

STRATEGIES FOR COMBATTING METH IN TRIBAL HOUSING

Presented by:

Ed Clay Goodman

Dave Heisterkamp

Sylvia Wirba

METHAMPHETAMINE

Known as “chalk, crystal, ice, meth, or speed,” and is “an addictive stimulant that is closely related to amphetamine, but has longer lasting and more toxic effects on the central nervous system and a high potential for abuse and addiction.”

A synthetic drug sold as capsules, pills, or powder and it can be injected, smoked, snorted, or swallowed.

Associated with serious, sometimes permanent or deadly, health conditions, including aggression, psychotic behavior, potential cardiac and neurologic damage, and violence.

Last year, 1,540 kilograms of meth were seized and 6,784 meth lab incidents occurred.

Is “nondiscriminatory” and transcends “the socially constructed barriers of gender, race, ethnicity, and sexual orientation.”

How is Meth Made?

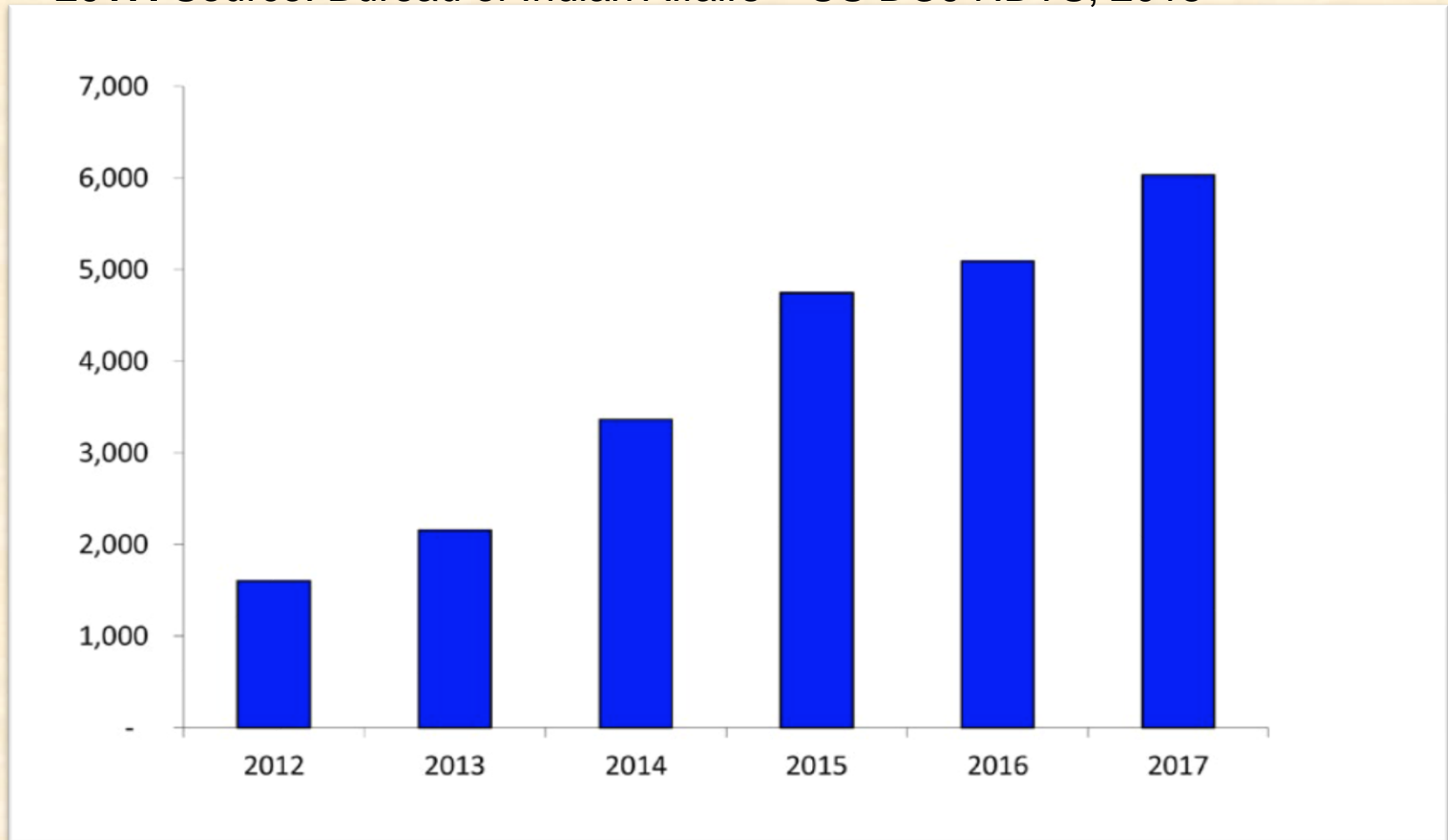
- Most of the meth abused in the U.S. is manufactured in “superlabs” here or, more often, in Mexico. But the drug is also easily made in small clandestine laboratories, with relatively inexpensive over-the-counter ingredients such as pseudoephedrine, a common ingredient in cold medicines.
- To curb production of methamphetamine, pharmacies and other retail stores are required by law to keep logs of purchases of products containing pseudoephedrine; individuals may only purchase a limited amount of those products on a single day.
- From National Institute on Drug Abuse website
- <https://www.drugabuse.gov/publications/drugfacts/methamphetamine>

