of Interior has officially described as “ineffective” and “fundamentally flawed.”<sup>5</sup> As a result of inadequate management of Tribal energy resources by federal agencies, only a fraction of Tribal energy potential has been developed to date, and the actual economic benefits to Tribal communities have been disproportionately small.

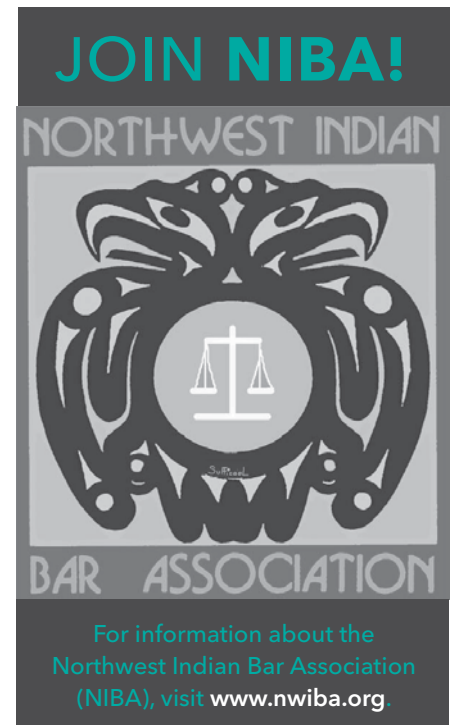
### Operationalizing Tribal Sovereignty

A clear and urgent need exists for Tribal self-governance over their own energy resources. The most viable approach is for Native American Nations to assert their inherent sovereignty over the natural resources within their lands, managing the development and distribution of energy in accordance with Tribal laws

designed specifically to serve the needs and promote the interests of their citizens. However, for the regulation of energy, there is presently a gigantic gap in Tribal laws. For over a century, the federal and state governments have made a concerted and continual effort to enact and enforce energy-related laws within their jurisdictions.<sup>6</sup> In states with abundant energy resources, institutionalizing the authority of the state government over energy development is a clear priority. For example, the state regulations governing oil and gas development in energy-rich Alaska run to hundreds of pages, and comprehensively regulate activities from resource ownership down to detailed operational matters.<sup>7</sup> In contrast, only a handful of Tribes have enacted even a fraction of the laws codified by the major energy producing states—and most Tribes have no energy governance laws at all. The severe performance deficiencies of federal energy management noted above provide an urgent call to action for Tribal governments to operationalize their sovereignty over the energy sector by enacting laws for the self-governance of their resources.

### The Model Tribal Energy Code

A necessary and fundamental institution for the governance of energy within Native American Nations is the Tribe's legal code. To provide the basis for Tribal governments to regulate energy-related activities within their jurisdictions, the Tribal Energy Consortium has developed the first **Model Tribal Energy Code** in the United States. The goal of the Model Code is to create a “best-of-all-worlds” set of laws that provides Tribal Nations with: 1) a complete legal code for the regulation of traditional and emerging renewable energy development; 2) legal terms that are already recognized and



accepted by the federal government and key industry enterprises; and 3) provisions that operationalize Tribal sovereignty and create competitive advantages for the Nation's economic development.

To achieve these objectives, the foundation of the Model Code synthesizes terms from existing energy codes and related regulations adopted by the federal government of the United States, the governments of the primary energy-producing states, and the governments of Native American Tribes with established energy development programs. These codes were selected as a starting point based on their industry-recognized terms for regulating energy development activity. By starting from these codes, the Model Code adapts a structure and terminology familiar to and accepted by the federal government agencies and industry entities that Tribes may partner with to develop and distribute energy within their communities. Chapters of the Model

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## The Model Tribal Energy Code: Energy Sovereignty for Native American Nations

Tribal Energy Code include:

- 100.10 Purpose and Applicability
- 100.20 Tribal Energy Department
- 100.30 Tribal Energy Resource Agreements
- 100.40 Environmental and Cultural Protection
- 100.50 Rights of Way
- 100.60 Drilling, Excavation, and Subsurface Activities
- 100.70 Oil, Gas, and Mineral Energy
- 100.80 Renewable Energy
- 100.90 Taxation
- 100.100 Tribal Utility Commission

The Model Code is formulated to (a) recognize the sovereign authority of Tribal governments, and (b) enhance the efficiency and attractiveness of conducting energy development activity within the Nation's jurisdiction, consistent with the Nation's laws and oversight requirements. The requirements for responsible, transparent, and documented actions by parties involved in energy development

have been retained in the Model Code, but procedural matters are left to the discretion of the Tribe. The Tribal government is also empowered to apply its sovereign discretion to facilitate projects of particular urgency or benefit to its citizens, and to require beneficial community engagement and information sharing.

