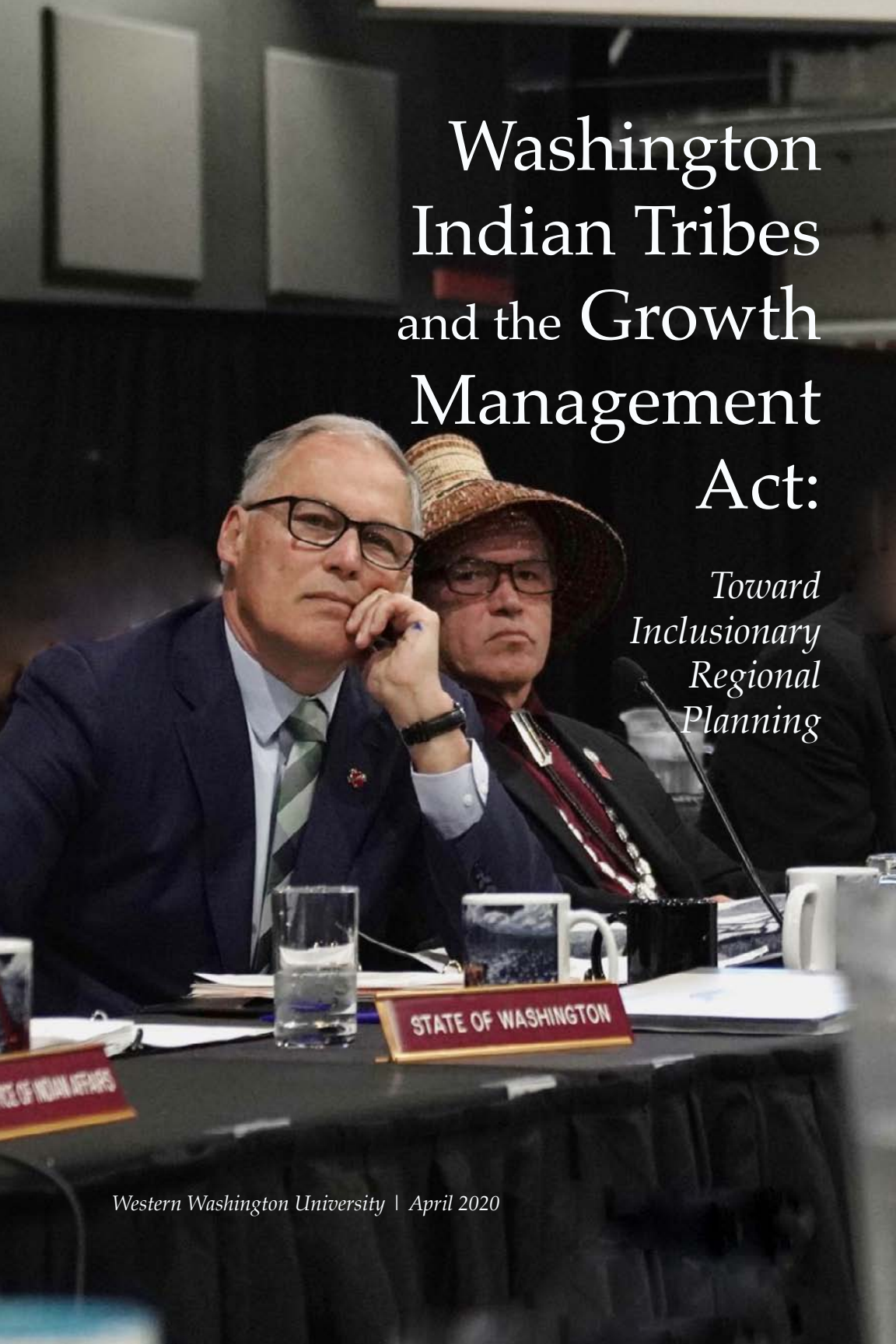

Washington Indian Tribes and the Growth Management Act:

Toward Inclusionary Regional Planning

Western Washington University | April 2020

Washington Indian Tribes
and the
Growth Management Act

Toward Inclusionary Regional Planning

A research study funded under a grant by the Bullitt Foundation,
Seattle, WA, to investigate a regional planning framework that fosters
a plurality of visions that are equitable, just, and inclusive of Tribal Nations.

Urban Transitions Planning Studio
Huxley College of the Environment
Western Washington University,
Bellingham, Washington
April, 2020

Cover photo: Washington Governor Jay Inslee and Swinomish Chairman Brian Cladoosby, 30th Annual Centennial Accord Meeting, November 7, 2019, Shelton Washington. Courtesy of the Office of the Governor.

Contents

Appendices

Figures and Tables

Figures

Tables

Authors, Contributors, Advisers, and Participants

Nicholas Zaferatos, Ph.D., AICP, principal investigator, Professor of Urban Planning and Sustainable Development, Western Washington University (WWU).

Contributors: Allan Olson, attorney, general manager, Swinomish Indian Tribal Community; Larry Wasserman, former environmental policy director, Swinomish Indian Tribal Community; Elliot Winter and Kylee Butler, graduate research assistants (WWU).

Advisers and Participants: Appreciation is extended to the following advisers and colleagues: the Honorable Brian Cladoosby, chair, Swinomish Indian Tribal Community; Professor Jean Dennison (Osage Nation; Anthropology, University of Washington); Professor Christopher Teuton, chair, American Indian studies (University of Washington); Ginny Broadhurst (Salish Sea Institute, WWU); Michael Caldwell (Quinault); Joe Tovar (Tovar Planning); and to the eighteen federally recognized tribal government planning directors within the Emerald Corridor who participated in this research project through surveys, interviews, and workshops: Confederated Tribes of the Chehalis Reservation, Cowlitz Indian Tribe, Jamestown S'Klallam Indian Tribe, Lummi Nation, Muckleshoot Tribe, Nisqually Indian Community, Nooksack Indian Tribe, Suquamish Tribe of the Port Madison Reservation, Puyallup Tribe, Samish Indian Nation, Sauk-Suiattle Tribe, Skokomish Tribe, Stillaguamish Tribe, Swinomish Indian Tribal Community, Tulalip Tribes, Upper Skagit Tribe, Port Gamble S'Klallam Indian Community, and the Squaxin Island Tribe.

A special note of gratitude is extended to Steve Whitney and the Bullitt Foundation, Seattle, WA, for providing funding support under Grant Number 18-03308 of the Foundation's Regional Ecosystem Health Program category as well as to Emily Weiner and the Western Washington University Foundation for assistance in the administration of this research project.

1

Overview to the Study

Problem Statement

Washington State and the Emerald Corridor,[1] the rapidly urbanizing region of western Washington along Interstate 5, lacks a regional planning framework that embraces a plurality of visions inclusive of tribal rights and interests, thereby in some instances resulting in conditions of exclusion and conflict.

One of the most perplexing problems facing cooperation in regional planning in Washington State lies in the relationship between local governments (counties, cities, utility districts, etc.), deriving their authority to plan from state-enabling legislation, and tribal nations, whose authority emerges from their inherent sovereignty, treaty-based rights and federally conveyed rights and who are not subject to state planning laws. These rights and authorities may involve overlapping jurisdictions both on and off Indian reservations. Further complicating the situation is the fact that local governments have historically applied policies that directly affect tribal interests in ways that are often adverse to tribal goals. Adding to the confusion is the absence of a clear directive in Washington's planning legislation to guide local governments toward the coordination of their planning policies with those of neighboring tribes. Differences in respective community goals may result in regional conflicts that frustrate efforts toward a consistent and inclusionary regional planning vision. With urban growth projected to increase in the Corridor over the next several decades, which will further stress the natural ecosystems, the impact on tribal interests can be expected to increase.

The goal of this research is to investigate approaches to achieving inclusionary regional planning—an approach that would include federally recognized Indian tribes as an integral part of the planning process of Washington State's Growth Management Act (GMA) of 1990.[2] In reaching this goal, the project seeks to achieve the following outcomes:

- Create a knowledge base that will inform planning agencies of tribal interests in the Emerald Corridor
- Formulate procedural protocols to guide the institutionalization of tribal and local government agency working relationships
- Inform a process engaging tribes and local agencies responsible for growth-management planning regarding an operational framework for inclusionary regional planning
- Develop a legislative framework to foster the work of inclusionary regional planning

Background

An important goal of the GMA is to coordinate comprehensive plans among adjacent jurisdictions. The act requires the coordination of those plans that are adopted pursuant to state law (Revised Code of Washington [RCW] 36.70A.040) or with "counties or cities" that share a common boundary. In both cases, tribes are precluded from the state's vision for coordinated planning because they are not subject to the state's law, despite the presence of tribal treaty rights and interests in areas subject to GMA planning that may be adversely affected by local government plans and policies enacted under the GMA. This report is intended to foster a greater understanding of those tribal rights and interests, to promote improved coordination among local governments and the tribes in carrying out growth-management planning, and to achieve diversity, equity, and inclusion through coordinated planning.

Because Washington State lacks a regional planning framework that embraces a plurality of visions inclusive of tribal rights and interests, environmental and land-use policy conflicts have often ensued. The most obvious problem facing any effort to foster regional cooperation in planning occurs when local-government policies are applied unilaterally to Indian reservations or to off-reservation ceded lands that adversely infringe upon tribal self-governance or affect tribal treaty rights. Adding to the confusion is the absence of a clear directive in Washington's planning legislation to guide local governments toward the coordination of their planning policies with those of neighboring tribes in order to avoid such conflicts, as is the case in the state's laws that require local governments to coordinate their plans with adjacent local governments. Differences in respective community goals often result in regional conflicts that frustrate efforts toward attaining a cogent regional planning vision.

Conflicts between tribal and nontribal governments in Washington State are complex and have led to decades of litigation. The focus of state–tribal conflict in Washington State, beyond the well-acknowledged treaty fishing-rights litigation, include unresolved tribal land claims; land-use jurisdictional infringement on reservations; water rights; tribal economic development; public-services delivery; and the management of environmental, cultural, and natural resources.[3] The marginalization of tribes in Washington's regional planning framework precludes our state's ability to attain inclusive and equitable long-term goals that reflect the interests of the diverse communities that together occupy the Emerald Corridor.

