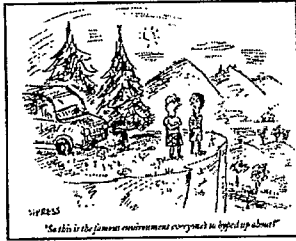


### CLE International

Environmental  
Law  
on  
the  
Reservation



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### The Freedom of Information Act

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

Ed Keable  
Office of the Solicitor  
Division of General Law  
Department of the Interior

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### Training Objectives

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

[Disclaimer]

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## Training Objectives

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

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## 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).

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## 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"

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## 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

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## *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

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## *Klamath Water Users Ass'n*

- FOIA request
- Case history
  - ◆ District Court
    - ◆ Decided for DOI: fiduciary communication theory
  - ◆ 9<sup>th</sup> Circuit Court of Appeals
    - ◆ Decided for plaintiffs: “direct interest” test for exemption 5 threshold

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*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.”

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*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**

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*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

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**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

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**What Survives *Klamath*?**

- Exemption (3) - Statutory Exemptions
  - ◆ Archaeological Resources Protection Act  
16 U.S.C. § 470hh(a)
  - ◆ National Historic Preservation Act,  
16 U.S.C. § 470w-3
  - ◆ Indian Mineral Development Act,  
25 U.S.C. § 2103(c)

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**What Survives *Klamath*?**

- More Exemption (3) Statutes:
  - ◆ Federal Cave Resources Protection Act,  
16 U.S.C. § 4301
  - ◆ Indian Gaming Regulatory Act,  
25 U.S.C. § 2701
  - ◆ Section 207, National Parks Omnibus  
Management Act of 1998, Pub. L. 105-  
391; 16 U.S.C. § 5937

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**What Survives *Klamath*?**

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

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**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

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**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.

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**What Survives *Klamath*?**

- Exemption (6) – General Privacy
  - ◆ Home addresses
  - ◆ Home telephone numbers
  - ◆ Blood quantum
  - ◆ Social security numbers
  - ◆ Etc.

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**What Survives *Klamath*?**

- Exemption (6) – General Privacy - *Caveat*
  - ◆ § 217 - Indian Land Consolidation Act Amendments of 2000 PL 106-462
    - ◆ 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

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**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

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**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

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**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.

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**What Survives *Klamath*?**

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

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