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Crossing the Dark and Fearful River: Monsanto, PCBs, and Emerging Tort Theories

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CROSSING THE DARK AND FEARFUL RIVER: MONSANTO, PCBS, AND EMERGING TORT THEORIES

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I. INTRODUCTION

"I was in the air, with outstretched arms, and floating fast. There was a fearful dark river that I had to go over, and I was afraid. It rushed and roared and was full of angry foam. Then I looked down and saw many men and women who were trying to cross the dark and fearful river, but they could not. Weeping, they looked up to me and cried: "Help us!" Black Elk Speaks.[3]

Black Elk witnessed the full arc of his tribes' interaction with colonizers. Born in 1863, he grew into a wičháša wakhą or 'holy man' of the Oglála Sioux tribe in time to see the virtual destruction of his people, the land they knew, and their way of life.[4] Today, tribes are re-tracing that journey, hoping to reverse the effects of centuries of cultural, environmental, and actual genocide, and regain a modicum of what was lost. Before they can arrive, tribes must cross a "dark and fearful river...." The river is dark because it is chock full of poison; fearful because returning the river to a healthy state seems a Sisyphean undertaking.

In this article, the river represents the polychlorinated biphenyl (PCB) contamination that is ubiquitous in the water, land, animals, plants, and the physical bodies of Native Americans themselves. Toxic pollutants such as PCBs affect all humankind, but the dark, deleterious presence of PCBs disproportionally affects Native Americans.[5] Native American tribes and their members have suffered, are currently suffering, and will continue to suffer from the environmental and public health crises perpetuated by PCBs, but emerging tort theories offer a glimmer of hope for a financial remedy.[6] The purpose of this article is to provide an overview of how PCBs affect Native land and peoples, and show how tribes can begin the process of ameliorating and remediating PCB contamination through traditional and emerging tort theories which seek to hold the source of PCBs, Monsanto, financially responsible for the harm they caused. PCB contamination affects Native peoples

[3] JOHN G. NEIHARDT, BLACK ELK SPEAKS: THE COMPLETE EDITION 154 (2014).
[4] *See Id*.
[5] *See* discussion *infra* Section V.A.
[6] *See* discussion *infra* Section IV.

around the world, but this article relies heavily on tribes located in the Pacific Northwest and their relationship to salmon as a focal point to guide the discussion.

Tribal, state, and city authorities are currently pursuing or have settled product liability, public nuisance and other common law and statutory tort claims brought against Monsanto[7] for PCB contamination.[8] "Sovereign-led" litigation melds traditional plaintiff common law tort litigation with sovereign-led environmental suits and is an emerging trend in environmental law.[9] Tort claims against the manufacturers of contaminants ubiquitous in the environment give sovereigns a new angle for pursuing damages separate from a traditional statutory environmental claim under federal or state regulatory schemes, such as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). For example, a strict liability products claim based on failure-to-warn and defective design theories allows tribes to avoid the difficult task of proving the origin and circumstances of any given PCB release because those theories do not require such proof. This is particularly relevant to PCB contamination, because since 1935 Monsanto has been the sole producer of PCBs in the United States.[10] Thus, Monsanto is the only possible source of most PCB contamination, eliminating the need for market-share or commingled-product theories.[11]

Furthermore, internal Monsanto documents show that Monsanto was well aware of the negative impacts of PCBs decades before such information became public knowledge and PCB was

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[7] The original Monsanto Chemical Co. "Old Monsanto" underwent a series of corporate spin offs and acquisitions beginning in 1997. As a result, PCB plaintiffs have identified the following corporations as bearing responsibility for Old Monsanto's PCB contamination: Bayer, Pharmacia, Pfizer, Solutia, and Monsanto ("New Monsanto"). New Monsanto was acquired by Bayer in 2018. For ease of reading, this article will simply refer to those entities collectively as "Monsanto"; *See* Plaintiffs' Second Amended Petition at 5-6, Back v. Monsanto, No. 18SL-CC03530 (Mo. Cir. Ct. Jan. 17, 2020).

[8] *See e.g.* Plaintiffs' Second Amended Petition at 5-6, Back v. Monsanto, No. 18SL-CC03530 (Mo. Cir. Ct. Jan. 17, 2020); Complaint, Washington v. Monsanto, No. 16-2-29591-6 (King Co. Super. Ct. 2016); City of Seattle v. Monsanto Co., 387 F.Supp.3d 1141, 1148 (W.D.Wash., 2019).

[9] Eric L. Klein & Graham C. Zorn, Def. Research Inst., *Beyond MTBE: Where Sovereign-Led Litigation Goes from Here*, FOR THE DEF. 4 (June 2017) [hereinafter *Beyond MTBE*].

[10] Gerald Markowitz & David Rosner, *Monsanto, PCBs, and the creation of a "world-wide ecological problem",* J. PUBLIC HEALTH POLICY**,** Nov. 2018 at 465.

[11] Beyond MTBE, *supra* note 9, at 4.

effectively banned statutorily.[12] Those documents are compelling evidence for key elements of strict liability claims. Thus, the mere presence of PCBs in the environment may be enough to support a finding of liability against Monsanto.

Additionally, sovereign plaintiffs may seek damages for the loss of value of a natural resource, such as a fishery or a drinking water supply.[13] Even natural resources without a direct economic use can be calculated to form part of an award for damages.[14] Finally, sovereigns may be able to employ outside counsel on a contingency fee basis, alleviating much of the risk and financial burden.[15]

Part II of this article explores the history of PCB production, including Monsanto's knowledge of the negative health effects of PCB exposure and continues with a discussion of how PCB negatively affects Native populations through its accumulation in marine life. In Part III, we briefly review the history of sovereign-led suits brought to address public health issues, potential causes of action against Monsanto for PCB contamination, and threshold issues of standing tribal plaintiffs must establish in order to defeat a motion to dismiss. Part IV discusses PCB litigation by the St. Regis Mohawk Tribe, the State of Washington, and the City of Seattle. Finally, Part V argues that Native Americans are disproportionately affected by PCB contamination in the environment and concludes with a discussion of issues tribal plaintiffs may confront in PCB litigation against Monsanto.

II. HISTORY OF PCB IN THE UNITED STATES

Polychlorinated biphenyls (PCBs) are part of an extremely prevalent group of manufactured organic chemicals called

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[12] *See* discussion *infra* Section II.A.

[13]Graham Zorn & Eric Klein, *Natural Resource Damages: A New Angle In PCB Litigation*, LAW 360 (April 05, 2017), https://plus.lexis.com/api/document?Id.=urn:contentItem:5N7V-VVN1-K0BB-S0R1-00000-00&Id.type=PID.&context=1530671

[14] *E.g.,* DESVOUGES ET AL., MEASURING NONUSE DAMAGES USING CONTINGENT VALUATION: AN EXPERIMENTAL EVALUATION OF ACCURACY (2d. Ed. 2010) available at http://www.rti.org/sites/default/files/resources/bk-0001-1009_web.pdf.

[15] Beyond MTBE, *supra* note 13.

chlorinated hydrocarbons.[16] They are made by attaching chlorine atoms to biphenyl rings, which are composed of carbon and hydrogen.[17] While chlorinated hydrocarbons range in physical and chemical properties, PCBs are commonly known for being tasteless and odorless.[18] PCBs are also known for having a high boiling point, being nonflammable, being insoluble in water, and not oxidizing in air.[19] These properties have resulted in the use of PCBs in a large array of products ranging from copy paper to electrical equipment.[20] Due to the commonplace nature of many of these products, PCBs are a pervasive part of our everyday life.

A. Production of PCBs

PCBs were first manufactured in 1929 and used primarily as a fluid coolant, and by the early 1930s Swann Chemical Company began to produce them in the United States.[21] In 1933, Monsanto acquired most of Swann's shares and officially bought the company in 1935.[22] Once Monsanto acquired Swann, it was the only PCB producer in the entire country.[23] The original Monsanto exists as three present day entities after various acquisitions and mergers.[24] In 1997, Monsanto transitioned its industrial chemical and fibers into a new corporation, Solutia Inc.[25] Additionally, in 2000, Monsanto began focusing solely on the agricultural side of its business, while Pharmacia & Upjohn Inc took over the chemical businesses.[26]

Monsanto was aware that PCBs were being used in products like transformers that were to be widely distributed.[27] In fact, their product codes demonstrate that they intended to use PCBs in

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[16] Polychlorinated Biphenyls (PCBs), United States Environmental Protection Agency, (last visited Jan. 14, 2021) https://www.epa.gov/pcbs/learn-about-polychlorinated-biphenyls-pcbs#what.
[17] Complaint for Damages at 9, Bard v. Monsanto, No. 18-2-00001-7 (King Co. Super. Ct. Jan. 2, 2018).
[18] *Id.*
[19] *Id.*
[20] MARKOWITZ, *supra* note 10, at 479.at 465.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] Timeline: History of Monsanto Co, Thomson Reuters, https://www.reuters.com/article/us-food-monsanto/corrected-timeline-history-of-monsanto-co-Id.USTRE5AA05Q20091111.
[25] *Id.*
[26] *Id.*
[27] *Id.*

products like "electrical insulation, flameproofers, paints, varnishes, adhesives, lacquers, moisture proof paper, heat transfer, impregnation, delustering rayon, plasticizers, fireproofing cloth, ink, lubrication, temperature control equipment, and chewing gum."[28]

After New Deal legislation was passed and the United States began its involvement in World War II, there was a significant increase in electrification products that led to a huge demand for insulating materials that PCBs were commonly used in.[29] Recognizing this market development, Monsanto began heavily advertising products containing PCBs.[30]

B. Growing Recognition of Toxicity

The side effects of PCBs were noted early on in their production, and the increase in demand for PCB-laden products led to a greater understanding of their deleterious effect on human health.[31] Early manufacturers realized that the process of chlorinating diphenyl created an unstable chemical compound that released hydrochloric acid.[32] When hydrochloric acid came into contact with the worker's skin, it led to various infections and skin disease.[33] Workers involved in large scale production began developing a serious skin condition called chloracne, which produces "disfiguring pustules and blackheads."[34] These infections led Swann to conduct a study with Dr. Frederick Flinn, a professor at Columbia University, to determine whether PCBs could cause dermatitis.[35] Dr. Flinn reported that "if a leak or spillage occur[ed] the immediate bathing under these circumstances should be insisted on."[36] This statement demonstrates that Swann, and eventually Monsanto, were aware of the potential risks associated with PCBs prior to their mass production.[37]

A few years later, in 1937, the Dean of Public Health at Harvard University, Cecil Drinker, wrote an article that discussed

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[28] *Id.* at 466.
[29] *Id.*
[30] *Id.* at 473.
[31] *Id.* at 474
[32] *Id.*
[33] *Id.*
[34] *Id.* at 466.
[35] *Id.* at 467.
[36] *Id.*
[37] *Id.*

his own concerns about "the possibility of systemic effects following ingestion or inhalation of such products."[38] His study concluded that chlorinated biphenyls could cause liver and skin damage.[39] In response to this study, the future Medical Director of Monsanto, R. Emmet Kelly, stated that though there were some skin issues observed in workers, the cause thereof had never been attributed to chlorinated biphenyls.[40] He further claimed that there were no "systemic reactions" among workers who manufactured the chemical.[41] One year after his initial study, Drinker wrote a "Report to the Monsanto Chemical Company" in which he warned Monsanto that the high toxicity of chlorinated biphenyls made them dangerous, and "no liberties can be taken with it."[42]

Within this same timeframe, internal communications for Monsanto discussed the toxicity of chlorinated biphenyls.[43] One Monsanto official wrote that "prolonged exposure to Aroclor vapors evolved at high temperatures or by repeated oral ingestion will lead to systemic toxic effects."[44] Aroclor is an industrial trade name for a specific type of PCB mixture used commonly as a coolant and as transformer fluid.[45]

Additionally, during the early 1940s, the New York Division of Industrial Hygiene investigated two cable plants that were known to use chlorinated naphthalene, which is a similar chemical from the same category of chlorinated hydrocarbons.[46] They discovered that several workers at both plants had died due to liver damage, and several more had cases of dermatitis.[47] The department concluded its report by stating that chlorinated biphenyls were highly toxic and needed to be handled with extreme care due to the risks associated with exposure.[48]

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[38] *Id.*
[39] *Id.*
[40] *Id.* at 469.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] Polychlorinated Biphenyls (PCBs), United States Environmental Protection Agency, https://www.epa.gov/pcbs/learn-about-polychlorinated-biphenyls-pcbs#what.
[46] *Id.*
[47] *Id.*
[48] *Id.* at 470.

By 1944, Monsanto was warning their salesmen about the adverse effects of PCBs in products.[49] In a manual produced by the company, Monsanto warned workers of the toxicity of chemicals in Aroclor, listing symptoms like "acute yellow atrophy of the liver."[50] In a service bulletin published by Monsanto a few years later, they also warned employees about "skin-eruptions" that could be caused by exposure to Aroclor.[51]

During the mid-1950s, Dr. Kelly, Monsanto's Medical Director, stated that Monsanto was aware that Aroclors were toxic but there was no known Maximum Allowable Concentration.[52] He also expressed concern for PCBs in household products because the usage and exposure of these chemicals could not be monitored.[53]

In the 1960s, an industrial hygienist in Monsanto's medical department wrote to a tool company in Chicago regarding Monsanto's brand of hydraulic fluid, Pydraul.[54] The memo explained that Pydraul was an insoluble fluid and because of its density would sink if it was released into streams or other bodies of water.[55] This was problematic due to the fact that a typical use for Pydraul was for hydraulic fluid in submarine periscope housings, increasing opportunities for leaks.[56] The memo further elaborated by stating that if "discharged in large concentrations it will adversely affect the organisms in the body of the receiving stream which will affect the aquatic life in the stream."[57] At this point in time, Pydraul was also being used in various industrial processes and in the food industry, with leaks being recorded from deep fryers.[58]

During this period, corporations began expressing concerns about the use of Pydraul.[59] States began to pass laws that required certain products to contain a label identifying any dangers.[60] An

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[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.* at 466.
[53] *Id.*
[54] *Id.* at 477.
[55] *Id.* at 470.
[56] Gerald Markowitz, *From Industrial Toxins to Worldwide Pollutants: A Brief History of Polychlorinated Biphenyls*, PUBLIC HEALTH REPORTS, Oct. 2018 at 722.
[57] MARKOWITZ, *supra* note 10, at 479.
[58] *Id.*
[59] *Id.* at 478.
[60] *Id.*

internal communication within Monsanto revealed that the company was worried about how these regulations would impact their sales.[61]

In the same decade, a study that was conducted to study the effects of dichloro-diphenyl-trichloroethane (DDT) found alarming amounts of PCBs in fish and fauna, particularly in fish and sea birds.[62] Even more disturbing, PCB had been discovered in human depot fat.[63] The study found traces of the chemical in salmon, sea eagles, fir tree needles, and in the hair of a baby.[64] In 1968, Elmer Wheeler, a member of Monsanto's Medical Department, wrote a piece for the National Agricultural Chemical Association.[65] His article touched upon the fact that PCB was impossible to control and definitively toxic.[66] The article also stated that there were no permissible levels of PCBs due to their extreme toxicity, and that PCBs were causing peregrine falcons to go extinct by thinning the shells of their eggs.[67] Thus, within just a few decades of production within the United States, PCBs were being used in household products all over the country despite manufacturers possessing a concrete understanding of the risks to the environment and human health.[68]

The detrimental effects of PCBs were being discovered outside the United States as well.[69] In 1969, thousands of people in Japan consumed rice oil that contained PCBs.[70] The contamination was caused by a leakage during manufacturing.[71] Of the 14,000 people who consumed the oil, 1,867 people contracted what is now called Yusho disease.[72] Symptoms of Yusho disease include "acne-like eruptions, pigmentation of the skin, nails, and conjunctiva, increased discharge from eyes, and numbness in the limbs."[73] Once ingested, PCBs crossed the placenta barrier, which in turn led to

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[61] *Id.*
[62] *Id.* at 482.
[63] *Id.*
[64] *Id.*
[65] *Id.* at 488.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 484.
[71] *Id.*
[72] *Id.* at 497.
[73] Bommanna G. Loganathan & Shigeki Masunaga, *PCBs, Dioxins and Furans: Human Exposure and Health Effects*, 2 HANDBOOK OF TOXICOLOGY OF CHEMICAL WARFARE AGENTS, 239 (2015).

infants being born with the disease.[74] A 2007 study with victims of Yusho disease found that the effects of exposure lasted two generations.[75]

Recognizing the dangerous effects of PCBs, Monsanto started working with companies to manage contamination.[76] However, Monsanto adopted the disingenuous stance that any contamination was due to the lack of care on the part of their customers.[77] In the 1970s, the prevalence of products containing PCBs forced Monsanto to publicly acknowledge the environmental dangers.[78] In a public letter written by Monsanto's Director of Sales, the already widespread PCB contamination was alluded to by a vague admission that PCBs "had been discovered at some point in some marine, aquatic, and wildlife environments."[79]

Monsanto continued to claim that they were working to control PCBs and that it was not a common household product in an attempt to maintain its reputation.[80] This was a blatant falsity — since their creation over forty years earlier, PCBs were prevalent in households in the form of electrical insulation, paint, and printer paper.[81] Although Monsanto actively obfuscated the serious health risks posed by PCBs, Monsanto eventually announced that it would begin to restricted sales due to concerns that PCBs caused birth defects in animals.[82]

Despite making public statements that they would begin restricting sales, Monsanto continued to produce products containing PCBs and kept searching for new markets for their products.[83] Monsanto continued selling PCBs in closed systems by having its customers sign a contract stating that the client knew about the toxicity of PCBs. In a move particularly relevant to this article, Monsanto even considered approaching Native American tribes during this period to sell their products containing PCBs.[84]

Further studies added to the growing body of research showing the negative impacts caused by PCB contamination. In

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[74] MARKOWITZ, *supra* note 10, at 497.
[75] LOGANATHAN, *supra* note 73.
[76] MARKOWITZ, *supra* note 10, at 489.
[77] *Id.*
[78] *Id.* at 498.
[79] *Id.* at 500.
[80] *Id.* at 502.
[81] *Id.* at 466.
[82] *Id.* at 404.
[83] *Id.* at 510
[84] *Id.* at 510, 518.

