



Tribal Lands and Environment:
A National Forum on Solid Waste, Emergency
Response, Contaminated Sites and
Underground Storage Tanks

*Radisson Hotel and Conference Center
Oneida Tribe of Indians of Wisconsin*

August 23-25, 2011



Tribal Sovereignty and Superfund: The Power of Tribal ARARs and the Role of the EPA National Remedy Review Board

3:30 – 5:00 p.m.
Turtle Room

*Case Study: The St. Regis Superfund Site, Cass Lake, MN
Leech Lake Band of Ojibwe*

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The Development and Implementation of Tribal Environmental Law to Cleanup and Restore Reservation Lands and Resources

2011 Tribal Lands Forum
August 24, 2011

by
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Key Questions

1. What are the sources of Tribal legal authority?
2. What are the policy reasons for Tribes to develop and enforce their own regulatory programs?
3. Why should Tribes develop their own hazardous substance cleanup laws and standards?
4. What are the risks if Tribes don't?



Overview

- Indian Reservations are the remaining homeland of Indian Tribes
- Tribes entitled to use and enjoy their reservation homeland and associated on and off-Reservation natural resources
- If Tribes do not exercise their sovereignty to protect the Reservation Environment – who will?



Why a Tribe or Band Should Enact Its Own Cleanup Standards

- Assertion of the Tribe or Band's inherent sovereign powers
- Demonstrates a Tribe or Band's governmental process, self-confidence and authority
- Exercise Tribe or Band's right of self-determination and protects its interests, both on and off the Reservation (extra-territorial jurisdiction)

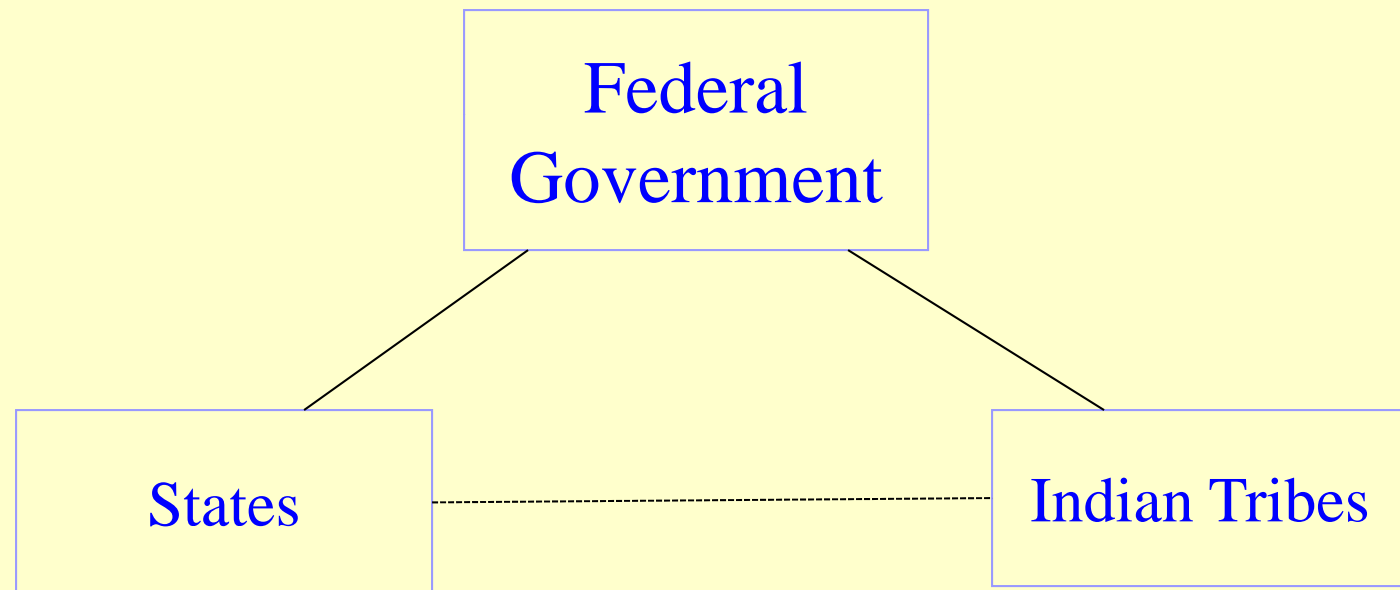


Why a Tribe or Band Should Enact Its Own Cleanup Standards

- Enables a Tribe or Band to apply its own values to determine how clean is “clean” (and for what purpose)
- Important for establishing a baseline from which to measure Natural Resource Damage injuries



