

# Native Communities, Food Safety and the Law

Food Safety Webinar Series 2014  
First Nations Development Institute  
May 2014

Presented by: Janie Simms Hipp, J.D., LL.M. and A-dae Romero, J.D., LL.M. (anticipated 2014)

# Sections of Discussion

- General Food Safety Legal Issues
- Traditional Foods and Food Safety
- Retail Food Safety
- Food Donation and Food Safety
- Additional Resources

# Food Safety Law Distinguished

- There is a legally defined “food safety” body of law
  - At the international, federal, state and local levels
  - Quite comprehensive area of the law
  - But still developing
- For Tribes, the idea of “food safety” also implies the protection of our “own” foods from misuse or exploitation outside of the Tribe or community
  - Legally speaking these issues fall under the body of law of Intellectual Property-Trademarks- Patents

# Recognition

- Some Food is more than a physical item, some consider food a “relative”
- Some Food has historical roots in and of the community
- Tribes have highly developed processes and behavior regarding food that pre-date food safety law talked about here
- Some Food is culturally significant
- Some Food is vital to maintenance of community, culture, and physical health of people
- Some Food is not always a choice
- Talking about some food is intimate, but not so in the legal food safety context

# Before we begin...

- There are two approaches:
  - Participate in the US legal schematic regarding food safety
  - Not participate in the US legal schematic regarding food safety
- Both approaches have consequences for a Tribe and community.....
- But if food is being produced for market or has the potential to be eaten outside of the community, then these are things to consider...

# Food Safety Considerations and Variations

- The extent of food safety considerations are dependent on level of food production/sales:
- Among Tribes:
  - There are Tribes with Tribally owned food businesses that sell product inside and outside their communities
  - There are Tribal producers and Tribal food businesses who produce food for sale and for giving away
  - There are Tribal producers who produce food for sale within their own community
  - There are Tribal producers who produce only for consumption and NOT for sale
  - There are Tribal producers who produce food only for consumption OUTSIDE their own community
  - There are Tribes and Tribal producers who produce food for an export market outside the US

# General Food Safety Legal Issues

# Food Safety



- Why do governments get involved in food safety?
  - The safety of the food supply is an important issue
    - Health, safety, welfare of the public are the primary functions of government
  - Concern over sanitation has been an issue for centuries
    - Example: rules pertaining to public health which concern us even today were reflected in the Old Testament: rules concerning water and food contamination, sewage disposal, infectious diseases and health education
    - Oral history relates “good food handling” practices for all cultures
  - FOOD is a product involved in Commerce: the US Constitution and the Commerce Clause pertain to food
  - Contemporary concerns over additives, pesticides, residues, nutrition, adulteration and other health impacts of food



# Food as a Product of Commerce

- Think back to the origins of this country or any country
- The first products of commerce were agricultural or food products
- Economies are built on food and agricultural products
- Sovereignty of any country or nation is tied to its relationship with food
- Without food sovereignty, countries or nations do not remain sovereign too long
- In order to build strength in a country or nation, build a strong food base first

# Food Safety Federal Control



- General Regulatory Framework
  - FDA regulates “Food”
  - USDA regulates meat, poultry, processed eggs, any other food with at least 2% meat content

TEST QUESTION:

Who has regulatory authority over SPAM?

Powered eggs?



# Food Safety Standards

- For many years we simply operated under a standard of zero-tolerance for cancer causing substances and little else in the form of tight food safety measures (Dulaney Clause) + we had general “safe handling” laws
- Many of the laws were state and local in character
- In the 1990s, the federal laws were modified to provide reasonable certainty of no harm and broadened coverage to include a range of potential health issues resulting from chemical use in food supply
- Equally important in the 1990s was the passage of the Hazard Analysis Critical Control Point (HACCP) procedures that became widely used in food industries

# Hazard Analysis and Critical Control Points (HACCP)

- HACCP is a systematic preventive approach to:
  - food safety and biological, chemical, and physical hazards in production processes that can cause the finished product to be unsafe, and designs measurements to reduce these risks to a safe level
- HACCP approaches can be administered at all stages of the food supply chain
- At present: voluntary on all food, except on meat and seafood (mandatory)
- New FDA proposed produce rules would make HACCP mandatory for all “registered facilities.”
- What is a “registered facility”