Resolution of past exclusionary practices and the associated historic conflicts between tribes and nontribal governments requires a new approach to form mutually beneficial working relationships and policy outcomes. As a process for developing intergovernmental policy reform, a clearer understanding of the underlying tensions is first required, along with a pathway toward establishing a meaningful dialogue among the affected parties in order to more clearly understand the interests, community values, administrative procedures, and legal authorities that intersect in tribal and local government jurisdictional territories.

Since the 1980s, the approach used by Washington State's executive branch has attempted to emphasize cooperation and negotiation to resolve regional natural-resources conflicts and litigation. In 1987, various state departments (the Departments of Natural Resources, Ecology, Fish and Game, and Labor and Industries) signed the historic Timber, Fish, and Wildlife Agreement[4] with tribal governments, environmental groups, and private-industry groups. This agreement was an attempt to reach mutual understanding and agreement rather than litigate recently adopted regulations promulgated by the Forest Practices Board. This cooperation led to another historic agreement, the Centennial Accord of 1989,[5] between the governor and the then twenty-six federally recognized Indian tribes in the state, which proclaimed a new "government-to-government" relationship with tribal governments that has changed the way state agencies work with tribes. Nearly every state executive agency now has a "tribal liaison" responsible for understanding the interests, concerns, and rights of tribes in order to facilitate government-to-government dialogue to align policies and resolve potential conflicts. However, the state legislature has not adopted a comparable framework. The GMA is a prime example of how tribes are marginalized in the regional planning process. Local and regional planning processes conducted under the GMA often overlook or ignore tribal interests, and as a consequence tribal issues are all

too often left to be resolved in the courts.

Like the state, Indian tribes, operating under their own inherent authority and enabling legislation, also plan for their futures. Tribes plan for future population growth, the increased demand on natural resources, the need for expanded services and infrastructure, employment and community betterment, the impacts of climate change on their geographically low-lying populations, and the ecosystems that support their treaty-protected natural resources. Although there appears to be an alignment of many goals between tribes and local governments, to date Indian tribes do not have a meaningful way to participate in forming a collective vision of the state's future.

Past experiences in tribal–local government cooperation in Washington State and elsewhere exemplify how the principles of collaborative regionalism in planning can successfully lead to improved conditions in local communities. Several important principles have been observed from past tribal–local government experiences that can provide guidance toward achieving an inclusionary Emerald Corridor planning model:

- Regional cooperation in land-use planning that is inclusive of tribal interests becomes possible when it employs a government-to-government approach.
- Long-standing barriers to institutional communication must first be identified and overcome.
- Regional cooperation requires commitments by elected officials and by professional planning staff tasked with resolving complex issues.
- The collaborative interjurisdictional process requires the capacity to address emerging issues through continuous consultation and a forum for dispute resolution.
- Time and resources must be dedicated to the development of skills among policy makers and agency planning staff involved in the relationship.
- Constant monitoring for unforeseen events is required to sustain the relationship.
- The development of intergovernmental dialogue must be a priority of the participating governments and appropriate staff.

Measuring Project Success

Although successful experiences in intergovernmental cooperation with tribes have occurred in the past, there has yet to emerge a general paradigm from those experiences to serve as a framework to guide cooperative regionalism in planning. Only through a collaborative process among tribal and nontribal participants might we expect to identify an approach that is inclusive of those diverse interests.

Project success depends on the acceptance of a paradigm shift toward inclusionary participatory planning—a shift that emphasizes mutual understanding, a government-to-government approach, and an institutional structure to achieve mutual long-term goals that reflect both nontribal and tribal community goals. The project seeks to expand local government knowledge and understanding about the goals and interests of tribal communities and to provide guidance regarding ways to encourage more effective tribal engagement in regional planning. As an end result, the project seeks to incorporate tribal interests in regional state plans in order to reconcile inconsistencies and avert future conflicts.

Chapter 1 Endnotes

[1] The Bullitt Foundation, a Seattle-based philanthropy, defines the Emerald Corridor as the rapidly growing urban region bounded by Vancouver, British Columbia, to the north, Portland, Oregon, to the south, and the Cascade Mountains to the east. The foundation's programs target a range of issues and challenges at multiple scales in the built environment and the natural landscape within which the region's cities nest. The foundation has funded this research investigation under Grant Number 18-03308.

[2] State of Washington, Growth Management Act of 1980, ESHB 2929, RCW 36.70A.

[3] During the past few decades, tribal interests have extended well beyond reservation boundaries over the rights of tribes to off-reservation natural resources in the network of rivers and watersheds throughout the state. These interests involve the right of fish passage (recently litigated before the U.S. Supreme Court), the right to minimum levels of instream flows (the subject of the state Supreme Court's decision in Whatcom County, Hirst (Eric), et al. v. W. Wash. Growth Mgmt. Hr'gs Bd., 91475-3 (2016), and the subsequent "Hirst fix" legislation), the right to protect riparian areas that affect the survival of fish (the subject of the state Supreme Court's decision in a tribe's challenge to a county's GMA regulations), and tribes' rights to protect cultural interests through their delegated authority under the National Historic Preservation Act of 1966.

[4] State of Washington, Timber, Fish ,and Wildlife (TFW) Agreement: A Better Future in Our Woods and Streams, final report (Olympia: Washington Department of Natural Resources, Forest Regulation and Assistance Division, 1987).

[5] State of Washington, Centennial Accord (Olympia, WA: Office of the Governor, 1989).

2
The Authority of Tribes

A Condensed History of Federal Indian Policy[1]

Native American Nations represent a unique segment of American society that retains distinct rights guaranteed in a series of agreements with the United States. Treaties serve both to recognize the political and cultural diversity of Indians in American society and to guarantee their right to manage their societal affairs and their reserved territorial homelands. American Indian communities exist as independent political nations within a larger nation. Since treaty making , however, Indian tribes have also been subjected to a series of federal policies that have disrupted the stability of their societies through actions seeking to assimilate and terminate tribes. Despite the destabilizing effects of those policies, tribal communities continue to exist, and, in light of federal policy enacted since the 1970s supporting Indian self-determination and self-governance, their advancement as political communities has been considerable.

Unlike local governments, whose authority to plan and manage their territories is clearly established under state enabling laws, a tribe's authority to regulate its reservation territory and to protect its treaty rights both on and off the reservation is not as clearly evident. Although a tribe's planning authority is generally established under its own constitutional powers of self-governance, nontribal governments often infringe upon its authority.

A tribe's ability to exercise control over its territory and its treaty-reserved rights is a fundamental attribute of self-government. Indian tribes derive their governing powers from three important sources: retained inherent sovereignty, treaty rights, and federally conveyed rights. Prior to the treaties, the tribes exercised absolute autonomy. The treaties served both to limit sovereignty and to affirm specific rights and powers. Between 1887 and 1934, the U.S. Congress attempted to reverse through Indian assimilation policies the commitments made in many of its treaties. The General Allotment Act of 1887[2] introduced private land ownership to many reservations by subdividing commonly held lands and distributing those parcels to Indian families. The

net effect was to subject those lands to state taxation, to transfer title out of federal trust ownership, and eventually to enable the selling of those lands to non-Indians. This explains how in many reservations in Washington State a complex land tenure exists consisting of federal tribal trust, individual Indian trust, and fee-simple land title.[3] Furthermore, the allotment process declared much of the reserved Indian territories to be "surplus" lands, which reduced Indian-held lands from about 138 million acres in 1887 to about 48 million acres in 1934. Much of those surplus lands also became converted to fee-simple, non-Indian ownership.

Recognizing the adverse effects of assimilation, Congress passed the Indian Reorganization Act[4] in 1934, which sought to reconstitute the Indian Territory and reaffirm tribal self-governance. The self-governance policy, however, was reversed in 1953 when Congress passed a series of acts with the intent of terminating tribal governments by disbanding certain tribes' political authority, foreclosing their tribal territories, and encouraging the assimilation of those terminated Indians and their resources into the mainstream economy. Other acts of Congress[5] transferred certain criminal jurisdiction over Indians to designated states. By 1968, Congress and the federal executive branch once more brought about a reversal of its Indian-termination policies by introducing the tribal self-determination and self-governance era, a lasting policy that has helped to reconstitute those tribal territories that were extinguished during termination and has pledged support for tribal self-governance and reservation community development.

Tribal sovereignty has been shaped and reshaped by these past federal policies as well as by legal doctrine. The cumulative effects of these policies and court decisions have created a somewhat tumultuous planning setting where jurisdictional uncertainty continues to exist. The jurisdictional ground upon which tribes base their planning is tested whenever a tribe applies its authority over reservation lands and resources. A tribe's planning authority is particularly contested in the areas of land-use regulation and environmental management, especially where non-Indian interests are present.

The Doctrines of Federal Trust Responsibility and Tribal Sovereignty

The U.S. Supreme Court first recognized the existence of a trust relationship in its earliest decisions (*Johnson v. McIntosh*; *Cherokee Nation v. Georgia*, 1831; *Worcester v. Georgia*),[6] which affirmed the principle of a trust between the United States and the Indian people. In almost all of the treaties, Indians ceded their land territories in exchange for promises that included the guarantee of a permanent, self-governed reservation and the federal protection of their well-being. The Court has held that such promises establish a special trust relationship, characterized as that of ward and guardian, and the duty to protect Indian rights and interests (*United States*

v. Kagama).[7] These decisions recognized the tribes as distinct political communities possessing self-governing authority within their reservation boundaries, and the trust relationship created a federal responsibility for maintaining Indian lands and natural resources.[8] With the proclamation of the federal self-determination policy in 1970, the administration of the trust responsibility has been extended throughout the federal administration to all programs that affect Indian tribes.[9]

For 150 years following these Supreme Court rulings, few further limitations on tribal sovereignty were found to restrict the tribes' political status. However, courts have questioned a tribe's ability to exercise jurisdiction over non-Indians living on the reservation, where such jurisdiction is found to be inconsistent with the tribe's domestic status. Where it cannot be shown that tribal interests are affected, the Supreme Court held in *Montana v. United States* (1981)[10] that a tribe generally lacks inherent powers to regulate hunting and fishing by non-Indians on non-Indian-owned land within a reservation. In contrast, the Court has affirmed that tribes retain the power to prosecute their own members or to tax non-Indians for activities on the reservation as being consistent with their domestic dependent status (*United States v. Wheeler*;[11] *Washington v. Confederated Tribes of the Colville Indian Reservation*[12]) and the preclusion of state or local taxing authority on trust lands regardless of ownership (*Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization*[13]).