DRUG CRIME IN INDIAN COUNTRY

- Methamphetamine continues to be the most prevalent drug seized from drug operations in Indian Country.
- Marijuana and methamphetamine are the illicit substances most widely used by American Indians
- Mexican traffickers are principal wholesale suppliers and producers of most illicit drugs available on reservations throughout Indian Country. Overall, Indian Country saw a substantial increase in methamphetamine and heroin seizures in FY 2017.
- Although marijuana is the most widely available illicit drug on reservations, crystal methamphetamine, powder and crack cocaine, diverted pharmaceuticals, heroin, heroin/fentanyl mixes, and MDMA are also available at various levels.
- Source: U.S. Department of Justice Drug Enforcement Administration, National Drug Threat Assessment (NDTS), 2018

DRUG CRIME IN INDIAN COUNTRY

Indian Country Law Enforcement Program Drug Cases, FY 2012 – FY 2017. Source: Bureau of Indian Affairs – US DOJ NDTs, 2018

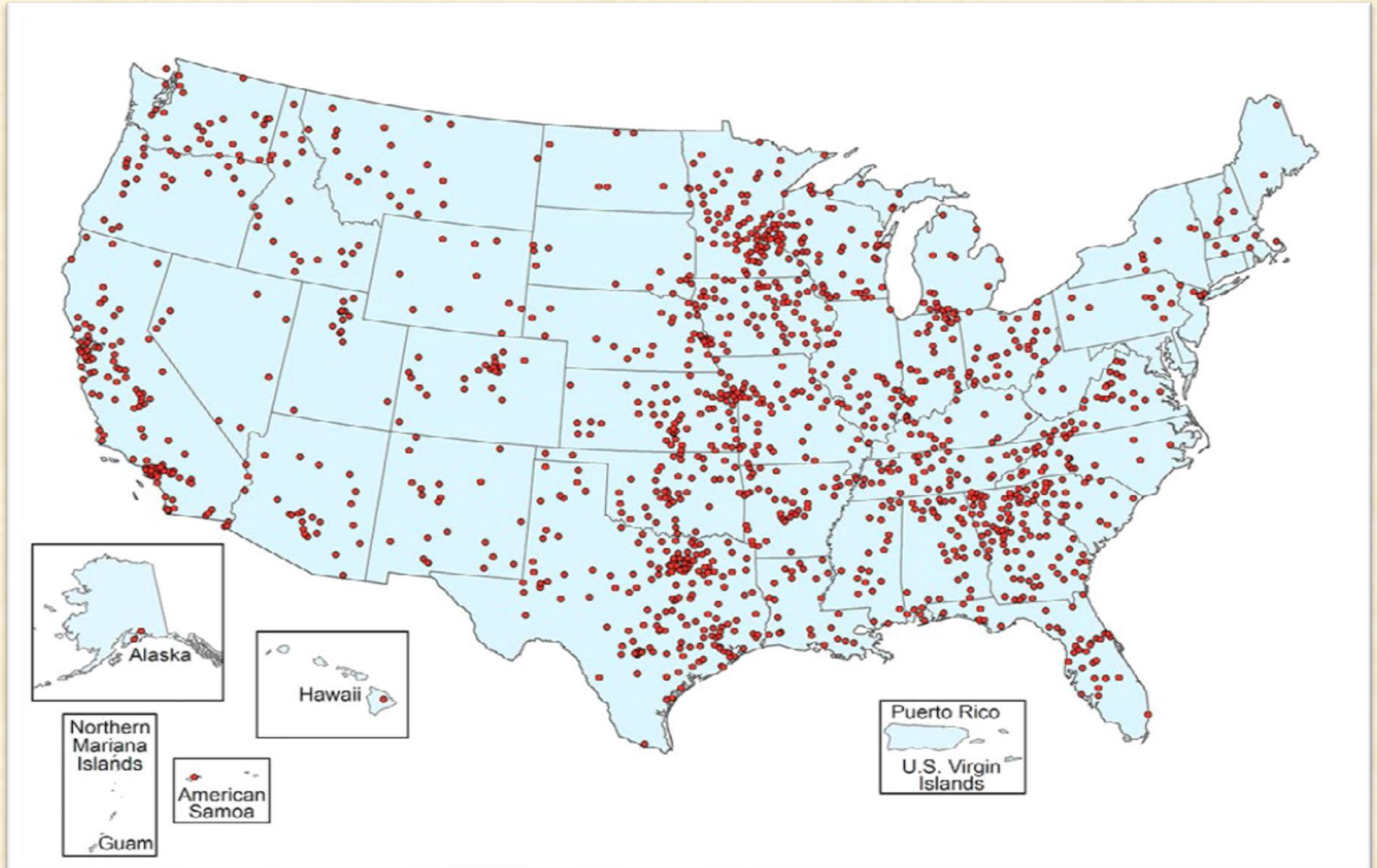


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A National and International Problem

- The following figure shows NDTs respondents that designated methamphetamine as the greatest drug threat.
- 30% of NDTs respondents nationwide reported meth is the drug that takes up the most law enforcement resources, second only to heroin with 36 % of responses.
- Additionally, NDTs respondents nationwide reported meth as the drug that most contributes to violent crime (36%).
- DEA Outlook: Mexican crime syndicates will continue to produce and traffic high-purity, high-potency meth across the border and sell the product at low cost. They will continue to adapt production methods as new legal restrictions are placed on the ingredients.
- From U.S. Department of Justice Drug Enforcement Administration, National Drug Threat Assessment (NDTS), October 2017.