### Next Steps for Tribal Energy Sovereignty

The Tribal Energy Consortium offers the Model Tribal Energy Code to Tribal governments at no cost, and the Code is currently being adopted by numerous Tribes throughout the United States. Combined with the unprecedented level of federal grant funds and technical assistance presently available to Tribes for energy projects, the opportunities for Tribal energy development have never been greater. Native American Nations seeking to exercise self-governance over their energy resources are encouraged to contact the authors for details on implementing the Model Tribal Energy Code to enhance their energy sovereignty. ■

#### ABOUT THE AUTHORS



**Dr. Greg Guedel** serves as legal counsel for the nonprofit Tribal Energy Consortium and is the founder of Guedel Strategic Law, which

serves Native American Nations throughout the United States. His legal practice emphasizes the representation of Native American Tribes and enterprises for strategic planning, risk management, and economic development. Dr. Guedel may be contacted at [greg@guedellaw.com](mailto:greg@guedellaw.com).



**Philip H. Viles Jr.** (Cherokee Nation) is the first Banking Director for the Catawba Digital Economic Zone, the first jurisdiction created for

fintech and digital asset growth in the United States. He served on the Cherokee Nation's highest court from 1976 to 2002 and as Chief Justice for 16 of those years. In 2015, he began teaching at the University of Tulsa College of Law for the Master of Jurisprudence in Indian Law Program. Mr. Viles may be contacted at [pv@utulsa.edu](mailto:pv@utulsa.edu).

- 1 The Tribal Energy Consortium is a 501(c)(3) non-profit organization formed and governed by Native Americans: [www.ndnenergy.org/](http://www.ndnenergy.org/).
- 2 Lizana Pierce, DOE OFF. OF INDIAN ENERGY, DOE INDIAN ENERGY PROGRAM OVERVIEW 6 (2018), [www.energy.gov/sites/prod/files/2018/12/f58/1-indian-energy-overview.pdf](http://www.energy.gov/sites/prod/files/2018/12/f58/1-indian-energy-overview.pdf).
- 3 Shawn E. Regan & Terry L. Anderson, The Energy Wealth of Indian Nations, 3 LSU J. ENERGY L. & RESOURCES 195, 196 (2014), [digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1048&context=jelr](http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1048&context=jelr)
- 4 Anelia Milbrandt, Donna Heimiller, & Paul Schwabe, NAT'L RENEWABLE ENERGY LAB'Y: TECHNO-ECONOMIC RENEWABLE ENERGY POTENTIAL ON TRIBAL LANDS (July 2018), [www.nrel.gov/docs/fy18osti/70807.pdf](http://www.nrel.gov/docs/fy18osti/70807.pdf).
- 5 U.S. DEP'T OF THE INTERIOR, BIA Needs Sweeping Changes to Manage the Osage Nation's Energy Resources 1 (October 19, 2014), at [www.doi.gov/sites/default/files/2021-migration/CR-EV-BIA-0002-2013Public1.pdf](http://www.doi.gov/sites/default/files/2021-migration/CR-EV-BIA-0002-2013Public1.pdf).
- 6 The first modern federal law specifically regulating the energy sector was the Federal Power Act of 1920, 16 U.S.C. §§ 791–828c.
- 7 See Alaska Administrative Code, Title 11, Natural Resources: [www.touchngo.com/lglcntr/akstats/aac/title11.htm](http://www.touchngo.com/lglcntr/akstats/aac/title11.htm).

# DON'T FORGET!

## MEMBERS – Don't Miss Out on Upcoming Opportunities

Remember to update your contact information with the WSBA and renew your membership with the WSBA Indian Law Section.