1966, a Mississippi zoologist released a study that found that a Monsanto plant was polluting a nearby creek where fish with high levels of PCBs were detected.[85] The fish were deformed, sick, and lethargic. Within a year of the plant's closing, the ecology of the creek had significantly improved.[86] Another study found that bottom feeders like goldfish were particularly susceptible to the harmful effects of PCBs.[87] The study found goldfish with many physical deformities, including stubs where fins should be and eyes popping out of their sockets.[88]

With more information about PCBs becoming widely available to the public, the United States National Cancer Institute met in 1975 to review numerous studies and ultimately concluded that PCB led to carcinomas.[89] Later, an Environmental Protection Agency (EPA) conference discussed traces of PCB discovered in human breast milk.[90] PCBs were found to be ten times more persistent than DDT, a commonly used insecticide that had suspected carcinogenic qualities.[91] By the end of 1975, the EPA called for a voluntary ban on PCBs, asking Monsanto to cease production.[92] Russel Train, the EPA Administrator during that time stated that since the beginning of PCB production in 1929, 700 million pounds of PCBs had been manufactured, 300 million of which were still present in air, water, and soil.[93]

In 1976, Monsanto finally announced its plans to phase out PCB manufacturing and later that year, the Senate passed the Toxic Substances Control Act (TSCA).[94] As of 1979, PCB manufacturing has been banned in the United States, however, some products containing PCBs are allowed to continue being used subject to compliance with the TSCA.[95] The TSCA continues to manage storage, disposal, processing, and distribution of PCBs.[96]

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[85] *Id.* at 519.
[86] *Id.*
[87] *Id.* at 520.
[88] *Id.*
[89] *Id.* at 524.
[90] *Id.*
[91] *Id.*
[92] *Id.* at 525.
[93] *Id.*
[94] *Id.* at 526.
[95] TOXIC SUBSTANCES CONTROL ACT (TSCA) COMPLIANCE, 40 C.F.R. §700 (1976), *available at* https://www.epa.gov/compliance/toxic-substances-control-act-tsca-compliance-monitoring. (last visited Date) Per BB Rule 18.1
[96] *Id.*

Despite the fact that PCB production has been illegal for several decades, the ubiquitous presence of PCBs in the environment, food chain, and human bodies themselves has propelled continued research into their harmful effects. Contemporary studies have shown that PCB in maternal serum at levels of 9.7 ng/ml can limit brain development in children as well as affect their attention spans and IQ levels.[97] PCBs have also been linked to abnormal levels of thyroid hormones in infants, which affect physical growth and brain development.[98] Children born with higher PCB levels suffered from lower birth weight, which can cause other issues such as high blood pressure, cardiovascular disease, diabetes, and strokes.[99] Ultimately, the harm caused by PCBs continues to occur even as we gain a clearer understanding of their adverse effects due to their extreme prevalence in everyday products and their difficulty breaking down in natural environments.

C. Bioaccumulation in Marine Life

Bioaccumulation is "the net accumulation of a contaminant in, and in some special cases on, an organism . . . ."[100] This process is particularly prevalent in aquatic ecosystems because phytoplankton, small organisms at the base of the food pyramid, collect nutrients from the water that are critical to their growth.[101] As they collect nutrients, phytoplankton also collect any chemicals present in the water.[102] Although chemicals like PCBs can exist in concentrations so low they cannot be detected by instruments used to measure their presence in bodies of water, the process of bioaccumulation results in significant contamination for certain species

Phytoplankton are at the bottom of the food web, so once they uptake PCB, larger organisms like zooplankton and smaller fish consume phytoplankton and the number of toxins in those species

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[97] *PCBs in Farmed Salmon*, ENVIRONMENTAL WORKING GROUP, (last visited Nov. 12, 2021), https://www.ewg.org/research/pcbs-farmed-salmon.
[98] *Id.*
[99] *Id.*
[100] MICHAEL C. NEWMAN, FUNDAMENTALS OF ECOTOXICOLOGY: THE SCIENCE OF POLLUTION 97 (5th ed. 2020).
[101] *Bioaccumulation/Biomagnification Effects,* U.S ENV'T PROT. AGENCY (last visited Nov. 13, 2021), https://www.epa.gov/sites/production/files/documents/bioaccumulationbiomagnificationeffects.pdf.
[102] *Id.*

becomes more concentrated.[103] This process repeats at every step of the food chain and is called biomagnification.[104] Since PCBs are difficult to break down, aquatic organisms store them in their fatty tissues.[105] Thus, organisms who are top predators within the food web, like salmon, can accumulate PCB in their systems to the point of suffering from deformities and death.[106] This can occur even if PCB levels in the body of water itself are low.[107] Due to salmon's predatory nature, they can experience PCB build-up at twenty-to-thirty times the levels in their environment.[108]

One study looking at PCB determinants in Coho salmon found that most PCB uptake occurs via food consumption.[109] The study also found that PCB concentrations increase exponentially with salmon length and in some fish, concentrations could double within the span of the year.[110]

A different study looked at PCB magnification in migrating Pacific salmon, a species particularly indicative of PCB impacts due to their ability to travel from the ocean to freshwater streams when they spawn.[111] The salmon deplete their lipids during their pre-spawning period, which can potentially magnify hydrophobic organic contaminants (HOCs) which, in turn, increase toxicity risk for salmon.[112] If salmon are unable to transform or eliminate the HOCs they have accumulated, the loss of lipid that occurs during the upriver migration can cause "magnification of the lipid-normalized concentrations" of contaminants like PCBs in their tissue.[113]

In pre-migration salmon, HOC concentrations are near the threshold for toxic effects, which means the salmon are at a point where they can no longer detoxify themselves from PCBs.[114] In

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[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] ENVIRONMENTAL WORKING GROUP, *supra* note 97.
[109] Charles P. Madenjian et al., *Net Trophic Transfer Efficiency of PCBs to Lake Michigan Coho Salmon From Their Prey*, 32 ENV'T SCI. & TECH. 3063, 3063 (1998).
[110] *Id.* at 3065.
[111] Adrian M. H. Debruyn et al., *Magnification and Toxicity of PCBs, PCDDs, and PCDFs in Upriver-Migrating Pacific Salmon*, 38 ENV'T SCI. & TECH. 6271, 6271 (2004).
[112] *Id.*
[113] *Id.*
[114] *Id.*

post-migration, they are predicted to meet or exceed the toxic threshold.[115] This could in turn affect their embryos who are more sensitive to HOCs.[116] Since egg survival is crucial to salmon populations, PCB pollution can have serious detrimental effects on survival rates.[117] Pacific salmon populations have been decreasing since the 1960s, which coincides with high PCB concentrations.[118]

Not only does salmon depletion make communities that rely on seafood for nutrition and income more vulnerable, it also indicates an issue with aquatic ecosystems on a broader scale. Salmon are considered indicator species, which means that the health of salmon populations indicate whether rivers and oceans are thriving.[119] The health of salmon is directly impacted by the health of the ecosystem.[120] Salmon are exposed to a wide range of ecosystems because some salmon species live in both river and ocean systems.[121] These salmon travel long distances and return to the same space each year when spawning.[122] Because of salmon's relationship to the rest of the ecosystem, bioaccumulation of PCBs in salmon demonstrates a greater issue of contamination that impacts other species and their environs.

D. PCB Persistence in Aquatic Ecosystems

PCBs were banned in the United States several decades ago.[123] While the ban has resulted in lower PCB levels in aquatic ecosystems, PCBs will continue to exist in the environment for the foreseeable future due to their existence in machinery and equipment that is still being used today and due to upcycling in food webs.[124] When animals with PCBs in their systems die, PCBs don't die with them.[125] Instead, animal tissue breaks down, which allows

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[115] *Id.*
[116] *Id.*
[117] *Id.* at 6223.
[118] *Id.*
[119] *Atlantic Salmon (Protected)*, NAT'L OCEANIC& ATMOSPHERIC ADMIN. (last visited Nov. 13, 2021), https://www.fisheries.noaa.gov/species/atlantic-salmon-protected.
[120] *Id.*
[121] *Id.*
[122] Debruyn*, supra* note 112**.**
[123] Christopher Dunagan, *New Theory rethinks spread of PCBs and other toxins in Puget Sound,* ENCYCLOPEDIA OF PUGET SOUND, (last visited Nov. 14, 2021), https://www.eopugetsound.org/magazine/pcb-theory.
[124] *Id.*
[125] *Id.*

PCBs to continue cycling through the food web.[126] For these reasons, many aquatic ecosystems are still recovering from the pervasiveness of PCBs, demonstrating that the ban has not eradicated the problem.

In San Francisco Bay, PCBs continue to exist both on the land and in the watershed. Decades after the ban, the levels of PCBs in sportfish remain up to ten times higher than the threshold of concern for human health.[127] Equipment that contains PCBs, like transformers, can be used for several decades and is still in use today despite the known dangers of PCB pollution.[128]

In an attempt to remedy PCB pollution in the San Francisco Bay, the San Francisco Regional Water Quality Control Board established a PCB total maximum daily load (TMDL).[129] The California State Legislature also implemented various programs to remediate San Francisco Bay during the 1980s and 1990s in response to its designation as a toxic hot spot.[130] In addition, the California Office of Environmental Health Hazard Assessment created a fish consumption advisory that still exists today.[131] Finally, California created the California Toxics Rule that instituted human health criteria for PCBs at 170pg/L in the water.[132] This criterion was created to protect against "human cancer risk for fish consumers from waters meeting these PCB concentrations."[133] The criteria set forth by the state of California are almost always exceeded in the San Francisco Bay.[134]

Sportfish, which are big-game, bony, saltwater fish, are one of the main indicators of the severity of PCB pollution in the Bay because they accumulate high levels of the pollutant and are found near shore where fishermen often frequent.[135] Approximately 86% of fish samples taken during one study had PCB concentrations higher than the threshold for a potential human health concern, and the recommended rate of consumption for sportfish caught in the bay are two per month, with stricter recommendations for children,

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[126] *Id.*
[127] J.A. Davis, et al., *Polychlorinated biphenyls (PCBs) in San Francisco Bay*, 105 ENV'T RSCH. 67, 68 (2007).
[128] *Id.* at 69.
[129] *Id.* at 68.
[130] *Id.* at 69.
[131] *Id.*
[132] *Id.* at 70.
[133] *Id.*
[134] *Id.*
[135] *Id.* at 70, 82.

pregnant individuals, and those who are breastfeeding.[136] Additionally, 90% of the samples collected in different monitoring spots within San Francisco Bay exceeded the criteria set by the California Toxics Rule.[137] Various bird species and harbor seals in the bay also have elevated PCB levels.[138]

Washington state is also struggling with the effects of PCB contamination in its aquatic ecosystems.[139] The Puget Sound has high levels of PCB, especially in comparison to other waterways.[140] A representative of the Washington Department of Fish and Wildlife stated that the "Puget Sound is a PCB hotspot. What gets in the sound stays in the sound."[141] One of the reasons PCBs remain in the sound for so long is because of their hydrophobic nature.[142] PCB molecules repel water, which allows them to attach to other organisms or sediments instead of dissolving.[143] Their inability to dissolve makes them more likely to be taken up by bacteria or plankton in the sound, which then gets consumed by fish.[144]

The Puget Sound is extremely deep.[145] Its depth allows for zooplankton, a primary food source for krill, to thrive.[146] PCB levels in Chinook salmon in the sound also impact their growth, immunity to disease, and hormone levels.[147] Overall, one-third of fish samples studied in Puget Sound had contaminant levels high enough to cause health risks to themselves and to organisms, including humans, who consumed them.[148]

III. LITIGATION STRATEGY

A. *History of Sovereign-led Suits to Combat Public Health Crises*

[136] *Id.* at 70.
[137] *Id.* at 71.
[138] *Id.* at 71-72.
[139] *Id.* Dunagan, *supra* note 124.
[140] *Id*.
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*

There is a substantial history in United States jurisprudence of sovereigns and other government actors pursuing tort claims against manufacturers of various products for the harms those products have caused the public. One high-profile example is the tobacco litigation pursued by various State Attorneys General and the United States Department of Justice.[149] Although product liability suits against tobacco manufacturers had been pursued by private individuals since the 1950s, early suits were almost universally unsuccessful.[150] The turning point in holding tobacco manufacturers responsible was the discovery and publication of internal documents showing that tobacco companies knew of the health risks of smoking and actively hid such knowledge from the public.[151]

Another high profile example of sovereign-led suits that seek to remedy a public health crisis, including suits by many Native American tribes,[152] involves suing opioid manufacturers and distributors.[153] In 2017, the United States Department of Health and Human Services declared the opioid epidemic a public health emergency,[154] spurring a plethora of lawsuits against opioid manufacturers by tribes, states, counties, and cities.[155] Tribal plaintiffs, such as the Cherokee Flandreau Santee and Rosebud Sioux, and the Sisseton Wahpeton Oyate have filed suit against opioid manufacturers for the following tort claims: (1) public nuisance; (2) negligence and gross negligence; (3) unjust

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[149] *See* Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation*, *in* REGULATING TOBACCO 176, 176-97 (Robert L. Rabin & Stephen D. Sugarman eds., 2001). [hereinafter *Rabin, The Third Wave*].

[150] Robert L. Rabin*, A Sociolegal History of the Tobacco Tort Litigation,* 44 STAN. L. REV. 853, 859 (1992).

[151] Rabin, The Third Wave, *supra* note 150 at 183-85 (discussing the disclosure of internal tobacco companies' documents at congressional hearings which prompted "a wave of revulsion against the industry in the public and political spheres").

[152]*See Native American Tribes Sue Opioid Manufacturers, Distributors*, CBS NEWS (Jan. 9, 2018, 3:54 PM), https://www.cbsnews.com/news/native-american-tribes-sue-opioid-manufacturers-distributors/.

[153] *See In re* Nat'l Prescription Opiate Litig., No. MDL 1:17-cv-02804, 290 F.Supp.3d 1375, 2018 WL 4895856, (N.D. Ohio Oct. 5, 2018) [hereinafter *Opioid Litigation*].

[154] Press Release, U.S. Dep't. of Health & Hum. Servs., HHS Acting Secretary Declares Public Health Emergency to Address National Opioid. Crisis (Oct. 26, 2017), [https://perma.cc/9YPH-Q5JZ].

[155] *See, e.g., Opioid Litigation*, *supra* note 154; Cherokee Nation v. McKesson Corp., No. CIV-18-056-RAW, 2021 WL 1181176, at *1 (E.D. Okla. Mar. 29, 2021).

enrichment; and (4) civil conspiracy.[156] Sovereign-led opioid litigation argues that opioid manufacturers' unethical marketing and prescribing practices make them liable for the harms caused by the opioid epidemic.[157] This emerging tort strategy immediately prompted a lively policy debate.[158]

Finally, PCB tort litigation is similar to state suits based on MTBE contamination which hit their high watermark with a $236 million dollar judgment in New Hampshire against Exxon Mobil Corp.[159] Beginning in the 1970s, gasoline manufacturers began to use MTBE as an additive to replace lead, boost octane, and reduce engine knock.[160] After the 1990 amendments to the Clean Air Act, the already broad use of MTBE increased to help emissions conform to those regulations.[161] However, growing concerns about MTBE contamination of groundwater resulted in state restrictions and outright bans in the early 2000s, and a federal repeal of sections of the CAA, which had prompted the increase of MTBE use in gasoline.[162] Ultimately, gasoline refiners eliminated their use of MTBE by 2006.[163] MTBE litigation began with individual plaintiffs suing for well contamination and eventually evolved to include claims by municipalities, water suppliers, and state sovereigns.[164]

B. *Potential Causes of Action*

1. Product Liability: Defective Design & Failure to Warn

Plaintiffs injured by a product can assert a strict liability claim that there was a defect in the way the product was designed or manufactured, or that the manufacturer failed to warn consumers

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[156] Cherokee Nation v. Mckesson Corp., No. CIV-18-056-RAW, 2021 WL 1181176, at *2 (E.D. Okla. Mar. 29, 2021); Flandreau Santee Sioux Tribe v. Purdue Pharma L.P., No. 4:18-cv-04003 (D.S.D. Jan. 8, 2018).
[157] *See* Opioid Litigation *supra* note 154 at *34.
[158] *See, e.g.*, Abbe R. Gluck, et al., *Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis*, 46 J. OF L., MED. & ETHICS 351 (2018); Derek Carr et al., *Reducing Harm Through Litigation Against Opioid. Manufacturers? Lessons from The Tobacco Wars*, 133 PUB. HEALTH REP. 207 (2018).
[159] State v. Exxon Mobil Corp., 168 N.H. 211 (2015).
[160] *Beyond MTBE*, supra note 9 at 63.
[161] *Id.*
[162] *Id.* at 63-64.
[163] *Id.* at 64.
[164] *See id.*

that its product was dangerous.[165] A product liability claim typically requires the paradigmatic negligence elements of duty, breach, damage, and proximate cause.[166] This cause of action focuses on the knowledge, actions, or inactions of a manufacturer rather than the on product itself.[167]

Under a product liability theory, tribal plaintiffs could allege that Monsanto bears liability for failing to warn consumers and the public of its unreasonably dangerous products containing PCBs. Plaintiffs can argue that Monsanto had a duty to warn the public about the dangers posed by PCBs as soon as it gained such knowledge. Jurisdictions differ significantly in regard to the elements of product liability.