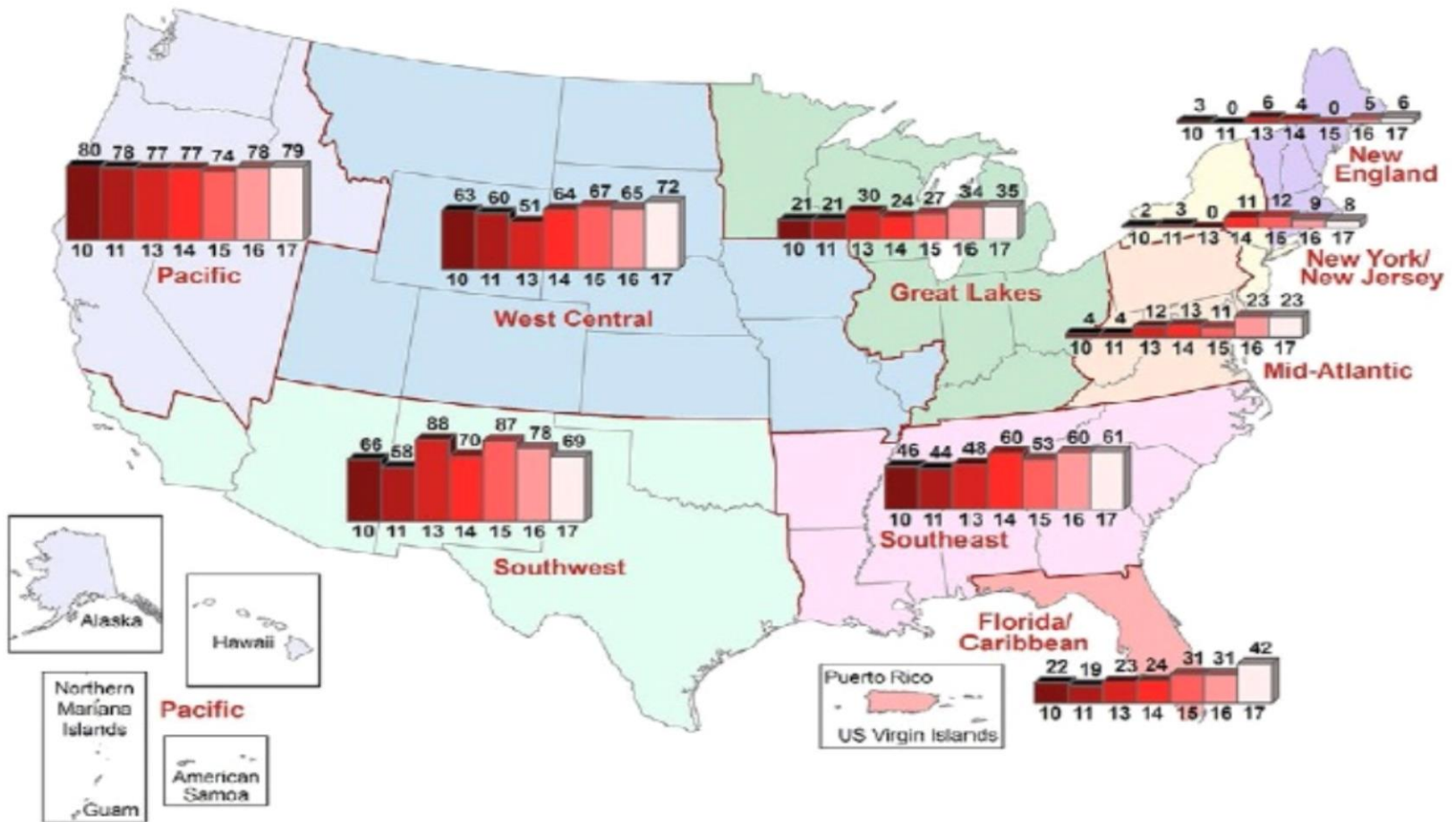
Meth is a National Problem



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Meth is a National Problem

Figure 59. Percentage of NDTS Respondents Reporting High Methamphetamine Availability 2010 – 2011, 2013 – 2017.



Source: National Drug Threat Survey

Meth in Indian Country

Catastrophic Impact in Indian Country Overall

- “Native Americans now experience the highest meth usage rates of any ethnic group in the nation.”
 - From NCAI November 2006
- Easy to make
- Highly addictive
- Limited treatment options
- Drug cartels have targeted reservations
 - Jurisdictional issues
 - Lack of law enforcement resources on many reservations
 - Poverty/socioeconomics

BACKDROP OF LEGAL ISSUES

Three hazards are interrelated, but raise important and distinct concerns.

- **ENVIRONMENTAL HAZARDS:** Contamination by meth's component ingredients are toxic, corrosive, and deadly to the environment.
- **PUBLIC SAFETY AND PROPERTY DAMAGE:** The manufacture and use of meth creates various public safety issues and risks of damage to life and property.
- **HEALTH CONCERNS:** Meth poses significant health hazards not only to those who use it, but to those exposed to residue or to contamination.