# A MID-CAREER PARADIGM SHIFT: MY FIRST YEAR PRACTICING IN INDIAN COUNTRY

by Carmen Bremmer

After more than twenty years litigating primarily for technology clients in intellectual-property matters, a case I had devoted over a decade to ended abruptly. This brought me to a crossroads where I could cleanly pivot to something new if I wished, so I decided to take a risk. A job posting to be Associate General Counsel to an unnamed enterprise of an unnamed Indian Tribe caught my interest. When a recruiter for the position asked if I'm familiar with Kitsap County, I was delighted. It was the Suquamish Tribe, my neighbors across the Agate Passage whose businesses my family had frequented and whose ancestral lands we had been fortunate to call home since relocating from Texas in 2013. I determined to pursue the position and, much to my gratification, I landed it.

The things I didn't understand about what my new position would

These texts were exciting because I could see how my work would directly and meaningfully impact an underserved community. They were also my first clue that this career transition would involve a steeper learning curve than I had expected, and in more ways than one. Looking back, my first year practicing in Indian Country was roughly equivalent to the first year of law school in terms of the fundamental shifts it required in the way I spot and analyze issues.

The most basic and important of these shifts centered around tribal sovereignty and sovereign immunity. I understood these concepts at some abstract and academic level, or at least thought I did. Still, I was surprised when my offer letter from Port Madison Enterprises ("PME"), the Suquamish Tribe's economic development agency, recited that matters concerning my employment would

ministerial tasks like maintaining state business registrations for PME's construction subsidiaries who do work outside the Port Madison Reservation. Indeed, even the intellectual property work I still do in this role requires viewing familiar concepts through

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## I COULD SEE HOW MY WORK WOULD DIRECTLY AND MEANINGFULLY IMPACT AN UNDERSERVED COMMUNITY.

entail could fill volumes. When I first moved to Washington, I took the Washington Law Component as required for admission by motion to the WSBA. That was my first exposure to federal Indian law, which I found nuanced and interesting, but ultimately not relevant to my practice at the time. I brushed up on Indian law and economic development in Indian Country before starting my new position by reading *American Indian Law in a Nutshell* by Judge Canby and *Strategies and Methods for Tribal Economic Development* by Gregory Guedel.

be governed by the Suquamish Tribal Code rather than state law. I was surprised to learn that Tribal leaders regularly engage in government-to-government consultations with other elected officials at every level of local, state, and federal governments, and that every state agency in Washington is required to have a tribal liaison to help maintain that government-to-government relationship. To protect my client's interests, I've had to learn to first and always be mindful of tribal sovereignty, whether negotiating contracts for PME or performing more

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## A Mid-Career Paradigm Shift: My First Year Practicing in Indian Country

the lens of tribal sovereignty. Nothing in any study guide for the Washington Law Component or the texts I reviewed before starting this job could have prepared me for how dramatic the shift in my thought process would need to be over the following months.

Equally as surprising was the community I was welcomed into this past year. Like many Americans, I only ever knew a caricatured version of Indian Country before this job. So many concepts relating to Native American culture, history, and self-determination were completely new to me, and the learning curve to understanding the complexities of Indian Country as a cultural concept has been even steeper than the legal and operational sides of my role at PME. The experience has been humbling, gratifying, and intensely educational, and the learning curve still stretches high overhead after a year-plus on the job. I'm eager to see where my journey serving Indian Country takes me in the years to come. ■

### ABOUT THE AUTHOR



**Carmen Bremer** is Associate General Counsel for Port Madison Enterprises, the economic

development agency of the Suquamish Tribe. Before joining PME, Carmen practiced primarily in federal courts, with an emphasis on intellectual property and civil rights litigation. Carmen has worked at multinational law firms including Weil Gotshal & Manges and Haynes Boone, and she also ran her own practice at Bremer Law Group PLLC. When she's not practicing law or shuttling teenagers around, Carmen can usually be found running a trail somewhere in the mountains.

## Application of Federal Employment and Labor Laws in Indian Country

by Shelby Stoner

**Q** Do federal employment and labor laws apply to federally recognized Tribes operating on their own reservations?

The answer to this question is convoluted. For many years, federal courts have grappled with whether federal employment and labor laws apply in Indian country. And even when courts have spoken on the subject, their conclusions that certain federal laws apply on reservations rest on a shaky legal foundation that disregards Tribal sovereign immunity and longstanding Indian law canons, at least in the Ninth Circuit. As a result, Tribal governments are forced to guess whether their economic and governmental activities are subject to federal employment laws or not, and if so, which ones.

