CLE International

Environmental Law on the Reservation

The Freedom of Information Act

Communications between Federal Agencies and Indian Tribes following Klamath Water Users Association v. DOI.

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Training Objectives

- Brief overview of the FOIA
- Review Klamath
- Post Klamath communications between Federal agencies and Tribes

[Disclaimer]
Training Objectives

■ Keep in Mind:
  • I am a lawyer
  • Working for the Federal government
  • In Washington, DC.
  • TRUST ME.

FOIA Overview

■ History
  • Passed in 1966
  • Purposes: open operation of government

FOIA's objective is to achieve the "fullest responsible disclosure." S. Rep. No. 89-813 at 3 (1965).

FIOA Overview

■ Release documents upon request UNLESS one of nine exemptions applies.

■ Reno policy: foreseeable harm standard
  • "FULLEST responsible disclosure"

■ Ashcroft policy: sound legal basis standard
  • "fullest RESPONSIBLE disclosure"
FOIA Overview

- Exemption (2) – Internal Personnel Rules and Agency Practices
- Exemption (3) – Statutory Exemptions
- Exemption (4) – Commercial Information
- Exemption (5) – Common law Privileges
- Exemption (6) – General Privacy
- Exemption (7) – Government Investigations
- Exemption (9) – Well Data

Klamath Water Users Ass’n

- Background
  - Klamath irrigation project
  - BOR Op-Plan
    - BOR, BIA, FWS, SOL
    - MOU with Klamath Basin Tribes
  - State water rights adjudication
  - Klamath plaintiffs

Klamath Water Users Ass’n

- FOIA request
- Case history
  - District Court
    - Decided for DOI: fiduciary communication theory
  - 9th Circuit Court of Appeals
    - Decided for plaintiffs: “direct interest” test for exemption 5 threshold
Klamath Water Users Ass'n

- Case history (cont'd)
  - U.S. Supreme Court
    - "functional test" implicitly approved
    - "threshold analysis" must precede the privilege analysis
    - threshold test fails where, as here, the tribes communicated as "self advocates at the expense of others seeking benefits inadequate to satisfy everyone."

Klamath Water Users Ass'n

The Big Myth:

The Klamath case stands for the proposition that no Federal agency communications with Tribes are protected under the FOIA.

NOT

Klamath Lessons

- "functional test" implicitly approved
- "threshold analysis" must precede the privilege analysis
- threshold test fails where, as here, the tribes communicated as "self advocates at the expense of others seeking benefits inadequate to satisfy everyone."
- Klamath addressed exemption (5) only
What Survives *Klamath*?

- Exemption (2) – Internal Personnel Rules and Practices of an Agency
  
  - Post 9/11, an exemption in flux.
  - Classified information (Ex. 1) vs.
  - Sensitive information (Ex. 2, maybe)
    - "critical infrastructure" information

What Survives *Klamath*?

- Exemption (3) - Statutory Exemptions
  
  - Archaeological Resources Protection Act, 16 U.S.C. § 470hh(a)

What Survives *Klamath*?

- More Exemption (3) Statutes:
  
  - Federal Cave Resources Protection Act, 16 U.S.C. § 4301
What Survives *Klamath*?

- Exemption (4) – Commercial Information
  - *Utah v. DOI*, 256 F. 3d (10th Cir. 2001)
  - Goshute tribe and PFS entered into a lease for a spent nuclear fuel repository
  - Tribe forwarded it to BIA or approval
  - 10th Circuit upheld DOI's withholding of certain lease provisions under exemption (4)

What Survives *Klamath*?

- Exemption (5) – Common Law Privileges
  - Communications between tribes when they are not acting as "self advocates at the expense of others seeking benefits inadequate to satisfy everyone" if they meet "functional test" requirements.
  - Coal / timber resources of tribes
  - 638 contracting

What Survives *Klamath*?

- Exemption (5) – Common Law Privileges
  - Common Interest Doctrine
  - Transmittal of an agency’s privileged communication (already exempt from release) to a Tribe’s attorney for the purpose of preparing a common defense or position in litigation.
What Survives *Klamath*?

- Exemption (6) – General Privacy

  - Home addresses
  - Home telephone numbers
  - Blood quantum
  - Social security numbers
  - Etc.

What Survives *Klamath*?

- Exemption (6) – General Privacy - Caveat

    - names/addresses of Indian owners of trust or restricted lands,
    - information on location of parcels, and
    - % of interest each individual owns

  NOT protected from release IF

What Survives *Klamath*?

- Exemption (6) – General Privacy - Caveat

  - § 217 - PL 106-462 (cont’d)

  Requested by

  - Other Indian owners within same reservation
  - Tribe exercising jurisdiction
  - Prospective applicants for leasing, use, consolidation of the land
What Survives *Klamath*?

- Exemption (7) – Government Investigations
  - Comprehensive Environmental Response
    Compensation and Liability Act
    (CERCLA), 42 U.S.C. §§ 9601-75
  - 43 C.F.R. Part 11 – DOI Regulations
    - Methods for determining exposure,
      quantifying injury, and determining
      damages

What Survives *Klamath*?

- Exemption 7 (cont'd)
  - "Law enforcement proceedings" include
    civil actions.
  - Pending or contemplated law
    enforcement proceedings are protected as
    long as the agency can point to a specific
    proceeding.

What Survives *Klamath*?

- Exemption (9) – Well Data
  - Water well data.