Tribal governments, by virtue of their sovereign status, are not comparable to "local governments," which derive their authority from states. A local government can enact regulations only when the state has conferred such power. Similar to a state, tribes also retain governing powers. Tribal sovereignty is generally protected from the intrusion of state law and jurisdiction within Indian country, and the Supreme Court has consistently prohibited state law from applying to Indians in Indian country and has ruled that state law has application only where "essential tribal relations" are not involved. The question of whether a state's authority extends into Indian country is based on whether the state action infringes on the "right of reservation Indians to make their own laws and be governed by themselves" because state interference would undermine a tribe's authority over reservation affairs (*Williams v. Lee*).[14] The Supreme Court in *McClanahan*[15] further held that state law would be permitted into Indian country only if two conditions are met: (1) the intrusion will not interfere with tribal self-government, and (2) non-Indians are involved. The ruling in *William v. Lee* that state law may not interfere with tribal self-government serves as a legal test to be applied along with preemption analysis.

Tribal Authority to Plan and Regulate the Reservation Territory

Tribal governments' ability to exercise control over their territories becomes clouded where past federal policies created a land-tenure condition on many reservations that permitted the subsequent intrusion of state jurisdiction over those lands. Today, many Indian reservations in the Emerald Corridor contain a fragmented land-ownership pattern and non-Indian property-rights interests (figure 2.1). Because of this condition, state and local governments often apply their authority on many reservations for the purpose of protecting the interests of non-Indian occupants. This land-tenure condition represents a pervasive obstacle to tribal planning by challenging a tribe's exclusive control over its reservation and its ability to comprehensively manage its territory. Although it has long been recognized that tribes retain inherent rights to manage their reservations, local governments continue to contest the exercise of tribal authority over fee-simple reservation lands. A major challenge to a tribe's ability to regulate its reservation occurs with respect to fee-simple reservation lands when states and local governments supplant a tribe's land-use authority with their own policies.

Supreme Court rulings have further limited a tribe's authority to exercise civil jurisdiction over non-Indians on their reservations. In *Montana v. United States*,[16] the Court limited tribal civil jurisdiction over non-Indians by ruling that a tribe does not have the authority to regulate hunting or fishing by non-Indians on non-Indian fee lands within the reservation. A general principle was established in *Montana* that limited tribal authority to what is necessary to protect tribal self-government or to control its internal tribal relations by ruling that tribes have been divested of their sovereignty to regulate relations between Indians and non-Indians by virtue of their dependent status. However, *Montana* provides two broad exceptions where tribal authority may apply to non-Indians: (1) a tribe retains its authority to regulate nonmembers who have entered into consensual relations with the tribe through commercial dealings, contracts, leases, or other arrangements, and (2) a tribe retains its regulatory authority when that conduct threatens or has a direct effect on the political integrity, the economic security, or the health or welfare of the tribe. The scope of the second exception is similar to the traditional scope of authority found in the police powers.[17] After *Montana*, subsequent lower-court decisions granted tribes authority over non-Indians under the second *Montana* exception when the non-Indian activity was found to threaten the integrity of the tribe and its resources (*Knight v. Shoshone and Arapahoe Tribes*[18]).

Tribes also retain powers to regulate activities that threaten to degrade tribal lands, waters, and resources under their proprietary rights, their inherent sovereignty, and federal environmental laws where Congress has conferred environmental-protection authority to the tribal governments. The Supreme

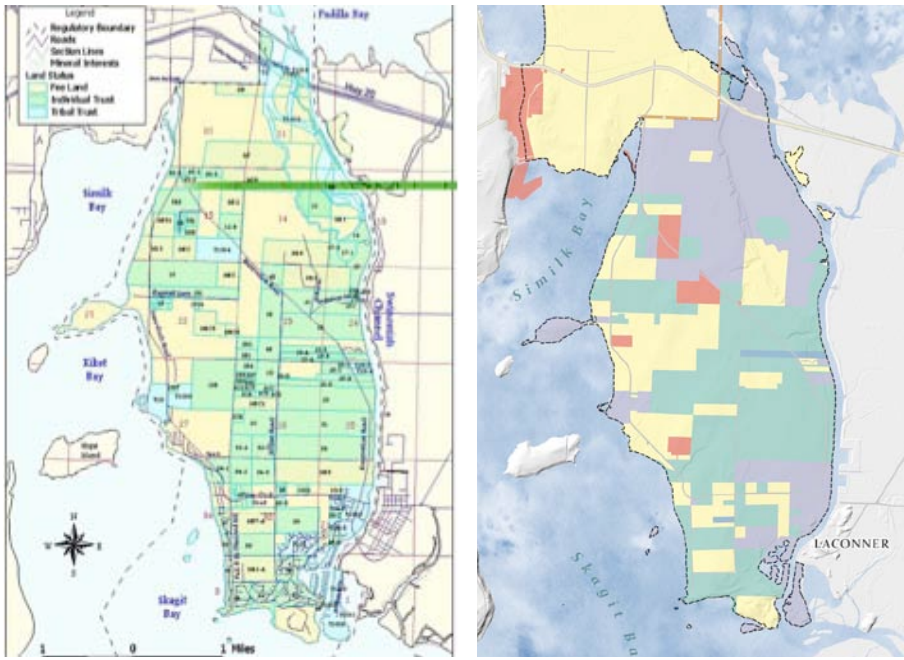

Figure 2.1. Example of the effects of the General Allotment Act on Indian reservations established under federal treaties, resulting in (*left*) the alienation (approximately 50%) of the reservation compared to (*right*) recent tribal efforts to reconstitute alienated lands (currently approximately 70% trust) to federal trust ownership: case study of the Swinomish Indian Reservation. (*Map key*: green, tribal member trust lands; yellow, fee-simple land; blue, tribal trust land; red, tribal fee land.)

Court had previously affirmed tribal proprietary, aboriginal, and reserved water rights by finding that the creation of Indian reservations included the implied reservation of a proprietary water right (*United States v. Winters*[19]). Related to the reserved water right is the right to water of undiminished quality. This right of protection is derived from the "equitable apportionment doctrine" that imposes a duty on sister states to protect water quality and prevent the diminishment of quality enjoyed by neighboring states.

In 1984, the U.S. Environmental Protection Agency (EPA) adopted an Indian policy that established a tribe's authority to conduct reservation-wide environmental programs similar to those delegated to the states. Congress later amended most environmental statutes so that the EPA could provide

funding to tribes, enabling them to develop the capacity to protect their territories, just as it had in the case of states.[20] Since 1984, the EPA Indian Policy has been comprehensive, providing guidance for the administration of environmental programs on Indian lands. In particular, the policy directs the EPA to recognize tribal governments as the primary authority for implementing federal environmental programs on tribal lands and to assist the tribes in assuming regulatory responsibility. The policy also encourages cooperation between the tribes and state and local governments in the implementation of federal environmental programs. The latter directive is of particular importance because it encourages regional cooperation to comprehensively address common environmental protection problems that are rarely contained within a single jurisdiction's boundaries.

Contentious Histories in State Relations

The conflicts between states and tribal governments are multifaceted and are often associated with decades of continuing litigation. Since 1985, Washington State's approach to resolving conflicts with the tribes has emphasized negotiation and mediation as an alternative to litigation. This trend toward negotiation progressed further in 1989 when the Washington State governor proclaimed a new precedent for guiding relations with the tribes by recognizing the legitimacy of tribal sovereignty. The new policy established a government-to-government relationship, creating an innovative avenue for addressing a variety of complex problems. Though these changes were motivated primarily by the state's need to address tribal rights that were affected by the state's natural-resources-management authority, many tribes also embraced the process as a way to advance tribal interests within and outside the reservations. Notwithstanding several successful negotiated settlement experiences, many such negotiations were prompted by court mandates or occurred under the threat of litigation.

The management of land-use activities, similar to the administration of environmental programs, also requires a coordinated approach to foster greater consistency in regional planning. The notion of a reservation territory becoming jurisdictionally divided based on whether a particular parcel of land is held in fee simple or federal trust ownership presents a disastrous scenario for planning because the reservation landscape cannot be adequately managed under an inconsistent land-use program that reflects the competing interests of both Indian and non-Indian communities. Collaborative-planning processes that seek to build stronger regional communities by reconciling the competing Indian and non-Indian interests that coexist within the reservation or in the region should be a long-term goal of the GMA.

Rebalancing Regional Interests: Getting to Cooperative Regionalism

Cooperation between local governments can produce greater efficiencies in the provision of local governmental services while reducing jurisdictional conflicts and attaining unified regional planning policies. Many states encourage agreements by local governments to create joint plans for regional planning.[21] Washington mandated local government cooperation in 1990 when it enacted its growth-management law.[22] One requirement of the GMA calls for local land-use plans to be consistent with adjoining local jurisdictions, thereby fostering intergovernmental cooperation. Although cooperation among counties and municipalities has progressed throughout the state, fewer gains have been made with regard to encouraging intergovernmental relationships with tribal governments.

Planning solutions that are based on regional cooperation with tribes can serve as a pathway for promoting inclusive planning and for overcoming the jurisdictional stalemates that can impede both tribal and regional development. The resolution of historic conflicts in tribal and local government relations begins with a meaningful dialogue intended to reconcile the differences between tribal and nontribal interests. The experiences between tribes and Washington State under the Centennial Accord illustrate the process for fostering cooperative relations to address long-standing disputes in the management of natural resources. Although the state-level experiences in Washington originally focused largely on the protection of off-reservation tribal treaty rights, the process was later expanded to resolve on-reservation conflicts involving comprehensive planning and the delivery of public services. Since the 1980s, dozens of cooperative agreements among tribes, Washington State, counties, municipalities, and regional agencies have resolved conflicts in land-use planning and regulation, building-code administration, water and sanitary sewer utility services, environmental management, habitat restoration, transportation planning, forest practices, mutual aid, and other essential governmental services.

These initial experiences were motivated by the tribes' efforts to protect their treaty rights, but the process has expanded to resolve many other types of conflicts. The emerging precedent favoring negotiated solutions through inclusive dialogue and comanagement approaches offers an important pathway for the reconciliation of the historic exclusion of Native Americans and their interests in regional planning throughout the Emerald Corridor. It is a crucial step in overcoming the barriers that tribes have faced as we work toward building culturally tolerant and politically pluralistic regional communities.