Civil Regulatory Authority: The Three Sovereigns





Sources of Tribal Civil Regulatory Authority

- Tribe and Bands as property owners
- Powers conferred by Congress through statute or treaty
- Retained inherent sovereignty

Atkinson Trading Co. v. Shirley, 121 S. Ct. 1825 (May 29, 2001)



Tribes/Bands as Property Owners

- Concept of the “Reservation Environment”
- Geographic criterion that governs the extent of the Tribe’s authority
- Extraterritorial reach of Tribal regulatory programs



Tribal Government Land Acquisition Policy

- Applicable to all lands (fee and trust) within the exterior boundaries of the Reservation
- Means to acquire fee lands to convert into trust lands and expand the Tribal/Band land base
- Acceptance of land into trust requires compliance with applicable Federal and Tribal law



Retained Inherent Sovereignty

- To regulate the activities of nonmembers who have entered into *consensual relationships* through commercial dealing, contracts, leases or other arrangements; and
- To exercise civil authority over conduct of nonmembers on the Reservation that directly effects the Tribe's *health, welfare, political integrity, or economic security*.

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



Powers Conferred by Congress

- Several federal environmental statutes provide for Treatment as State designations for Tribes that meet certain regulatory standards (e.g., *Clean Air Act*, *Clean Water Act*)
- By contrast, CERCLA is *not* delegable



Clean Water Act

33 U.S.C. §§ 1251 *et. seq.*

- Water quality standards (WQS) protect designated uses and provide foundation for enforceable pollution control measures
- Tribal and federal WQS are enforceable on Indian reservation, State WQS (whether or not) approved by EPA do not apply within the Reservation Environment



Tribal WQS

- CWA defines “reservation” to include all land within the limits of an Indian reservation, notwithstanding the issuance of any patent. (33 U.S.C. § 1377(h)(1))
- May be more stringent than either State or Federal WQS (33 WSC § 1377)
- Off-reservation, upstream discharge point sources must comply with Tribal WQS (*City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 118 S. Ct. 410 (1997))



CERCLA

- Comprehensive Environmental Response, Compensation and Liability Act
- Enacted in 1980 to clean up leaking, inactive or abandoned hazardous waste sites and provide emergency responses to spills
- Remedial statute – applies retroactively where past acts contribute to current endangerment
- Parties responsible for causing release should pay for cost of clean-up



SARA

- Superfund Amendments and Reauthorization Act of 1986
- Expanded the role of Indian Tribes in both remediation and natural resource damage processes
- Generally, governing body of an Indian Tribe is to be “afforded substantially the same treatment as a State” with respect to many provisions of Superfund. (42 U.S.C. § 9626(a))
- Section 107(f)(1) amended to extend recovery for liability for damages to natural resources to Indian Tribes