This article summarizes the framework adopted by the Ninth Circuit to determine when federal employment statutes of general applicability apply to federally recognized Tribes. The article further seeks to clarify when Tribes should comply with federal employment laws under Ninth Circuit precedent. This will depend on the federal statute at issue, the type of business operated by the Tribe, any relevant treaties, and even the particular court hearing the case.<sup>1</sup>

### Ninth Circuit Framework for Determining Applicability of Federal Laws in Indian Country

When a federal employment or labor statute expressly exempts Tribes from its application, courts and the federal agencies applying those statutes—namely, the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB)—generally agree that the statutes are inapplicable to Tribal employers. When the federal statute is one of “general applicability,” however, courts and agencies have a more difficult time determining which federal statutes apply to which Tribal enterprises. In *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), although the Ninth Circuit acknowledged Tribes’ inherent sovereign power, it emphasized Tribe “possess only a limited sovereignty that is subject to complete defeasance.” *Id.* at 1116. The Circuit established a three-part test for determining when federal statutes of general applicability apply to Tribes:

A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.

*Id.* at 1116 (internal citation and quotation marks omitted). Unless one of these exceptions applies, the Ninth Circuit will apply the federal employment statute to Tribes. Two Circuits—and several scholars—have rejected Coeur d’Alene’s framework because it disregards well-established Indian law canons providing that Tribal sovereignty will

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## Application of Federal Employment and Labor Laws in Indian Country

not be abrogated absent “clear and plain” congressional intent and any “ambiguities . . . must be resolved in favor of tribal sovereignty.” *EEOC v. Fond du Lac Heavy Equip. and Constr. Co., Inc.*, 986 F.2d 246, 248–51 (8th Cir. 1993); *NLRB v. Pueblo of San Juan* (“San Juan”), 276 F.3d 1186, 1191–92, 1200 (10th Cir. 2002) (en banc).

### Federal Employment Laws that May Apply in Indian Country

Under the current state of the law within the Ninth Circuit, the following federal statutes of general application have been, or could be, applied to enterprises owned by Tribes or Tribal corporations owned by Tribal members:

- Occupational Safety and Health Act (OSHA)
- National Labor Relations Act (NLRA)
- Employment Retirement Income Security Act (ERISA)
- Fair Labor Standards Act (FLSA)
- Family and Medical Leave Act (FMLA)
- Equal Pay Act (EPA)
- Age Discrimination in Employment Act (ADEA)

#### OSHA (29 U.S.C. § 651 et seq.)

OSHA ensures safe and healthful working conditions and is silent on whether it applies to Tribes. 29 U.S.C. § 652(5). The Ninth Circuit has held that OSHA applied to a Tribe-owned farm located on the reservation, potentially because it employed non-Indians. *Coeur d’Alene*, 751 F.2d at 1116. In contrast, the Tenth Circuit has held that OSHA does not apply to Tribal enterprises operating on the reservation because Congress did not expressly limit the application of the Tribe’s treaty; nor did Congress override the Tribe’s retained inherent sovereignty. *Donovan v. Navajo Forrest Prods. Indus.*, 692 F.2d 709, 710–11 (10th Cir. 1982).

#### NLRA (29 U.S.C. § 151 et seq.)

The NLRA protects employees’ rights against unfair labor practices (e.g., to join or support a union) and is silent on whether it applies to Tribes. 29 U.S.C. § 152(2). The Ninth Circuit has held that the NLRA applies to a Tribe-owned casino located on the reservation. *Pauma v. NLRB*, 888 F.3d 1066, 1077 (9th Cir. 2018). The NLRB and two other Circuits likewise have concluded that the NLRA applies to Tribal enterprises. See *id.* at 1079 (listing cases). However, the Tenth Circuit has held that the NLRA did not preempt Tribal “right to work” ordinance. *San Juan*, 276 F.3d at 1200.

#### ERISA (29 U.S.C. § 1001 et seq.)

ERISA protects employees’ retirement and health plans and is silent on whether it applies to Tribes. 29 U.S.C. § 1002(5). The Ninth Circuit has held that

ERISA applies to a Tribe-owned sawmill located on the reservation. *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683, 685–86 (9th Cir. 1991).