Meth and the Environment

- Methamphetamine production also involves a number of other, very hazardous chemicals. Toxicity from these chemicals can remain in the environment around a methamphetamine production lab long after the lab has been shut down, causing a wide range of health problems for people living in the area.
- From National Institute on Drug Abuse website
- <https://www.drugabuse.gov/publications/drugfacts/methamphetamine>

Meth and the Environment

Cooking v. Smoking

- Studies have shown that the smoking of meth alone can produce levels of airborne meth that may result in a general contamination of the structure in which it is smoked (although contamination levels will also depend upon how much meth was smoked and the smoker's technique).
- From EPA Voluntary Guidelines for Methamphetamine Laboratory Cleanup, March 2013
- https://www.epa.gov/sites/production/files/documents/meth_lab_guidelines.pdf

TDHE Meth Programs

- Many TDHEs have implemented varying programs to address meth contamination in their units, including:
 - Policies and Procedures
 - Testing
 - Cleanup
 - Safety
 - Notification
 - Working with Tenants when Meth is found in a unit
 - Second chances
 - Eviction

LIABILITY ISSUES

Addressing the use and manufacture of meth in Indian housing imposes substantial time and financial burden on Tribes/TDHEs.

- One key area is liability for damages – and sovereign immunity may not provide the legal barrier against such liability.
 - Tribal housing authorities, the majority of which have “sue and be sued” language in their charters, have been held to possess the same sovereign immunity as the tribe. There have been cases, however, holding to the contrary, including a Ninth Circuit case.
 - Inter-tribal consortiums have been held to possess the same sovereign immunity as their individual component entities. But, again, there is a case with a holding to the contrary.

LIABILITY ISSUES

If tribal sovereign immunity does not bar suit, Tribes/TDHEs may be held liable for harm, under tort law, if the Tribe/TDHE knew of the danger and failed to disclose it, or take proper precautions, and the tenant was harmed due to leasing premises contaminated with meth.

The trend in case law evidences applying ordinary principles of negligence (i.e., Did the Tribe/TDHE act reasonably?)

LIABILITY ISSUES

Cost of Clean-Up & Decontamination

- Once a unit is determined to be contaminated, the Tribe/TDHE is responsible for making necessary repairs before renting or selling it. If repairs are not made, the Tribe/TDHE may be liable for harms incurred by subsequent tenants or homeowners. In some states, landlords cannot rent property if it is contaminated above a certain level.
- Depending on the Tribe's/TDHE's insurance policy, the insurance company may be required to pay for clean-up costs/decontamination. AMERIND has been discussing including meth clean up coverage with its membership.
- The tenant responsible for the contamination may be held liable for clean-up costs; however, collecting from such individual(s) is often difficult.

LIABILITY ISSUES

Tribes/TDHEs can be liable for harm caused by fire, explosion, or contamination from a lab that it knew, or should have known about, or other harm from drug-related activity.

- The statutes/case law evidence a negligence standard (i.e., if the landlord knew or should have know about potential harm and failed to take reasonable precautions = liable).
- Where criminal activity is the result of the tenant's actions, the landlord will be held liable if the landlord knew, or should have known, of such activity and failed to take precautionary measures.
- Landlords do not have a duty to protect tenants from co-tenants. The acts must be foreseeable and the landlord must have failed to take precautionary measures.
- These cases are very fact specific and turn on issues such as how much the landlord knew or should have know, what steps it could have taken, and if it had liability insurance. The same principles apply to public housing authorities.

LIABILITY ISSUES

Most states and most tribes lack comprehensive statutory or regulatory frameworks for dealing with meth liability.

- The result is a lack of standards for detection and decontamination, for disclosure, and for determining of liability.
- With a comprehensive statutory framework (like those in OR and WA, discussed below), responsibility for each phase is fixed and liability can be ascertained and avoided by following certain steps for decontamination or disclosure.

PREVENTIVE MEASURES

It is preferable to develop effective preventive measures because once the damage is done, the cost of clean up is often prohibitive and the potential liability significant.