Planning that reflects a diversity of interests within a region requires more than simply acknowledging differences—it also requires a respect for and acceptance of differences, without which our planning risks remaining a discriminatory and exclusionary practice. Planning with Native American communities requires the recognition of the legitimate political rights of tribes to plan for their lands and resources and to advocate for the protection of their treaty rights. As our regional planning encounters the presence of conflicting tribal interests, the process of planning requires a deeper understanding of the differences that exist among communities and the acceptance of cultural and political plurality. Without this understanding and acceptance, any efforts to achieve Washington State's growth-management goals threaten the continued subjugation of Native American communities and put nontribal communities at risk due to adverse legal determinations.

Chapter 2 Endnotes

[1] This section comes in part from Nicholas C. Zaferatos, "Planning in Native American Reservation Communities: Sovereignty, Conflict, and Political Pluralism," in *Cities and the Politics of Difference: Multiculturalism and Diversity in Urban Planning*, ed. Michael A. Burayidi (Toronto: University of Toronto Press, 2016), 159-189, and *Planning the American Indian Reservation: From Theory to Empowerment* (Syracuse, NY: Syracuse University Press, 2015).

[2] 25 U.S.C. sec. 331–34; 339, 341, 348, 349, 354, 381.

[3] "Reservation fee-simple title" refers to those land parcels for which title had previously been held in federal trust for the exclusive benefit of Indians and thereafter were transferred out of federal trust as fee-simple land title, a land title exchange that was enabled under the General Allotment Act of 1887.

[4] Also known as the Wheeler-Howard Act (25 U.S.C. sec 461–479).

[5] Public Law 280, enacted by Congress in 1953, exemplifies such an express delegation of authority by transferring the jurisdictional authority over most crimes and certain civil matters to six states. Public Law 280 was amended in 1968 to require tribal consent to further state jurisdiction in all future cases. The amendment also permitted states to retrocede criminal or civil jurisdiction acquired under Public Law 280. Public Law 280 specifically excludes the regulation and taxation of trust land and exempts Indians' hunting and fishing rights. In *Santa Rosa Band v. Kings County* (532 F. 2d 655 [9th Cir., 1975], cert denied, 429 U.S. 1038 [1978]), the Supreme Court confirmed that Public Law 280 does not transfer regulatory powers over Indian reservations to the states.

[6] *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

[7] 118 U.S. 375, 384 (1886).

[8] In its decision in *Washington v. United States et al.* (548 U.S.__ [2018]), the Supreme Court upheld the Ninth Circuit Court of Appeals' decision concerning fisheries habitat protection, requiring the State of Washington to remove barriers to fish passage.

[9] See W. Clinton, "Memorandum on Government-to-Government Relations with Native American Tribal Governments," *Weekly Compilation of Presidential Documents* 30 (17) (1994): 936–937, and B. Obama, "Memorandum for the Heads of Executive Departments and Agencies: Tribal Consultation," Presidential Documents, *Federal Register* 74 (2009): 215.

[10] 450 U.S. 544 (1981).

[11] 435 U.S. 313 (1978).

[12] 447 U.S. 134 (1980).

[13] 724 F.3d 1153 (9th Cir. 2013).

[14] 358 U.S. 217 (1958).

[15] *McClanahan v. Arizona State Tax Commission*, 441 U.S. 164 (1973).

[16] 450 U.S. 544 (1981).

[17] Police powers are defined as that which "enables the people to prohibit all things inimical to comfort, safety, health, and the welfare of society" (*Drysdale v. Prudden*, 195 N.C. 722, 143 S.E. 530, 536 [1928]).

[18] 670 F. 2d. 900 (10th Cir., 1982).

[19] 207 U.S. 563 (1908).

[20] Congress reaffirmed the EPA's policy of working on a government-to-government basis with tribes when it amended the provisions of the Safe Drinking Water Act in 1986, the Clean Water Act in 1987, and the Comprehensive Environmental Response, Compensation, and Liability Act in 1986 to recognize the EPA's obligation to treat tribes as states for the purpose of delegating responsibility for implementing environmental programs and regulating the reservation environment.

[21] Wisconsin's intergovernmental cooperation law requires local governments within metropolitan areas to sign compact agreements with neighboring municipalities or counties for the provision of joint public services (Wisconsin Statutes, chapter 66, subchapter III: Intergovernmental Cooperation, sec. 66.0301–66.0315).

[22] State of Washington, *Growth Management Act*, ESHB 2929, RCW 36.70

3

Identification of Tribal Interests Affected by Local and Regional Planning

Tribes along the Emerald Corridor in Washington State interact with local municipalities and counties in myriad ways regarding issues of economic, geopolitical, and cultural concern. These interactions come as a result of planning actions by tribal, local, state, and federal agencies and the need for tribes to have their concerns acknowledged and expressed. The Shorelines Management Act of 1971 and the Growth Management Act (GMA) of 1990 are two major pieces of statewide legislation administered at the local level that have the greatest consequences affecting tribal interests regarding natural resources and land use. The articulation of tribal interests fall into two geographic categories: those actions affecting tribal interests that occur on Indian reservations and those actions that occur off the reservation with the potential to adversely affect Indian treaty-reserved natural resources, including fish and wildlife resources, as well as cultural and spiritual interests. On-reservation issues are further complicated in that on a number of reservations along the Emerald Corridor of Washington State, land ownership and associated jurisdiction over land use are often represented as a composite of tribal, local, state, and federal policies and regulations. The presence of conflicting legal authorities has resulted in land-use policy uncertainty when landowners, either tribal or nontribal, attempt to propose or engage in activities requiring a permit issued by different jurisdictions.

This section identifies the major areas of intergovernmental engagement and the concerns expressed by tribes located along the Emerald Corridor. A telephone survey of tribes located in the Corridor was conducted in October 2018 to identify major issues and interests that exist with local or state governments regarding land management, with a particular focus on natural-resource concerns.[1] The subject areas of tribal interest are identified and summarized in table 3.1. In addition to the telephone survey, an online survey was also administered to all tribes and counties in Washington

State concerning the status of intergovernmental cooperation in land-use management between tribes and local governments. The results of that survey are also summarized in chaper 5.

Table 3.1. Tribal–Local Government Policy and Jurisdictional Issues of Concern

On-Reservation Concerns	*Off-Reservation Concerns*
1. Interlocal Coordination and Consistency	1. Notice of Development Activities
2. Land Use and Water Management	2. Responsiveness to Tribal Input
3. Staff Coordination	3. Adequacy of Development Regulations
4. Forest Practices and Cultural Protection	4. Agricultural practices
5. Transportation Planning	5. Permit Review
6. Emergency Response	6. Code Enforcement
7. Code Enforcement	7. Protection of Instream Flows
8. Annexation and Urban Growth Areas	8. Culverts
	9. Climate Change

General Areas of Concern: On-Reservation Issues

As a result of the General Allotment Act, most Indian reservations created under treaties in western Washington contain a mix of tribal trust lands administered either by the tribe or by the U.S. Bureau of Indian Affairs (BIA) and fee-simple lands owned and occupied largely by non-Indian residents. The tribes exclusively regulate trust lands. Fee-simple lands, however, despite being located within the exterior boundaries of a reservation, are often regulated by the county or, in some instances, by local municipalities as well as by the tribe, resulting in a condition of jurisdictional overlap and uncertainty and a number of inherent conflicts. First, applicable land-use regulations may differ based on the jurisdictional authorities' conflicting policies, despite the immediate adjacency of trust and fee-simple parcels. On most of these reservation fee-simple lands, the tribes also apply their land-use authority under a uniform reservation-wide planning policy. Because of differences in cultural, environmental, and economic priorities of tribal and nontribal jurisdictions, different forms of land use and natural-resource protection often result in the application of policies regulated by a tribe rather than policies for fee lands administered by nontribal jurisdictions. This often results in fee landowners seeking permits from the government whose regulations are most favorable with their needs. Several issues can be

identified regarding the conflicts resulting from the condition of overlapping land-use regulations by multiple jurisdictions.

Interlocal Coordination and Consistency

Over the past three decades, memorandums of agreement (MOAs) and intergovernmental agreements (IGAs) between nontribal jurisdictions and the tribes have been developed to address issues on a number of reservations. These agreements strive for consistency in development regulations to minimize conflicts and to provide more certainty to applicants for development permits. In the case of building codes, for example, there are a few instances where both a tribe and a county issue use permits and may utilize the same building inspector and identical building codes. In these situations of concurrent jurisdiction under a memorandum of understanding (MOU), applicants have a choice to obtain permits from either jurisdiction based on preference and cost considerations. It is important to point out these arrangements were not the result of state regulation or guidance under the GMA. Rather, they arose on an ad hoc basis as a result of a mutual desire to avoid legal disputes over jurisdiction that might result in adverse outcomes to either party.

It is important to note that the principle of cooperation and coordination in planning for a region is both endorsed by the American Planning Association as well as stated as an explicit goal and requirement in the GMA.[2] The goal is further incorporated in the state's growth-management regulations.[3] Yet, notwithstanding the goal and policy calling for the coordination of planning among jurisdictions, the GMA fails to specifically encourage the participation of tribal governments in regional planning.

Land-Use Management and Water Availability

On a number of reservations, significant inconsistencies regarding land-use planning remain. Zoning and density requirements as applied to fee lands within the reservation are frequently a source of tribal concern because the GMA does not acknowledge tribal authority or direct counties to coordinate their land-use regulations with tribes. The location of utility infrastructure, such as sewer and water-supply lines, has been identified as a cause for concern when those utilities support a county's policies that may encourage greater rates of development than provided for under a tribe's policies. On most reservations, groundwater withdrawals on fee lands have historically been administered under state law, where questions remain as to whether state civil jurisdiction is applicable. These withdrawals have the potential to adversely affect federally reserved on-reservation water rights. Although Coordinated Water Supply Plans[4] can identify the authorized water purveyor in a particular area, these plans often disregard a tribe's claim of authority as a reservation water purveyor and rarely address the issue of permit-

exempt wells on individual fee parcels. In at least one case, a tribe has fully participated in a Coordinated Water Supply Plan that recognizes the tribe as the reservation water purveyor.

