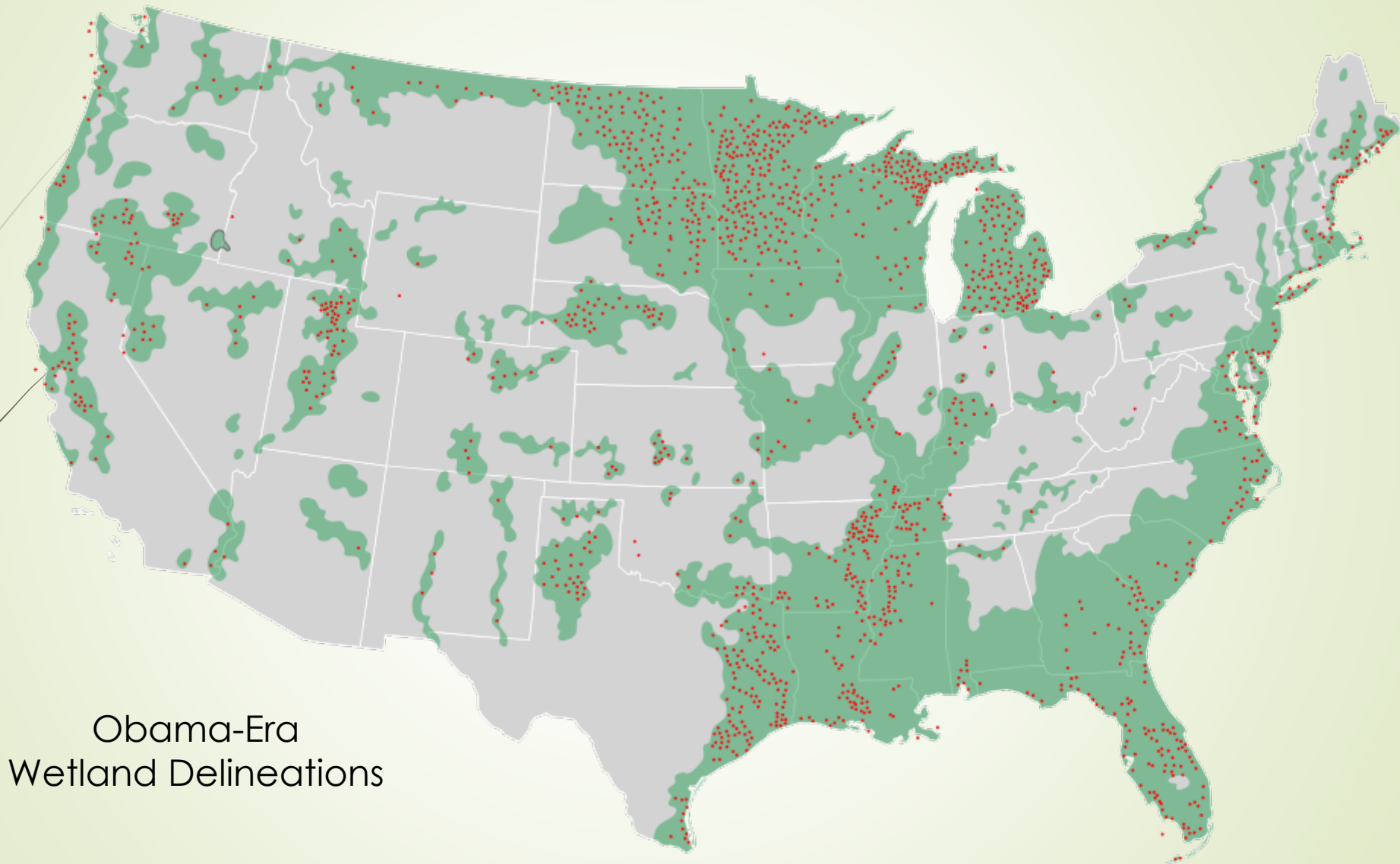




Tribal Attorney Perspective on WOTUS Conforming Rule

Edward R. Ornstein, Esq. (SMN)
Special Counsel on Environmental Affairs
Miccosukee Tribe of Indians of Florida



