The Tribal Role in Environmental Litigation and Policy Making

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Introduction

Tribes Can Strategically Utilize Litigation to Further Environmental Interests

• Tribes have used litigation to advance their interests in environmental quality both on and off the reservation
• Carefully consider pros and cons before initiating litigation
  • Likelihood of success
  • Expense
  • Public Relations
  • Ongoing relationship with government agencies
  • Response from Tribal membership
Affecting Environmental Policy Through Litigation

Legal mechanisms that Tribes may leverage to help protect environmental and natural resources quality on and off Tribal lands:

- Treaty rights
- Federal Environmental Statutes and Regulations
  - Citizen Suits
  - Substantive Statutory Claims
- APA
- Tribal Law, e.g., HSCA, Tribal WQS
- Permit Challenges
- NEPA
Affecting Environmental Policy Through Litigation – Treaty Rights

• Asserting Treaty rights to stop proposed actions can be an effective tool in influencing environmental policy
  • Language of Treaty is key
• Reservations Created by Treaties vs. Executive Orders
Affecting Environmental Policy Through Litigation – Treaty Rights

- *United States v. Washington* (Culverts Case)
  - **Parties**
    - Plaintiffs: 21 Tribes + United States
    - Defendant: State of Washington
  - **Facts**
    - 1854 and 1855 – Stevens Treaties – Tribes relinquish large swaths of land in exchange for guaranteed right to off-reservation fishing
      - “Fishing clause” guaranteed "the right of taking fish, at all usual and accustomed grounds and stations…in common with all citizens of the Territory."
Affecting Environmental Policy Through Litigation – Treaty Rights – *U.S. v. Washington*

- **1974 – Boldt decision**
  - Tribes entitled to take up to 50% of harvestable fish
  - Court interpreted Fishing Clause as promising protection for the Tribes’ supply of fish, not merely their share of fish

- **1976 – Ninth Circuit**
  - 9th Circuit ruled that the issue of human-caused environmental degradation, and resulting declines in fish supply, must be resolved in context of particularized disputes
Affecting Environmental Policy Through Litigation – Treaty Rights – *U.S. v. Washington*

- 2001 – 21 Tribes file complaint against State; U.S. joins.
- Contend that State had violated and continued to violate its duties under the Stevens Treaties by building and maintaining culverts that:
  - Prevented mature salmon from returning to spawning grounds
  - Prevented smolt from moving downstream and out to sea
  - Prevented young salmon from moving freely to seek food and escape predators
Affecting Environmental Policy Through Litigation – Treaty Rights – *U.S. v. Washington*

- Washington culvert – fish passage barrier
Affecting Environmental Policy Through Litigation – Treaty Rights – *U.S. v. Washington*

- 2007 – Federal district court holds that in building and maintaining the culverts, State had caused the size of salmon runs to diminish, thereby violating State's obligation to not interfere with Tribes’ treaty rights
- 2009-10 – Court conducts bench trial to determine appropriate remedy
- 2013 – After failed settlement efforts, Federal district court issues permanent injunction ordering State to correct offending culverts
Affecting Environmental Policy Through Litigation – Treaty Rights – *U.S. v. Washington*

- Ninth Circuit decision (2015)
  - Rejects State’s argument and affirms that State has an obligation to refrain from building and maintaining barrier culverts that interfere with Treaty rights by contributing to the decline in salmon populations
Affecting Environmental Policy Through Litigation – Treaty Rights – *U.S. v. Washington*

- Supreme Court of the United States heard case in 2018
- Issues
  - Whether a treaty right to take fish at usual and accustomed stations guaranteed that number of fish would always be sufficient to provide a moderate living for Tribes
  - Whether dist. ct. erred in dismissing State’s equitable defenses against Fed. govt. where Fed. govt. signed Treaties, for decades told State to design culverts in particular way, and then alleged said culverts violated Treaties
  - Whether dist. ct.’s injunction violates federalism and comity principles where expensive culvert replacement will in many cases have no impact on salmon, and where Tribes showed no clear connection b/w culvert replacement and tribal fisheries
Affecting Environmental Policy Through Litigation – Citizen Suits