#### FLSA (29 U.S.C. § 201 et seq.)

The FLSA establishes a federal minimum wage (\$7.25 per hour), overtime pay, recordkeeping requirements, and youth employment standards but is silent as to whether it applies to Tribes. 29 U.S.C. § 203(d). The Ninth Circuit has held that the FLSA does not apply to a Tribe’s Division of Public Safety operating on the reservation under the “intramural” exception, *Snyder v. Navajo Nation*, 382 F.3d 892, 895–96 (9th Cir. 2004), but it has held it does apply to a smoke shop owned by Tribal members located on the reservation, *Solis v. Matheson*, 563 F.3d 425, 439 (9th Cir. 2009).

#### FMLA (29 U.S.C. § 2601 et seq.)

The FMLA permits eligible employees to take unpaid leave for certain family and medical reasons and is silent as to whether it applies to Tribes. 29 U.S.C. § 2611(1)(4)(B). The Ninth Circuit, in an unpublished opinion, declined to reach the question of whether the FMLA applies to Tribes. *Carsten v. Inter-Tribal Council of Nevada*, 599 F. App’x 659, 660 (9th Cir. Mar. 26, 2015); see also *Muller v. Morongo Casino, Resort, and Spa*, 2015 WL 3824160, at \*7 (C.D. Cal. June 17, 2015) (concluding Tribal employer did not waive sovereign immunity to suit under the FMLA). Unless a Tribe can prove a *Coeur d’Alene* exception applies, the Ninth Circuit will apply the FMLA to Tribal enterprises.

#### EPA (29 U.S.C. § 206(d))

The EPA protects employees who are allegedly subject to pay discrimination because of their gender and is silent on whether it applies to Tribes. 29 U.S.C. § 203(d). Although the Ninth Circuit has not expressly addressed the issue, the EEOC maintains that it has jurisdiction over gender-based pay discrimination charges under the EPA brought against Tribes.<sup>2</sup> Unless a Tribe can prove a *Coeur d’Alene* exception applies, the Ninth Circuit will apply the EPA to Tribal enterprises.

#### ADEA (29 U.S.C. § 630 et seq.)

The ADEA protects employees aged 40 and older who have allegedly been discriminated or retaliated against because of their age. The ADEA is silent on whether it applies to Tribes. 29 U.S.C. § 630(b). The Ninth Circuit has held that the ADEA does not apply to a Tribe’s Housing Authority under the “intramural” exception. *EEOC v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1081–82 (9th Cir. 2001). Other circuits have reached the same conclusion, albeit for different reasons. See, e.g., *EEOC v. Cherokee Nation*, 871 F.2d 937, 938–39 (10th Cir. 1989) (because the ADEA is silent, it does not apply).

## Application of Federal Employment and Labor Laws in Indian Country

Still, the EEOC maintains it has jurisdiction over age-discrimination charges under the ADEA brought against Tribes. *See supra* EEOC FAQ. Unless a Tribe can prove a *Coeur d'Alene* exception applies, the Ninth Circuit will apply the ADEA to Tribal enterprises.

### Federal Employment Laws that Do Not Apply in Indian Country

Finally, there is a smaller class of federal employment statutes that do *not* apply to Tribal enterprises because Congress expressly exempted Tribes from their application:

- Title VII of the Civil Rights Act (Title VII)
- Americans with Disabilities Act (ADA)
- Genetic Information Nondiscrimination Act (GINA)

#### Title VII (42 U.S.C. § 2000e *et seq.*)

Title VII protects employees who have allegedly been discriminated or retaliated against because of their race, color, religion, sex, or national origin. Title VII's text expressly exempts "Indian tribe[s]" from the definition of "employer." 42 U.S.C. § 2000e(b).

#### ADA (42 U.S.C. § 12101 *et seq.*)

The ADA protects employees who have allegedly been discriminated or retaliated against because of their disability. The ADA's text exempts "Indian tribe[s]" from the definition of "employer." 42 U.S.C. § 12111(5)(B)(i).

Still, at least one district court in the Ninth Circuit has concluded that the ADA provisions that protect other individuals from discrimination in "a place of public accommodations" also apply to Tribes. *See, e.g., Drake v. Salt River Pima-Maricopa Indian Cmty.*, 411 F. Supp. 3d 513, 518 (D. Ariz. 2019). Nevertheless, the district court concluded that the Tribe's sovereign immunity, which was not abrogated by the Tribe or Congress, precluded the ADA public accommodation claims brought against the Tribe. *Id.* at 520.