# Good Agricultural Practices

- Good Agricultural Practices (GAP)
- The Food Safety Modernization Act authorized FDA to establish clearer GAP and HACCP practices for fruit and vegetable producers
- Good Agricultural Practices
  - While there are many programs that define “good practices” there are several other commonly accepted programs
    - GAP = Good Agricultural Practices
    - GHP = Good Handling Practices
    - GMP = Good Manufacturing Practices
    - GFIS = Global Food Safety Initiative (international standards)
    - ISO = International Standards certifications
- Question: what are Tribal specific practices and how do we record those to ensure they are validation
- Question: if we try to establish our own practices and those are rejected in the marketplace outside our communities, will we have to conform to other practices to reach a market

# Food Safety and the Hill



- Congressional perspective
  - Congress passes all federal laws that have anything to do with the food safety issues of the US
    - State and local governments can pass laws in this area as well, unless preempted by federal laws
    - Tribal governments can likewise pass laws in this area, unless preempted by federal laws
  - Agriculture committees in Congress
    - Address food safety, nutrition and quality
    - The issues may also be addressed in other committees with jurisdiction in related areas (public health, homeland security, etc.)
  - Meat and poultry food safety is still addressed in the agriculture committees
  - Food safety concerns in the produce supply largely approach the issues from a public health and nutrition vantage point and have other committees involved in those laws
  - These issues are NOT addressed in the Indian Affairs Committees

# Food Safety History

- Food safety regulation first emerged at the federal level in the 1890s as a matter of public health and sanitation
- The food safety and nutrition/health lobbies have been focused on improving research to ensure “causal” effects and links between diet and health are better understood
- The scientific community has a large role to play in developing food safety responses to public health and food supply issues



Courtesy of Susan Schneider

# Food Safety History continued

- What this has led to is a strengthening of the “science” behind traceability of disease in the food supply
- Policy activities in this area are closely tied to consumer, hunger, nutrition, and environmental issues
- Activist groups in the area of food safety are less concerned with on-farm viability of the agriculture operation’s activities in response to deepening regulations
- And the courts are involved in food safety because they are the venue (location) for any lawsuits related to dangers in the foods we eat
- Lawsuits have always been present in the court system in the area of food safety for centuries





# ADULTERATED FOOD:

## 21 United States Code Section 342

- Adulteration:
  - If a food has been prepared, packed, or held under unsanitary conditions and has become contaminated with filth, or rendered injurious to health
- Adulteration is a criminal and civil violation
- Under some circumstances, food safety violations can be criminal issues

Example:

Jenson Brothers in Colorado have been arrested and charged with placing adulterated food into interstate commerce



# Question for Tribes?

- What is the “Tribal Food Safety History” of any given Tribe
  - Does a Tribe have a food safety officer or inspector
  - Does a Tribe have a food safety record in its businesses or public places serving food
  - Does a Tribe offer food safety training and education to food producers or to handlers of food
- Establishing a “Tribal Food Safety History” will give some recognition to the practices currently utilized by the Tribe
- Does the Tribe have a plan to improve their practices
- Does the Tribe have a plan to help their Tribal members improve their practices
- Who maintains the records of that history? Are there records?

# Food Safety:

## Issues of Concern

- When discussing food safety legal issues, we normally focus on a series of areas of concern:
  - Salt
  - Sodium nitrite
  - Cholesterol
  - Allergens (peanuts, etc.)
  - Additives
  - Intolerances (lactose intolerance, gluten intolerance)
  - Fats
  - Pesticides
  - Natural substances occurring in food
  - Chemical substances introduced to food
  - Pathogens
  - Virus
  - Bacteria
- Viruses, bacteria, pathogens, chemical substances were discussed in previous webinars in this series (please refresh your knowledge by reviewing those webinar slides)

# Food Safety:

## Policy choices

- Policy choices – many different approaches to food safety policies are available:
  - “Let the Buyer Beware”
  - Nutrition education and labeling
  - Warning labels
  - Self-regulation of the food sector, by the food sector
  - No significant risk level which allows some presence of food safety concerns if “no significant risk” is detectable
  - Negligible or de minimus risk which allows some presence of food safety concerns if it is a “de minimus” risk or “negligible” risk
  - Reasonable certainty of no harm which allows some presence of food safety concerns if there is a reasonable certainty that no harm will occur
  - Zero tolerance = no presence

