

Tribal Government 101

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WHAT IS A TRIBE?

- “It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated *domestic dependent nations*.” *The Cherokee Nation v. the State of Georgia*, 30 U.S. 1, 18 (1831) (emphasis added).
- “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, they are 'a separate people' possessing 'the power of regulating their internal and social relations . . .’” *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975) (internal citation omitted).
- Indian Tribes are autonomous self-governing communities whose authority is derive from their inherent sovereignty, protected treaty rights, and authority delegated by Congress.

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What is “Indian Country”?

- Indian Country is used in both case law and in statutes to define all lands within the limits of reservations under the jurisdiction of the United States, all dependent tribal communities, and all Indian allotments.
- “Trust Lands” are lands held by deed by the United States for a Tribe or Tribal Member for the use and enjoyment of the Tribe or Tribal Members. Trust lands are not subject to state regulations.
- “Restricted fee” land is land owned by an individual Native American or an Indian tribe which has a restriction on alienation, requiring the consent of the U.S. government before the land can be sold or alienated. Restricted fee lands are not subject to state regulations.
- “Fee” land is own either by a tribal member or non-tribal member and possibly subject to state or local regulation.

What are the Federal Government’s Powers over Tribes or Tribal Members?

- "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Lone Wolf v. Ethan Hitchcock*, 187 U.S. 553, 566 (1903).
- “Congress, the Court concluded, has the power "to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so."...*United States v. Dion*, 476 U.S. 734, 738 (1986).
- "This Court has several times applied.... that general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary..." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99,120 (1960).

What are the States' Authority over Tribes or Tribal Members?

- States generally lack civil and criminal jurisdiction over Indians within Indian country, absent federal legislation.
- In 1953, Congress gave six states — Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin — criminal jurisdiction over tribal members and other people on reservations. This legislation, known as PL 280, also permitted other states to opt for similar jurisdiction. Tribal consent was not required, and tribes were not consulted.
- “The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session.” RCW 37.12.100.

Tribal Sovereign Immunity

- “Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the ‘common-law immunity from suit traditionally enjoyed by sovereign powers.’ That immunity, we have explained, is ‘a necessary corollary to Indian sovereignty and self-governance....And the qualified nature of Indian sovereignty modifies that principle only by placing a tribe's immunity, like its other governmental powers and attributes, in Congress's hands...’” *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 188 L. Ed. 2d 1071, 82 USLW 4398 (2014) (internal citations omitted).
- A Tribe's sovereign immunity can only be abrogated by either an Act of Congress or through an express waiver by the Tribe.

TRIBAL ECONOMIC DEVELOPMENT

- Tribes operate a wide variety of different economic ventures, including gas stations, strip malls, cannabis stores, retail, resource mining, fishing, and gaming.
- In 2021, revenue from gaming was \$39 billion dollars. (*Source: National Indian Gaming Commission*).
- Commercial Shellfish harvest in the Puget Sound, Strait of Juan De Fuca, and the Pacific Ocean (*Source: Northwest Indian Fisheries Commission*):
 - 800,000 pounds of manila and littleneck clams.
 - 1.8 million pounds of geoduck clams.
 - 450,000 oysters.
 - 4.7 million pounds of crab.
 - 150,000 pounds of sea cucumbers.
 - 300,000 pounds of green and red sea urchins.
 - 250,000 pounds of shrimp.

TRIBAL RUN AND TRIBAL OWNED BUSINESS

Tribal Business can be formed in several ways:

1. As a government department.
2. As a federally chartered corporation (known as a Sec. 17 corporation).
3. As a tribal owned business or LLC organized under a Tribal business code.
4. As a tribal owned business or LLC organized under a State business code.

TRIBAL RUN AND TRIBAL OWNED BUSINESS (Off Reservation)

- Whether a tribal own business will be subject to state and local regulations will depend on the *organization* of the business and the *location* of the business.
- Tribal commercial activities organized through the Tribe (i.e. a government department, Sec. 17 corporation, or a Tribal business code) on the reservation and operating on tribal own lands off the reservation can be immune from state or local regulations. See *Mich. v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014).