Some courts have found a continuing duty to guard against product defects post-sale in cases involving safety equipment,[168] industrial machinery,[169] and oil circuit breakers.[170] Other courts take the stance that the product must have been defective at the time it left the manufacturer's hands.[171] Several jurisdictions use a utility-risk balancing test: the risks inherent in a product are balanced against the societal utility of the product.[172] Another type of product-liability test looks to the adequacy of warnings given by a manufacturer for an inherently unsafe product.[173] Finally, in some jurisdictions, products liability claims based on failure to warn are properly sounded in the tort of negligence.[174]

2. Public Nuisance

Common law provided the first means of attempting to control environmental pollution: tort claims alleging environmental

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[165] *See generally* AMERICAN LAW OF PRODUCT LIABILITY § 32:1 (3d ed. 2021); RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965); RESTATEMENT (THIRD) TORTS: PRODUCTS LIABILITY § 2 cmt. i (AM. L. INST. 2012); Bruce Jones et al., *Theories of Liability and Damages*, *in* TOXIC TORT LITIGATION 24-26 (Arthur F. Foerster & Christine Gregorski Rolph eds., 2d ed. 2013).
[166] AMERICAN LAW OF PRODUCT LIABILITY § 32:3 (3d ed. 2021).
[167] *Id.*
[168] *E.g.,* W.M. Bashlin Co. v Smith, 277 Ark. 406, 643 S.W.2d 526 (1982).
[169] *E.g.,* Smith v. Selco Prod., Inc., 96 N.C. App. 151, 385 S.E.2d 173 (1989).
[170] *E.g.,* Gracyalny v. Westinghouse Elec. Corp., 723 F.2d 1311 (7th Cir. 1983).
[171] *E.g.,* Gregory v. Cincinnati Inc., 450 Mich. 1, 538 N.W.2d 325 (1995).
[172] *E.g.,* Hernandez v. Crown Equip. Corp., 92 F. Supp. 3d 1325, Prod. Liab. Rep. (CCH) 19576, 96 Fed. R. Evid. Serv. 1218 (M.D. Ga. 2015).
[173] *E.g., In Re* Yasmin and Yaz (Drospirenone) Mktg., Sales Pracc and Prod. Liab. Litig., 870 F. Supp. 2d 587 (S.D. Ill. 2012).
[174] *E.g.,* Daughetee v. Chr. Hansen, Inc., 960 F. Supp. 2d 849 (N.D. Iowa 2013) (applying Iowa law).

pollution as a cause of action can be traced back to at least as early as the seventeenth century, where odor from a defendant's hog lot was found to be a nuisance.[175] In modern times, nuisance theory was endorsed by the Restatement (Second) of Torts to address environmental harm.[176] A public nuisance is one that unreasonably interferes with a right held by the general public and includes the consideration of whether such interference affected public health and safety, whether the conduct was illegal, and whether the effects of the interference are long-term or permanent.[177]

The Restatement (Second) of Torts § 821C identifies who can bring suit under a public nuisance theory.[178] Many states have adopted the Restatement, but the law of public nuisance remains fairly nebulous and undefined. That ambiguity is one reason public nuisance has been an attractive cause of action for litigants seeking to hold manufacturers of hazardous products responsible for the harms they cause. Public nuisance claims have been raised against the manufacturers of guns, opiates, tobacco, lead paint, and asbestos, with mixed results.[179]

The elements of public nuisance in many jurisdictions also require that the defendant acted negligently or intentionally in creating the public nuisance. For example, under New York law, a plaintiff alleging public nuisance must prove by clear and convincing evidence the following: 1) a public nuisance exists; 2) negligent or intentional conduct by the defendant created the public

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[175] William Aldred's Case (1611) 77 Eng. Rep. 816, 9 Co. Rep. 57 b (K.B.); *See* 1 JOHN H. WIGMORE, SELECT CASES ON THE LAW OF TORTS 569–71 (1912).
[176] Restatement (Second) of Torts §§ 821B–821E, at 87–104 (AM. L. INST. 1965).
[177] *Id*. at § 821B.
[178] "(1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference. (2) In order to maintain a proceeding to enjoin to abate a public nuisance, one must (a) have the right to recover damages, as indicated in subsection (1), or (b) have authority as a public official or public agency to represent the state or a political subdivision in the matter, or (c) have standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action." *Id.* at § 821C.
[179] *See generally* Elizabeth O'Connor Tomlinson, *Proof of Public Nuisance in Products Liability Tort Cases*, *in* 132 AM. JUR. PROOF OF FACTS 3d 193 § 1 (2021).

nuisance; and 3) particular harm suffered by the plaintiff is dissimilar the harm suffered by the community at large.[180]

3. Medical Monitoring

Medical monitoring, a type of toxic tort, is a cause of action that pursues damages resulting from exposure to a harmful substance.[181] Traditional toxic tort plaintiffs must prove that the substance was toxic, and that they were exposed to an extent sufficient to cause harm.[182] In contrast, a medical monitoring claim posits that the plaintiff has a substantial risk of developing a serious disease due to their exposure and therefore, they should be compensated for the costs of conducting future tests to ensure early detection of the disease.[183] Medical monitoring can be brought as its own cause of action, or as a remedy pursuant to damages from another tort action.[184] Medical monitoring claims by sovereigns, as well as municipal health organizations, have seen recent success in various districts as a stand-alone tort claim.[185]

4. Negligence

Negligence is a classic tort theory often alleged in conjunction with other causes of action in a toxic tort suit.[186] Although negligence actions typically require a higher level of proof than strict liability claims, they also allow plaintiffs to make broad allegations that the defendants engaged in tortious conduct by

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[180] *See* N.A.A.C.P. v. AcuSport, Inc., 271 F. Supp. 2d 435, 448 (E.D.N.Y. 2003).
[181] Martha A. Churchill, *Toxic Torts: Proof of Medical Monitoring Damages for Exposure to Toxic Substances*, 25 AM. JUR PROOF OF FACTS 3d 313 § 1 (2021).
[182] *Id.*
[183] Bruce Jones et al., *Theories of Liability and Damages*, *in* TOXIC TORT LITIGATION 40 (Arthur F. Foerster & Christine Gregorski Rolph eds., 2d ed. 2013).
[184] *See In re* World Trade Ctr. Lower Manhattan Disaster Site Litig., 758 F.3d 202 (2d Cir. 2014).
[185] *See, e.g., In Re* Oxycontin Antitrust Litig., 821 F. Supp. 2d 591, 602 (S.D.N.Y. 2011) (rejecting oxycontin manufacturers' arguments that medical monitoring claims "belong solely to individual consumers."); City of Charleston v. West Virginia-American Water Co., 2016 U.S. Dist. LEXIS 80527, *10-12 (W.D.W. Va. June 21, 2016) (finding "that the Charleston Board of Health has a legitimate claim for medical monitoring, as the body responsible for the city's public health."); *contra* Caronia v. Philip Morris USA, Inc., 5 N.E.3d 11, 14 (N.Y. 2013) (holding that a threat of future harm is insufficient to impose liability against a defendant in a tort context).
[186] Bruce Jones et al., *supra* note 184 at 9-11.

failing to exercise reasonable care in their conduct.[187] The elements of negligence are: (1) a duty to protect others from unreasonable risk; (2) breach of that duty; (3) a causal connection between breach and injury that resulted, and; (4) actual injury or damage.[188] In a toxic tort, one obstacle plaintiffs often face is demonstrating the defendant knew or should have known of the hazardous nature of the product at the time the product was manufactured and sold, or at the time of exposure.[189]

IV. STANDING ISSUES: PROPRIETARY V. *PARENS PATRIAE*

A. Overview of Standing

Tribes attempting to sue Monsanto for PCB contamination can expect to have their standing challenged in a motion to dismiss. Standing is a jurisdictional concept that asks whether the person or entity seeking relief has a right to do so, and if the court has proper jurisdiction to grant such relief.[190]

Courts must make a determination of standing and jurisdiction before moving on to substantive issues, making standing a threshold issue tribes must overcome to advance any litigation. In Federal Court, the Rules of Civil Procedure and the jurisprudence interpreting them call for a liberal pleading standard; courts should assume that the plaintiff's factual assertions are true and make inferences in the plaintiff's favor.[191] The essential inquiry is whether the petition has stated a legitimate claim for relief, and whether that claim is supported by facts that can support all the elements required to prove each cause of action.[192]

The paradigmatic elucidation of standing appears in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*.[193] Subsequent cases have added additional layers to standing analysis, culminating

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[187] *Id* at 11.
[188] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164–65 (5th ed. 1984); Many jurisdictions use a concise version of this rule which combine the third and fourth elements. *See* Olivo v. Exxon Mobil Corp., 872 A.2d 814, 817 (N.J. Super. Ct. App. Div. 2005).
(elements of negligence are "a duty of care, a breach of that duty, and that the breach proximately caused the harm.")
[189] Bruce Jones et al., *supra* note 184 at 10.
[190] *See* Lujan v. Def. of Wildlife, 504 U.S. 555, 560–561 (1992).
[191] *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).
[192] *Id*.
[193] 458 U.S. 592 (1982).

in what is sometimes referred to as the *Lujan* test.[194] In determining standing, federal courts use a three-pronged test. The requirements are as follows: 1) the plaintiff must have experienced an injury in fact that is "concrete and particularized" and "actual or imminent," but "not conjectural or hypothetical"; 2) "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court"; and 3) "it must be likely, as opposed to merely speculative, that the injury will be 'redressed by a favorable decision."[195] However, as many commentators have noted, since its inception in the 1970's, the tripartite *Lujan* test for standing - injury in fact, causation, and redressability – has been plagued by "inconsistenc[y], unreliability, and inordinate complexity."[196]

Despite, or perhaps because of the ambiguity of the standing doctrine, various courts have allowed sovereigns to assert public nuisance and product liability claims in either their proprietary or *parens patriae* capacities.[197] States have successfully asserted their standing to sue the producers of pollutants such as MTBE[198] and

[194] Lujan v. Def. of Wildlife, *supra* note 191.
[195] Lujan v. Def. of Wildlife, *supra* note 191 at 560–561 (internal quotations and citations omitted).
[196] 3 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.1, at 1107 (4th ed. 2002); *See* Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061 (2015); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3, at 57 (2003) ("The Court has not consistently articulated a test for standing; different opinions have announced varying formulations for the requirements for standing in federal court."); Robert A. Weinstock, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798, 814 (discussing how Massachusetts v. EPA "left scholars befuddled and lower courts without instruction").
[197] *Compare* Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 962–965 (E.D. Tex. Sept. 8, 1997) (upholding state's *parens patriae* standing to assert product liability claims against tobacco manufacturers to recover Medicaid. expenses incurred due to citizens' personal injuries or death); *and* Brown & Williamson Tobacco Corp. v. Gault, 280 Ga. 420, 423 (2006) (stating that punitive damages in products liability case against tobacco manufacturers were brought in state's *parens patriae* capacity) *with* State v. Philip Morris, USA, Inc., 713 N.W.2d 350 (Minn. 2006) (referencing the state's entry into a settlement agreement in its proprietary capacity for recovery of tobacco-related health care costs).
[198] *See In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Litig., 457 F. Supp. 2d 455, 460 (S.D.N.Y. 2006).

sewage,[199] products such as tobacco[200] and opioids,[201] and against Monsanto itself for PCB contamination.[202]

B. *Proprietary Standing*

Proprietary standing allows sovereigns to sue like a private party for concrete or particularized injuries to their property rights.[203] *Snapp* provides the rough contours of a state's proprietary interests:

> [L]ike other associations and private parties, a State is bound to have a variety of proprietary interests. A State may, for example, own land or participate in a business venture. As a proprietor, it is likely to have the same interests as other similarly situated proprietors. And like other such proprietors it may at times need to pursue those interests in court interests in court.[204]

Thus, proprietary standing is readily found when an injury to a traditional property right is alleged.[205] Abstract claims relating to asserting an injury to the environment have also been upheld.[206]

Tribes in the Pacific Northwest have a proprietary interest in the ability to safely use their land. In the State of Washington, for example, tribes could file tort claims in their proprietary capacity because Washington law considers "whatever is injurious to health or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of life and property" an

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[199] *See* Missouri v. Illinois, 180 U.S. 208 (1901).
[200] Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 962–965 (E.D. Tex. Sept. 8, 1997).
[201] *See In re* Opioid. Litig., 2018 N.Y. Misc. LEXIS 2428 (S. Ct. N.Y. 2018)
[202] State of Ohio v. Monsanto Co., et al., Case No. A 18 01237, Entry Denying Defendants' Motion to Dismiss (Sept. 18, 2018) (attached as Exhibit 2) (finding that the State had parens patriae standing to assert claims against Monsanto for defective design, failure to warn, negligence, public nuisance, trespass and unjust enrichment).
[203] *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel*. Barez, 458 U.S. 592 (1982).
[204] *Id.* at 601–02.
[205] *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3531.4 (3d ed.)
[206] Summers v. Earth Island Inst., 555 U.S. 488, 129 (2009) (harm to "recreational or even the mere esthetic interests of the plaintiff" supports standing); Friends of the Earth, Inc. v. Laid. Law Environmental Services (TOC), Inc., 528 U.S. 167, 180–184 (2000).

actionable nuisance.[207] For a nuisance claim, anyone who has been "injuriously affected or whose personal enjoyment is lessened by the nuisance" is able to bring suit.[208]

The exact parameters of a sovereign's proprietary interests are unclear and evolving.[209] Professor Seth Davis has identified five areas where states may have a proprietary interest: ownership of land or participation in a business venture; corporate interests; financial interests; common law interests; and private law interests.[210] However, the proprietary interests of states are not wholly analogous to those of Native American tribes, because tribes have unique property rights as a result of treaties, executive orders, and doctrines such as the federal trust.[211] Of special importance to PCB litigation are the varying proprietary interests tribes possess in regards to hunting, fishing, and gathering, collectively known as usufructuary property rights.[212]

For example, Pacific Northwest tribes who are signatories to what are now known as the "Stevens Treaties"[213] have a right to the "taking [of] fish, at all usual and accustomed grounds and stations."[214] The Supreme Court has repeatedly recognized that such treaty provisions enumerate tribal property rights.[215] Furthermore, tribes and scholars have oft argued that treaty fishing rights include an implied right of habitat protection.[216] The Ninth

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[207] RCW 7.48.010.
[208] RCW 7.48.020.
[209] Seth Davis, *The Private Rights of Public Governments*, 94 NOTRE DAME L. REV. 2091, 2103 (2019).
[210] *Id*.
[211] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15 (2019).
[212] *See id.* at §§ 18, 19.
[213] *See e.g.* Treaty of Medicine Creek (10 Stat. 1132); Treaty of Point Elliott (12 Stat. 927); Treaty of Point No Point (12 Stat. 933); Treaty of Neah Bay (12 Stat. 939); Treaty with the Yakamas (12 Stat. 951); and Treaty of Olympia (12 Stat. 971); *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 674 (1979).
[214] Treaty of Medicine Creek, U.S.-Nisqually, art. III, Dec. 26, 1854, 10 Stat. 1133.
[215] Menominee Tribe v. United States, 391 U.S. 404, 413 (1968); Hynes v. Grimes Packing Co., 337 U.S. 86, 105 (1949); *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 18.02 (2019).
[216] *See* Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407 (1998); Allen H. Sanders, *Damaging Indian Treaty Fisheries: A Violation of Tribal Property Rights*?, 17 PUB. LAND & RESOURCES L. REV. 153, 167 (1996); Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part II): Asserting A Sovereign Servitude to Protect Habitat of Imperiled Species*, 25 VT. L. REV. 355, 359 (2001).

Circuit held in *United States v. Washington* ("The Culverts Case") that the Stevens Treaties included the following:

> That is, even in the absence of an explicit promise, we would infer a promise that the number of fish would always be sufficient to provide a "moderate living" to the Tribes. Just as the land on the Belknap Reservation would have been worthless without water to irrigate the arid land, and just as the right to hunt and fish on the Klamath Marsh would have been worthless without water to provide habitat for game and fish, the Tribes' right of access to their usual and accustomed fishing places would be worthless without harvestable fish.[217]

As a corollary, tribal treaty fishing, hunting, and gathering rights are rendered worthless if those resources are too contaminated by PCBs to be safely harvested and consumed. An implied treaty right to fish and game which are safe to consume is logically consistent with the rationale of The Culverts Case, and the spirit of the Stevens Treaties.

Thus, many tribes have proprietary rights, particularly in regards to hunting, fishing, and gathering, enabling them to sue those responsible for interfering with the use of their property, such as when corporations like Monsanto cause widespread toxic contamination on tribal land.