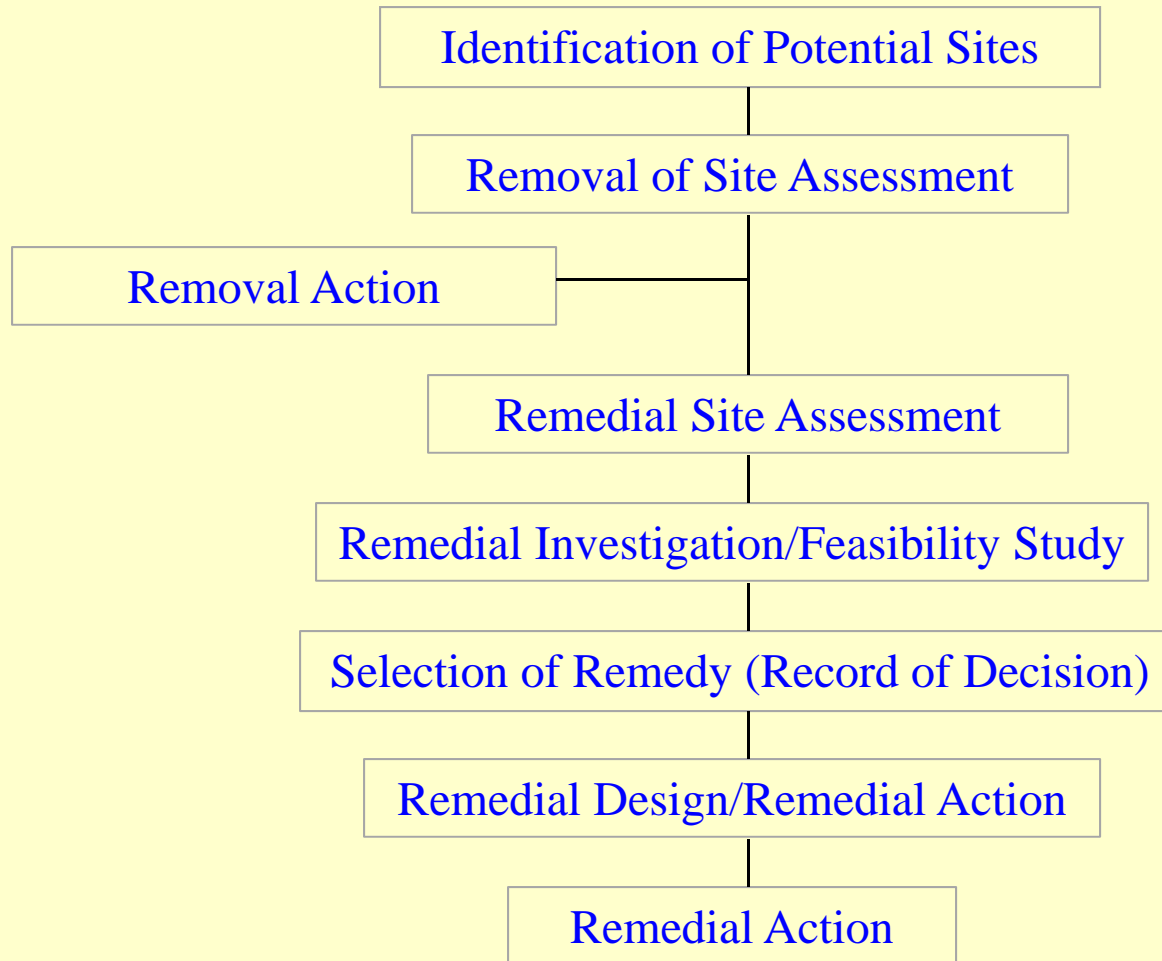


CERCLA Liability

- Strict
- Joint and Several
- Remedial (retroactive)
- Liability for clean up costs
- Liability for Natural Resource Damages



Remedial Process





Tribal Sovereignty The Power of Tribal ARARs and the Role of the EPA National Remedy Review Board

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Lessons Learned

- You need to have a long-term view and stay focused on the issues to be addressed
- The strength of your staying power is the long-term commitment of Tribal leadership
- Develop and work with partner governments and agencies
- Maximize Tribal participation in the CERCLA process



Lessons Learned

(Continued)

- Ensure that Tribal ordinances and policies are current and defensible
- Develop the administrative record to include support for Tribal concerns.
- Provide Tribal ARARs to EPA - the ROD must comply with ARARs
- Continue to tell your story – EPA’s memory is short



Tribal Civil Regulatory Authority -- Tribes Have Inherent Authority to:

- Regulate the activities of nonmembers who have entered into *consensual relationships* through commercial dealing, contracts, leases or other arrangements; and
- Regulate the conduct of nonmembers on the Reservation that directly effects the Tribe's *health, welfare, political integrity, or economic security*

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



Tribal Environmental Enforcement Goals

- Implement timely and effective clean up that protects human health and the environment
- Maximize effectiveness in negotiations with EPA (the State) and responsible parties
- Facilitate economic development
- Recover Tribal response costs



Tribal Enforcement

- *Directly under Federal law:* carry out federal enforcement actions under a § 104(d)(1)(A) cooperative agreement; or by CERCLA citizen suit to enforce EPA orders
- *Indirectly under Federal law:* through implementation of Tribal standards as ARARs.
42 U.S.C. § 9621(d)(2)(A)(ii); 40 C.F.R. § 300.400(g)(4)
- *Directly under Tribal law:* where the scope of the Tribal HSCA is broader than CERCLA (e.g., oil as a hazardous substance)



All Roads Lead to Tribal Cleanup Standards

- Whether acting as a property owner, asserting its civil regulatory authority or working in cooperation with EPA to implement remedial measures, the CERCLA process is driven by the need for the selected remedy to comply with ARARs.
- The importance of Tribal cleanup standards cannot be overstated.