#### GINA (42 U.S.C. § 2000ff *et seq.*)

GINA protects employees who have allegedly been discriminated or retaliated against because of their genetic information. The statute's text exempts "Indian tribe[s]" from its application. 42 U.S.C. § 2000ff(2)(B) ("employer" is defined under 42 U.S.C. § 2000e(b)); *id.* § 2000e(b) (exempting "Indian tribe[s]" from definition of "employer"); *see also* 29 C.F.R. § 1635.2(d).

### Conclusion

Although Tribes might have good reasons to question the application of certain federal employment and labor laws to enterprises wholly owned by sovereign Tribes that operate on their own reservations, Ninth Circuit precedent will require Tribes to prove that

at least one of the *Coeur d'Alene* exceptions apply. That is, the Tribe must prove either that its enterprise is engaged in purely "intramural" matters or provides traditional government services or that specific treaty language or other indicia, such as legislative history, preclude application of the relevant federal statutes to enterprises wholly owned by Tribes.

Tribal employers should consider proactively adopting policies and procedures, in Employment Handbooks or otherwise, that comply with federal employment and labor statutes of general applicability (e.g., OSHA, NLRA, ERISA, FLSA, FMLA, EPA, and ADEA). This is particularly true for Tribal enterprises that do not provide traditional government services or involve purely "intramural" matters, such as casino resorts, farms, and sawmills. These types of enterprises will not be exempt under current Ninth Circuit precedent unless a Tribe can point to specific treaty language or other indicia that precludes the application of the federal statute to the Tribal enterprise.

If you continue to question whether a particular federal employment or labor statute applies to your specific Tribal enterprise, you should seek the advice of legal counsel with expertise advising Tribal entities in employment and labor matters. ■

- 1 Whether federal employment laws apply in Indian country will also depend on the type of Tribal employer, i.e., whether the enterprise is wholly (or partially) owned by the Tribe, whether the enterprise is owned by a Tribal member, and/or whether the enterprise is incorporated under Tribal law. This article addresses the application of federal employment law to enterprises wholly owned by the Tribe.
- 2 FAQ About Indian Tribes and Tribal Employment Rights Offices, EEOC.gov, available at [www.eeoc.gov/frequently-asked-questions-about-indian-tribes-and-tribal-employment-rights-offices](http://www.eeoc.gov/frequently-asked-questions-about-indian-tribes-and-tribal-employment-rights-offices) (accessed Feb. 16, 2025) ("EEOC FAQ").

#### ABOUT THE AUTHOR



As a litigator at Galanda Broadman PLLC, an Indigenous rights law firm, **Shelby Stoner** leads the strategy and execution of complex, high-impact cases involving federal Indian law, Indigenous rights and other civil rights matters, land and environmental issues, and appellate litigation. Shelby previously clerked in the U.S. Court of Appeals for the Ninth Circuit and in the U.S. District Court for the Western District of Washington. She also worked as an associate at K&L Gates, where she focused her litigation practice on employment and labor issues, as well as federal Indian law matters.

# A TOXIC LEGACY IN ALASKA: MILITARY CONTAMINATION, ENVIRONMENTAL JUSTICE, AND TRIBAL SOVEREIGNTY

by Justin Mack

Because of Alaska's strategic importance during World War II and the Cold War, hundreds of military installations were constructed throughout the state. As the wars ended, the Formerly Used Defense (FUD) sites were abandoned, often without proper environmental remediation. What remained were toxic chemicals, eventually leaching into the environment surrounding the FUD sites, impacting local communities and the fish and wildlife on which they rely.

While there have been clean-up efforts over the decades at some FUD sites, pollutants persist within today's food web, generations later. Alaskan Indigenous communities are the most impacted people, especially those communities that rely on subsistence hunting and fishing. Because the FUD sites were often developed on tribal land, the persistent toxic leaching disproportionately impacts Native Alaskans.

This article examines recent studies and evidence of ongoing contamination, the failure of environmental laws meant to address the remediation of FUD sites, and the health impacts on Indigenous communities in Sivuqaq, Alaska, and the Northeast Cape FUD site.

## Contamination of Alaska's Subsistence Fisheries

Recent research shows increased levels of Polychlorinated biphenyls (PCBs)—man-made chemicals used in industry that were banned in 1979 due to health concerns—and mercury near FUD sites throughout Alaska. A 2022 study of Dolly Varden fish from the Northeast Cape FUD site on Sivuqaq (St. Lawrence Island) found extremely high contamination levels. Jordan-Ward et al., *Elevated mercury and PCB concentrations*

in Dolly Varden collected near a formerly used defense site on Sivuqaq, Alaska, 826 Sci. Total Env't 154067 (2022).