C. Parens Patriae Standing

Historically, *parens patriae* was a common law doctrine allowing sovereigns to protect citizens who are not legally able to act for themselves.[218] In modern times, the *parens patriae* doctrine has been expanded to include quasi-sovereign interests, which encompass the health and well-being of citizens.[219] State courts typically adhere to the same principles as federal courts regarding

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[217] United States v. Washington, 853 F.3d 946, 965 (9th Cir. 2017) (internal citations omitted).

[218] Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General As the Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y. 57, 100 (2005).

[219] Miccosukee Tribe of Indians of Florida v. United States, 680 F. Supp. 2d 1308 (S.D. Fla. 2010); *See* 91 C.J.S. *United States* § 311 (2021);

parens patriae standing, and often rely on federal precedent.[220] The starting point for a modern *parens patriae* standing analysis is *Snapp*.[221]

In order to establish standing, a sovereign must: 1) "articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party"; 2) "express a quasi-sovereign interest": and 3) "allege an injury to a sufficiently substantial segment of its population."[222] The *Snapp* court characterized two general categories of quasi-sovereign interests:

> "First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system."

Eschewing "an exhaustive formal definition" or "definitive list of qualifying [quasi-sovereign] interests" the Supreme Court emphasized such rights "must be sufficiently concrete to create an actual controversy between the State and the defendant. The vagueness of this concept can only be resolved by turning to the facts of individual cases."[223]

Some courts have correctly recognized the extent of tribal quasi-sovereign interests. For example, in *Miccosukee Tribe of Indians of Florida v. U.S*, the Court properly recognized the quasi-sovereign interests of the tribe:

> "The Miccosukee Tribe's interest in its ability to preserve its culture and way of life is a paradigmatic example of an interest that goes beyond a proprietary or private interest, and affects the general well-being of a sufficiently substantial segment of Tribe members."[224]

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[220] Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1864 (2000).
[221] Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601-08 (1982).
[222] *Id*.
[223] *Id*. at 602.
[224] *See* Miccosukee Tribe of Indians of Florida v. United States, 680 F. Supp. 2d 1308, 1315 (2010).

The insidious trend followed by many courts, however, is to hold tribes to different, more arduous standard than applied to other sovereigns.[225] Specifically, some courts have held that tribes must allege an injury to every single member of their people in order to establish *parens patriae* standing.[226]

One fraught aspect of standing law complicating any tribal assertion of its quasi-sovereign interests is the relationship between the modern tripartite *Lujan* test for standing – injury, causation, and redressability – and the *parens patriae* doctrine itself. The *parens patriae* doctrine was formulated in a series of cases from the early 20th centuries which predate the *Lujan* test for standing.[227] Later, in 1982, well after the modern tripartite standing test was formulated, the Supreme Court found that the Commonwealth of Puerto Rico had *parens patriae* standing to bring a suit against apple growers in Virginia for discrimination against Puerto Rican workers and the subsequent injury to Puerto Rico's economy.[228] Importantly, the Court in *Snapp* did not even mention the tripartite standing test: it held that Puerto Rico has standing because is articulated a valid quasi-sovereign interest in protecting its citizens from discrimination.[229] Based on *Snapp* and other jurisprudence, some scholars argue that showing a quasi-sovereign interest under the *parens patriae* doctrine is an alternative method of establishing standing.[230] They argue that the modern tripartite standing test is simply not applicable in such situations.[231]

Another convoluted and inconsistent aspect of standing law stems from the Court's decision in *Massachusetts v. EPA*.[232] There,

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[225] *See* Allan Kanner, et. al., *New Opportunities for Native American Tribes to Pursue Environmental and Natural Resource Claims*, 14 DUKE ENVTL. L. & POL'Y F. 155, 182–83 (2003); *See e.g.* Assiniboine & Sioux Tribes v. Montana, 568 F. Supp. 269 (D. Mont. 1983)*;* Kickapoo Tribe of Ok. v. Lujan, 728 F. Supp. 791 (D. D.C. 1990*);* Alabama & Coushatta Tribes of Tex. v. Tr. of the Big Sandy Ind. Sch. Dist., 817 F. Supp. 1319 (E.D. Tex. 1993).
[226] Assiniboine & Sioux Tribes v. Montana, 568 F. Supp. 269 (D. Mont. 1983).
[227] Missouri v. Illinois, 180 U.S. 208 (1901); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907).
[228] Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592 (1982).
[229] *Id*.
[230] *See* Christie Henke, *Giving States More to Stand On: Why Special Solicitude Should Not Be Necessary*, 35 ECOLOGY L.Q. 385, 389 (2008); *see also* Sara Zdeb, *From Georgia v. Tennessee Copper to Massachusetts v. EPA: Parens Patriae Standing for State Global-Warming Plaintiffs*, 96 GEO. L. J. 1059, 1074 (2008).
[231] *Id*.
[232] 549 U.S. 497 (2007).

the State of Massachusetts petitioned for a review of the Environmental Protection Agency's denial of a petition for rulemaking that would regulate greenhouse gas emissions pursuant to the Clean Air Act.[233] The deeply divided Court discussed both *parens patriae* doctrine, and the *Lujan* test, but its standing analysis suffers from significant ambiguity at best, and downright contradiction at worst.[234] Specifically, the Court implied that the State of Massachusetts had met the modern standing requirements, but the Court also emphasized that "the Commonwealth is entitled to special solicitude in our standing analysis."[235] *Massachusetts v. EPA* suggests that sovereigns may be entitled to sue based solely on their quasi-sovereign interests, regardless of whether they meet the strict standing requirements elucidated in the *Lujan* test.[236] This view aligns with the Court's decision in *Snapp* holding that Puerto Rico had *parens patriae* standing because "it has a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any State."[237]

For Native American tribes, PCB in the water, fish, animals, and the physical bodies of tribal members themselves implicates a quasi-sovereign interest: it is an injury to tribal members' health, safety, and wellbeing. Thus, PCB contamination gives rise to a tribe's *parens patriae* interest. Similar tribal interests have been recently upheld in opioid litigation, where courts have recognized a tribal *parens patriae* interest that goes beyond the deaths it continues to cause; tribal interest lies in the "broad societal, health, and economic concerns arising from the pervasive presence of illegal opioids in the Nation's communities."[238]

For tribes in the Pacific Northwest, the cultural, religious, and dietary significance of salmon also gives rise to a *parens patriae* interest in salmon and other marine resources because the deprivation of the ability to safely consume fish impacts a tribe's

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[233] *Id*. at 511-514.
[234] *See* Bradford Mank*, Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States,* 49 WM. & MARY L. REV. 1701, 1770 (2008)*; Calvin Massey, State Standing after Massachusetts v. EPA*, 61 FLA. L. REV. 249, 261 (2009).
[235] Massachusetts v. EPA, 549 U.S. at 520.
[236] Robert A. Weinstock, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798 (2009).
[237] Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 608 (1982).
[238] Cherokee Nation v. Mckesson Corp., No. CIV-18-056-RAW, 2021 WL 1200093, at *3 (E.D. Okla. Mar. 29, 2021).

ability to practice its culture and traditions.[239] Based on those and other factors, tribes should be able to establish *parens patriae* standing by alleging that the health, safety, way of life, and culture of the tribe are at risk due to the actions of Monsanto.

V. CURRENT LITIGATION AGAINST MONSANTO

One tribal plaintiff, the Saint Regis Mohawk Tribe (SRMT), is currently pursuing claims against Monsanto for PCB contamination based on tort theories.[240] Additionally, many state Attorneys General (herein AG or AGs) are currently engaged in litigation, including those from New Mexico, Ohio, Oregon, and Washington.[241] Recently, the State of Washington settled a suit with Monsanto over PCB contamination for $95 million.[242] The Washington AG brought suit in its *parens patriae* capacity pursuing damages on behalf of itself and all state residents for injuries to the state's public natural resources, including a loss of economic value.[243] Cities and other municipal bodies are also pursuing PCB contamination claims against Monsanto.[244] At least ten cities, including Los Angeles, Baltimore, Seattle, Tacoma, San Diego and San Jose have sued Monsanto on theories of public nuisance.[245]

A. St. Regis Mohawk Tribe

The St. Regis Mohawk Tribe is a federally recognized Native American tribe that has lived along the St. Lawrence River

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[239] *See* Miccosukee Tribe of Indians of Florida v. U.S., 680 F. Supp. 2d 1308, 1315 (2010) ("The Miccosukee Tribe's interest in its ability to preserve its culture and way of life is a paradigmatic example of an interest that goes beyond a proprietary or private interest, and affects the general well-being of a sufficiently substantial segment of Tribe members. Accordingly, the Miccosukee Tribe's equal protection claim alleges a quasi-sovereign interest sufficient to support *parens patriae* standing as to its equal protection claim.").

[240] Plaintiffs' Second Amended Petition, Back v. Monsanto, No. 18SL-CC03530 (Mo. Cir. Ct. Jan. 17, 2020).

[241] Washington v. Monsanto, No. 16-2-29591-6 (King Co. Super. Ct. Dec. 16, 2016).

[242] *Monsanto to Pay Record $95 Million to End Ferguson's Lawsuit Over PCBs*, WASHINGTON ATTORNEY GENERAL'S OFFICE (Jun 24, 2020) https://www.atg.wa.gov/news/news-releases/monsanto-pay-record-95-million-end-ferguson-s-lawsuit-over-pcbs.

[243] *See* Complaint, Washington v. Monsanto, No. 16-2-29591-6 (King Co. Super. Ct. Dec. 16, 2016).

[244] See e.g., City of Spokane v. Monsanto Co., No. 2:15-CV-00201-SMJ, 2016 WL 6275164 (E.D. Wash. Oct. 26, 2016).

[245] *Id*.

in northern New York for eons.[246] The SRMT is part of a larger Mohawk community, the Akwesasne, that includes the Saint Regis Mohawk Reservation located in the United States, and the Akwesasne Mohawk Reserve located in Canada.[247] Akwesasne, which means "land where the partridge drums," is located at the confluence of the Saint Lawrence, Saint Regis, Raquette, Grasse, and Salmon Rivers.[248] For generations, the SRMT has availed itself of the abundant fish and wildlife and rich alluvial soils of its homeland,[249] as well as trapping and gathering of plants for use as medicine and for weaving traditional baskets.[250]

Beginning in the 1700s, and continuing today, non-native industries have been polluting Akwesasne, resulting in massive negative impacts on the SRMT, tribal members, and their homeland.[251] Beginning in the mid-20th century, the environmental pollution caused by several industries located on the St. Lawrence river adjacent to Akwesasne essentially destroyed the ability of tribal members to safely fish, trap, or pursue husbandry activities.[252]

Today, "Akwesasne is downwind, downriver, and down gradient from one federal and two state Superfund sites, one of which, the General Motors plant, has been determined to be a serious hazardous waste site."[253] From 1969 to 1974, the General Motors plant used PCBs manufactured and sold by Monsanto.[254] Those PCBs now contaminate the waters, sediment, fish, and other organic life on the reservation.[255] Additionally, elevated levels of PCBs are present in the five individually named plaintiffs, all members of the SRMT who resided for an extended period of time in Akwesasne.[256] Each of the individually named plaintiffs in the SRMT suit suffer from ailments associated with exposure to PCBs.[257]

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[246] *See generally Culture and History*, ST. REGIS MOHAWK TRIBE (last visited April 29, 2021), https://www.srmt-nsn.gov/culture_and_history
[247] ELIZABETH HOOVER, THE RIVER IS IN US FIGHTING TOXICS IN A MOHAWK COMMUNITY 2-3 (2016) [Hereinafter *The River Is In Us*].
[248] *Id*.
[249] *Id.*
[250] *Id.*
[251] *Id.* at 69.
[252] *Id.* at 71.
[253] *Id.* at 3
[254] *Id.* at 81; Plaintiffs' Second Amended Petition at 11-12, Back v. Monsanto, No. 18SL-CC03530 (Mo. Cir. Ct. Jan. 17, 2020).
[255] Plaintiffs' Second Amended Petition at 11-12, Back v. Monsanto, No. 18SL-CC03530 (Mo. Cir. Ct. Jan. 17, 2020).
[256] *Id.* at 9-12
[257] *Id.* at 14-15

The SRMT filed suit against Monsanto and its spin-off companies in the Missouri Circuit Court, 21st Judicial District, located in St. Louis, Missouri. The SRMT brought claims in its proprietary capacity and in its *parens patriae* capacity.[258] The petition also names five individual plaintiffs, but the petition and supporting memoranda are careful to clarify that the SRMT is not asserting claims on behalf of any individuals; the five individual tribal members are suing to recover individual damages separate from the tribe.[259] The SRMT asserted claims for strict liability under both New York and Missouri law based on product liability theories of design defect, ultrahazardous condition, and failure to warn. Additionally, the Tribe asserted causes of action for negligence, medical monitoring, public nuisance, and unjust enrichment.[260]

In its motion to dismiss the SRMT's Second Amended Petition, Monsanto argued that the SRMT lacked both proprietary and *parens patriae* standing to assert product liability and public nuisance claims against Monsanto.[261] The core of Monsanto's argument is that SRMT only asserts personal injuries suffered by tribal members.[262] According to Monsanto, the *parens patriae* claims by SRMT are nothing more than the individual tribal member claims masquerading as *parens patriae* claims.[263] Monsanto argued that the Tribe lacks any standing to bring personal injury claims of its individual members.

Importantly, SRMT makes both types of claims in its Second Amended Petition, bringing "action in both its proprietary capacity for the damages it has itself sustained, as well as in its *parens patriae* [sic] capacity for the damages it has incurred and will incur in protecting the health, safety and welfare of Tribal members."[264] Later in the petition, each discrete cause of action is bought separately, first on behalf of individual plaintiffs and then on behalf of the SRMT.[265]

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[258] *Id.* at 12
[259] *Id*.
[260] *Id*.
[261] Defendants Reply Brief in Support of Motion to Dismiss, Back v. Monsanto at 1-2, No. 18SL-CC03530 (Mo. Cir. Ct. Mar. 15, 2019).
[262] *Id.* at 2
[263] *Id.* 6-12
[264] Plaintiffs' Second Amended Petition at 3, Back v. Monsanto, No. 18SL-CC03530 (Mo. Cir. Ct. Jan. 17, 2020).
[265] *See* Plaintiff Saint Regis Mohawk Tribe's Opposition to Defendants' Motion to Dismiss, Back v. Monsanto, No. 18SL-CC03530 (Mo. Cir. Ct. Mar. 11, 2019).

On April 1, 2019, the Circuit Court for the County of St. Louis granted Monsanto's Motion to Dismiss as to all of the SRMT's proprietary claims except as to the claims of public nuisance and unjust enrichment.[266] The Court held that the SRMT had individual standing to proceed on its public nuisance claim because the Tribe had a proprietary interest in its "traditional rights to hunt and fish which include rights to game and fish that are safe for consumption ... [which] have all been severely impacted or restricted' on the Tribe's current Reservation."[267]

The court denied Monsanto's motion to dismiss as to the claims brought in the SRMT's *parents patriae* capacity. The court relied on *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*[268] to draw a distinction between the quasi-sovereign interests implicated by the product liability, negligence, and medical monitoring claims and the proprietary interests implicated by the public nuisance claim. Quasi-sovereign interests, as explained by the circuit court, include the Tribe's "*parens patriae* interest in the Tribe's political and cultural integrity"; "the emotional state, well-being and mental health of tribal members"; "the Tribe's public health, its culture and its way of life"; and Tribal members' "economic [well-being], health, safety and welfare."[269]

The Court also allowed the SRMT's unjust enrichment claim to move forward, rejecting Monsanto's argument that the Tribe failed to plead an essential element of unjust enrichment, and finding that the SRMT sufficiently alleged that they incurred costs associated with the PCB contamination. [270]

Following the Court's order dismissing parts of the Second Amended Petition, the SRMT repeatedly emphasized that the Tribe does not seek damages on behalf of any individually named plaintiffs.[271] In its brief in opposition to Monsanto's motion to dismiss, the SRMT reiterated that "the tribe does not seek damages

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[266] Order on Defendant's Motion to Dismiss at 4, Order on Defendant's Motion to Dismiss at 2, No. 18SL-CC03530 (Mo. Cir. Ct. Apr. 14, 2019).
[267] *Id.* at 3 (internal citations omitted).
[268] Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982).
[269] Order on Defendant's Motion to Dismiss at 2, No. 18SL-CC03530 (Mo. Cir. Ct. Apr. 14, 2019).
[270] *Id.* at 3.
[271] Plaintiff Saint Regis Mohawk Tribe's Opposition to Defendants' Motion to Dismiss at 5, Back v. Monsanto, No. 18SL-CC03530 (Mo. Cir. Ct. Mar. 11, 2019).

for any individual tribe member or unnamed party."[272] The Tribe's position is that the proper time to calculate and dispense damages is post-trial.[273]

Next, the parties entered the discovery phase of litigation. In response to Monsanto's first set of interrogatories, the SRMT detailed the specific damages it suffered as follows: economic damages to public health in the amount of $150,000,000; environmental damage in the amount of $2,150,100,000; natural resource damages in the amount of $580,992,100; and damages to its culture and way of life in the amount of $105,019,200.[274]