# Food Safety:

## Federal, State, Local

- Has long been seen as the responsibility of the federal government in many areas
- State governments have been “partners” to the federal government in carrying out the oversight and enforcement of federal policy
- State government and local governments are also becoming more active in the food safety area by passing laws that go into areas the federal government hasn’t expressed policy - - or by going beyond the federal policy (sometimes these laws can be challenged)
- Will Tribal governments follow?

# Food Safety:

## Federal agencies involved

- Primary Federal department/agency presence:
  - FDA – part of HHS – safety/quality/effectiveness of animal feeds and drugs and all foods except meat and poultry
  - USDA – FSIS – safety/wholesomeness/accurate labeling of meat and poultry products
  - USDA – AMS – safety/quality of egg products and shell eggs and engagement in the produce sector and with value added products
  - EPA, USDA (FSIS), FDA – safety of pesticide products and pesticide residue tolerance in foods/feeds
  - NMFS and FDA – voluntary seafood inspection
  - CDC
- 13 federal agencies have had something to do with food safety

# Science and Policy

- Science has moved faster than public policy in the area of food safety
  - Ability to measure or quantify the existence of minute residues
  - Ability to trace food borne illness to the original source
- Science provides the ability to development or manufacture of new approaches to food borne illness, food safety, animal and plant disease, and nutrition through biotechnology and laboratory activities
- Relevant and emerging policy questions:
  - What is an acceptable level of risk in the food supply
  - What does it mean when we can trace markers scientifically and technically down to the farm level - - i.e., what impact does that have on the producer's legal liability



# Role of the Private Sector

- What is the proper role of the private sector (i.e., private food-related businesses)?
  - Self-regulating
  - Responding to regulation
  - Labeling and providing enough information to consumers to allow choice to drive product selection
  - Warning labels (what are they warning against?)
  - Different level of risk applicable to different people
    - Immune-compromised individuals
    - Children
    - Elders
  - When do we cross the line from regulation for safety to affecting personal choice in food selections
  - Role of food assistance programs & the role of food safety within those programs
    - Food assistance programs exist when the “ability to pay” does not exist
    - What is the proper level of risk in assistance programs as opposed to the commercial private sector



# Food Safety: General Legal Issues

- Contract law
  - The purchase and sale of food involves buyers and sellers
  - Contracts for the purchase and sale of food can be written or oral
  - At your farmers market, you are engaging in a contract to buy or sell food
  - What are the rights and duties of the parties in those “contractual relationships”
- Uniform Commercial Code (UCC)
  - The UCC deals with commercial transactions
  - It includes sections dealing with transactions in “goods”
  - Foods are “goods”
- Product Liability law
  - Food is a product
  - What happens when the product doesn’t meet expectations
- The “business transaction” related to buying and selling food
- When buying and selling food you are engaging in a business transaction, whether you like it or not
- You also engage in a transaction when you give food

# Food Safety

- Livestock, feed, seed, pesticides and food are “goods”
- Sales and other transactions of goods result in the creation of “warranties”
- Express Warranties
  - Stated as part of the sales agreement
- Implied warranties
  - Are “read into” or “implied” in the sales agreement by the UCC, unless there is specific language or circumstances that exclude the warranties
  - Sales agreements may result in the creation of two types of implied warranties:
    - Implied warranty of merchantability
    - Implied warranty of fitness for a particular purpose

# Food Safety

- Express warranties
  - Explicit statements made by the seller
  - Once the express warranty is made, it is very difficult to disclaim the warranty
  - Created in usually three possible ways:
    - Seller makes an affirmation of fact or a promise that relates to the goods and becomes part of the bargain
      - The warranty is that the goods will conform to the promises made
    - Oral or written statements concerning the goods that the buyer relies upon when purchasing the goods
      - “all my cows are bred”
      - “all my hay is of the highest quality”
      - “all my onions are organic”
      - “all my tomatoes are natural”
    - Statements made on the product label