Tribal Hazardous Substances Control Act ("HSCA")

- Tribal equivalent to CERCLA (remedial statute)
- Tribal exercise of inherent sovereignty and civil regulatory authority
- Requires the implementation of remedial measure to protect human health and the environment
- Creates Tribal cause of action for Natural Resource Damages



Tribal HSCA

(Continued)

- Establishes standards for the cleanup of sites contaminated by hazardous substances (including petroleum products)
- Provides for voluntary or directed enforcement of Tribal law
- Provides for use of the Tribal administrative process and requires exhaustion of Tribal administrative remedies
- Provides for judicial review of the Tribal agency's decision in Tribal Court



Tribal Cleanup Standards as ARARs

Under § 121 of CERCLA, cleanup of a contaminated site must comply with all “legally applicable or relevant and appropriate . . . requirements,” or ARARs, including Tribal environmental requirements that may be “more stringent” than federal requirements



Tribal Cleanup Standards

- There are no federal cleanup standards (or ARARs) in CERCLA
- EPA looks to states and Tribes for guidance
- Tribes can develop their own cleanup criteria
- Tribal ARARs are powerful regulatory tools for protecting the health of the reservation population and the quality of the reservation environment

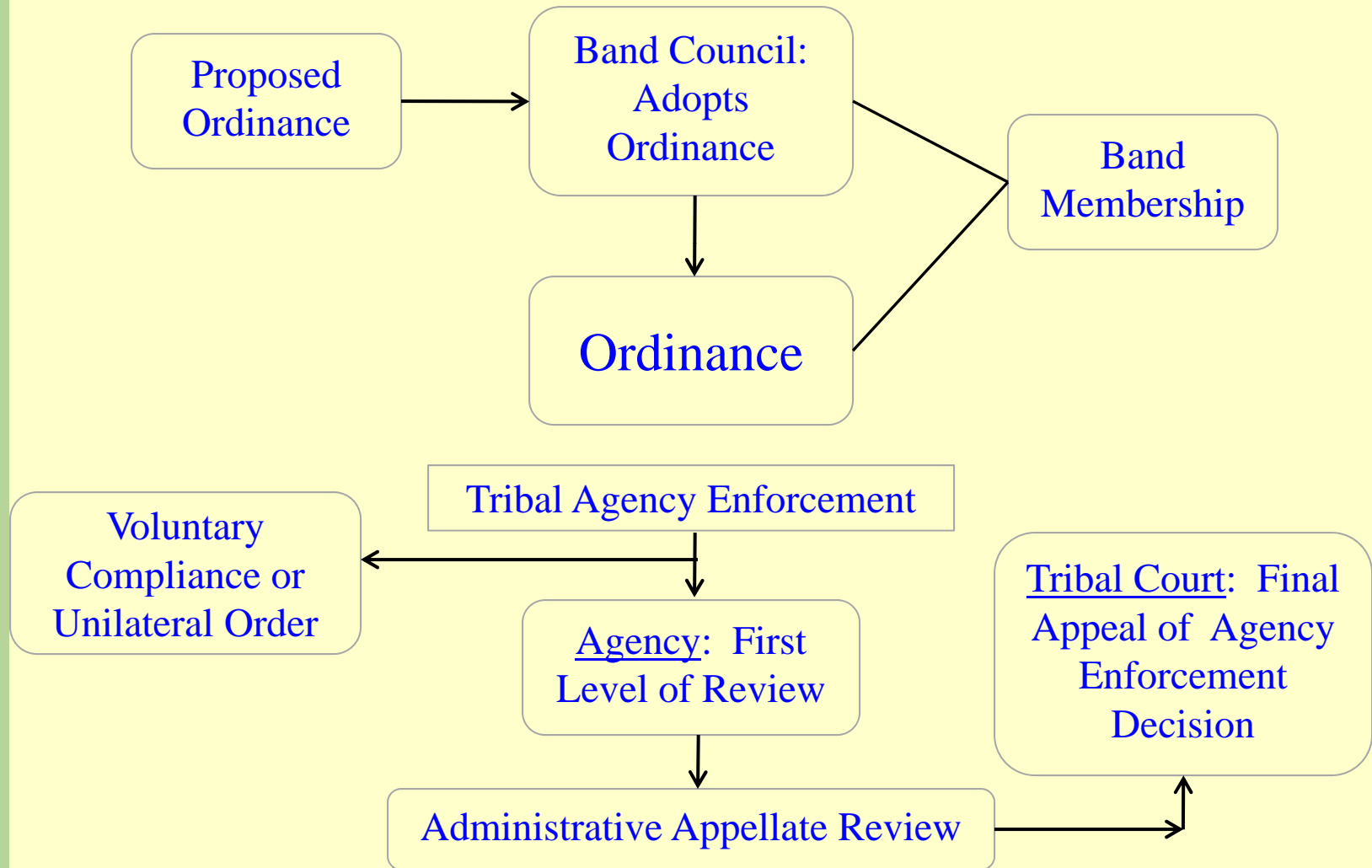


Developing Cleanup Standards

- Starting point: existing Tribal or state cleanup standards
- Tribal and state standards can be the same
- Tribes may set more stringent cleanup standards because of differing resource uses (fish consumption, traditional foods, medicines, basket making)
- Standards define injury to impacted resources (water quality, sediment, wetlands)



