

Working with Indian Tribes: A Primer for Consultations

Terry Williams

Commissioner of Fisheries and Natural
Resources, Tulalip Tribes

Drawn from: U.S. EPA “Working Effectively with Tribal
Governments” (August 1996)

Report Documentation Page				Form Approved OMB No. 0704-0188	
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE 01 AUG 2004		2. REPORT TYPE N/A		3. DATES COVERED -	
4. TITLE AND SUBTITLE Working with Indian Tribes: A Primer for Consultations				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Commissioner of Fisheries and Natural Resources, Tulalip Tribes 7411 Tulalip Bay Road Marysville, WA 98271				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release, distribution unlimited					
13. SUPPLEMENTARY NOTES See also ADM002111. Department of Defense Conservation Conference. Held in Savannah, Georgia on August 22-27, 2004, The original document contains color images.					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT UU	18. NUMBER OF PAGES 35	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

Chronology

- 1608-1830: Earliest treaties
 - 1830-1850: Removal
 - 1850-1871: Reduction of Indian land
 - 1887-1909: Assimilation & allotment era
 - 1934: Indian Reorganization Act
 - 1949-1970: Termination
 - 1970: The self-determination era
 - 1990: The Federal *Era of Devolution*
-

Earliest Treaties

- Since the British colonial era, Tribes have reserved certain lands for their own use, while selling or ceding certain lands to non-Indian governments
 - Land that Tribal governments have withheld from sale have been called “Indian reservations”
-

Removal (1830-1860)

- “The Indian Question”: Increasing conflicts between the Tribes and the growing colonies
 - Jefferson proposed, and Jackson disposed the “Removal Policy”
 - Congress passed the Indian Removal Act in 1830
-

Removal (1830-1860)

- The Supreme Court reviewed the issues in the “Cherokee Cases”:
 - Johnson v. McIntosh (1823): prior occupancy
 - Cherokee Nation v. Georgia (1831): DDN
 - Worcester v. Georgia (1832): Federal jurisdiction
 - Recognized “domestic dependent nations”, tribal self-government, and federal control over Indian affairs
-

Removal (1830-1860)

- “Trail of Tears”: Cherokee removed in winter with few provisions: 4-8,000 died
 - Many other tribes also removed: 11 major tribes and many smaller ones
 - Little oversight and control, and the removal process is filled with “bribery, perjury and forgery”
 - Cultural impacts of Removal: Cosmology, ancestors, stories, and traditional knowledge
-

Reduction of Indian Land (1850-1871)

- Indian Wars in the West
 - Intense Treaty negotiations, resulting in large reductions in Indian territories
 - Many treaties re-negotiated, forcing further reductions in the Indian Estate
 - Some tribes remained in portions of ancestral homelands, but many forced to remove to and co-inhabit new territories
-

Assimilation & Allotment (1887-1909)

- Dawes Act, or the Indian General Allotment Act of 1887 (1887-1934)
 - The “Allotment” system divided tribal land into individual parcels and privatized communal property to assimilate tribes into non-Indian culture
 - Many of the parcels were sold or given to non-Indians
-

Assimilation & Allotment (1887-1909)

- Indian homelands, reserved through treaties, were much reduced
 - 150 million acres in 1887, itself a fraction of ancestral land base, reduced to 50 million
 - Failed to achieve goals of economic self-sufficiency or assimilation
 - Created a jurisdictional nightmare with “checkerboard reservations” of tribal lands and fee lands
-

Indian Reorganization Act (1934)

- IRA, or Wheeler-Howard Act
 - Tribal New Deal
 - Positive effects: tribal constitutions, tribal laws, tribal membership rules, economic self-development
 - Negative effects: Western style governance and goals disrupted traditional governance
-

Termination (1949-1970)

- Hoover Commission Report of 1949, urges assimilation and the end of trust status
 - House Termination Resolution in 1953
 - Public Law 290 allows state criminal law jurisdiction in several states
 - Congress adopts tribal termination policy in 1954
-

Wardship and Self-Determination

- Federal Indian law and policy to this point reflects tension in the concepts of wardship and self-determination
 - History of US-Tribal relations to this point not particularly exemplary
-

The Self-determination Era (1970)

- Nixon's special message to congress on July 8, 1970
 - Declares "New Era" of government-to-government tribal relations
 - Calls for repeal of the Termination Act
 - Tribal self-administration of BIA programs and tribal education
 - Increased tribal representation in BIA, Interior, and control over trust lands
-

Federal *Era of Devolution* (1990)

- Following Nixon, successive presidents make statements on Indian Policy
 - All recognize tribal sovereign status
 - Congress reinforces principle of government-to-government relations in findings (e.g. Indian Tribal Justice Act (Public Law 103-176))
-

Federal *Era of Devolution* (1990)

- Memorandum on Government-to-Government Relations with Native American Tribal Governments (1994)
 - Executive Order 13084 on Tribal Consultation and Coordination with Indian tribal Governments (May 1998)
 - Executive Order on Consultation and Cooperation with Tribal Governments (November, 2000)
-

Important Terminology

- Ceded territory is off-reservation land where Tribes have retained treaty rights to hunt, fish, and gather other resources
 - The federal governments' trust responsibility includes protecting treaty rights **whether on or off a reservation**
-

Key Term: “Trust Responsibly”

- Trust responsibility comes from Indian treaties, statutes, executive orders, and the historical relationship between the U.S. and Indian Tribes
 - Relationship was not created by a single document nor is its scope defined in any one place
-

Key Term: “Trust Responsibly” (cont.)