# Food safety

- Express warranties can also be made if the seller provides “any description of the goods” that becomes part of the bargain
  - The warranty is that the goods will conform to the description
  - Description of the goods on a label, a sign, an advertisement in the newspaper, magazine or on-line
- Express warranties can also be created if the seller displays a “sample or model” of the goods
  - The warranty is that the rest of the goods will conform to the sample or model

# Food safety

- Express warranties can be created by statements
- Statements do not create express warranties if they are statements of opinion, honestly held, or merely commendation of the goods (“puffing talk”)
  - “these okra are the best”
  - “my beans are better than his beans”
- Statements can be oral or written or both
- But if the statement is first oral, then later is reduced to writing, the writing will likely control

\*\*There are also food labeling laws re: claims on labels\*\*

Food labels are statements

# Food safety

- Representations by the food business
- Any representations made by a company, its employees, consultants or agents pertaining to a product, whether oral or written, can be treated as an express warranty
- Must closely monitor any representations made by your employees
- Must also provide training concerning appropriate representations to your employees

# Food Safety

- Implied Warranties
  - Imposed by law to assure a fair result and fulfill the buyer's expectations that an acceptable product is being purchased
  - Two types of implied warranties
    - Implied warranty of merchantability
    - Implied warranty of fitness for a particular purpose
- Implied warranty of merchantability
  - Merchants are held to a higher standard of business conduct than others who participate in business transactions
  - Merchants = those who deal in the goods of the kind sold
  - Are you a merchant???
  - Where merchants are involved, there is an implied warranty that the goods are merchantable
  - Exists even if the seller made no statements or promises and didn't know of the defect in the goods

# Food Safety

- In order for goods to be merchantable:
  - Pass without objection in the trade under the contract description
  - In the case of fungible goods, are of fair average quality within the description
    - Fungible goods can be food; fungible goods are those that are interchangeable and of like kind
  - Are fit for the ordinary purposes for which the goods are used
  - Run, within variations permitted by the sales agreement, of an even kind, quality and quantity within each unit and among all units (involves bulk purchases)
  - Are adequately contained, packaged, and labeled as the agreement may require (if sold in containers)
  - Conform to the promises or affirmations of fact made on the container or label (if sold in containers)



# Food Safety

- Standards of merchantability also involve standards of the particular trade
- If a product fails to comply with industry standards, an implied warranty of merchantability may arise
- Known product defects must be disclosed to a potential buyer
- Every seller with knowledge of defects must disclose those to the buyer
- Underlying rationale: the buyer is getting what is being paid for and that market participants are acting in “good faith”

# Food Safety

- Special rules apply in some states concerning livestock sales transactions
- Some states exempt livestock sellers from implied warranties if
  - The seller knew the animals were sick at the time of the sale
  - Some state statutes exempt the livestock seller from implied warranties for all sales
  - Some statutes provide an exemption from implied warranties if certain conditions are met
  - It depends on where you are
  - Express warranties can still be made
- Also, cannot usually hide behind an exclusion if the seller knows the animals are diseased or sick and sells them anyway
- In the area of livestock sales it may come down to whether the seller knew or should have known the animals were diseased, sick or unable to breed

# Food Safety

- Implied warranty of fitness for the buyer's particular purpose
- Seller has reason to know of the buyer's particular purpose for purchasing the goods and the buyer relies on the seller's skill or judgment to select or furnish the goods
- Doesn't matter whether the seller is a merchant or not
- Questions tend to revolve around the expertise of the buyer and seller and the relative skill or knowledge of either

# Lawsuits Involving Food Safety

- Food and drink cases usually focus on three issues:
  - Is the food or drink wholesome or defective
  - Is the condition of the food or drink the cause of the plaintiff's harm
    - Plaintiff is the one who is harmed
  - Is the food or drink condition attributable to the defendant
    - Defendant is the one who allegedly caused the harm
- Lawsuits involving food safety usually fall into categories:
  - Disgusting stuff in food
  - Who is responsible for stuff in the food - - food tampering
  - Keeping the stuff
  - Ordinary stuff
  - Invisible stuff
  - Uneaten stuff
  - Bottle stuff
  - Damages – who gets paid for finding the stuff & what about damages when the stuff is missing?
  - Regulation – failure to follow regulations
  - The Delaney Clause (tolerances in foods – related to cancer deaths)
  - Violation of statutes