The SRMT estimates its past medical costs to be $50 million dollars.[275] Thus far, a critical point of contention between SRMT and Monsanto has occurred over the production of medical records related to the SRMT's claim of past medical expenditures.[276] SRMT based its preliminary estimate of past medical costs on fifty-nine living and forty-five deceased Tribal members. These members were diagnosed at the SRMT clinic with Non-Hodgkin's lymphoma, malignant melanoma, and breast cancer.[277] Those three diseases have all been found by the International Agency for Research on Cancer (IARC) to be caused by PCBs.[278] The SRMT further identified 281 living and 138 deceased members of the Tribe diagnosed with cardiovascular disease, which they assert is associated with exposure to PCBs.[279] The SRMT estimated, based on a review of a representative patient's record, that it spends over $100,000 per patient suffering from one of the aforementioned diseases after accounting for treatment paid for by private insurance, Medicare, or Medicaid.[280]

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[272] *Id*.
[273] *Id*.; SRMT relies on State v. Hess Corp., 161 N.H. 426, 438 (2011), as modified on denial of reconsideration (Mar. 22, 2011).
[274] Plaintiff's Responses to Pharmacia LLC's First Set of Interrogatories at 11-14, No. 18SL-CC03530 (Mo. Cir. Ct. Sept. 14, 2018).
[275] *Id.*
[276] *See* Defendant Pharmacia LLC's Motion to Compel the Production of Records Relating to the Tribe's past Medical Expenditures, Back v. Monsanto, No. 18SL-CC03530 (Mo. Cir. Ct. Apr. 14, 2020).
[277] Plaintiff Saint Regis Mohawk Tribe's Responses to Pharmacia LLC'S First Set of Interrogatories at 12-14, Back v. Monsanto, No. 18SL-CC03530 (Mo. Cir. Ct. Apr. 3, 2020).
[278] *Id.*
[279] *Id*
[280] *Id.*

Furthermore, the SRMT estimates that it will incur future medical costs in the amount of $93 million.[281] That estimate is based on extensive blood sampling of 703 adult tribal members to determine the level of PCBs contained in their blood.[282] Over 75% of the study group had high levels of PCB congeners known to cause one or more of the three types of cancers previously mentioned.[283] In coming to its future medical damages figure, the SRMT extrapolated the blood sample data to determine the number of Tribal members who would participate in a medical monitoring program designed to ameliorate harm from PCB exposure, concluding that of the SRMT's 7,714 members, about 5,862 likely had similarly high levels of PCBs in their blood.[284]

The SRMT did not, however, assert that PCB exposure necessarily caused all the Non-Hodgkin's lymphoma, malignant melanoma, breast cancer, and cardiovascular disease found in Tribal members.[285] Rather, the SRMT proposes to prove its past and future medical expenditures using statistical analysis and aggregate evidence.[286] In contrast, Monsanto's interrogatories and its motion to compel argue for a different approach: litigating the causation and damages based on a review of the complete medical records and history of all 814 Tribal member identified by the SRMT as having suffered from cardiovascular disease, non-Hodgkin's lymphoma, malignant melanoma, and breast cancer.[287]

The litigation's discovery phase was still ongoing as of late 2021.[288] During this phase, Monsanto has repeatedly asked and received continuances as it seeks to compel the SRMT to disclose information including: the SRMT's membership database; the Tribe's Brownfields Database; and the Medical and Non-Medical Record Data Held by the Tribe's Medical Clinic.[289] In April of

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[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] *Id.*
[286] *Id.* at 8.
[287] *Id.*
[288] Docket Search for Missouri Court System, MISSOURI COURTS, https://www.courts.mo.gov/cnet/caseNoSearch.do (Enter 18SL-CC03530 in Case Number prompt, click "find", navigate to "Docket" Tab at top of screen).
[289] *Id*.

2021, Monsanto went so far as to use the rules of discovery to conduct property inspections of the Akwensanse community.[290]

Additionally, Monsanto filed a motion to sever the claims of the individually named plaintiffs from the claims of the SRMT.[291] In a vindication of the SRMT's position that the individual and tribal claims were interrelated, the court denied Monsanto's motion to sever.[292] The court found that"[t]he devolvement, discharge, dangers, and damages caused by PCBs (and Defendants alleged knowledge and involvement in same) constitute and comprise a series of transactions or occurrences based on questions of law and fact common to both the individual Plaintiffs and those of the Tribe."[293] This litigation is ongoing as of the writing of this article.

B. State of Washington

Washington was the first state to sue Monsanto over PCB contamination.[294] In December of 2016, the Washington State Attorney General filed its original complaint against Monsanto in the King County Superior Court of the State of Washington.[295] That complaint alleged that Monsanto was responsible for PCB contamination in Washington's "bays, oceans, rivers, streams, soil, and air."[296] The Washington complaint points out that PCB contamination is global, and that PCBs "have been detected in the tissues of every single species tested, including marine life, various animals and birds, plants, and trees, and humans."[297]

Washington's complaint included the following causes of action: public nuisance, products liability - failure to warn, defective design - negligence, and statutory trespass.[298] The Washington

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[290] SAINT REGIS MOHAWK TRIBE, MONSANTO INSPECTIONS BEING CONDUCTED ON APRIL 27TH & 28TH (2021) https://www.srmt-nsn.gov/news/2021/monsanto-inspections-being-conducted-on-april-27th-28th.
[291] Defendants Motion to Sever, Back v. Monsanto, No. 18SL-CC03530 (Mo. Cir. Ct. Apr. 15, 2021).
[292] Order on Defendants Motion to Sever, Back v. Monsanto, No. 18SL-CC03530 (Mo. Cir. Ct. Sept. 20, 2021).
[293] *Id*.
[294] WASHINGTON ATTORNEY GENERAL'S OFFICE, AG FERGUSON MAKES WASHINGTON FIRST STATE TO SUE MONSANTO OVER PCB DAMAGES (2016) https://www.atg.wa.gov/news/news-releases/ag-ferguson-makes-washington-first-state-sue-monsanto-over-pcb-damages-cleanup
[295] Complaint, Washington v. Monsanto, No. 16-2-29591-6 (King Co. Super. Ct. Dec. 16, 2016)
[296] *Id.* at 2.
[297] *Id.*
[298] *Id.*

complaint is careful to include an equitable indemnity cause of action regarding the PCB contamination of the Lower Duwamish river that is currently being remediated.[299]

Monsanto sought to remove the suit to federal court based on two theories. First, Monsanto argued that it had been "acting under color of an officer or agency of the United States" and a federal court, therefore, had jurisdiction pursuant to 28 U.S.C 1442(a)(1).[300] Second, Monsanto argued that the federal district court had jurisdiction under 28 USC 1331 and Art. I, section 8, clause 17 of the US constitution, because the claims "arise, in part, on federal enclaves and under federal laws"[301]

Monsanto argued that it manufactured PCBs in close collaboration with the US Government and was therefore acting as an agent of the United States when it produced and sold PCBs.[302] In support of this assertion, Monsanto points to a long history, beginning in the World War II era, where the US military relied on PCBs produced by Monsanto.[303] Monsanto claimed that most of the PCBs produced in that era were "for use by" the US military."[304] Monsanto also points to the "Necessity Certificates" issued to them by the Federal Government during WWII as evidence that it acted as a US agent.[305] For the time period following WWII, Monsanto argued that the US military continued to rely on PCBs to an extent justifying the invocation of federal officer jurisdiction. Furthermore, Monsanto claims that, despite deciding to stop the production of PCBs for various uses in 1970, the federal government directed Monsanto to continue producing PCBs under section 101 of the Defense Production Act of 1950.[306]

The United States District Court for the Western District of Washington entered an order granting the State of Washington's motion to remand in July 2017.[307] The US District Court relied on a test promulgated by the Ninth Circuit in remanding this case to state court.[308] In the Ninth Circuit, a defendant may invoke federal officer

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[299] *Id.*
[300] Order Granting State of Washington's Motion to Remand at 2, Washington v. Monsanto No. C17-53RSL (W.D. Wash. July 28, 2017).
[301] *Id.*
[302] *Id.* at 2.
[303] *Id.* at 4.
[304] *Id.*
[305] *Id.*
[306] *Id.* at *4.*
[307] *Id*. at 1.
[308] *Id.* at 5; *See* Leite v. Crane Co., 749 F.3d 1117, 1120 (9th Cir. 2014).

jurisdiction under the following circumstances: (1) it is a "person" within the meaning of the statute; (2) a causal nexus exists between the plaintiff's claims and the actions the entity took pursuant to a federal officer's direction; and (3) it has a colorable federal defense to the plaintiff's claims. In pointed language, the Court found that Monsanto failed to show that its actions of producing PCBs, and subsequently concealing their toxicity, were done under the direction of a federal officer. [309]

The district court rejected Monsanto's arguments and remanded the case to state court. Regarding the claim that Monsanto acted as a federal officer, the court noted that although the Supreme Court has suggested that it may be possible for a private contractor to invoke federal officer jurisdiction if they are "helping the Government to produce an item that it needs," it has not specified "whether and when particular circumstances may enable private contractors to invoke the statute."[310]

In 2020, the State of Washington settled its suit with Monsanto for $95 million.[311] Approximately $21.25 million of the settlement will be paid in contingency fees to the outside firms of Baron & Budd and Harrigan Leyh Farmer & Thomsen.[312]

C. City of Seattle v. Monsanto Co.

On January 25, 2016, the City of Seattle (Seattle) filed a complaint against Monsanto in the District Court for the Western District of Washington.[313] The complaint asserted the following claims against Monsanto: public nuisance, defective design, failure to warn, negligence, and equitable indemnity.[314] Those claims were based on the presence of PCBs in Seattle's drainage systems, stormwater and water bodies.[315]

Monsanto filed a motion to dismiss on May 18, 2016, and the Court subsequently dismissed Seattle's claims of defective design, failure to warn, and equitable indemnity but allowed Seattle to proceed with its public nuisance and negligence claims.[316] On

[309] *Id.* at 6-8
[310] Id. at 3, quoting Watson v. Philip Morris Co., 551 U.S 142, 153–54 (2007).
[311] WASHINGTON ATTORNEY GENERAL'S OFFICE, *supra* note 226.
[312] *Id.*
[313] City of Seattle v. Monsanto Co., 387 F.Supp.3d 1141, 1148 (W.D.Wash., 2019).
[314] *Id.* at 1150
[315] *Id.* at 1148
[316] *Id*.

March 24, 2017, Monsanto filed an answer to Seattle's first amended complaint and counterclaims against Seattle.[317]

1. Order on Motion to Dismiss

In its motion to dismiss, Monsanto argued that all of Seattle's claims were preempted by Washington's Product Liability Act (WPLA) which preempts most product-related common-law torts except those based on fraud, intentionally caused harm, or claims under Washington's Consumer Protection Act.[318]

The court found that Seattle's negligence claim and product liability claims of failure to warn and defective design were grounded in common law, and thus fell under the WPLA's definition of "product liability claim[s]".[319] Additionally, because the WPLA only preempts claims arising after 1981,[320] and Seattle's claims were grounded on Monsanto's conduct prior to 1979 (when the Toxic Substances Control Act was enacted), the court found that none of Seattle's claims, including negligence and product liability, were preempted by the WPLA.[321]

2. Statute of Limitations

Monsanto also argued that Seattle's claims were barred by the applicable statutes of limitation.[322] The court rejected that argument because it found that Seattle brought suit for the benefit of the state and thus the actions "arise out of the exercise of powers traceable to the sovereign powers of the state which have been delegated to the municipality."[323] The court distinguished proprietary municipal actions - operating a city drainage system,[324]

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[317] *Id*. at 1150.
[318] Order Granting in Part and Denying in Part Defendant's Motion to Dismiss Plaintiff's First Amended Complaint at 5, City of Seattle v. Monsanto C16-107RSL (W.D. Wash. Feb 22, 2017); *See* RCW 7.72.010(4).
[319] RCW 7.72.010(4),
[320] Macias v. Saberhagen Holdings, Inc., 175 Wn.2d 402, 408-09 (2012) (citing RCW 4.22.920(1)).
[321] Order Granting in Part and Denying in Part Defendant's Motion to Dismiss Plaintiff's First Amended Complaint at 7, City of Seattle v. Monsanto C16-107RSL (W.D. Wash. Feb 22, 2017).
[322] *Id.*
[323] *Id.* at 8 (quoting Wash. Pub. Power Supply System v. General Electric Co., 113 Wn.2d 288, 293 (1989)); *See also* RCW 4.16.160.
[324] City of Algona v. City of Pacific, 35 Wn. App. 517, 520 (1983).

contracting for the production of electricity,[325] and declaring a public health emergency due to contaminated drinking water[326] - from sovereign municipal actions -- administering a public school system[327], and leasing property for log yards.[328] The court held that Seattle was acting in its sovereign capacity when it sued to restore the purity of its waterways.[329] Specifically, Seattle was authorized by statute to prevent "the defilement or pollution of all streams running through or into its corporate limits," and to "declare what shall be a nuisance, and to abate the same."[330] However, the court found that Seattle's equitable indemnity claim did not promote the public welfare and was therefore susceptible to the statute of limitations.[331]

3. Public Nuisance

Seattle's public nuisance cause of action was based on Washington's statutory scheme, which defines an "actionable nuisance" as anything "injurious to health" that "obstruct[s] the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property."[332] Under Washington law, any act that "obstructs or tends to obstruct" or "render[s] dangerous for passage, any lake or navigable river, bay, stream, canal or basin," is a nuisance.[333] Washington law further defines a "public nuisance" as "one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal."[334] Additionally, it is a public nuisance to "in any manner . . . corrupt or render unwholesome or impure the water of any such

[325] Wash. Pub. Power Supply System v. General Electric Co., 113 Wn.2d 288, 302 (1989).
[326] City of Moses Lake v. United States, 430 F. Supp. 2d. 1164, 1177–78 (E.D. Wash. 2006).
[327] Bellevue Sch. Dist. No. 405 v. Brazier Const. Co., 103 Wn.2d 111, 116 (1984), superseded by statute as stated in Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co., 176 Wn.2d 502, 513 (2013).
[328] Louisiana-Pacific Corp. v. Asarco Inc., 24 F.3d 1565, 1582 (9th Cir. 1993).
[329] Order Granting in Part and Denying in Part Defendant's Motion to Dismiss Plaintiff's First Amended Complaint at 7-9, City of Seattle v. Monsanto C16-107RSL (W.D. Wash. Feb 22, 2017).
[330] *Id.* quoting RCW 35.22.280(29), -(30*)*.
[331] *Id.*
[332] RCW 7.48.010.
[333] RCW 7.48.120.
[334] RCW 7.48.130.

spring, stream, pond, lake, or well, to the injury or prejudice of others."[335]

Monsanto's motion to dismiss Seattle's public nuisance cause of action argued that Seattle lacked standing and failed to establish proximate causation.[336] The court rejected Monsanto's arguments. First, in regard to standing, the court noted that Seattle does not need to own the contaminated water to bring a public nuisance claim because Seattle was injured financially by the toxic contamination.[337] Second, the court rejected Monsanto's argument that Seattle could not bring a public nuisance claim for the East and Lower Duwamish Waterways because they do not have a property interest in those bodies of water. The court found that the statutory language and corresponding jurisprudence gave Seattle a "special interest" in the public land in question because Seattle owns property abutting that land.[338] Thus, the court found that Seattle had suffered an injury pursuant to RCW 7.48.020, as well as a "special injury" pursuant to RCW 7.48.210.[339]

4. Product Liability

Although the court denied Monsanto's motion to dismiss on the previously mentioned causes of action, it granted the motion as to Seattle's product liability claims.[340] Under Washington law, to succeed on a strict liability - defective design - claim, a plaintiff must show: "(1) a defect existed in the product when it left Monsanto's hands; (2) the defect was unknown to the consumer or user; (3) the defect rendered the product's intended use unreasonably dangerous; and (4) the defect proximately caused

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[335] RCW 7.48.140(2).
[336] Order Granting in Part and Denying in Part Defendant's Motion to Dismiss Plaintiff's First Amended Complaint at 11, City of Seattle v. Monsanto C16-107RSL (W.D. Wash. Feb 22, 2017).
[337] RCW 35.22.280(29), -(30) (vesting municipalities with authority to prevent "the defilement or pollution of all streams running through or into its corporate limits," and to "declare what shall be a nuisance, and to abate the same").
[338] *Id.;* See D'Ambrosia v. Acme Packing & Provision Co., 179 Wash. 405, 408 (1934); Reed v. Seattle, 124 Wash. 185, 188–89 (1923) (collecting cases); Brazell v. City of Seattle, 55 Wash. 180, 187–88 (1909).
[339] Order Granting in Part and Denying in Part Defendant's Motion to Dismiss Plaintiff's First Amended Complaint at 12, City of Seattle v. Monsanto C16-107RSL (W.D. Wash. Feb 22, 2017).
[340] *Id.* at 14

Seattle's injury."[341] Regarding failure to warn, a plaintiff must show that a product without a manufacturing defect is still unreasonably dangerous in the hands of the user absent adequate warnings.[342] The court reasoned that Seattle did not properly allege that it was a "user" or "consumer" of Monsanto's product, and refused to impose strict liability based on Seattle's argument that it was a "foreseeable bystander."[343]

Finally, the court found that Seattle plead sufficient facts to properly allege a nuisance claim.[344] Specifically, Seattle alleged facts suggesting that Monsanto "owed Seattle a duty to avert foreseeable financial loss due to environmental damage caused by Monsanto's chemicals."[345]