In the following slides we discuss various kinds of preventive measures.

PREVENTIVE MEASURES

Establishing minimum safety standards for meth decontamination.

- Some states set minimum safety levels at the level that will show up on a test of the area.
- There is no federal or state uniform minimum safety level.
- Such standards generally do not apply to Tribes/TDHEs.
- Establishing a standard may reduce liability. WA and CO have reports that can provide tribes with guidance.
- The standards should address: (1) minimum safe levels of meth, (2) testing measures, (3) clean up/decontamination procedures, (4) safety measures, and (5) notification requirements.
- Tribal standards should be strictly enforced and reviewed periodically.

PREVENTIVE MEASURES

Testing or inspecting units.

- Make “routine inquires/inspections” into the condition of rental properties.
 - NAHASDA authorizes Tribes/TDHEs to undertake such inquiries; in fact, the Act requires that units built or maintained with federal funds be regularly inspected.
 - Inspections can include meth testing. There must be language in the rental agreement, however, and searches are subject to the Fourth Amendment’s prohibition against unreasonable searches and seizures. A similar analysis seems likely under ICRA, which applies to Indian tribes.
 - Local law enforcement are tempted to “piggyback” on NAHASDA inspections as it permits access to units without obtaining a search warrant. This violates a tenant’s Fourth Amendment and ICRA rights. However, evidence obtained in this manner is often inadmissible in court.

PREVENTIVE MEASURES

Evictions - using information from testing for eviction.

- NAHASDA requires that tribes/TDHES include lease/homebuyer language that authorizes eviction for engaging in drug-related criminal activity.
- This mirrors other HUD-funded public housing programs.
- The U.S. Supreme Court has held that HUD-funded public housing programs can evict tenants/homebuyers based on the drug activity of *anyone* in the unit, *even if* the tenant/homebuyer was unaware of the drug activity or the user was not under the tenant's/homebuyer's control.

PREVENTIVE MEASURES

Using information from testing for eviction.

- However, a positive meth test may not support eviction. The tenant may argue that the previous tenant contaminated the unit. The Tribe/TDHE bears the burden of proof.
- However, the Tribe/TDHE may rebut these arguments by:
 - (1) consulting an expert to assess the meth levels;
 - (2) establishing a baseline for tribal housing, i.e., test the unit pre/post move in/out for meth levels;
 - (3) testing air filters that are periodically replaced during the tenant's occupancy;
 - (4) testing the tenant's personal belongings *with* consent.

Eviction

- Entire family or just responsible party, if known?
- How long will an eviction process take?
 - Safety considerations
 - FED
 - Restraining Order
- Will the Court grant damages awards for contamination costs?
 - How will the TDHE collect after the Tenant is evicted?
 - What evidence will the TDHE have to show costs to the Court?

Second Chance?

- Pros
 - Prevents homelessness
 - Prevents moving the problem to another Unit
 - Allows the TDHE to maintain relationship if costs are owed
 - Keeps families together
 - Political Issues

Second Chance?

- Put any second chance agreements in writing
 - Can be Addendum to Lease
 - Once the Unit is decontaminated, show clean status in writing
 - Can document any costs owed TDHE
 - Failure to comply consequences
 - Insert requirement for random testing for at least one year

Second Chance?

- Cons
 - Risks repeated contamination of the Unit if meth use continues
 - User may not change-Enabling?
 - May show that TDHE isn't serious about meth prohibition
- Uniformity
 - Hard to treat all cases the same, but tenants eventually know who a TDHE works with and who they evict

Cleanup and Tenant Issues

- Will Tenant Possessions be tested?
 - Some jurisdictions will require testing of possessions
- Tenant Possessions when contaminated?
 - How will TDHE work with Tenant to dispose of contaminated possessions?
 - Any liability for the possessions?
- Disposal Requirements?
 - In most cases, cannot throw out with normal refuse

PREVENTIVE MEASURES

Pre-screening applicants.