# Cases

- Disgusting stuff in food
  - Rocks in box of Grape Nuts (Elliott v. Kraft Foods)
  - Cockroach in biscuit and gravy breakfast (CEF Enterprises v. Betts)
  - Cockroach in chili dog (Bullara v. Checker's Drive-In)
  - Condom in soft drink (Hagan v. Coca-Cola)
  - Metal in meatball (Jones v. GMRI)
  - Hypodermic needle point in steak (Kroger v. Beck)
  - Decomposed human toe in chewing tobacco (Pillars v. RJ Reynolds)



# Cases

- Responsibility for Stuff in Food – Tampering
  - Tin plate sliver in bowl of soup (Mears v. Heinz)
  - Maggots in soup (Campbell Soup v. Gates)
- Tampering and Stuff: Fingers in Food
  - Deliberately putting stuff in food
    - Pin in Baby Ruth candy bar (Tardella v. Nabisco) – when did pin get into the candy bar
    - Finger in the Wendy’s chili (2005)
    - Syringe in Diet Pepsi (innocently deposited there by diabetic relative, but ended in 60 copycat cases and a videotape of a woman planting a syringe)
    - Finger in frozen chocolate custard (2005)



# Cases

- Keeping the stuff
  - If the plaintiff swallows or disposes of the “stuff” (i.e., it can’t be found) his case may go away too)
  - No evidence, no case
  - Schafer v. JLC Food Systems (object in muffin, but no evidence)
- Ordinary stuff
  - The object isn’t necessarily offensive or repulsive (pieces of cork from a crushed bottle cap in a beverage)

# Cases

- Invisible Stuff
  - If no visible foreign substance in the food, the plaintiff will need to establish a connection between his illness and the food
    - Food poisoning from egg rolls (Gant v. Lucy Ho's Bamboo Garden) - - expert will have to establish that the bacteria causing the illness is usually transmitted from fecal matter of an infected person and that the egg rolls were the source
    - Fatal allergic reaction triggered by sulfite potato whiteners (Trapnell v. John Hogan)
- Uneaten Stuff
  - Person doesn't ingest the food but is sickened by observing, touching, or smelling or thinking about the food, he might be able to recover \$ if he can establish a causal connection between his condition and the food (Prejean v. Great Atlantic)
  - Unpackaged prophylactic in Coke (Wallace v. Coca-Cola)
  - Worm-like object in rice she almost ate (Sowell v. Hyatt)



# Cases

- Bottle stuff
  - Glass
  - Mice
  - Decayed
  - Decomposed
  - Skeleton
  - Flies, spiders, worms and cockroaches
  - Cases involving all these critters and more
- Damages (\$) in food safety cases
  - Range of \$\$ exposure
  - What is more gross
    - Mice heads
    - Maggots
    - Cockroaches
    - Body parts
    - Range of \$\$ based on range of grossness and the degree someone was harmed (upset stomach for a while vs. hospitalized vs. death)



# Cantaloupes Case



- Cantaloupes – September 26, 2013
- Eric and Ryan Jensen turned themselves in and plead not guilty to 6 counts of selling adulterated food (criminal)
- Cantaloupe outbreak (listeria-tainted cantaloupes) led to 33 deaths
- Prosecution by US Attorney’s Office:
  - Farmers allegedly failed to clean the cantaloupes properly
  - Potato cleaning system they had installed in May 2011 for processing cantaloupes was supposed to include a catch pan where chlorine spray could be used to kill bacteria
  - Spray allegedly never used
  - Prosecutors didn’t have to prove that the brothers intended to sell contaminated cantaloupes - - just that they did sell the cantaloupes - - no “intent” required

# Cantaloupe Case & Other Case

- May face up to 1 year in prison + fine of up to \$250,000 on each of the 6 charges
- U.S. Attorney:
  - “As this case so tragically reminds us, food processors play a critical role in ensuring that our food is safe. They bear a special responsibility to ensure that the food they produce and sell is not dangerous to the public. Where they fail to live up to that responsibility, and as these charges demonstrate, this office and the FDA have a responsibility to act forcefully to enforce the law.”
- Other case - Peanuts
- February 2013 – prosecutors brought felony fraud and conspiracy charges against the owner and four people associated with Peanut Corp. of America (2009 salmonella outbreak – 9 deaths)
  - Fraud, conspiracy, introduction of adulterated and misbranded food into interstate commerce