Sivuqaq is a remote island located in the Bering Sea, approximately 125 miles off the west coast of mainland Alaska. Since time immemorial, the Northeast Cape of Sivuqaq was inhabited by Siberian Yupik people. The U.S. military displaced to the village of Savoonga to install a military outpost in the early 1950s. While the Northeast Cape Indigenous people have been relocated, the Cape is still commonly enjoyed for subsistence hunting and fishing.

The 2022 study revealed that 89 percent of sampled fish exceeded the EPA's mercury screening level for unrestricted human consumption. 100 percent of sampled fish exceeded the EPA's cancer risk threshold for PCB contamination. Moreover, fish from regions near the FUD site had significantly higher levels of pollutants than those from non-contaminated areas.

Studies have shown that FUD sites are not the only source of contamination in these regions. See Frank Wania, *Assessing the Potential of Persistent Organic Chemicals for Long-Range Transport and Accumulation in Polar Regions*, 37:7 Env't Sci. & Tech. 1344–1351 (2003). The Arctic acts as a hemispheric sink for persistent organic pollutants (POPs). These pollutants travel from warmer climates through a process known as global distillation, and they settle in and around Arctic regions throughout the world, impacting fish and wildlife. The combination of global distillation and toxic waste from the FUD sites has had significant health impacts on the Indigenous people of Sivuqaq, including higher rates of cancer, reproductive disorders, and

thyroid disease. David Carpenter et al., *Polychlorinated biphenyls in serum of the Siberian Yupik people from St. Lawrence Island, Alaska*, 64(4) Int'l J. Circumpolar Health 322–35 (2005).

The findings in the study suggest that elevated levels of toxins remain, impacting local fisheries and those who rely on them, despite the Army Corp of Engineers' seemingly successful remediation efforts.

In 2011, the Native Village of Savoonga requested a Public Health Assessment by the Agency for Toxic Substances and Disease Registry (ATSDR) to consider health impacts near the Northeast Cape FUD site. The ATSDR released assessments in 2017 and 2022 that suggested that contamination levels from the Suqitughneq (Suqi) River did not pose a health risk to local residents. Off. Cmty. Health & Hazrd Assessment, U.S. Dep't Health & Hum. Res., *Health Consultation: Northeast Cape Formerly Used Defense Site 77* (2022). The ATSDR found that "if the Northeast Cape becomes a year-round community in the future, ATSDR recommends collecting additional edible fish samples." This comment highlights ATSDR's fundamental misunderstanding of the cultural significance of the land. ATSDR failed to consider that the Northeast Cape inhabitants were displaced by the military site and would likely return when it is safe to do so.

In considering the testing done by the ATSDR, the 2022 study examined how and where the data was collected, and identified several concerning gaps in the ATSDR research. See Jordan-Ward et al. The ATSDR relied on the Army Corps' sampling, which included eight Dolly Varden fish collected from an estuary located 2.4 km downstream from the FUD

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## A Toxic Legacy in Alaska: Military Contamination, Environmental Justice, and Tribal Sovereignty

site. *Id.* at 14–15. These estuaries experience tides which tend to disperse and dilute contaminants and are oftentimes not comparable to upstream contaminated sites. Further, the Army Corps study did not differentiate between freshwater and saltwater Dolly Varden. The concern is that freshwater Dolly Varden accumulate contaminants throughout their lifespan, while saltwater species spend their lives in the ocean and do not reflect freshwater pollution sources. By including saltwater Dolly Varden in the Army Corp study, we do not have a clear understanding of freshwater impacts of the Northeast Cape FUD site.