Tribal Water Quality Standards

- Clean Water Act (CWA) Section 518(e) expressly provides for Indian tribes to play essentially the same role in Indian country that states do within state lands, authorizing EPA to treat eligible federally recognized Indian tribes in a similar manner as a state (TAS) for implementing and managing certain environmental programs.
- A tribe may be found eligible to run one or more of these programs if it can demonstrate...it is federally recognized; it has a governing body carrying out substantial governmental duties and powers; it has appropriate authority; and it is (or will be) capable of carrying out the functions of the particular program.
- “[t]he EPA’s construction of the 1987 amendment to the Clean Water Act--that tribes may establish water quality standards that are more stringent than those imposed by the federal government--is permissible because it is in accord with powers inherent in Indian tribal sovereignty.” *City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996).

Environmental-Treaty Protected Rights

- Lummi Nation-Gateway Pacific Terminal- Showing of greater than *de minimis* impact on treaty reserved fishing rights defeats coal terminal permit at Cherry Point.
- The “Culverts Decision” where Washington must redesign its culverts to prevent unnecessary loss of salmon which impacts the treaty right of Washington tribes.

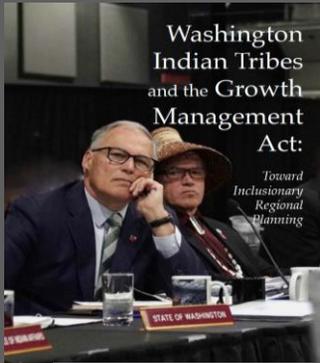
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Tribal, County, and City implementation of Substitute House Bill 1717

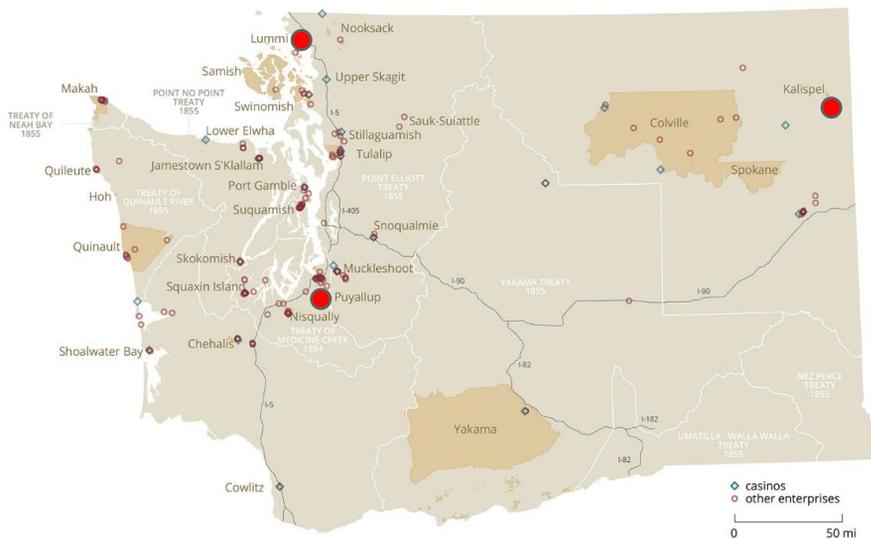


Kirk Vinish, AICP
Director of Planning & Public Works for the Lummi Indian Nation

AWC Conference 2023

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INDIAN COUNTRY IN WASHINGTON - 2022



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Milestones along the path to Tribal Inclusion in GMA Planning

1988 Federal Indian Gaming Act was passed

1989 Governor Booth Gardner signed the Centennial Accord with sovereign tribal nations to promote “government to government” relationships

1990 GMA adopted – tribal inclusion section was considered but not adopted

2019 *Road Map to Washington’s Future* Report advocated for tribal inclusion in GMA

2020 Annual Centennial Accord Meeting – discussed legislation for tribal inclusion

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ESHB 1717



- ESHB 1717 was introduced last session as a means for Tribes, in collaboration with Cities and Counties, to work towards joint planning efforts.
- The bill identified a process for Tribes and municipalities to plan together as well as a dispute resolution process.
- The bill included several specific and required provisions.
- Historically, some Cities and Counties have been reluctant to deviate from standard review and planning practices guided by the GMA. Consultative & collaborative planning efforts sometimes seen as exposing municipality to legal risk.
- ESHB 1717 was not necessary to engage in this type of planning but the legislature wanted to bridge this gap to promote proactive joint planning efforts between Tribes and Cities/Counties and make it clear that this process is protected.