# Federal Regulations

- Food manufacturing and marketing in the US must comply with the Federal Food, Drug and Cosmetic Act
  - Prohibits the sale or distribution in interstate commerce of “adulterated” food or drink
  - Adulterated if contains poisons, pesticide residues, additives, filth or decomposed matter in excess of administratively established tolerances
  - What is a “trace” amount
  - What are the risks at certain concentrations
  - Delaney Clause = no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal

# State Statutes & Local Laws

- States that have “pure food statutes” imposing criminal penalties on those who sell adulterated food, regardless of the seller’s knowledge of the adulteration or his ability to discover it
  - Violations of pure food statutes = negligence per se = liability, period
- What are the state laws regarding food in your particular state
- What are your Tribes’ laws regarding food
- Are those laws different
- What are the laws of the state in which your food is sold

# Tribal perspective

- Which Tribes have “Pure Food Codes”
- Which Tribes have inspection and enforcement offices for those food codes
- Which Tribes have food safety officers
- Which Tribes have food manufacturing and producing within their borders
- Are those food manufacturing or producing activities occurring on trust lands
- Which Tribes own food businesses
- Which Tribes have food being sold in their Tribal businesses
- Where are Tribal foods being sold

# How do we prepare?

- Food Codes are necessary
- FDA Consultation is necessary
- USDA Consultation is necessary
- Indian Health Service involvement is important
- Producers, and Tribal food businesses, must become more familiar with food safety laws and regulations at the federal, state and local level
- Making sure your legal counsel at your Tribe are well versed in these issues
- Make sure your own production and manufacturing operation is aware of these issues and is preparing
- What are your plans for food safety, sanitation and control

# What happens if we don't prepare

- State enforcement of State laws related to water quality used in food production and related to pure food laws and safe food handling requirements
- Federal enforcement
- Criminal enforcement in the event that our foods are implicated in a food borne illness outbreak
- Closure of our food businesses if implicated in a food borne illness outbreak
- Market access - - will we be able to engage in the commercial marketplace with our food? If so, how?
- Lawsuits brought by those allegedly harmed by our foods



# Traditional Foods and Food Safety

# Traditional Foods

- Where does traditional food fit in the scheme of jurisdiction?
- First, how do we define traditional foods?
  - Can we do this over the span of the country since there are so many different variations of traditional foods
  - Perhaps this discussion is ripe for Tribal government/Tribal court jurisdiction
  - There are federal definitions in US Forest Service, Department of Interior and likely other federal department regulations mostly referring to Tribal specific agreements or Tribal cultural and land use issues
    - “Foods commonly gathered...”
  - The 2014 Agricultural Act (Farm Bill) and previous Farm Bills refer to “traditional foods” in the law

# Traditional Foods Questions

- Does a Tribe want to define “traditional foods” in their own policy?
  - If yes → protections under Tribal code, Geographic Indicators protections
  - If no → ensure that the parameters of use are clearly defined to prevent accidental liability

# Food Safety Matters

- Food Safety matters for Tribes
  - To the people we feed
  - To the people we give food to or share food with
  - To the companies we do business with
  - To the consumers buying our products at any market
- It matters whether you are
  - Selling at a farmers market
  - Selling at a tribal supported or customer supported market
  - In a buying club
  - In a food buying cooperative
  - In a food selling cooperative
  - Selling in tribal businesses
  - Selling to tribal schools
  - Selling off reservation
  - Selling on reservation
  - Selling in large grocery markets
  - Selling in export markets
- It also matters if you give your food away

# Retail Food Safety

# Food Safety Matters – Corporate Partners

- All corporate partners require some level of proof of food safety compliance
- Most corporate partners require some liability insurance for food producers and food businesses
- Why?
  - When food is bought and sold along the supply chain, food safety problems can arise
  - When lawsuits occur or food recalls happen, liability can be throughout the food supply chain or centered in one “spot” on the chain (depends on the science of determining where the weak link was in the supply chain)
- Corporate partners are trying to manage their risk
- You should try to manage your risk as well