Enforcement of an Ordinance Under the Tribal Administrative Process





History of the St. Regis NPL Site

- 1957 – St. Regis Paper Co. opens mill to treat lumber with land leased from railroads – later expands
- 1960 – Use of pentachlorophenol (PCP) in fuel oil begins
- 1969-73 – Copper Chromium Arsenate used in warm months
- 1984 – Operations end, listed as NPL site



Waste Treatment Process

- 3 unlined ponds to treat wastes
- Wood conduits
- Disposal in City Dump
- Disposal to Cass Lake sewer system
- Estimated volume of 12,000 gallons a day



Removing sludge from storage pond



St. Regis Paper Company Superfund Site Cass Lake, Minnesota





Current Conditions

- Site has 4 Operable Units (OU)
 - OU1 Process Area (soils)
 - OU2 Contaminated Soil Containment Vault
 - OU3 Cass Lake City Dump & Fox Creek
 - OU7 Residential House Dust
- Not being cleaned up as one site, or as operable units, rather on a phased-media specific basis: residential areas; soils; groundwater; etc.



Contaminants of Concern

- Wood Treatment facilities produce a wide range of contaminants
 - Physically range from dust to DNAPL
 - PCP
 - CCA
 - Dioxins/Furans
 - Metals (chromium, arsenic, barium, mercury)
 - Bioaccumulation issues



The Failed Remedy

- 1984 – St. Regis site is listed as “posing an imminent and substantial threat to human health and the environment”
- 1985-1988 – Minnesota Pollution Control Agency
 - Groundwater containment wells installed OU1
 - Soil Vault for “visually contaminated” site wastes (results in 1.5 million gallons of leachate by 2005)
 - Cass Lake City water extension to residences



EPA Remedial Process

- 1995 – Leech Lake Band requests lead change from State to EPA
- 2011 – FS (for soils) Completed –Soil Cap Preferred
- 2011 – Draft/Final ROD for Soils
- 2011 – Negotiations w/ PRP for Consent Decree to implement ROD
- 2012 – Implementation of Soil Remedy



Tribal Position: Remedial Action is Premature

- EPA-5 must first complete site characterization
- Remedial alternatives cannot be fairly evaluated until sampling is complete and costs are known
- EPA-5 must comply with the Tribe's HSCA, as an ARAR
- The Natural Resource Trustees should be part of the remedy selection process
- EPA must participate in meaningful and informed decision-making with the Tribe, State of Minnesota, the Trustees and the City of Cass Lake



EPA National Remedy Review Board

- Internal advisory body
- Regional representatives present their preferred remedy
- Tribal/State Agency partners may participate
- PRPs may not participate



EPA National Remedy Review Board

- Remedy Review Board issues recommendations to EPA Regional Office
- Regional Office responds to Remedy Review Board
- However, the process assumes the Region's good faith compliance with the Board's recommendations



How Did EPA Region 5 Respond to the Recommendation Made By the National Remedy Review Board?

NRRB Comment: Insufficient subsurface sampling to determine contamination data horizontally & vertically

- EPA Region 5 Response: *Necessary data to conduct a baseline risk assessment, and develop and evaluate remedial alternatives for the remaining soil contamination exists collectively in [list of documents, studies, and reports]*
- Tribe's Observation: Region 5 found the sampling to be adequate, ignoring NRRB's comment



How Did EPA Region 5 Respond to the Recommendation Made By the National Remedy Review Board?