Obama-Era
Wetland Delineations



Open Questions



- ▶ How will individual watersheds be regulated? How will the Conforming WOTUS Rule trickle down to each locality? How will various Army Corps districts resolve ambiguities?
 - ▶ The Wildlife Society suggests 63% of wetlands will be federally deregulated.
- ▶ How will wetlands divided by artificial structures be regulated? What if those structures are flowgates rather than dikes, levees, or berms?
 - ▶ Conforming rule preamble discusses levees, dikes, and berms subsequent to redefinition of “adjacent.”
- ▶ Even if there are not surface connections, what’s the lag time for impacted water to cross from one body to another? Once a navigable water becomes imperiled, can the navigable water be used as a proxy to justify regulation in the source body? (think, County of Maui)
- ▶ What is the impact for a Tribe or State which has assumed regulatory authority from the EPA? Does there need to be any impact if the Tribe or State fills gaps in the regulatory scheme?
 - ▶ Conforming Rule preamble specifically considers impact on States and Tribes administering CWA programs.
 - ▶ Alito: “States can and will continue to exercise their primary authority to combat water pollution by regulating land and water use.”

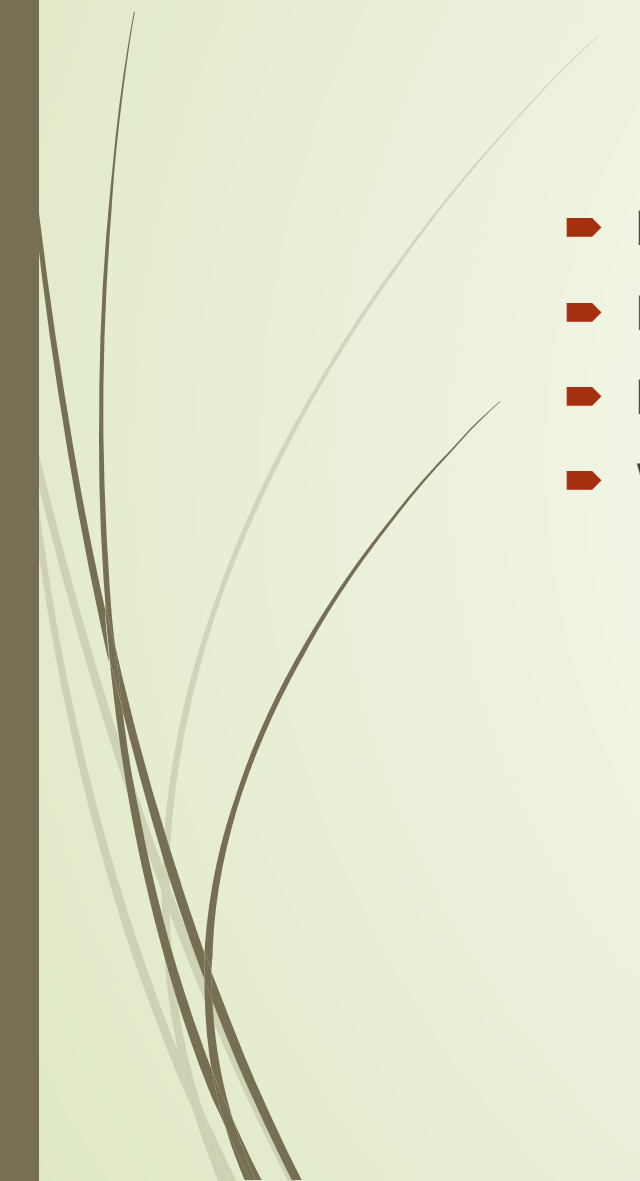


Beyond Delegated Authority

- ▶ Tribes as sovereign nations, retaining inherent sovereignty unless explicitly abrogated (see, *Cherokee v. GA*, *Worcester v. GA*, *Johnson v. McIntosh*, *Santa Clara Pueblo v. Martinez*, *McGirt v. Oklahoma*, etc.)
 - ▶ Tribes as sovereign regulators to the exclusion of states (see, *California v. Cabazon*, *Montana v. U.S.*, *Brendale v. Confederated Tribes*, etc.)



Broadening the Toolkit

- ▶ Functional equivalence test (Maui)
 - ▶ Reallocation of national advocacy resources to states
 - ▶ Establishing Tribal *Montana* jurisdiction to regulate
 - ▶ When all else fails, mass torts
- 

Contact

► Edwardo@miccosukeetribe.com