# Food Safety Matters – Corporate Partners

- Large Grocery Chains
  - Walmart (as just one example)
    - Has adopted GFSI standards
    - Global Food Safety Initiative
    - 1<sup>st</sup> US retailer to require all Private Brand suppliers and select categories of national brand suppliers to achieve certification against one of the Global Food Safety Initiative (GFSI) internationally recognized food safety standards
    - These standards exceed FDA or USDA requirements
    - Adopted this policy in 2007
    - Since 2007, approx. 2000 food manufacturing facilities around the world have achieved certification
    - Applies to bottled water, produce, meat, seafood, deli, in-store bakery, dairy and home meal products
    - Applies to domestic suppliers and international suppliers
    - The requirements for these standards has resulted (by 2010) in a product recall reduction rate of 31.41%

# Food Safety Matters – Corporate Partners

- Walmart's adoption of GFSI applies to the Pet Food Industry also
- Walmart also provides assistance to small and developing suppliers is also achievable through scalable approaches to food safety for those producers by using standards aligned with GFSI principles
- Additional commodity-specific requirements to enhance food safety
  - Beef safety
  - Bulk deli
  - Nuts and seeds
  - Sprouts



# Food Safety Matters – Corporate Partners

- Supplier Education
  - On farm
  - Supplier templates
  - Supplier summits
  - Workshops and webinars
  - Employee education (and supplier education)
    - High 5
      - Be clean, be healthy
      - Keep it cold, keep it hot
      - Don't cross-contaminate
      - Wash, rinse, and sanitize
      - Cook it and chill it
- Most retail grocery require liability insurance and many farmers markets require liability insurance also

# Food Safety Matters – Corporate Partners

- Walmart Slides were an example
- Any corporate partner of a Tribal food business or farm/ranch will have their own standards
- Important to understand those standards, do your homework, and seek out information concerning those standards
- Auditing by the corporate player or by a 3<sup>rd</sup> party (or both) is important
- Records are critical to achieving audit compliance
- Planning is critical to achieving audit compliance
- Compliance with your plan as demonstrated by your physical conditions and your records are critical to compliance
- Failure to comply with your own plan demonstrates negligence and increases your liability

# Food Safety Matters

## Recalls and Regulatory Actions

- When food borne illnesses occur and outbreaks take place several things happen
- Media involvement may occur
- Local, state and federal regulators appear
- Disease and illness public health authorities appear
- Lawyers appear
- Recalls may happen
  - Voluntary
  - Mandatory
  - Highly costly - - require you to retrieve the affected food product AT YOUR OWN EXPENSE
- All the legal issues previously discussed are made real in your business or on your farm
- Lawsuits are likely to occur
- Civil and criminal penalties are likely to occur

# Food Donation and Food Safety

# Food Safety Matters – Giving Away

- Implied warranties and express warranties in food apply even if you are giving your food away
- The implication is that the food will be fit to eat and not dangerous
- Legal Liability is discussed in even the new Farm Bill section that sanctions the “donation” of traditional foods to our Indian Country institutions (schools, clinics, hospitals, etc.)
- Actual language in the farm bill (Section 4033) protects the donator of the food from legal liability, but also requires the donator to comply with USDA and FDA food safety standards

# 2014 Agriculture Act (2014 Farm Bill)

## Title IV: Nutrition

### Section 4033 Service of Traditional Foods in Public Institutions

- Allows for the service of donated traditional foods in residential child care facilities, child nutrition programs, hospitals, clinics, long-term care facilities, and senior meal programs.
  - Traditional foods include: wild game meat; fish; seafood; marine mammals; plants; and, berries.
- Includes a waiver of liability for tribe or tribal organization against any civil actions arising from harm caused by the donation of tradition food.
- Requires USDA and FDA to allow service of traditional foods if certain food safety measures are met, which will include meeting measures for food safety in the preparation and processing, labeling and storage of these foods

# Bill Emerson Act

- Prior to 1990
  - A total mish-mash of food donation laws, cases, policies
- 1990-1996
  - Model Act (regarding donated food)
- 1996:
  - Bill Emerson Good Samaritan Food Donation Act
- Exempts those who make good faith donations of food and grocery products to nonprofit organizations that feed the hungry
- Exempts them from liability for injuries arising from the consumption of the donated food