Comprehensive Plans and Staff Coordination

A number of tribes reported that proposed changes in county comprehensive plans or comprehensive plan amendments affecting on-reservation lands were not communicated to the tribe. Tribal experience has been that communication networks are frequently the result of informal staff interactions rather than of contact made according to a formal statutory or regulatory requirement. This informality produces inconsistencies in information sharing and adversely affects tribal members' confidence that they will be fully informed, consulted, and involved in proposed land-use changes.

Forest Practices and Cultural Protection

Inconsistent forest-practices rules on reservations are an additional point of conflict. The BIA or a tribe generally administers timber-harvest and road-building regulations on federal trust lands. On-reservation forest practices on fee lands are generally administered by the Washington Department of Natural Resources, whose forest-practices rules are not necessarily consistent with tribal policies. It is also unclear that the state's civil authority to manage reservation natural resources is valid. In addition to the timber-harvest management, the treatment of cultural resources pursuant to the state's forest-practices regulations frequently does not address tribal concerns. Although there are mechanisms for consultation to address cultural-resource needs,[5] the resolution of these issues is frequently not adequate to meet tribal concerns.

Transportation Planning

A significant element expressed by tribes is a desire for more robust infrastructure coordination, particularly with regard to transportation planning. Roads to tribal residences and enterprises are frequently an extension of local or state roads, and the desire to minimize the costs of road extensions and to coordinate with neighboring jurisdictions in transportation planning has resulted in what has generally been recognized as positive working relationships. A number of tribes have entered into interjurisdictional agreements that define road locations, development densities, and maintenance obligations. These agreements are the result of all parties identifying common needs rather than a result of state statute.

The issue of road maintenance on some reservations has been identified as a source of concern. Damage from storm events and inadequate road maintenance have required tribes to expend their own resources to make

the needed repairs. In some instances, tribes are pursuing, in collaboration with the counties in which they are located, the transfer of road ownership to provide greater tribal authority to address unmet maintenance needs.

Coordination in Emergency Response

One important area that has witnessed improvement has been tribes' ability to engage in regional emergency-preparedness planning with regional governments. With the increased acceptance and understanding of the effects of climate change related to storm surges, sea-level rise, and flooding, greater coordination has been taking place between tribal, local, and state emergency-response agencies. Marine-spill response coordination with neighboring jurisdictions and tribes has greatly improved as well.

In summary, land-use planning associated with activities on Indian reservations has been observed to have the greatest success when written agreements are established among tribes and their adjacent jurisdictions. Such agreements typically are ad hoc and independent of state guidance or requirements but consistent under certain state interlocal cooperation laws.[6] A number of tribes reported attempts to establish MOUs with local governments, only to be rejected at the county legislative level. In other instances, tribes reported that there were long-term agreements in place that transcended changes in elected officials and staff. It appears that the success of these agreements is in part the result of the commitments by the individuals who drafted, endorsed, and administer those agreements. The most successful intergovernmental interactions occur where there is a positive, collaborative relationship between tribal and nontribal elected officials. This relationship is expressed to agency staff, which promotes collaborative engagement for day-to-day land-management activities. Successful agreements incorporate a variety of elements, including comprehensive planning and zoning, building-code enforcement, infrastructure development and maintenance, law enforcement, and data sharing.

Code Enforcement

A number of tribes expressed concerns about the absence of adequate code enforcement in on-reservation areas where local governments presumptively apply their development policies. To ensure policy consistency, a number of local governments apply their development permits on Indian reservations without prior consultation with tribes, and their permit actions are based on a complaint system. This system thus often places tribes in an adversarial position when they identify an alleged permit-enforcement infraction. In the absence of perseverance by the tribe, these infractions are either not acted upon in a timely manner, which may have impacts on tribal interests.

Annexation and Urban Growth Areas

Local governments propose the annexation of lands for inclusion within their jurisdictional boundaries and designate land as future urban growth areas (UGAs) under the GMA. Such actions often result in conflict when proposed annexation or UGA designations affect Indian country. A consultative process should be required under the GMA before a county or city may propose the annexation of lands that are designated as "Indian country" or are adjacent to or within of any portion of an Indian reservation or when a county or city proposes a UGA designation adjacent to or within the boundaries of an Indian reservation to ensure that such actions are consistent with tribal land-use policies.

General Areas of Concern: Off-Reservation Issues

Although tribes have treaty-reserved rights to fisheries and water resources, under the GMA there is no statutory authority to recognize those rights, nor is there a requirement for coordination and collaboration among local jurisdictions and tribes. These issues are further complicated by inconsistencies in these jurisdictions' land-use regulations and comprehensive plan elements that affect tribal reserved rights

For some tribes in the Emerald Corridor, more than three-dozen counties and municipalities are located within their usual and accustomed fishing areas, each with its own different comprehensive plan elements and development regulations that have the potential to adversely impact tribal resources. Although the needs of fisheries resources are generally consistent throughout a watershed, the diverse priorities and unique governance structure of each jurisdiction create an inconsistent set of regulations with varying effects on tribal resources.

> *The lack of a requirement for resource-management consistency creates an impossible task for tribes. Most tribes do not have the resources to effectively participate in the development of local comprehensive plans, development regulations, critical-area ordinances, shoreline-management plans, and transportation plans in each jurisdiction.*

Because there is no regulatory requirement for tribal involvement or a requirement for concurrence between the various local governments' policies, the tribes cannot adequately ensure that their resources are protected. Further, although the needs of fish are generally consistent from watershed to watershed, each jurisdiction determines, as a matter of interpretive science and formulated policy, the degree to which these resources are protected. This inconsistency often results in uneven protection and ultimately a decline in the abundance of adequate habitat upon which the fish depend. Some tribes have reported that although some municipalities and counties have attempted

to prioritize natural-resource protection within their regulatory frameworks, other counties and cities tend to assign a higher priority to the protection of private-property rights and economic development, often to the detriment of natural resources.

The level of tribal engagement in these policy-development processes has therefore been dependent largely on the nature of the particular relationship between a tribe and a local government, and those relationships have ranged from formal agreements for interactions on a government-to-government basis to no intergovernmental collaboration at all. Owing to a history of failure to address tribal interests at the local planning level, many tribes have chosen to petition or engage state agencies to influence land-use outcomes. In some instances, this tactic has been successful, but more often than not state statutory requirements are not adequate to fully address tribal resource concerns. Depending on the facts of a particular issue, a number of tribes have chosen to bypass local GMA processes and state statutes to engage the federal government instead, petitioning it to intervene through the application of federal regulations or the filing of relief actions in the courts. Federal agency intervention is triggered sometimes through the application of the federal government's trust responsibility to protect treaty-based resources, but more frequently tribes have chosen to litigate land-use issues directly, with varying success.

As a result of state and federal salmon-restoration funding requirements, the degree of collaboration and coordination between counties and tribes has generally improved with respect to habitat-restoration and protection projects. With the development of salmon-recovery plans, shared data, watershed and coordinating councils, and increased funding sources, common restoration visions have often resulted. Such common visions have led to the formulation of coordinated, jointly developed and administered restoration projects. These efforts have been positively influenced by funding criteria that provide for a higher likelihood of success for projects that have broad-based community support.

Notice of Development Activities

Many tribes expressed dissatisfaction regarding notification to the tribe of proposed development activities, both at the comprehensive plan and development-regulation stage and in the review of individual permit applications. Other than pursuant to State Environmental Policy Act (SEPA) of 1971 requirements, it has been difficult for tribes to stay abreast of land-use activities that may affect tribal resources. Some jurisdictions actively reach out to local tribes, have a good understanding of ongoing tribal concerns, and provide timely information. Most tribes reported that without a meaningful obligation on the part of the local jurisdiction, it is usually an onerous process

to discover what actions have been proposed or have taken place. This is further complicated by short timeframe for providing a response or the lack of feedback from county officials to tribal response. A unified statewide data-management system that depicts potential impact areas affecting tribal resources should be employed to facilitate tribal review of proposed actions that may adversely affect tribal interests.

Responsiveness to Tribal Input

Each tribe interviewed expressed a concern that comments it submitted regarding regional land-use-planning policies or individual permit reviews are largely ignored. Some tribes stated that local jurisdictions made an adequate effort to provide opportunities for their concerns to be heard, but in most instances those concerns had little effect on final decisions by local governments. Most of the tribes expressed support for regulatory reforms to GMA procedures to require tribal interests to be formally addressed in order to ensure the protection of tribal resources.

A commonly expressed view was that if local governments were to have a regulatory obligation to consider and incorporate tribal interests, land-use planning pursuant to state law would be more effective and efficient. The variability and inconsistency of local jurisdictions' responsiveness to tribal interests create a disincentive to tribal engagement.

Adequacy of Development Regulations

The tribes expressed concern that the low degree of natural-resource protection provided for by development regulations has resulted in the long-term decline in habitat for fish and wildlife. The GMA requires the use of best available science but provides a standard of review that is very difficult to meet. RCW 36.70A.320 establishes that comprehensive plans and development regulations are presumed valid upon adoption unless a petitioner can demonstrate that the action taken by the city or county is clearly erroneous. An action is clearly erroneous if the state Growth Management Hearings Board is left with the firm and definite conviction that a mistake has been committed. Some tribes expressed a concern that despite evidence to the contrary, this statutory burden is so high that the likelihood of a successful appeal is limited. Further, the GMA was amended to provide that the Growth Management Hearings Board should "grant deference to counties and cities in how they plan for growth" and that "local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstance." In essence, this position departs from the principle of requiring best available science as the criteria for the protection of critical areas.[7] Some tribes expressed concerns that the development of Critical Area Ordinances is often dictated primarily by political considerations, with little recourse for tribes to utilize

scientific evidence to ensure that critical natural resources are protected. As a result, tribal engagement in the formulation of GMA development regulations has been limited, and tribes have often had to pursue alternative venues for legal recourse.