5. Counterclaims

Subsequently, Monsanto brought six counterclaims and asserted ninety affirmative defenses.[346] Monsanto's counterclaims against Seattle are based on the discharge of pollutants into the Duwamish River, the East Waterway, the West Waterway, Elliott Bay, Puget Sound and Lake Washington ("Affected Water Bodies").[347] The counterclaims include: 1) a CERCLA claim for the recovery of costs incurred investigating and remediating pollutants released by Seattle; 2) a claim for declaratory relief under CERCLA and the Declaratory Judgment Act stating that Seattle is jointly and severally liable to Monsanto for future clean-up costs; 3) claims that Seattle violated the National Pollutant Discharge Elimination System (NPDES) Permits and portions of the Clean Water Act resulting in injury to Monsanto; 4) a negligence claim; 5) an unjust enrichment claim; and 6) a contribution claim.[348]

6. Clean Water Act (CWA)

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[341] City of Seattle v. Monsanto Co., 237 F. Supp. 3d 1096, 1107 (W.D. Wash. 2017).
[342] *Id.*; Novak v. Piggly Wiggly Puget Sound Co., 22 Wash.App. 407, 412, 591 P.2d 791 (1979).
[343] Order Granting in Part and Denying in Part Defendant's Motion to Dismiss Plaintiff's First Amended Complaint at 14, City of Seattle v. Monsanto C16-107RSL (W.D. Wash. Feb 22, 2017).
[344] *Id.* at 15.
[345] *Id.*
[346] *See* City of Seattle v. Monsanto Co., 387 F.Supp.3d at 1150.
[347] *Id.* at 1150-51.
[348] *Id.*

Seattle argued to the District Court that Monsanto failed to plead sufficient facts demonstrating that it has standing for each counterclaim they brought. Seattle argued that Monsanto lacked standing for its CWA counterclaims because it failed to demonstrate injury in-fact, causation, and redressability.[349]

The District Court discussed the elements of standing, including injury-in-fact, causation, and redressability. Monsanto's central claim was that Seattle, through the operation of its sewage and stormwater systems, was responsible for discharging pollutants into bodies of water. Although the Court recognized that Monsanto's generalized allegations were not ideal, it held they were sufficiently pled under the *Lujan* standard.[350]

The court then considered Monsanto's argument that it had suffered injuries, including contingent liabilities, response costs, and defense costs.[351] First, according to Monsanto, contingent liability arises from the fact that Monsanto was not only subject to multiple contemporaneous suits by State and local authorities, but also faced future regulatory actions by Federal, State, or local actors.[352] The Court rejected those arguments, stating that the injuries alleged by Monsanto were conjectural or hypothetical and not actual or imminent.[353] However, the court did find that Monsanto pled sufficient facts to show that it incurred costs under the CERCLA clean-up process in the Lower Duwamish, including costs from an analysis of Seattle's drainage basins.[354]

The court rejected Monsanto's causation claim that Seattle caused Monsanto's injuries by discharging pollutants into the surrounding bodies of water.[355] Specifically, Monsanto argued that Seattle's non-compliance with the CWA resulted in the EPA determining that Monsanto was a Potentially Responsible Party under CERCLA, which in turn prompted the State of Washington to sue.[356] In rejecting Monsanto's chain of causation arguments, the court noted that the EPA and the State of Washington made independent decisions to take action against Monsanto.[357]

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[349] City of Seattle v. Monsanto Co., 387 F.Supp.3d at 1152.
[350] *Id*.
[351] *Id*. at 1153.
[352] Id. at 1154.
[353] *Id*.
[354] *Id*..
[355] *Id*. at 1155.
[356] *Id*.
[357] *Id*.

Furthermore, the court pointed out that Monsanto's actions of producing PCBs occurred long before any alleged CWA violations by Seattle.[358]

Regarding redressability, Monsanto argued that an injunction enjoining Seattle from violating the CWA and requiring Seattle to remediate its stormwater discharges would satisfy that prong.[359] The court soundly rejected that argument, reasoning that 1) any civil penalties would be paid to the US, not Monsanto; 2) an injunction or civil penalty would not redress Monsanto's future defense cost and contingent liabilities; and 3) Monsanto's "future response costs, in so far as they are incurred as a consequence of Seattle's activities, can be recovered through cost recovery or contribution under CERCLA."[360] Unlike Monsanto's CWA counterclaims, the court found that Monsanto's CERCLA counterclaim was properly pled.[361]

7. Settlement Talks

In 2020 and continuing into 2021, Monsanto entered controversial settlement negotiations seeking to certify a class action settlement for approximately 2,500 cities, counties and ports affected by PCB contamination.[362] Those settlement talks have repeatedly failed to win approval, in part because of concerns that they impede the ability of other injured parties, such as states, to file PCB related claims.[363] The City of Seattle has strenuously objected to the proposed settlement:

> The City considers the proposed Settlement to be a gift to Monsanto and its new parent company, Bayer. The Settlement would allow them to close the books on

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[358] *Id*.
[359] *Id*. at 1155-56.
[360] *Id.*
[361] *Id.* at 1160.
[362] Objection re: Renewed Notice of Motion and Motion to Certify Class Action Settlement at 4, City of Long Beach v. Monsanto Company et al, 2:16-cv-03493 (C.D. Cal. May 19, 2016) (Doc. 228).
[363] Robert Burnson, *Bayer Fails to Win Approval for PCB Settlement Once Again*, BLOOMBERG LAW (Feb. 19, 2021, 9:59 AM), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/environment-and-energy/X6N3SL90000000?bc=W1siUmVzZWFyY2ggVHJhaWwiLCIvcHJvZHVjdC9ibGF3L3Jlc2VhcmNoX3RyYWlsL3Jlc3VsdHMvNmQ2ZWIwY2U3MTk0ZmU3NTZlNmZmOGUwMjQ5OTU0Y2MiXV0--97a7bc355c758dc26505396a63a19b7640a15af7&bna_news_filter=environment-and-energy.

> enormous liability arising from Monsanto's production and sale of PCBs. The proposed settlement, in the City's view, is a Trojan Horse for many of the class members, providing them a pittance to monitor their stormwater for PCBs and blocking them from getting funds they will need if PCBs are found.[364]

Notably, Monsanto did not did not invite SRMT to participate in these global settlement discussions.

VI. TRIBAL ISSUES

A. PCB Contamination and the Disproportionate Effects on Native Communities

"My strength is from the fish; my blood is from the fish, from the roots and berries. The fish and game are the essence of my life." -- Chief Weninock, Yakama, 1915

To the Columbia River Basin Native tribes of the Pacific Northwest, salmon is more than a food source; it is the foundation of their culture. These tribes call themselves the Salmon People.[365] Salmon was a fundamental aspect of Native economies in the Seattle area for thousands of years, and impacted the development of trade routes and commercial fishing in the area.[366] Salmon also shaped tribes' religious and spiritual practices, as over a dozen longhouses and churches that were built on tribal land used salmon in their services.[367] Salmon can be seen throughout Native artwork and appears in many folklores.[368] To this day, tribes in the area celebrate the annual salmon return, as well as the annual salmon ceremony

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[364] Objection re: Renewed Notice of Motion and Motion to Certify Class Action Settlement at 4, City of Long Beach v. Monsanto Co., 2:16-cv-03493 (C.D. Cal. May 19, 2016) (Doc. 228).
[365] Pacific Coast Region, NATIVE KNOWLEDGE 360, (last visited Jan. 14, 2021), https://americanindian.si.edu/nk360/pnw-history-culture-regions/pacific-coast.
[366] *Id.*
[367] *Id.*
[368] Salmon, the Lifegiving Gift, UNIVERSITY LIBRARIES UNIVERSITY OF WASHINGTON, (last visited Jan. 14, 2021), https://content.lib.washington.edu/aipnw/miller2.html.

where community members welcome the first salmon of the season.[369]

Native people consider salmon a "gift of food from the Creator" and they honor the salmon for the way that it allows communities to thrive.[370] Tribal members believed that salmon were "immortal humans who live in villages deep under the ocean."[371] When spring arrived, these people would disguise themselves as salmon and offer themselves to the tribal community as a source of food.[372] Once consumed, the tribes would return the salmon skeletons to the rivers so that the spirit could return as salmon people.[373] For tribes in the Columbia Basin, this was the cycle of life. [374]

Traditionally, all members of the tribe partook in the preparation of salmon.[375] During the cold winter months, salmon sustained tribes.[376] Men participated in fishing while women and children prepared the fish to be dried and smoked.[377] When Puget Sound tribal lands were signed over to the US government through treaties, tribal leaders made sure to explicitly guarantee their people the right to continue fishing salmon.[378]

Many tribal members in the present day rely on fishing as their main source of income, and salmon remains an essential form of sustenance for tribal members.[379] Ultimately, salmon was and still is an irreplaceable part of indigenous culture in the Pacific Northwest.[380] The Columbia River Inter-Tribal Fish Commission describes this deep connection between salmon and tribes by stating:

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[369] Pacific Coast Region, Salmon Ceremony reflects Tulalip culture, history, HERALDNET, (last visited Jan. 14, 2021), https://www.heraldnet.com/uncategorized/salmon-ceremony-reflects-tulalip-culture-history/#:~:text=The%20annual%20Tulalip%20Tribes%20Salmon,brought%20to%20shore%20by%20canoe.

[370] *Id.*

[371] The Salmon Symbol and First Nations, SPIRITS OF THE WEST COAST GALLERY, (last visited Jan. 14, 2021), https://spiritsofthewestcoast.com/collections/the-salmon-symbol.

[372] *Id.*

[373] *Id.*

[374] *Id.*

[375] *Id.*

[376] *Id.*

[377] *Id.*

[378] *Id.*

[379] *Id.*

[380] *Id.*

> "[S]almon and the river they use are part of our sense of place. The Creator put us here where the salmon return.[381] We are obliged to remain and to protect this place.[382] Without salmon returning to our rivers and streams, we would cease to be Indian people."[383]

Taking into account theessential nature of salmon to Washington tribes, PCB contamination in salmon populations are cause for serious concern.[384] For example, the State of Washington has promulgated fish advisories for its waters, including the Puget Sound recommending the consumption of no more than 2-3 servings of Coho, chum, pink, and sockeye salmon per week.[385] For chinook salmon, particularly "Blackmouth Chinook" which reside in the Puget Sound their entire adult lives, the recommendations are even more strict, no more than one serving per week and two servings per month, respectively.[386] For many tribal communities, substituting other food sources for contaminated fish and wildlife is not only impractical, it is antithetical to their cultural and religious practices.[387] For other tribes, such as the Saint Regis Mohawk, fish advisories along with visible signs of contamination seen by tribal members themselves have drastically reduced the amount of local fish consumption, although many members continue to eat local fish "because they felt a cultural obligation to do so."[388] In a particularly brutal catch-22, some SRMT members wonder about the net effect of substituting PCB contaminated fish, the consumption of which has been scientifically proven to contribute to diabetes,[389] for

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[381] *Id.*
[382] *Id.*
[383] *Id.*
[384] *Id.*
[385] WASHINGTON STATE DEPARTMENT OF HEALTH, PUGET SOUND FISH CONSUMPTION ADVICE (2015), https://www.doh.wa.gov/Portals/1/Documents/Pubs/334-098.pdf.
[386] *Id*.
[387] NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL, FISH CONSUMPTION AND ENVIRONMENTAL JUSTICE (2002), http//www.epa.gov/sites/default/files/2015-02/documents/fish-consump-report_1102.pdf.
[388] Elizabeth Hoover, *Cultural and health implications of fish advisories in a Native American community*, ECOL PROCESS 2, 4 (2013). https://doi.org/10.1186/2192-1709-2-4
[389] Codru N, Schymura et. al., *Akwesasne Task Force on the Environment: Diabetes in relation to serum levels of polychlorinated biphenyls and chlorinated pesticides in adult native Americans,* 115 ENV'T HEALTH PERSP. 1442–1447 (2007). https://doi.org/10.1289/ehp.10315.

processed foods because that dietary shift has resulted in "further exacerbating chronic, diet-related health problems in the community, such as diabetes and cardiovascular disease".[390]

Chinook or King salmon are one of the main sources of food for Puget Sound tribes.[391] One study found that PCB concentrations in that species were extremely high, causing young salmon to be immunosuppressed, suffering from DNA damage, and less able to metabolize toxins.[392] This affects adult salmon during their spawning migration.[393] Due to bioaccumulation, concentrations of PCB can be 2000 to a million times higher in organisms than in the surrounding waters, with highest amounts of PCBs at the top of the food chain.[394] When salmon are at a point in their life cycle when they have less lipids, the PCBs in their fat mobilizes to other lipid containing organs, ultimately affecting their liver, kidneys, and brain.[395]

Even without accounting for PCB contamination, Native communities face disproportionate health and environmental risks when compared to the average population in North America.[396] Native American populations have mortality rates that are higher than white Americans by 60% and are twice as high as that of the general US population.

In addition, Native populations are facing disproportionate consequences of PCB contamination due to their reliance on salmon. Existing health problems are often compounded by exposure to different contaminants, like PCBs.[397] In Spokane, an aluminum rolling factory manufactured metal for bombs and planes during World War II.[398] During production, the factory contaminated the groundwater with PCBs which leached into the Spokane River.[399]

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[390] Lawernce M. Schell et. al., *Organochlorines, lead, and mercury in Akwesasne Mohawk youth*. 111 ENV'T HEALTH PERSP 954 (2003). 10.1289lehp.599

[391] Brian R. Missildine et al, *Polychlorinated Biphenyl Concentrations In Adult Chinook Salmon (Oncorhynchus tshawytscha) Returning to Coastal and Puget Sound Hatcheries of Washington State*, 31 ENV'T SCI. AND TECH**.** 6944 (2005).

[392] *Id.*

[393] *Id.*

[394] *Id.*

[395] *Id.*

[396] Elizabeth Hoover et al, *Indigenous Peoples of North America: Environmental Exposures and Reproductive Justice*, 120 ENV'T HEALTH PERSPECTIVES 1645 (2012).

[397] *Id.*

[398] *Supra*, note 271.

[399] *Id.*

The Spokane Tribe relies heavily on fish.[400] In fact, members once consumed 1-2 pounds of fish a day.[401] However, due to contamination, the Washington Department of Health has limited fish consumption.[402] In some areas of the river, the department recommends that no fish be consumed due to high toxicity.[403]

On a larger scale, tribes across the continent face serious health risks from PCB in food sources. For example, the Aamjiwnaang Tribe near Ontario has suffered from PCB exposure which has in turn altered the way the tribe is able to practice their culture, hunt, fish, gather medicine, and perform ceremonies.[404]

In Alaska, the San Lawrence Island Yupik Tribe has several abandoned U.S. military sites on their land which contain PCBs.[405] This is particularly problematic in the Arctic, because PCBs are especially persistent and bioaccumulate in the lipid-rich Arctic food which the Yupik people depend on.[406] For example, walruses in this region can have 193-421 parts per billion (ppb) PCB when the EPA sets a risk-based limit on fish of 1.5 ppb.[407] PCB levels in the hundreds are very alarming considering the EPA has declared that levels as low of 1.5 ppb can cause cancer risks.[408] Due to high exposure, Yupik people sampled for a study looking at PCB in blood serum of Native American populations had PCB levels 4-12 times higher than the general US population.[409] Yupik people also believe they suffer from higher rates of cancer, thyroid disease, diabetes, cardiovascular, and other chronic diseases[410]

Many tribes also suffer from PCB exposure through their air and water, making these toxins inescapable. The Tewa Pueblo communities in the southwestern United States have PCB levels 25,000 times higher than the standard for human health and 1000 times higher than the standard for wildlife habitat in Los Alamos Canyon.[411] This is due to the nearby Los Alamos National

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[400] *Id.*
[401] *Id.*
[402] *Id.*
[403] *Id.*
[404] *Id.* at 1646. *See infra*, Section II(C) for more information about bioaccumulation.
[405] *Id.*
[406] *Id.*
[407] *Id.*
[408] *Id.*
[409] *Id.*
[410] *Id.*
[411] *Id.*

Laboratory, which has been releasing toxic waste into the land, air, and groundwater.[412]

Finally, the Mohawk Nation at Akwesasne had three aluminum foundries built upstream of their community.[413] The foundries polluted nearby rivers with hydraulic fluids containing PCBs.[414] In 1986, the St. Regis Mohawk Department of Environmental Health and Safety issued an advisory that warned against eating fish from the river in this area.[415] Despite this warning, Mohawk adolescents who were breastfed continue to have higher PCB levels, and the entire community has higher risk of "thyroid dysfunction, decrease in cognitive function, elevated risk of diabetes, cardiovascular disease, and hypertension."[416]

Overall, native communities are at higher risk for PCB contamination due to their cultural relationship to the land and natural resources.[417] The possibility of increased PCB exposure has deprived tribes of their ability to pass down oral traditions through fishing and berry picking, medicine gathering, and other activities involving the environment.[418] Rocks can no longer be collected for sweat lodges due to contamination in streams.[419] Cedar used to wash babies, smudge, and make tea is also heavily polluted.[420] "This contamination threatens not only the health of indigenous communities, it also infringes on their reproductive rights, including the ability to impart cultural land-based knowledge to their children."[421]

B. Will Tribes be Treated Differently than Other Sovereigns?

1. The Court's Treatment of Tribal Sovereignty and Standing

Despite sturdy legal underpinnings that ostensibly recognize tribal sovereignty and the accompanying *parens patriae* interests,

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[412] *Id.*
[413] Hoover et al., *supra* note 397 at 1647.
[414] *Id.* at 647-48.
[415] *Id.* at 1648.
[416] *Id*.
[417] Hoover, et al., *supra* note 397, at 1645.
[418] *Id.* at 1647-48.
[419] *Id.* at 1648.
[420] *Id.*
[421] *Id.*

courts have often slithered around these doctrines to deny tribes their substantive and procedural rights.[422] At the heart of this issue is whether Native American tribes are subject to the same standing analysis as other sovereigns, such as states or commonwealths. Tribes, like states, have quasi-sovereign interests, but courts have often refused to treat them as similar entities.