# Bill Emerson Act

- The Act creates:
  - Exemption from liability for negligently caused harm
  - Arising from the “nature, age, packaging, or condition of” donated items so long as the following are met:
    - Donated item must be either “apparently wholesome food” or an “apparently fit grocery product”
    - The “covered party” must donate the items “in good faith”
    - The donation must be made to a “nonprofit organization”
    - The nonprofit must “distribute the donated items to needy individuals”



# Bill Emerson Act

- Apparently Wholesome & Fit Products
  - Food and grocery items
  - Meet all quality and labeling standards
  - Imposed by federal, state and local laws and regulations
- Covered parties
  - Persons – individuals, corporations, partnerships, organizations, associations, governmental entities and their officers, directors, partners, etc.; also includes retail grocers, wholesalers, hotels, motels, manufacturers, restaurants, caterers, farmers and nonprofit food distributors or hospitals
  - Gleaners – one who harvests for donation an ag product grown by another
  - Non-profits – incorporated or unincorporated entity with religious, charitable, or educational purposes, and of a non-profit character

# Bill Emerson Act

- Covered Activities
  - Field gleaning
  - Perishable produce rescue/salvage
  - Perishable & prepared food rescue
  - Nonperishable processed food collection
- Donate
  - Give without requiring anything of monetary value
- Good faith
  - Honesty in belief or purpose
  - Faithfulness to one's duty or obligation
  - Observance of reasonable commercial standards of fair dealing
  - Absence of intent to defraud or seek unconscionable advantage

# Bill Emerson Act

- National minimum standard
- States can provide more protection, but not less
- Tribes can provide more protection, but not less
  
- Doesn't protect
  - Gross negligence - - if I knew or should have known that my conduct was likely to be harmful
  - Intentional misconduct – if I knowingly and purposefully harmed
  - Must still comply with federal, state or local health/safety regulations
- FDA/USDA Comprehensive Guide to Food Recovery
  - <http://www.foodprotect.org/media/guide/food-recovery-final2007.pdf>
  
- Advice: Tribal Governments should review the documents (see Additional Resources) and pass policies that provide these protections

# Contact information

- Janie Simms Hipp, J.D., LL.M. (Agricultural Law) (Chickasaw)
- Indigenous Food and Agriculture Initiative at the University of Arkansas School of Law
- Address:
  - 259 Waterman Hall
  - University of Arkansas School of Law
  - Fayetteville, AR 72701
  - [jhipp@uark.edu](mailto:jhipp@uark.edu); 479-575-4699
- A-dae Romero, J.D. LL.M. (anticipated 2014) (Cochiti/Kiowa)

# Resources

- *Products Liability and Safety Cases and Materials*; Owen, Montgomery and Davis (book)
- *Agricultural and Food Policy*; Knutson, Penn and Flinchbaugh (book)
- *Agricultural Law Cases and Materials*; Meyer, Pederson, Thorson and Davidson (book)
- *Principles of Agricultural Law*; McEowen and Harl (book)
- [www.fda.gov](http://www.fda.gov)
- [www.usda.gov](http://www.usda.gov)
- [www.fsis.usda.gov](http://www.fsis.usda.gov)
- [www.ams.usda.gov](http://www.ams.usda.gov)

# Additional Resources

- All slides related to Donated Food Liability and the Bill Emerson Act are taken from resources located:
  - <http://law.uark.edu/foodrecovery>
  - <http://foodrecoveryproject.com>
  - Nicole Civita, J.D., LL.M. (Ag Law) – Visiting Assistant Professor at University of Arkansas School of Law
  - Food Recovery: a Legal Guide
- **Food Recovery presentation (N. Civita)**
  - [http://prezi.com/uh-ddvay0aq/?utm\\_campaign=share&utm\\_medium=copy](http://prezi.com/uh-ddvay0aq/?utm_campaign=share&utm_medium=copy)
- FDA/USDA Comprehensive Guide to Food Recovery
  - <http://www.foodprotect.org/media/guide/food-recovery-final2007.pdf>