(Continued)

NRRB Comment: No evaluation of potential for COC migration to groundwater

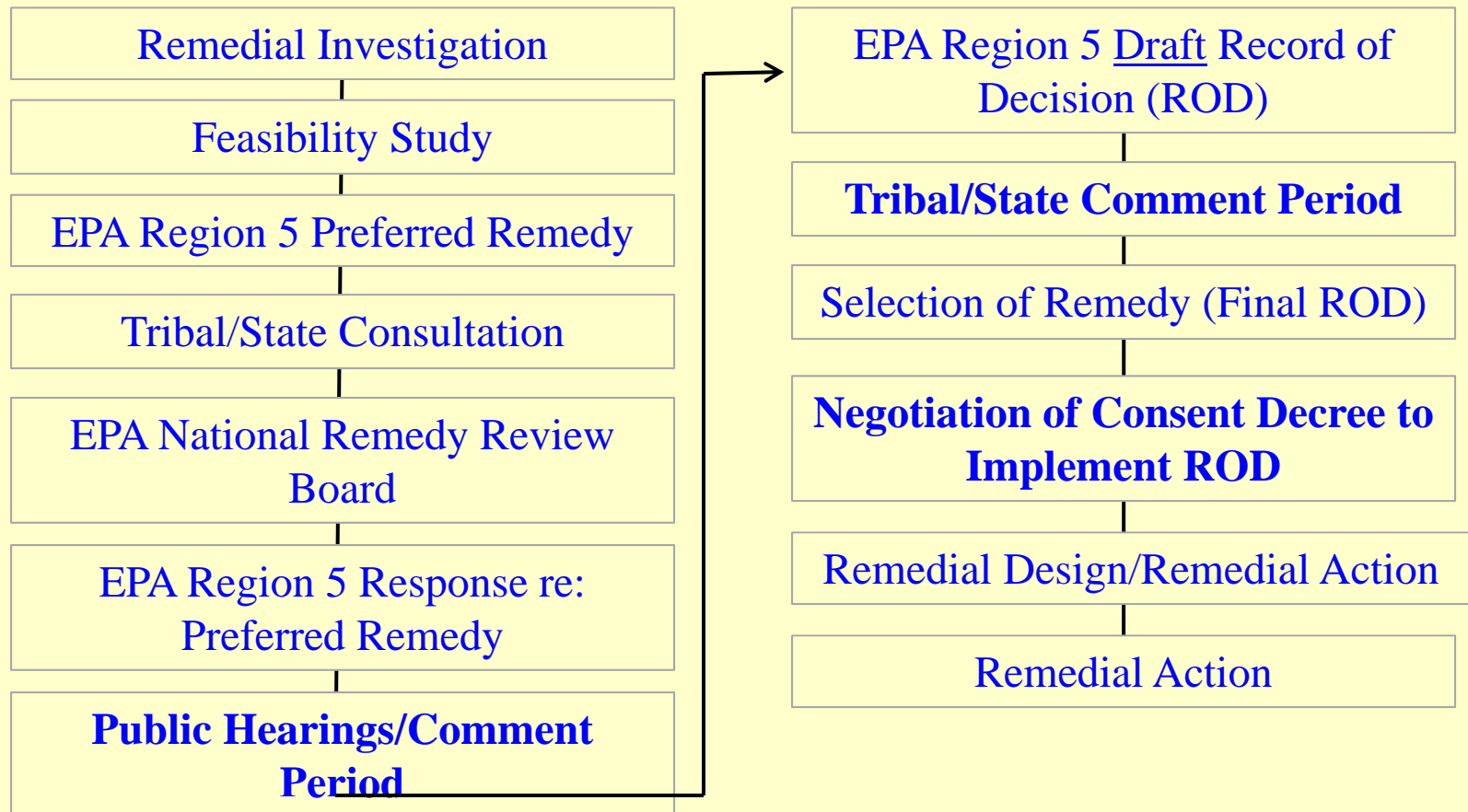
- EPA Region 5 Response: *EPA believes that this existing groundwater remedial action is an effective approach for addressing the groundwater source material*
- Tribe's Observation: Region 5 found the current remedial action to be adequate, ignoring the NRRB's comment



Where Do We Go From Here?



Remedy Selection at the St. Regis NPL Superfund Site





Summary

- Reservation lands are the glue that binds Tribes together
- The quality of the Reservation Environment is of critical importance to Tribes
- Contaminated Sites are detrimental to the health, safety, and economic survival of Tribes, and adjacent non-Indian communities



Conclusion

- Good intentions and strong words are not enforceable
- The Federal Government trust obligation is unreliable
- Tribes must act to protect their interests
- It is the development, implementation and enforcement of Tribal law that will enable Tribes to protect the health of the Reservation Population and the quality of the Reservation Environment



**The Earth and myself are of one mind.
The measure of the land and the
measure of our bodies are the same.**

**Himmaton Yalatkit (Joseph)
Nez Perce Chief**