There are a litany of examples of courts refusing to respect tribal sovereignty through ignoring or misapplying the *parens patriae* doctrine.[423] Just one year after the Supreme Court upheld Puerto Rico's sovereign right to sue in its *parens patriae* capacity to uphold the rights of its citizens in *Snapp*, a federal district court in Montana ignored *Snapp* completely, and relied on outdated dicta to deny Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation their sovereign rights.[424] The *Assiniboine & Sioux Tribes* court held that the tribe "must be acting on behalf of the collective interests of *all* its citizens. Here, the proposed claim is on behalf only of those Indians seeking refunds because they have been improperly subjected to these taxes…it can hardly be said that this lawsuit is on behalf of the interests of the entire Fort Peck constituency."[425] The district court ignores the clear *parens patriae* interest the Tribe has in the economic health of its members, and the Tribe's significant interest in protecting all of its citizenry from any present or future unlawful imposition of taxes. The issue is greater than the harm suffered by a relatively small proportion of the tribal members, it subsumes that issue and implicates the tribe's quasi-sovereign interests.

The Supreme Court in *Snapp* specifically addressed this issue, refusing to deny standing based on the fact that only a relatively small number of individuals were directly injured:

> "Petitioners contend that at most there were only 787 job opportunities at stake in Virginia and that this number of temporary jobs could not have a substantial direct or indirect effect on the Puerto Rican economy. We believe

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[422] *See* Kanner, *supra* note 226, at 182-83; *See e.g.* Assiniboine & Sioux Tribes v. Montana, 568 F. Supp. 269 (D. Mont. 1983); Kickapoo Tribe of Ok. v. Lujan, 728 F. Supp. 791 (D. D.C. 1990); Alabama & Coushatta Tribes of Tex. v. Tr. of the Big Sandy Ind. Sch. Dist., 817 F. Supp. 1319 (E.D. Tex. 1993).
[423] *See* Cami Fraser*, Protecting Native Americans: The Tribe As Parens Patriae,* 5 MICH. J. RACE & L. 665, 684 (2000).
[424] Assiniboine & Sioux Tribes v. State of Mont., 568 F. Supp. 269, 277 (D. Mont. 1983).
[425] *Id*.

that this is too narrow a view of the interests at stake here."[426]

The Court explicitly eschewed any bright-line limit "on proportion of the population of the State that must be adversely affected by the challenged behavior", and directed courts to look at "the indirect effects of the injury... in determining whether the State has alleged injury to a sufficiently substantial segment of its population."[427] The Court recognized that discrimination has a pervasive effect on all Puerto Ricans: "This Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils".[428] Discrimination rightfully resides in the pantheon of social justice issues, right alongside the right to clean air, water and food. Just as the commonwealth of Puerto Rico has a right to protect its citizens from discrimination, tribes have a right to protect their members from the host of oppressive ills that attack their physical, cultural and economic well-being.

Despite the fluid and case-specific analysis required by *Snapp*, several courts have imposed a heightened standard on tribal litigants by requiring *every single member* of the tribe to suffer an injury.[429] Similar to PCBs, once these fallacious decisions belittling tribal sovereignty enter the judicial environment, they persist. For example, *Assiniboine & Sioux Tribes* has been repeatedly cited by courts to exclude tribes from exercising their *parens patriae* standing because they "failed to prove [the Tribe] was acting on behalf of all of its members."[430] Just as PCBs travel up the food chain, the reasoning of the *Assiniboine & Sioux Tribes* line of cases has migrated into higher courts. For example, the Eighth Circuit cited to *Navajo Nation v. Superior Court of State of Washington for Yakima County,*[431] and *Kickapoo Traditional Tribe of Texas v.*

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[426] Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 609 (1982).
[427] *Id.*
[428] *Id*.
[429] *See* Assiniboine & Sioux Tribes v. State of Montana, 568 F. Supp. at 277.
[430] Navajo Nation v. Superior Court of Washington for Yakima County, 47 F. Supp.2d 1233, 1240 (E.D. Wash. 1999); *See* Alabama & Coushatta Tribes of Tex. v. Tr. of the Big Sandy Ind. Sch. Dist., 817 F. Supp. 1319, 1323 (E.D. Tex. 1993); Kickapoo Traditional Tribe of Tex. v. Chacon, 46 F.Supp.2d 644, 652 (W.D. Tex. 1999); Kickapoo Tribe of Ok. v. Lujan, 728 F. Supp. 791 (D. D.C. 1990).
[431] 47 F.Supp.2d 1233, 1240 (E.D.Wash.1999).

Chacon,[432] to blithely assert that "[t]he parens patriae doctrine cannot be used to confer standing on the Tribe to assert the rights of a dozen or so members of the Tribe."[433]

Another example of inequitable treatment by the courts is seen through big tobacco litigation. In a perfunctory one-page unpublished decision, the Fifth Circuit affirmed a district court decision dismissing with prejudice the Alabama Coushatta Tribe of Texas' suit against tobacco companies over the negative health effects caused by tobacco products.[434] The Alabama Coushatta Tribe brought the claim in its *parens patriae* capacity.[435] Despite the fact that many states had successfully asserted *parens patriae* standing to sue big tobacco on similar grounds, the Fifth Circuit did not discuss tribal sovereignty or *parens patriae* standing. Instead, the court analogized the tribe to labor unions and denied standing based on lack of direct injury.[436] Subsequently, the tribe's writ of certiorari was denied.[437]

Tribes and other native sovereigns have also attempted to assert their *parens patriae* standing to protect their cultural rights and practices from the dangers posed by climate change.[438] For example, in *Center for Biological Diversity v. U.S. Department of Interior,* the Native Village of Point Hope, Alaska asserted its *parens patriae* interests in "subsistence hunting, fishing, whaling, and gathering, as well as cultural and religious activities" to sue the U.S. Department of the Interior for approving leases off the Alaska coast for oil and gas development.[439] The Tenth Circuit found that the Native Village of Point Hope had standing under their procedural theory, but not under their substantive theory which invoked their *parens patriae* interests: "*Massachusetts*'s limited

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[432] 46 F.Supp.2d 644, 652 (W.D.Tex.1999).
[433] United States v. Santee Sioux Tribe of Neb., 254 F.3d 728, 734 (8th Cir. 2001).
[434] Alabama Coushatta Tribe of Tex. v. Am. Tobacco Co., 46 Fed. Appx. 225 (5th Cir. 2002)(unpublished) (cert denied).
[435] *Id*.
[436] *Id*.
[437] *Id*.
[438] *See* Elizabeth Ann Kronk, *Effective Access to Justice: Applying the Parens Patriae Standing Doctrine to Climate Change-Related Claims Brought by Native Nations*, 32 PUB. LAND & RESOURCES L. REV. 1, 19 (2011); Kamaile A.N. Turcan, *Fisheries Management in American Samoa and the Expanding Application of Parens Patriae Standing to Challenge Federal Administrative Action*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 8 (2019).
[439] Ctr. for Biological Diversity v. U.S. Dep't of Interior, 563 F.3d 466, 472 (D.C. Cir. 2009).

[special solicitude] holding does not extend to the standing analysis in this case."[440] Thus, as the concurrence notes, the Tenth Circuit side-stepped the issue of "whether the Native Village of Point Hope has identified by affidavit particularized harms to its culture and way of life from climate change sufficient to establish Article III standing".[441]

Perhaps the best example of a court vindicating tribal *parens patriae* interests occurred in *Miccosukee Tribe of Indians of Florida v. United States*.[442] In that case, the Tribe sued over the federal government's management of water which caused flooding on tribal lands.[443] The court found that the Tribe used the land in question for "cultural, religious, recreation, commercial, and subsistence activities, including hunting, fishing, frogging, commercial air-boating, and agriculture ... includ[ing] traditional subsistence agriculture and cultivating corn on tree islands for religious purposes."[444] Based on that finding, the court correctly invoked the *Snapp* rationale to find a quasi-sovereign interest, because there could be "little doubt that the Miccosukee Tribe's interests in preserving basic elements of its culture and way of life affects the general physical and economic health and well-being of Tribe members."[445]

The outcomes of recent cases seeking to extend the *parens patriae* doctrine to encompass tribal and native quasi-sovereign interests demonstrates the continued veracity of Justice Clarence Thomas' famous observation: "Federal Indian policy is, to say the least, schizophrenic."[446] For example, the Quapaw Tribe of Oklahoma successfully asserted *parens patriae* standing to sue former lead and zinc mine owners and operators whose operations resulted in extreme environmental hazards that persist to this day on Quapaw Tribal land.[447] The Tenth Circuit accepted the Quapaw Tribe's assertion of *parens patriae* standing without discussion, and focused on issues of sovereign immunity.[448] Eventually, after decades of convoluted litigation and a congressional reference, the

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[440] *Id*. at 477.
[441] *Id*. at 489 (Rogers, J., concurring) (citation omitted).
[442] 680 F. Supp. 2d 1308, 1312 (S.D. Fla. 2010)
[443] *Id*. at 1312.
[444] *Id*. at 1315.
[445] *Id*.
[446] United States v. Lara, 541 U.S. 193, 219 (2004) (Thomas, J., concurring).
[447] Berrey v. Asarco Inc., 439 F.3d 636, 641 (10th Cir. 2006).
[448] *Id*.

Quapaw Tribe is due to receive an almost $140 million settlement.[449]

Other courts have found creative ways to avoid recognizing the sovereign rights of native peoples. For example, in *Territory of American Samoa. v. National Marine Fisheries Service,* the Territory of American Samoa sued the United States over the management of the Samoan fisheries.[450] In that case, the Territory asserted its *parens patriae* standing to protect its cultural fishing practices and traditions.[451] The district court of Hawaii relied on *Massachusetts v. EPA*[452] to recognize the Territory's interest: "in light of the longstanding significance of fishing to the *fa'a Samoa*, Plaintiff has a quasi-sovereign interest in protecting the American Samoan's cultural fishing rights to preserve their culture for the benefit of the American Samoan people as a whole."[453] The district court subsequently affirmed its standing analysis in an order denying defendant's motion for reconsideration.[454] That victory for native quasi-sovereign interests in cultural practices, however, was short-lived. In 2020, the Tenth Circuit reversed in a cursory one-page opinion that avoided the *parens patriae* issue altogether: "This appeal raises a question of whether the Government of American Samoa ...can sue federal agencies under the doctrine of parens patriae…Because parens patriae is a prudential doctrine and not a jurisdictional limitation, we need not reach this issue, and instead proceed to the merits."[455] Then, in a mere paragraph of analysis, the court found that the relevant federal agency had "considered the consequences of the rule on alia fishing boats, and rationally determined the effects were not significant."[456]

Thus, the foregoing cases, and particularly the recent Quapaw Tribe and American Samoan litigation, illustrates the

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[449] *See* Bear v. United States, 147 Fed.Cl. 54, 56 (Fed.Cl., 2020).
[450] No. 16-00095, 2017 WL 1073348, at *11-17 (D. Haw. Mar. 20, 2017).
[451] *Id*. at *12; *See See* Kamaile A.N. Turcan*, Fisheries Management in American Samoa and the Expanding Application of Parens Patriae Standing to Challenge Federal Administrative Action,* 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1 (2019).
[452] 549 U.S. 497 (2007).
[453] Territory of Am. Sam. v. Nat'l Marine Fisheries Serv., No. 16-00095, 2017 WL 1073348, at *12.
[454] Territory of Am. Samoa v. Nat'l Marine Fisheries Serv., No. CV 16-00095 LEK-KJM, 2017 WL 8316931, at *6 (D. Haw. Aug. 10, 2017).
[455] Territory of Am. Samoa v. Nat'l Marine Fisheries Serv., 822 F. App'x 650, 651 (9th Cir. 2020), cert. denied, 141 S. Ct. 2797, 210 L. Ed. 2d 929 (2021).
[456] *Id*.

harrowing reality for tribes and native peoples seeking to protect their people, land, and culture under the *parens patriae* doctrine. Oftentimes, courts engage in a cursory, specious analysis to dismiss legitimate tribal claims. However, where courts correctly recognize tribal quasi-sovereign interests, the ensuing litigation is contentious and prolonged, requiring incredible stamina and fortitude from tribal governments to achieve a successful outcome.

Despite the various setbacks for tribes seeking to establish their *parens patriae* standing to protect tribal interests, tribes and other sovereigns continue to push those boundaries. Certainly, there will be instances where tribal interests do not rise to the extent that they implicate the *parens patriae* doctrine, but tribal claims deserve, at a minimum, to be analyzed properly, a baseline of effort which many courts have not deigned to make. A correct application of the *Snapp* rationale and its progeny would recognize that tribes have a *parens patriae* interest similar to that of states, and can sue to protect their citizenry without proving that every single tribal member has suffered an injury. As other commentators have argued, for purposes of standing analysis, tribes should be accorded the same "special solicitude" given to states.[457]

2. Monsanto's treatment of the Saint Regis Mohawk Tribe

Monsanto faces liability for PCB contamination from many potential sources, including state and tribal sovereigns, local government entities, and individuals. Undoubtedly, Monsanto has an internal litigation plan in place to mitigate their potential losses from these unique suits which combine elements of environmental, product liability, and toxic tort law. In fact, officials with Bayer, Monsanto's parent company, have stated that money has already been reserved for defending against PCB suits, although they declined to name a specific amount.[458] Furthermore, Monsanto maintains its own product-liability insurance, although the details of

[457] Nicholas A. Fromherz & Joseph W. Mead, *Equal Standing with States: Tribal Sovereignty and Standing After Massachusetts v. EPA*, 29 STAN. ENVTL. L.J. 130, 179 (2010); Hae-June Ahn, *Tribal Governments Should Be Entitled to Special Solicitude: The Overarching Sentiment of the Parens Patriae Doctrine*, 37 ECOLOGY L.Q. 625 (2010).

[458] Jeff Feely & Tim Loh, *Bayer's Other Legal Mess: An Old Liability Many Have Forgotten,* BLOOMBERG LAW (July 23, 2019, 3:34 AM), https://www.bloomberg.com/news/articles/2019-07-23/bayer-s-other-legal-mess-an-old-liability-many-have-forgotten.

that coverage were not disclosed.[459] Finally, Monsanto has shown a willingness to settle claims, as evidenced by their settlement with the State of Washington, and attempts to settle with cities.

Monsanto's response to the SRMT suit is strikingly different from its response to the Washington AG suit and City of Seattle litigation. Since as early in the litigation as the hearing on Defendant's motion to dismiss, the SRMT has alleged that Monsanto has "repeatedly treated the Tribe as 'less than' other sovereigns, and has consistently misunderstood, or intentionally obscured, the fact that the Tribe seeks damages for harms caused by Monsanto's PCBs to the Tribe's interests."[460] The SRMT further accuses Monsanto of "artificially and astronomically inflat[ing] the resources required for the parties and this Court to ready the case for trial."[461]

Why has Monsanto chosen to treat the SRMT differently than other plaintiffs? Are those differences based in legal strategy, or is there a more sinister, discriminatory rationale behind them? Certainly, tribes differ from states and cities in many respects which may prompt Monsanto to employ different strategies with each respective sovereign. One possible explanation for Monsanto's legal strategy is the structural differences between the SRMT complaint and other sovereign-led PCB litigation. Specifically, the combination of individual and sovereign plaintiffs in the SRMT complaint has been repeatedly, if unsuccessfully, attacked by Monsanto, including in a failed motion to sever.[462] Additionally, the SRMT's medical monitoring cause of action adds a layer of complexity not seen in many other sovereign-led PCB suits. If the SRMT is successful in pursuing its medical monitoring claim, Monsanto will undoubtedly face similar claims in the future. But those differences alone cannot explain Monsanto's conduct.

Perhaps Monsanto is concerned that the sheer number of federally recognized tribes represents a massive number of potential

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[459] Jeff Feely & Tim Loh, *Roundup Not Only Monsanto Legal Woe For Bayer; PCB Claims Still Coming*, INSURANCE JOURNAL (July 24, 2019), https://www.insurancejournal.com/news/national/2019/07/24/533721.htm#:~:text=The%20company%20says%20Monsanto%20has,for%20trial%20early%20next%20year.

[460] Plaintiff Saint Regis Mohawk Tribe's Opposition to Pharmacia LLC's Objections and Exceptions to Order of Special Master at 2, Back v. Monsanto, No. 18SL-CC03530 (Mo. Cir. Ct. 2020).