Agricultural Practices

The management of agricultural practices has been a particular source of concern for tribes over the past two decades. Agricultural practices have been shown to have significant impacts on water quality and the availability of salmon habitat, but such adverse practices have been largely unaffected by the GMA. In S*winomish Indian Tribal Community v. Western Washington Growth Management Hearings Board* (2007), the Washington Supreme Court found that "the GMA does not require the county to follow best available science (BAS); rather, it is required to 'include' BAS in its record. Thus, the county may depart from BAS if it provides a reasoned justification for such a departure." The Court also found that

> the legislature has not imposed a duty on local governments to enhance critical areas, although it does permit it. Without firm direction from the legislature to require enhancement of critical areas, we will not impose such a duty. Therefore, to the extent that the tribe argues that the GMA places a higher burden upon the county than the duty to prevent new harm to critical areas, we disagree. The "no harm" standard, in short, protects critical areas by maintaining existing conditions.[8]

Some tribes argue that the GMA is not an adequate conduit to recover threatened and endangered salmon resources. The standards of review and the "no-harm standard" preclude the use of development regulations to address this concern. This situation was further exacerbated when the state legislature adopted the Voluntary Stewardship Program in 2011.[9] In 2007, the legislature asked the William D. Ruckelshaus Center to assist in resolving the conflict over protection and enhancement of critical areas on agricultural lands. The basic premise was to establish an incentive-based voluntary program for the protection and enhancement of riparian areas, with a regulatory backstop if benchmarks were not met. The center established a working group involving the participation of state agencies as well as tribal, agricultural, environmental, and local-government interests. When most of the participants abandoned the principle of establishing regulatory backstops, the tribes withdrew from the process. When legislation was proposed to enact the Voluntary Stewardship Program, twenty western Washington treaty tribes opposed its passage. Despite that opposition, House Bill 1886 passed the legislature. Its passage, along with the previous Washington Supreme Court decision in *Swinomish v. the Western Washington Growth Management Board,*

provided evidence that the GMA and the legislative process were not viable avenues for addressing water-quality and salmon-habitat concerns associated with ongoing agricultural practices.

Permit Review

Tribes expressed a general dissatisfaction with local responsiveness to tribal review and comments to individual development permits and associated permit conditions. As detailed earlier, local jurisdictions often ignore site-specific information provided by tribes in favor of more lenient standards in implementing land-use policies. This was particularly evident in the responses from a number of tribes regarding how evaluations of critical areas are undertaken. In many instances, county code requires that for activities to occur within a critical area, an independent environmental review assessing impacts to the critical area's functions and values must be undertaken. Tribes have reported that unless a critical-area report is challenged, county officials, rather than conducting an independent review, accept the consultants' report as valid and definitive. A number of tribes noted that this process resulted in significant adverse impacts to tribal natural-resource interests. A number of tribes also expressed concern regarding the excessive use of variances and reasonable-use exemptions allowed by the permitting jurisdiction.

Code Enforcement

A number of tribes expressed concerns about the absence of adequate code enforcement in off-reservation areas where tribal interests occur. Many counties enforce their development permits on a complaint-based system rather than a system in which staff are assigned to independently review the protection of critical areas and the enforcement of permit conditions. This complaint-based system often places tribes in an awkward and adversarial position when they report an alleged infraction. In the absence of perseverance by the tribe in pursuing investigation, these complaints either are not acted upon or are not evaluated in a timely manner. There has also been inadequate communication with tribes as to how the local jurisdiction intends to follow up on enforcement issues that may lead to cumulative loss of habitat over time, further exacerbating impacts to tribal interests.

Protection of Instream Flows

Although the Washington State Department of Ecology (DOE) administers water rights, single-family wells are generally exempt from the need to obtain a water-rights permit from the DOE. However, pursuant to the GMA, counties can issue a building permit only if there is an adequate supply of potable water available to support a development activity. In the *Whatcom County, Hirst* decision,[10] issued in 2016, the Washington State Supreme Court held that jurisdictions planning under the GMA have a duty

to determine the availability of a legal water supply and cannot depend on rules adopted by the DOE. Further, the local jurisdiction must determine if senior water rights, including previously adopted instream flows, will be impaired. In essence, new development permits dependent on groundwater withdrawals from a well exempt from obtaining a permit from the DOE cannot be issued if senior rights will be impaired. This determination put a halt to permit issuance for new development dependent on exempt wells throughout much of Washington State. As a result, in 2018, over most tribes' objections, the Washington State Legislature passed ESSB 6091, which the governor signed the following day. The rule developed a new permitting and watershed-planning mechanism for watersheds with instream-flow rules adopted before 2001. In contrast to the *Hirst* decision, this rule now allows local jurisdictions to issue building permits based on past DOE rules, even if instream flows will be impaired. In addition, local governments must work with interested stakeholders to develop mitigation plans to offset ecological impacts from flow reduction. A number of watershed task forces are currently attempting to develop mitigation plans. However, it is unclear if instream flows will be protected adequately to meet tribal fisheries interests as a result of this process. This is the most recent example where the Washington State Legislature has created new rules that favor development rights over the protection of fisheries resources, and it remains to be seen if tribes and local jurisdictions can mutually agree on acceptable solutions.

Culverts

The most recent decision in the long-standing *United States v. Washington* treaty fishing case[11] resulted in a determination that the State of Washington has an obligation to provide adequate fish passage at state-owned culverts. The U.S. Supreme Court in a four-to-four decision left standing a Ninth Circuit Court of Appeals decision requiring that all state-owned fish-blocking culverts need to be made passable over time and that 90% of the habitat blocked by these culverts need to be made passable by 2030.[12] Washington State claims that the cost to repair these barriers is in the order of $2 billion. It is estimated that counties own four times as many culverts. The implication from the Ninth Circuit decision is that counties may have liabilities similar to the State of Washington's, and discussions are just beginning between tribes and counties in attempts to collaboratively address this issue in a manner and timeframe satisfactory to the tribes. There is as yet no coordinated mechanism among tribes and local jurisdictions to resolve this issue.

Climate Change

Many tribes are located along marine shorelines and freshwater watercourses. Climate-change predictions point to increasing frequency and magnitude of flood events, increased damage due to storm surges and sea-level rise, and

reduced summertime instream flows. A number of tribes are developing adaptation plans to address these anticipated changes, sometimes in coordination with local jurisdictions but more often than not by themselves. Tribes have expressed concerns that, absent a coordinated effort at the regional land-use-planning level that recognizes these changes, tribal natural and economic resources may be at risk. There remains uncertainty and variability in local jurisdictions' ability to adequately develop adaptation plans in coordination with tribal governments without a clear directive provided by the state through the GMA.

Conclusion

The lack of a requirement for consistency and an adequate level of protection and the magnitude of the task involved in evaluating the numerous actions that jurisdictions undertake have resulted in a common tribal view that the GMA and regional planning in Washington State have failed to adequately address tribal interests. Many tribes expressed concerns that local governments do not consider the protection of treaty-secured tribal interests as a regulatory or political obligation. As a result of these negative experiences, many tribes have reduced or eliminated their engagement at the local level and sought state, federal, or judicial remedies.

The survey shows that tribal concerns were based on two overarching shortcomings in the GMA. The first stems from the lack of a statutory requirement for early and meaningful communication between local governments and tribes to identify and, if possible, to reconcile inconsistencies between governmental policies. The second and more significant shortcoming is the lack of a requirement that tribal concerns be incorporated into GMA planning at the local level. In many instances, expressed tribal concerns have been ignored. Until these inconsistencies can be resolved, the Growth Management Act does not appear to be an effective tool to ensure policy consistency among adjacent land-use-planning entities.

Chapter 3 Endnotes

[1] The tribes participating in the October 2018 telephone survey included the Lummi, Swinomish, Stillaguamish, Tulalip, Puyallup, Squaxin Island, and Suquamish. A subsequent review of these issues took place at a meeting in December 2019 with the Muckleshoot, Stillaguamish, Cowlitz, Puyallup, Tulalip, Swinomish, and Kalispel Tribes. The following questions were asked in order to evaluate the level of tribal interaction with local governments as well as the tribes' interests and concerns in regional planning: (1) What interactions do you engage in with cities and counties regarding land-use management under the GMA? (2) Have they [these interactions] been positive or negative? (3) Have they primarily

concerned natural resources? (4) Do those interests mostly concern on- or off-reservation issues? (5) Have you been involved in any litigation? (6) What do you feel are the shortcomings, and what could be improved regarding engagement with surrounding jurisdictions? (7) How important are interjurisdictional land-use conflicts to the tribe? (8) What have been the most important issues of concern to the tribe? and (9) Do your intergovernmental interactions occur mostly at the staff or leadership level?

[2] RCW 36.70A.020: "Planning goals. (11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts."

[3] RCW 36.70A.100: "Comprehensive plans—Must be coordinated. The comprehensive plan of each county or city that is adopted pursuant to RCW 36.70A.040 shall be coordinated with, and consistent with, the comprehensive plans adopted pursuant to RCW 36.70A.040 of other counties or cities with which the county or city has, in part, common borders or related regional issues."

[4] State of Washington, Washington State Water Coordinating Act, RCW 70.116.

[5] State of Washington, *Centennial Accord* (Olympia, WA: Office of the Governor, 1989); State of Washington, *Millennium Accord* (Olympia, WA: Office of the Governor, 1999). In addition, the commissioner of public land also recognized the Natural Resources Department's relationship with Washington's sovereign tribes with an official Commissioner's Order on Tribal Relations, which serves as the department's tribal-relations policy and commits the department to conduct relations with the tribes as one government to another.

[6] State of Washington, Inter-Local Government Cooperation Act, RCW 39.34.010.

[7] Washington Administrative Code (WAC) Chapter 365-190-030: "Definitions. (6) (a) 'Fish and wildlife habitat conservation areas' are areas that serve a critical role in sustaining needed habitats and species for the functional integrity of the ecosystem, and which, if altered, may reduce the likelihood that the species will persist over the long term. These areas may include, but are not limited to, rare or vulnerable ecological systems, communities, and habitat or habitat elements including seasonal ranges, breeding habitat, winter range, and movement corridors; and areas with high relative population density or species richness. Counties and cities may also designate locally important habitats and species. (b) 'Habitats of local importance' designated as fish and wildlife habitat conservation areas include those areas found to be locally important by counties and cities."

[8] See RCW 36.70A.172(1). No. 76339-9, GMHB LEXIS 73 (W. Wash. Growth Mgmt. Hr'gs Bd.).

[9] RCW 36.70A.705.