- Establish criteria to prevent “high risk” individuals from entering tribal housing by: (1) performing criminal background checks, (2) soliciting information from past landlords, (3) establishing certain standards, i.e., no evictions/convictions for meth possession/manufacture.
- Such standards would likely be upheld because: (1) NAHASDA requires tenant selection standards that “are reasonably related to program eligibility and the ability of the applicant to perform the obligations of the lease,” and (2) Congress has implemented a lifetime ban on anyone ever convicted of meth manufacture in a federally-funded public housing unit.

PREVENTIVE MEASURES

Administering drug tests: Existing tenants/homebuyers.

- Drug testing on existing tenants presents a more difficult legal issue.
- Again, consent would be necessary – build it into policies and lease/homebuyer agreements.
- Testing based on reasonable suspicion or based on periodic, announced testing more likely to survive a legal challenge.
- Random testing, however, more likely to be struck down – evidence may not be usable in an eviction action.
- Such testing on existing tenants more likely be upheld if it is applied consistently, across the board, if it is a part of your written policies, if the process and standards are clear, and it is not random.

Notification Options

- Reporting test results to law enforcement?
 - What level of contamination?
 - Will law enforcement be able to do anything, if needed?
- Reporting test result to Child Protection or Elder Services?
 - Is there a child or elder at risk?
 - Small children and elders may be more susceptible to health risks from meth contamination.
 - Are there therapy/rehab resources available?

Other Policy Considerations

- Some jurisdictions require that a landlord disclose to future tenants when a unit was previously contaminated with meth.
- Once a unit tests positive the TDHE has a responsibility to make the unit safe and habitable, including moving occupants out as soon as possible.
- How do you prove a tenant is responsible for meth contamination if the units hasn't tested clear at occupancy and/or there isn't a police report or other evidence to tie the tenant to the contamination?
 - Some courts require evidence that meth contamination is caused by the tenant.

TDHE Examples

- Numerous houses have been tested positive for meth since program was implemented.
- Some programs have been in place for 4-5 years.
- TDHEs are working with some tenants and giving them one more opportunity to remain tenants.
- Tribal courts have been generally supportive/informed on the cases that have come before them.
- Also conducting ongoing outreach with tenants to educate tenants on tribal law, housing policies and possible consequences when meth is found in a unit.
- Based on current circumstances, the TDHEs have designated a significant part of their IHBG budget for meth remediation - the challenge of where to find other funding is huge.

Meth in Indian Country

- TDHEs working alone cannot solve this problem.
- There are three areas that tribes must address cooperatively to save their communities:
 - Housing and housing stock
 - Law enforcement and Court resources
 - Treatment and rehabilitation (without this, the problem simply moves from place-to-place)
- It has been said that there is no way to evict or arrest your way out of this problem.
- This is an incredible drain on tribal resources that are already severely limited.

Tribes Fighting Meth

- Many tribes creating stricter laws to address meth problems
 - Meth Code-criminal code and/or cleanup requirements
- Banishment/Disenrollment Laws
- For non-tribal and tribal members
- Even with strong laws in place, enforcement is still a major issue for some tribes due to current lack of law enforcement resources
 - Not enough police officers
 - Not enough funding
 - Not enough prosecutorial or court resources
 - Not enough jail/rehab resources

Other Political Considerations

- Will the tribal government support TDHE efforts and policies?
 - Training needed for tribal council and Executive office
 - Policies, risk to housing, health risks
- Can a THDE become “too” successful in addressing meth in housing units?
- Will the tribal government remain supportive even if numerous tenants are evicted from units?

Tenant Outreach & Training

- New/revised policies or rules
- Tenant notification
- Notify community and Tribe
 - Radio/television
 - By Mail
- Training
 - Special training for tenants
 - During recertification

THANK YOU - QUESTIONS

Ed Goodman

Hobbs, Straus, Dean & Walker, LLP
EGoodman@hobbsstraus.com

Dave Heisterkamp

Wagenlander & Heisterkamp, LLC
davidvh@wagenlander.com

Sylvia Wirba

Wagenlander & Heisterkamp, LLC
swirba@wagenlander.com