- It requires that the federal government consider the best interests of the Tribes in its dealings with them, and when taking actions that may affect them.
 - Every federal Department and Agency, including the military, is responsible for upholding the federal trust responsibility to the Tribal governments
-

Tribal Sovereignty

- The most basic of all Indian rights, the right to self-government, is not a right that has been granted by Congress, the President, or the Courts
 - Rather, Tribes derive their authority to govern from their status as independent, separate, political entities
-

Tribal Sovereignty (cont.)

- Tribes generally have all the powers of self-government of any sovereign
 - Recognized rights and reserved rights
 - Rights are conferred by tribes to the federal government, not granted
 - Rights not conferred by treaty are reserved
 - Only limitations to these powers stem from modifications of treaty *or by **express legislation of Congress*** (Cohen, Handbook of Federal Indian Law 241-42 (1982); Lone Wolf v. Hitchcock (1902))
-

Tribal Sovereignty (cont.)

- U.S. Supreme Court began discussing tribal sovereignty as early as 1830s
 - From this point forward, the Court has generally followed a course of upholding Indian sovereignty and the ability of tribes to exercise sovereign powers.
-

Canons of Construction

- Originated in *Worcester v. Georgia*, based on trust relationship
 - Treaties are to be interpreted as the tribes would have understood them at the time of the negotiations
 - “A cardinal rule in the interpretation of Indian treaties is that ambiguities are resolved in favor of the Indians.”
 - Cohen, Handbook of Federal Indian Law, 37 (1988)
-

Tribal Authorities

- Tribes have general power to:
 - Make laws governing conduct of Indians on reservations
 - Establish bodies such as Tribal police and courts to enforce laws and administer justice
-

Tribal Authorities (cont.)

- Tribes have general power to:
 - Regulate hunting and fishing, land use, environmental pollution, and other activities of non-Indians on fee lands within reservations that may have some direct effect on the political integrity, economic security, health, or welfare of the Tribe
-

Tribal Authorities (cont.)

- States have no authority over Indian affairs, Tribal governments, or reservation lands
 - Worcester v. Georgia (1832)
-

Tribal Roles

- Like national governments, they assert jurisdiction over their people and land; are landowners
 - Like state/local governments, they administer multiple service programs
 - Like a business, they manage resources, products, and services for profit
-

Comparison of Indian Tribes to States

	Indian Tribes	States
Independent sovereign government	X	
Exercise civil and criminal jurisdiction	X	X
Regulate land use	X	X
Own and operate for-profit businesses	X	
Manage, regulate, and protect natural resources	X	X

Principles for Involving Indian Tribes

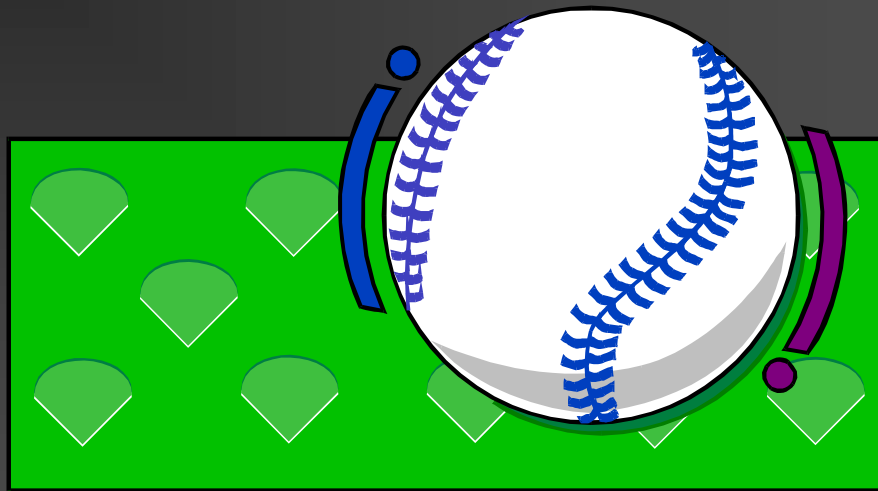
- Work with Tribes on a government-to-government basis
 - Recognize Tribes as primary parties for setting standards, making policy, and managing programs on reservations
 - Take appropriate steps to remove procedural or institutional impediments to their direct involvement
-

Principles for Involving Indian Tribes (cont.)

- Assure that Tribal concerns and interests are considered whenever a proposed action or decision will affect the reservation environment
 - Encourage communication between the Tribe(s), lead agency, and cooperating agencies
-

Principles for Involving Indian Tribes (cont.)

- Take steps to level the playing field



Tribal and National Homeland Security

- Border Security / Security Monitoring
 - Several tribes are located on borders with Canada and Mexico
 - Many tribes are adjacent to or near national security areas and bases
 - Tribal borders, tribal coastlines, tribal lands and reserved lands pose security risks as access points
-

Tribal and National Homeland Security

- DOD and DHS activities may affect tribal trust resources
 - Linkages between environmental, political, economic and cultural security with national security
-

Tribal and National Homeland Security

- DHS Requires Collaboration with tribes
 - DHS requires its agencies to Seek Out and Coordinate with tribes early in the planning process
 - DHS requires its agencies to coordinate EA/EIS as it would with a State or federal government
-

Tribal and National Homeland Security

- DHS requires its agencies to invite tribes to be a cooperating agency when the tribe has special expertise or jurisdiction over resources affected by the action
 - DHS cannot disclose certain tribal information that is protected by law
 - Tribes by definition of the DHS regulations can be cooperating agencies
-

Contact Information



- Terry Williams
 - Commissioner of Fisheries and Natural Resources,
Tulalip Tribes
 - 7411 Tulalip Bay Road
 - Marysville, WA 98271
 - Tel: (360) 651-4480
 - Email: judipatrick@tulalip-nsn.gov
- 