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Why ESHB 1717?

- Tribes are not required to plan under GMA but do develop plans.
- Cities and Counties are planning frequently without Tribal input or understanding of Tribal plans.
- Tribes frequently not notified as part of project review and plan development.
- Tribes manage natural, cultural, and Treaty resources that are affected by local plans and development.
- Mismatched planning expectations have lead to historical conflict.

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ESHB 1717 – Participation of Tribes

RCW 36.70A.040 (8)

- Tribes can voluntarily enter into agreements with Counties/Cities to participate in local planning process.
- Requires good faith negotiations between parties to develop an agreement.
- Mediation will be conducted by Department of Commerce upon failure to agree.

RCW 36.70A.190 (6)

- Tribes may request dispute resolution services over conflicts regarding comprehensive plan updates and development regulations.
- County or City will not be penalized for any delays when entering this process.
- Tribes provide comments to municipality, pause for 60 days, may extend for additional 60 days, facilitation will identify agreements/disagreements.

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ESHB 1717 – Participation of Tribes



RCW 36.70A.210 (4)

- [...] federally recognized Indian tribes whose reservation or ceded lands lie within the county shall be invited to participate in and cooperate with the countywide planning policy adoption process.

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Specific Provisions of ESHB 1717



RCW 36.70A.085 (3)

- Collaborate w/ Tribes on Port Container Elements.

RCW 36.70A.106 (3)(c)

- Tribes that wish to be notified of any required project and plan notifications, must be notified.

RCW 36.70A.110 (1)

- Coordinate planning efforts when agreement is in place.

RCW 36.70A.210 (3)(i)

- A countywide planning policy shall at a minimum, address the following: Policies that address the protection of tribal cultural resources in collaboration with federally recognized Indian tribes[...].

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What Do Tribes Want to See?



- Tribes are not stakeholders. They are sovereign governments that should be consulted in a government-to-government type relationship.
- Tribes want to participate in early planning efforts over natural, cultural, and Treaty resources both on and off Reservation.
- Tribes want to collaborate on transportation, economic development, and infrastructure planning so they can continue to grow and provide services.
- Tribes want their input to be included in local annexation proceedings, zoning, shoreline planning, and development standards as these planning processes can greatly affect Tribal development patterns and be inconsistent with Tribal standards and plans.
- While formal government-to-government discussion is one way municipalities talk to Tribes, Tribes want functioning working relationships between their staff and local government staff to avoid problems at the end of the planning process.

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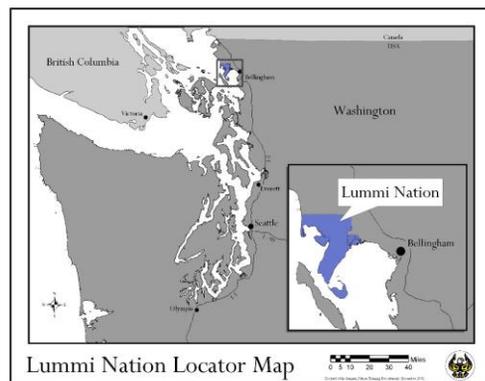
Opportunities for Collaboration



Lummi Nation



Collaborative Planning with Tribes



Kirk Vinish
Director of Planning and Public
Works – Lummi Nation

WA Planning Directors Annual Joint Conference
Presentation

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Opportunities



Lummi Nation

Coordinated Essential Public Facilities Planning

1. Example: **Transportation** Funding – Tribes have access to federal funding that can be used off reservation
2. Example: **Health Care** – Tribes have invested in clinics using HIS funding. Some tribes are opening up to non-natives.
3. Example: **Resource Management**
Establishment of wetland mitigation bank

WA Planning Directors Annual Joint Conference

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Lummi Nation

Transportation

Slater Road – I-5 Interchange (Exit 260)



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Health Care



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Resource Management Lummi Nation Wetland Mitigation Bar



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