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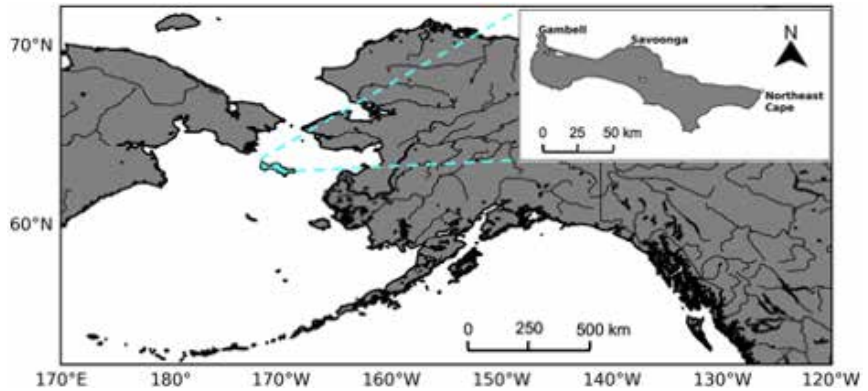
### RESEARCH SCIENTISTS PROVIDE CRITICAL DATA THAT HIGHLIGHT THE RISKS AND TOXIC IMPACTS ON INDIGENOUS COMMUNITIES.

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Sivuqaq is one island, and the Northeast Cape is only one FUD site. Alaska alone contains over 600 FUD sites. Over 500 sites—more than 83 percent of Alaskan FUD sites—are identified for remediation by the U.S. Army Corps and the Alaska Department of Environmental Conservation. Comprehensive follow-up studies must be done to ensure that FUD sites are identified for remediation and that long-term follow-up studies consider the health impacts of local residents.

### The Intersection of Law, Science, and Indigenous Advocacy

These FUD sites disproportionately impact Indigenous communities due to their proximity to tribal lands and the community's reliance on subsistence hunting and fishing.



Location of Sivuaq (St. Lawrence Island), Alaska, and Northeast Cape.

The people living near FUD sites are impacted by the release of hazardous substances which affects water, food sources, and overall health. Given the U.S. Government's lack of accountability and success in addressing the toxic impacts from FUD sites, creative solutions are necessary.

Law schools can offer legal assistance to communities by supporting environmental and Indigenous law research, supporting litigation, and advocating for policy change that supports research and cleanup. This effort should be done collaboratively with Alaska Native Tribes who can advocate for their rights through treaties and environmental justice. *See, e.g.,* Institutional Rev. Bd., *Research with Indigenous Peoples*, Univ. of Alaska, Fairbanks, last accessed April 11, 2025. Research scientists provide critical data that highlight the risks and toxic impacts on Indigenous communities.

Together, studies, data collection, and advocacy strengthen legal cases and policy reform.

By using community-based participatory research (CBPR), scientists can work directly with Native tribes to provide culturally relevant research, while law schools can support this effort through legal assistance. *See* N. Wallerstein, B. Duran, J. Oetzel, M. Minkler, *Community-Based Participatory Research for Health* (2018). CBPR programs center Native communities at every step of the process and lead to better outcomes for those communities. Several research programs are using the CBPR approach to identify health concerns and find impactful solutions for the long term. *See, e.g., Id.* This community-oriented research approach is not merely a research method but a fundamentally different approach to research where the impacted community helps shape and guide the research. ■

#### ABOUT THE AUTHOR



**Justin Mack** was born and raised in Alaska and is a member of the Agdaagux Tribe of King Cove. He is currently a 2L at Seattle University School of Law and Co-president of their Native American Law Student Association chapter. Justin currently lives in Anchorage with his wife and two daughters.

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**Anna Nollan** is an associate at Schwabe, Williamson & Wyatt, P.C. focused on a variety of legal issues, from environmental compliance and real estate matters to Indian trust land. In law school, Anna participated in the American Indian Law Journal as well as the Immigration Law Clinic. She has interned with several Seattle legal nonprofits and a local tribe.



**Dan Rey-Bear** has 30 years of experience in advising and representing Indian tribes and Indian enterprises, both as general counsel and on specific matters covering a wide range of issues, including litigation, governance, transactions, economic development, resource management, and regulatory and intergovernmental matters.



**Kevin Rezaie-Burdet** works for the Puyallup Tribe of Indians as the Judicial Law Clerk for the Puyallup Tribal Court. Kevin graduated from Seattle University School of Law in 2024, where he served as a lead editor for the Law Review and co-president of the Environmental Law Society. He has interned for tribes, the Federal government, the State of Washington, and nonprofits on legal issues regarding environmental enforcement, natural resource law, Federal Indian law, and Tribal law.

*Please feel free to get in touch with any questions or suggestions! The Indian Law Section newsletter is for your information and we'd love to hear from you!*

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