[461] *Id.*

[462] Order on Defendants Motion to Sever, Back v. Monsanto, No. 18SL-CC03530 (Mo. Cir. Ct. Sept. 20, 2021).

plaintiffs.[463] Strategically, it may be prudent for Monsanto to settle state suits that survive a motion to dismiss; as there are only fifty states, each piece of litigation that is concluded removes a significant source of liability. Although apparently willing to settle with at least some states, Monsanto may be concerned that settling with one tribe will encourage other tribes to file suit. States often have more legal and financial resources than tribes to pursue this type of complicated and costly litigation. For example, the budget of the Washington Attorney General's Office in the 2022-203 biennium is $374.9 million.[464] Compare that to the 2022 budget for the Attorney General of the Cherokee Nation, the United States' largest tribe, which is set at $10,000,000, and the resource disparity is clear.[465] However, the availability and recent successful use of contingency-fee counsel puts tribes in a position to sue despite any relative paucity of in-house legal resources.[466]

Another important difference between states and tribes is the extent to which they have waived sovereign immunity. As sovereign entities, Native American tribes possess immunity from suit absent their consent or congressional abrogation.[467] The federal government and most states have waived their sovereign immunity from suit to varying degrees through legislative action.[468] In contrast, many tribes have enacted very limited waivers of sovereign immunity.[469] Typically, such tribal waivers allow the tribal council or other authorized tribal representative to waive the tribe's sovereign immunity for specific transactions with non-tribal

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[463] As we write this article, there are 574 federally recognized tribes; *See* List of Federally Recognized Tribes, 86 Fed. Reg. 7,554 (Jan. 29, 2021).
[464] 2021 Wash. Sess. Laws 3253.
[465] Michael Overall, *The Cherokee Nation's Budget Will Hit a Record $3 Billion as the Tribe Responds to COVID and* McGirt, TULSA WORLD (Sept. 15, 2021), https://tulsaworld.com/news/state-and-regional/govt-and-politics/the-cherokee-nations-budget-will-hit-a-record-3-billion-as-the-tribe-responds-to/article_33d25a2e-157d-11ec-963e-7ff77df58054.html.
[466] *See* discussion *infra* Section V.D.
[467] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW*, supra* note 192 at § 7.05.
[468] *State Sovereign Immunity and Tort Liability in all 50 States,* MATTHIESEN, WICKERT & LEHRER, S.C., (last visited Apr. 7, 2022) https://www.mwl-law.com/wp-content/uploads/2018/02/STATE-SOVEREIGN-IMMUNITY-AND-TORT-LIABILITY-CHART.pdf.
[469] *See e.g.* Tulalip Tribal Code § 2.35 (available at *https://www.codepublishing.com/WA/Tulalip/#!/html/Tulalip02/Tulalip0235.html*).

entities.[470] The ability to contractually waive sovereign immunity is essential to the economic development of tribes, because many non-tribal entities will not enter into agreements with a tribe unless those agreements can be legally enforced.[471] Thus, many tribes are insulated from counterclaims to a much greater extent than states and cities. However, certain courts have found that congress abrogated tribal sovereign immunity[472] in regards to the Clean Water Act,[473] the Safe Drinking Water Act,[474] the Resources Conservation and Recovery Act,[475] and the Hazardous Materials Transportation Act.[476]

In addition to protecting government activities from suit, tribal sovereign immunity also extends to a tribes' commercial activities both on and off reservation land.[477] In 2015, the Supreme Court upheld the sovereign immunity of tribal corporations conducting activity off-reservation in *Michigan v. Bay Mills Indian Community*.[478] While ostensibly a victory for tribal interests, the majority and dissenting opinions gave rise to concerns that "lower courts may view the decision as signaling the Court's future willingness to limit immunity [of tribal business corporations]."[479] While it may be unlikely that tribal corporations have conducted off-reservation activities linked to PCB contamination, tribes should be cognizant of the volatility of the law concerning the immunity of tribal business corporations.[480]

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[470] *See* Patrice H. Kunesh, *Tribal Self-Determination in the Age of Scarcity*, 54 S. DAK. L. REV. 398, 415 (2009) (discussing considerations for tribes in determining whether to waive immunity).
[471] *Id*.
[472] *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 212 at § 7.05.
[473] 33 U.S.C. § 1365; *see* Atl. States Legal Found. v. Salt River Pima-Maricopa Indian Cmty., 827 F. Supp. 608 (D. Ariz. 1993).
[474] 42 U.S.C. § 300j-9(i)(1)(C); *see* Osage Tribal Council v. United States DOL, 187 F.3d 1174, 1180-1184 (10th Cir. 1999).
[475] 42 U.S.C. § 6972; see Blue Legs v. U.S. Bur. of Indian Affairs, 867 F.2d 1094, 1097 (8th Cir. 1989).
[476] 49 U.S.C. §§ 5101–5125; *see* Pub. Serv. Co. v. Shoshone-Bannock Tribes, 30 F.3d 1203, 1206 (9th Cir. 1994); N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty., 991 F.2d 458, 462 (8th Cir. 1993).
[477] Kiowa Tribe v. Manufacturing Techs. Inc., 523U.S. 751, 118 S.Ct. 1700 (1998).
[478] Michigan v. Bay Mills Indian Community, 134S.Ct. 2024 (2014).
[479] Brian L. Pierson, *The Precarious Sovereign Immunity of Tribal Business Corporations*, FED. LAW., April 2015, at 58.
[480] *Id*. at 61.

Importantly, the filing of suit by a tribe does not waive tribal sovereign immunity with respect to counterclaims,[481] crossclaims,[482] or compulsory counterclaims.[483] However, tribes may be subject to counterclaims for recoupment "arising out of the same transaction, seeking relief of a similar kind, and in an amount not in excess of the tribe's claim."[484] Thus, Monsanto may view tribes as particularly dangerous litigants due to their immunity from most counterclaims.

Regardless of Monsanto's motivations and strategic decisions, its actions speak clearly: by excluding SRMT from settlement talks, Monsanto is perpetuating a long and sordid history of corporate discrimination against Native Americans. As aptly put by Tribal Chief Eric Thompson, "Bayer is selectively discriminating against Native Americans, singling them out as not worthy of compensation, and purporting that Tribal governments are less sovereign than the ones with whom Bayer settled."[485] But the SRMT is fighting back:

> "The Tribe notes that Bayer's racist tactics will not be tolerated, and their actions will soon be held accountable in front of a jury. Billions of dollars in liability remain and we will no longer allow the Tribe to be swept under the carpet, as Bayer and its corporate predecessors have done for decades."[486]

C. Proving Causation and Damages for Medical Costs

The SRMT is in the unenviable position of being well situated to pursue a medical-monitoring claim as a result of the myriad environmental and health studies conducted over decades in regards to PCB contamination in Akwesasne. Beginning in the early

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[481] U. S. v. U. S. Fidelity & Guar. Co., 309 U.S. 506, 60 S. Ct. 653, 84 L. Ed. 894 (1940).
[482] Doe v. Shoshone Bannock Tribes, 159 Idaho 741, 367 P.3d 136 (2016).
[483] Bodi v. Shingle Springs Band of Miwok Indians, 832 F.3d 1011 (9th Cir. 2016).
[484] 42 C.J.S. Indians § 50 (2021); *See* Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir. 1982).
[485] SAINT REGIS MOHAWK TRIBE BAYER EXCLUDES SAINT REGIS MOHAWK TRIBE FROM GLOBAL PCB SETTLEMENT (June 26, 2020), https://www.srmt-nsn.gov/news/2020/bayer-excludes-saint-regis-mohawk-tribe-from-global-pcb-settlement.
[486] *Id.*

1960's, the first major health concerns stemmed from fluoride emissions which were a byproduct of nearby aluminum smelting.[487] Fluoride contamination caused cattle raised in Akwesasne to develop serious health issues, such as swelling in their legs causing immobility, loss of teeth, and a high calf mortality rate.[488] In 1973, the then-named Saint Regis Band Council responded by creating the Department of Environment.[489] In the late 1970's, concerns about contaminants, including PCBs, prompted the SRMT, New York State and Canadian governments to issue advisories recommending a drastic reduction of fish consumption, including advising that pregnant women and children under age fifteen should avoid eating any fish from waters located in Akwesasne.[490]

Naturally, the serious health problems seen in cattle, fish, and other wildlife prompted concerns about the health effects of industrial pollution amongst the Akwesasne community.[491] Thus began a long and continuing medical odyssey to understand the extent to which industrial contaminants affected tribal members. Notably, in 1982 the very first health study of Akwesasne members revealed the presence of PCB in fat samples taken from tribal members.[492] In the ensuing decades, a plethora of studies driven by tribal effort have confirmed links between the high PCB levels found in tribal members to thyroid problems, negative cognitive impacts, reproductive issues, diabetes, obesity, and heart disease.[493] Many of those studies were funded using the Superfund Research Program, which awards grants to researchers studying health and environmental issues linked to hazardous waste sites.[494]

This long history of environmental contamination and exposure to PCBs and the ensuing research makes the SRMT well positioned to pursue claims against Monsanto for PCB contamination. Importantly, the scientific body of research continues to grow regarding the harms caused by PCBs, putting tribes in an increasingly good position to act against Monsanto via civil suit.

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[487] *The River Is In Us*, *supra* note 248 at 72.
[488] *Id.*
[489] *Id.*
[490] *Id.* at 75.
[491] *Id.*
[492] *Id.* at 74
[493] *Id.* at 107.
[494] *See* NATIONAL INSTITUTE OF ENVIRONMENTAL HEALTH SERVICES, (last visited Apr. 6, 2022) http:// www.niehs.nih.gov.

The scale of sovereign-led suits complicates the task of proving causation and damages for medical costs incurred by a sovereign to monitor, diagnose and treat its citizens for exposure to toxic substances. In an individual cause of action, it is often reasonable and not overly burdensome to require a plaintiff to divulge a broad spectrum of information, including complete records of their medical treatment. Lawyers and experts for both parties use such information to litigate specific causation as well as damages. When a sovereign sues for medical expenses it has incurred and will continue to incur to protect its citizens from harm, however, the sheer scale of medical records involved, as well as the privacy interest of third parties, necessitates a different approach. For example, in the SRMT case, Monsanto requested all the medical records for all 814 Tribal members who allegedly suffered harm from PCB exposure in the form of certain types of cancer and cardiovascular disease.[495] In an affidavit to the court, the director of the SRMT's medical clinic explained that it would take one employee approximately 26 hours *per patient* to collect the requested medical documents and redact identifying information and that each patient's file would consist of over 2000 pages.[496] In fact, it took SRMT medical staff 14 hours to collect, print, and redact 20 years of a representative patient's medical records which were provided to Monsanto in discovery.[497]

In light of the incredible burden such discovery places on sovereign plaintiffs pursuing damages related to public health crises, courts have differentiated such cases from those where individuals pursue claims. In fact, courts around the nation have recently been inundated with cases presenting eerily similar claims and discovery disputes based on another public health crisis – the opioid epidemic. For example, the State of Oklahoma sued a number of opioid manufacturers for their role in causing and perpetuating the opioid epidemic.[498] In Oklahoma, the Special Discovery Master rejected the opioid manufacturers' requests that the state provide discovery

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[495] Plaintiff's Responses to Pharmacia LLC's First Set of Interrogatories at 11-14, No. 18SL-CC03530 (Mo. Cir. Ct. Sept. 14, 2018); *see supra* discussion Section IV.A.

[496] Exhibit A to Plaintiff Saint Regis Mohawk Tribe's Opposition to Motion to Compel the Production of Records at 3, Back v. Monsanto, No. 18SL-CC03530 (Mo. Cir. Ct. June 12, 2020).

[497] *Id*.

[498] State of Oklahoma v. Purdue Pharma L.P., No. CJ-2017-816 (Okla. Dist. Ct. Nov. 15, 2019).

regarding 950,000 patients and 42,000 doctors contained in the State's database and allowed the State to prove its case using statistical analysis.[499] Similarly, in the State of Ohio's recent litigation against opioid manufacturers, the Special Discovery master found "clearly overbroad" Defendants' production request to identify "any person that Plaintiff claims was harmed in any way by any Defendant, all documents concerning each such person's medical history [and] medical treatment . . . and any other records relating to the use of any prescription or over-the-counter medications or illicit drugs."[500] Thus, although a medical monitoring claim involves complicated discovery issues, there are ample recent precedents involving Native American tribes that can help inform future tribal litigation.

D. Contingency Fee Counsel

The use of contingency fee counsel to vindicate public rights is a long-standing practice that has engendered significant controversy.[501] The State of Washington Attorney General's office and the City of Seattle[502] both hired private firms on a contingency basis to pursue their claims against Monsanto. In general, the use of contingency fee counsel is well established in American jurisprudence and is recognized as a legitimate and ethical arrangement by all fifty states.[503] The use of outside counsel is attractive for various reasons: it lessens the financial burden of litigating complicated tort causes of action and leverages the specific tort expertise of private firms.[504]

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[499] Order of Special Discovery Master at 2-3, State of Oklahoma v. Purdue Pharma L.P., No. CJ-2017-816 (Okla. Dist. Ct. Oct. 10, 2018).
[500] Discovery Ruling No. 1, *In re* Nat. Prescription Opiate Litig. at 3, 7, No. 1:17-MD-2804 (N. D. Ohio June 11, 2018) (Doc # 606).
[501] *Compare* Neil F.X. Kelly & Fidelma L. Fitzpatrick, *Access to Justice: The Use of Contingent Fee Arrangements by Public Officials to Vindicate Public Rights*, 13 CARDOZO J.L. & GENDER 759, 768 (2008) *with* Richard O. Faulk & John S. Gray*, Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 942 (2007).
[502] City of Seattle v. Monsanto Co., 387 F. Supp. 3d 1141, 1165 (W.D. Wash. 2019).
[503] Neil F. X. Kelly, Fidelma L. Fitzpatrick, *Access to Justice: The Use of Contingent Fee Arrangements by Public Officials to Vindicate Public Rights*, 13 CARDOZO J.L. & GENDER 759, 768 (2008)
[504] *See* Rhode Island v. LIA, 898 A.2d 1234, 1235 (R.I. 2006) ("To help shoulder the enormous cost of this unprecedented lawsuit, the Attorney General engaged two private law firms to provide legal representation under a contingent

The use of contingency fee counsel was challenged by Monsanto in the City of Seattle's suit on the basis that such an arrangement violated the ethical rules of Washington law.[505] The basic argument is that since private counsel are paid on a contingency-fee basis, and therefore have a direct pecuniary interest in the outcome of the case, that such counsel has a conflict of interest; they may place their own financial interests above the interests of the public. Courts that have addressed this issue have held that the use of contingent counsel in public nuisance cases are not categorically barred provided that the government attorneys, who are neutral and conflict free, retain control over all discretionary decisions made to advance the litigation. [506]

In the City of Seattle's tort action against Monsanto for PCB contamination, for example, the court rejected Monsanto's argument that that the use of contingent counsel was unethical, relying on the reasoning of the California Supreme Court in a similar case.[507] Thus, tribal sovereigns and government entities are not categorically barred from employing private contingent counsel, assuming that tribal attorneys maintain control over the decision making process, including decisions regarding settlement.

VII. CONCLUSION

Native American tribes face serious and challenging environmental issues that affect their health, way of life, and economic well-being. One of those issues, PCB contamination, is at the forefront of emerging tort theories seeking to hold Monsanto financially responsible for the harms it caused through the

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fee agreement.... Realizing the state did. not have adequate resources to finance such a demanding suit, in October 1999 Whitehouse executed a retainer agreement [with contingent fee counsel]".).

[505] *See* discussion *supra* Section IV.C.i.

[506] *See, e.g.,* Cnty. of Santa Clara v. Super. Ct., 50 Cal. 4th 35, 58 (2010); State v. Lead Indus. Ass'n, 951 A.2d 428, 475 (R.I. 2008) (requiring the Office of Attorney General to retain *absolute and total control over all critical decision-making* in any case in which private counsel is retained on a contingency fee basis for a civil suit).

[507] City of Seattle v. Monsanto Co., 387 F. Supp. 3d at 1165. "Specifically, contingent-fee agreements between public entities and private counsel must provide: (1) that the public-entity attorneys will retain complete control over the course and conduct of the case; (2) that government attorneys retain a veto power over any decisions made by outside counsel; and (3) that a government attorney with supervisory authority must be personally involved in overseeing the litigation." (internal citations omitted).

manufacture and distribution of products containing PCBs. Although many states, cities and municipal bodies have sued Monsanto over PCB, only one tribe thus far, the St. Regis Mohawk Tribe, has attempted to hold Monsanto accountable through these emerging tort theories. Tragically, much of the blueprint for tribal tort litigation for PCB contamination is founded on a true narrative of the past, present, and future pain and suffering of Native Americans. As tribes enter into a post-*McGirt*[508] era where, hopefully, courts continue to progress in their respect for tribal sovereignty, tribes have an opportunity to sue in their *parens patriae* and proprietary capacities to remedy harms suffered by the tribe.

There is no doubt that PCBs have caused immense harm to tribes and will continue to do so until PCBs cease to be omnipresent in the environment, fish, animals, and the very bodies of Native Americans themselves. Although PCB contamination is a global problem, it disproportionately affects Native communities, because those communities not only often live in highly contaminated areas and traditionally subsist on large quantities of now contaminated fish and wildlife, but also because tribes have a sacred connection to the land, water, and creatures with whom they lived in harmony since time immemorial.

No mere civil suit can ever hope to solve the litany of issues caused by PCB contamination, but a settlement or award of damages can provide valuable resources for tribes attempting to cross the dark and fearful river through remediating the environment and providing medical screening and care to tribal members at risk for or suffering from diseases linked to PCB exposure.

[508] *See* McGirt v. Oklahoma, 140 S.Ct. 2452, 2462 (2020).