[10] *Whatcom County, Hirst (Eric), et al. v. W. Wash. Growth Mgmt. Hr'gs Bd.*,91475-3.

[11] *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash., 1974), Aff'd, 520 F. 2d. 676 (9th Cir.), cert. denied, 423 U.S. 1086 (1976).

[12] *Washington v. United States et al.* 17-269 (June 11, 2018).

4

Tribal Natural Resources Interests in Ceded Lands

Off-reservation treaty lands ceded by Washington State tribes contain important natural resources of continuing interest to the tribes. The Emerald Corridor has abundant natural-resource areas, anadromous-fish habitats, and key populations of large-game species, including elk, black tail deer, and Northern Cascade mountain goats—resources guaranteed to the tribes by a series of treaties executed beginning in 1855. These areas are also the location of concentrated urban development due to the rapid population growth that the state has experienced over the past few decades. Since 2000, the population in Washington State has grown by about 1.6 million, with much of that population located in the Emerald Corridor.[1] Counties experiencing the highest population growth include King, Whatcom, Snohomish, Pierce, Thurston, and Clark. Increased population growth has been a contributing factor to the degradation of riparian habitats that support species of particular interest to the tribes, including salmon, steelhead, bull trout, as well as big-game species. The Puget Sound bull trout is listed as "threatened" in Washington State, as are Puget Sound Chinook and steelhead, all of which are present within the ceded treaty areas.[2] Riparian forest cover in the Puget Sound area declined by 10.5% between 2006 and 2011, and only 16.8% of all riparian forests have been identified as "properly functioning."[3]

Anadromous Fish

Tribal reservations and counties located in the treaty ceded lands area contain a vast majority of the watersheds supporting anadromous fish in the Puget Sound region, including all salmon species, bull trout, and steelhead. The Point Elliot Treaty (1855) ceded lands contain a large majority of bull trout habitat in King, Snohomish, Skagit, and Whatcom Counties in western Washington (figures 4.1, 4.2).

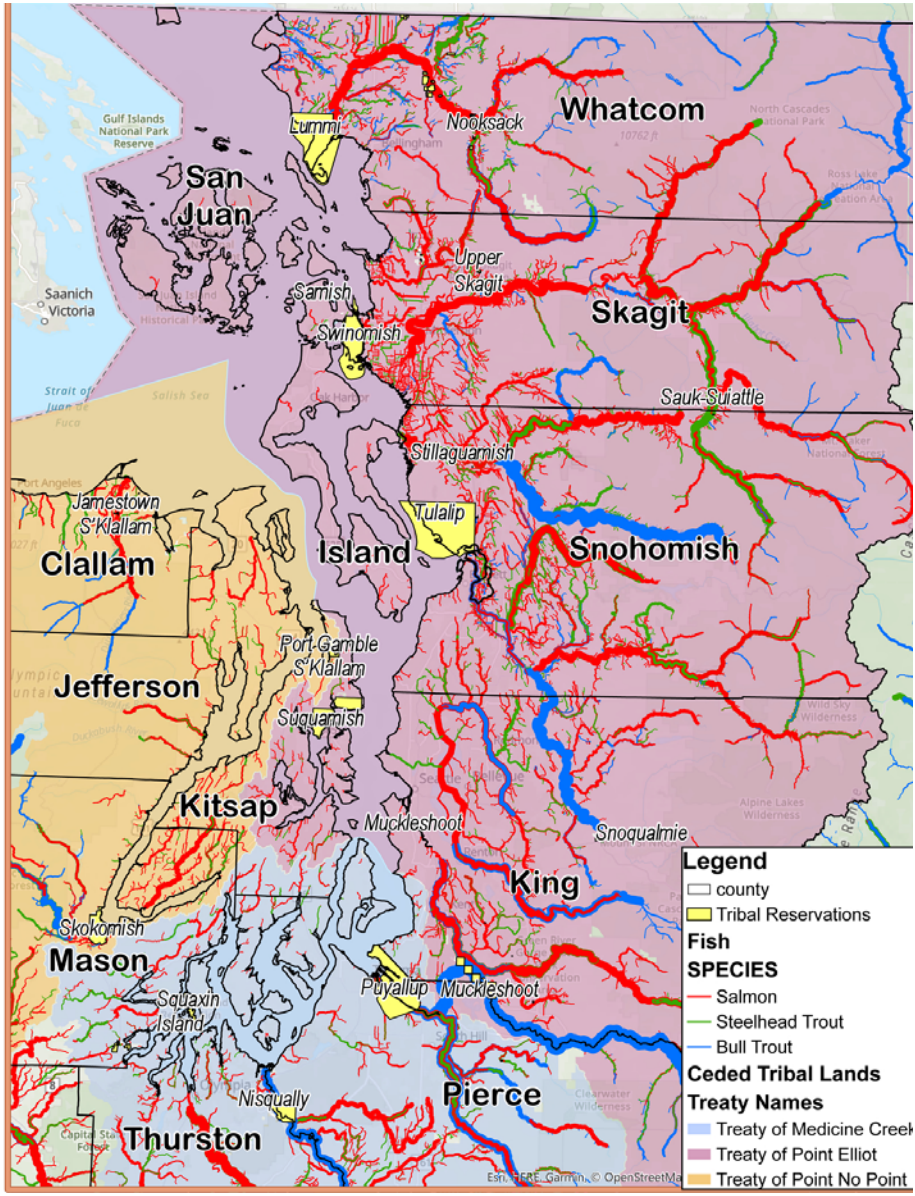

Figure 4.1. Salmon, steelhead, and bull trout watersheds within the northern treaty ceded lands, Washington State.

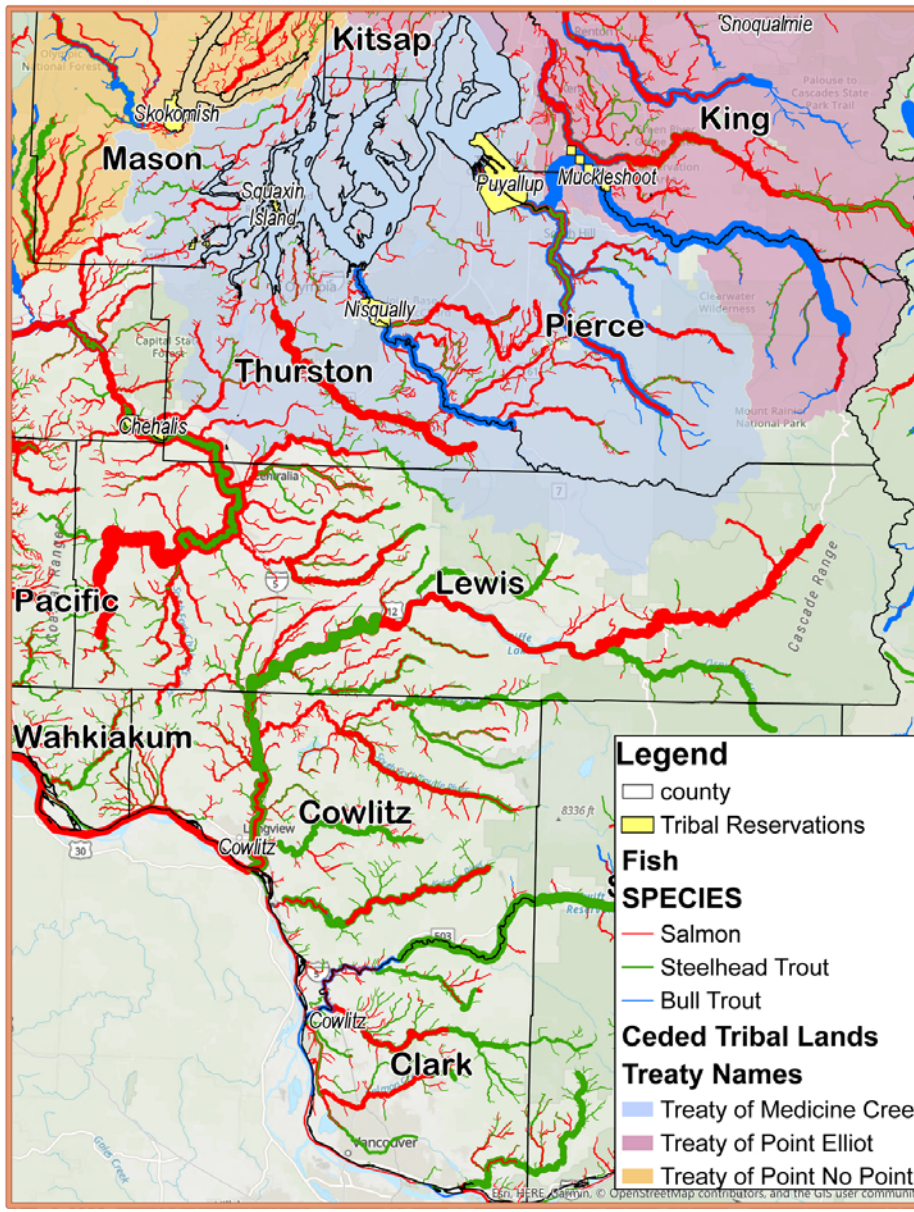

Figure 4.2. Salmon, steelhead, and bull trout watersheds within southern treaty ceded lands, Washington State.

The Treaty of Medicine Creek (1854) encompasses lands in Pierce, Thurston, Lewis, and Kitsap Counties. The signatory tribes of the Treaty of Medicine Creek include the Squaxin Island, Nisqually, and Puyallup Tribes. The treaty ceded lands located on the southern portion of Puget Sound, which contains important riparian habitats for salmon, steelhead, and bull trout, although steelhead constitute a smaller portion of the watershed. The watersheds within the ceded lands are host primarily to salmon species and steelhead.