- Citizen suits - present in many Fed. env’tl statutes
  - CAA; CWA; RCRA; CERCLA
- Defendants
  - Polluter (for violating effluent/emission standards or agency order)
  - Government (for failure to perform non-discretionary act)
- Notice required
- Attorney fees may be available
  - CAA gives Court discretion to award fees “whenever … appropriate”
Affecting Environmental Policy Through Litigation – Substantive Statutory Claims

• CERCLA § 107(a) –
  • Owner/operator/arranger/transporter of hazardous waste to a facility from which a release occurs and causes incurrence of response costs is liable for all response costs incurred by Fed. govt., State, or “an Indian tribe”

• Natural resource damages claims – Tribes as Trustees (CERCLA; Oil Pollution Act)

• CCT v. Teck

• New Mexico v. U.S. EPA (Gold King mine spill in Animas River)
  • New Mexico and Navajo Nation assert claims including CERCLA claims for cost recovery and declaratory relief
Affecting Environmental Policy Through Litigation – Administrative Procedures Act

- Court shall hold unlawful and set aside agency action found to be:
  - Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law
  - Contrary to constitutional right, power, privilege, or immunity
  - In excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - Without observance of procedure required by law;
  - Unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - Unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
Affecting Environmental Policy Through Litigation – Administrative Procedures Act

• Challenge agency action as arbitrary and capricious
  • New administrations can revoke existing rules, but must follow the APA rulemaking process, and the decision must not be arbitrary or capricious
  • *Organized Village of Kake v. USDA* –
    – Tongass National Forest in Alaska – largest national forest in United States
Affecting Environmental Policy Through Litigation – APA

Organized Village of Kate v. USDA

The National Forests of Alaska
Affecting Environmental Policy Through Litigation – APA
Organized Village of Kate v. USDA

- Tongass National Forest
Affecting Environmental Policy Through Litigation – Administrative Procedures Act

• Challenge agency rulemaking for procedural failures
  • Agency failure to explain its reasoning in response to significant comments raised during rulemaking process is arbitrary and capricious. – Ass’n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427 (D.C. Cir. 2012)
Affecting Environmental Policy Through Litigation – Tribal Law

• Enforce Tribal environmental laws and standards

  • Delegated authority under CWA
    – Achieve TAS status; Establish water quality standards; Enforce WQS against violators
    – 401 Certifications

• Tribal laws like Hazardous Substances Control Act (HSCA)
  – Enforce standards against violators
Affecting Environmental Policy Through Litigation – Permit Challenges

- Challenge issuance of permit(s) by State and Federal agencies to project proponent

Examples

- CWA 401 Certification
- Coastal Zone Management Act (CZMA) Consistency Determination
- CWA 404 Permit (“dredge and fill permit”)
Affecting Environmental Policy Through Litigation – National Environmental Protection Act

- NEPA
- Procedural statute
  - Ensures decision-makers are properly informed
  - Does not prescribe any particular substantive decision
- Applies to federal actions
  - Direct federal action – construction, program implementation, promulgation of regulations
  - Indirect federal action – federal funding for project (e.g., grants), federal permitting
Affecting Environmental Policy Through Litigation – National Environmental Protection Act

- EIS required for “major Federal actions significantly affecting the quality of the human environment”
  - If categorically exempt – No EIS required
  - Perform EA (environmental assessment) to determine if EIS is required because action is “significant”
    - (Or simply skip straight to preparing EIS)
  - If impacts deemed not significant, agency issue FONSI (finding of no significant impact)
  - If impacts deemed significant, agency must prepare EIS
Affecting Environmental Policy Through Litigation – National Environmental Protection Act

• Challengers should submit comments to agency during comment period.
  • Must alert agency to challengers’ position and contention
  • Comments should not simply state that a mistake was made, but show why the mistake was of possible significance to the results
  • Failure to do so will bar the challenger from raising contentions in subsequent litigation
Affecting Environmental Policy Through Litigation – National Environmental Protection Act

• “Hard Look” standard
  • Agency determination that EIS not required subject to judicial review
  • Burden on challenger to prove decision is arbitrary and capricious
  • Court does not substitute its own judgment for that of the agency
  • Court ensures that agency has taken a “hard look” at the environmental consequences likely to result from the action, is attuned to whether agency considered the relevant areas of environmental concern, and assesses whether agency has convincingly documented its determination of “no significant impact”
QUESTIONS?

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