The lands ceded in the Treaty of Point No Point (1855) include parts of Kitsap, Mason, Jefferson, and Clallam Counties. The signatory tribes of the Point No Point Treaty include the Jamestown S'Klallam, Port Gamble S'Klallam, and Skokomish Tribes. The ceded lands within the treaty area contain important salmon and steelhead habitats. Many of the watersheds contained within the treaty area were renowned for their steelhead and salmon fishing. They currently are home to some of the largest numbers of threatened species of salmon and steelhead as well as the endangered Hood Canal summer-run Chum Salmon area.[4]

The Chehalis and Cowlitz Reservations are located in the southern Emerald Corridor, an area that does not contain ceded lands. These areas include watersheds supporting salmon species and steelhead near the lower Cowlitz tribal area along the Columbia River. The Columbia River is one of the most important Pacific salmon rivers in North America and hosts large numbers of Chinook, Sockeye, Coho, and steelhead. The Cowlitz Tribe has signed a memorandum of understanding with the Washington Department of Fish and Wildlife to promote cooperation and coordination in the maintenance of fish and wildlife populations. The agreement acknowledges that the Cowlitz tribe has no reserved treaty fishing rights, but it recognizes the tribe's historic connection to salmon and its continued interest in preserving the species (see figure 4.2).

Hunting

Comanagement agreements for hunting were signed between the Washington Department of Fish and Wildlife and the tribes that created a management protocol for game species and designated unclaimed lands that provide for tribal access to hunting. These designated areas include land areas within the Puyallup, Issaquah, Maury, Kitsap, Whidbey, North Sound, Snoqualmie, and Stillaguamish Game Management Units.[5] The lands designated in these agreements have small populations of black tail deer and elk. The greater area of the Point Elliot Treaty ceded lands contains populations of black bear, northern Cascade mountain goat, elk, and black tail deer. Elk populations

are located within King County and Pierce County, and mountain goat populations are concentrated largely in Snohomish and Whatcom Counties (see figure 4.3).

The ceded lands of the Puyallup, Nisqually, and Squaxin Island Tribes contain populations of black tail deer and elk. One of the populations of elk within the Medicine Creek Treaty area is the Northern Rainer elk herd, which is one of ten elk herds in Washington State and one of the largest in western Washington. Black tail deer populations are limited to locations near Tacoma and to Vashon Island. The Squaxin Island Tribe signed a hunting comanagement agreement with the Washington Department of Fish and Wildlife in 2015, which establishes methods for cooperative population management of game species, including mountain goat, deer, and elk.[6] This area of comanagement includes the Puyallup, Deschutes, Storm King, South Rainier, Randle, Packwood, Kitsap, Anderson Island, Mason, and Satsop Game Management Units.

The Point No Point Treaty ceded areas also contain populations of black bear, elk, deer, and mountain goats in or around Olympic National Forest and National Park. These areas host a large population of northern Cascade mountain goat. Efforts to depopulate the introduced species from within and around the national park are currently in progress. The Skokomish Indian Tribe also signed a hunting comanagement agreement with the Department of Fish and Wildlife in 2014 to designate hunting areas on private industrial timber lands and public lands while also setting sustainable wildlife-population-management standards. The lower portion of the Emerald Corridor is home to populations of North Cascade mountain goat, deer, and elk in isolated populations. This area also contains recreational wildlife areas in Cowlitz and Clark Counties (see figure 4.4).

The Washington State Department of Ecology published a matrix (table 4.1) providing a reference for identifying federally recognized tribes that may have interests within county boundaries. The matrix was based on traditional tribal areas, ceded treaty lands, Usual and Accustomed Areas, traditional areas, the location of tribal reservations, and whether a tribe requested notification of activities within a particular county.

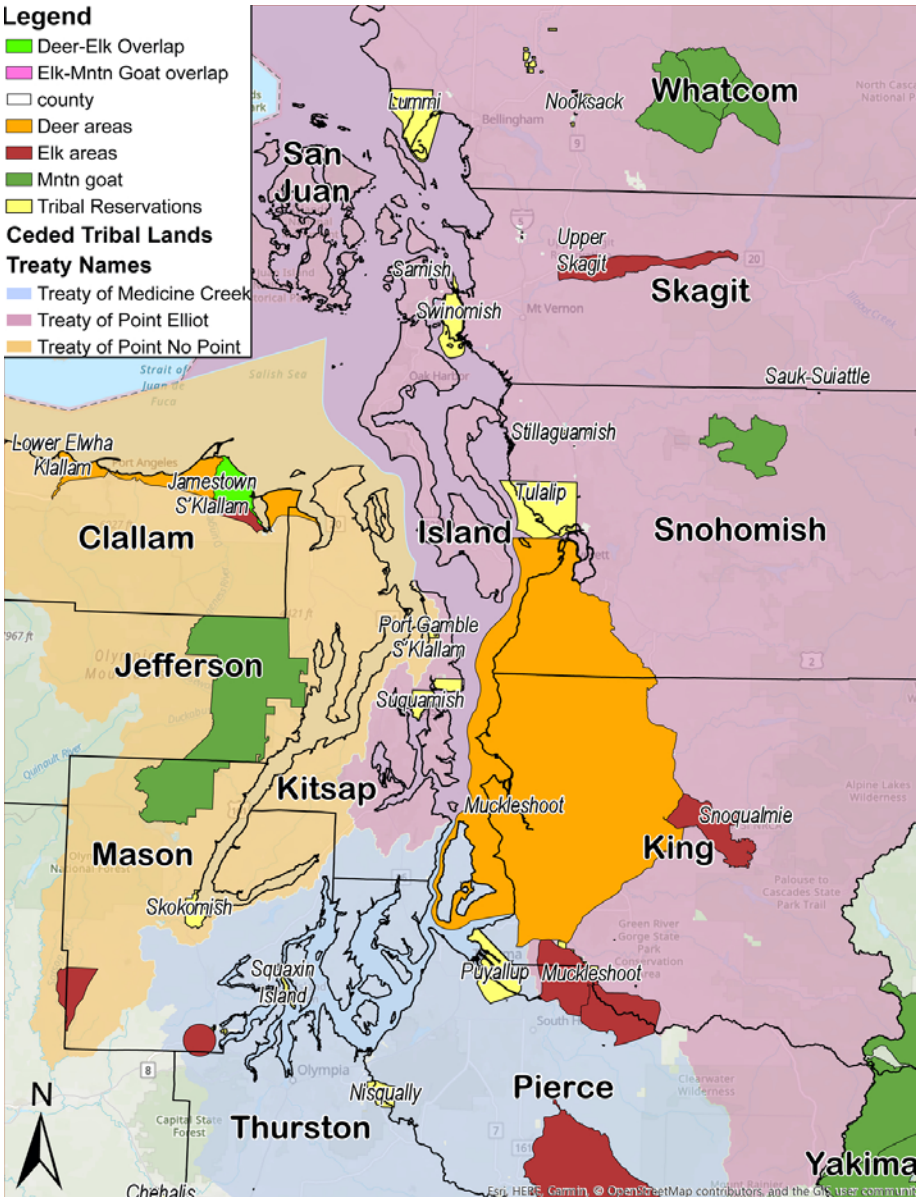

Figure 4.3. Location of big-game species within northern treaty ceded lands, Washington State.

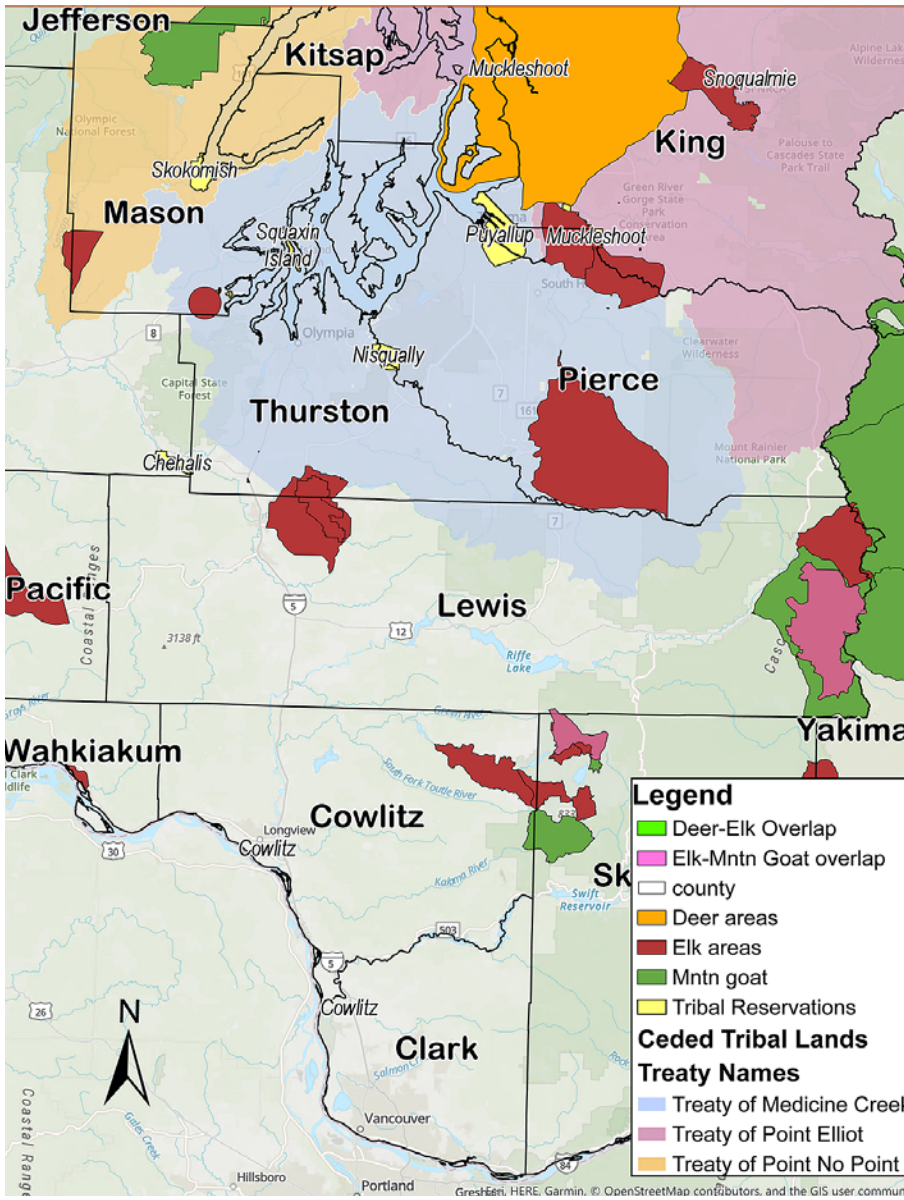

Figure 4.4. Location of big-game species within southern treaty ceded lands, Washington State.

Table 4.1. Washington State Counties with Tribal Interests

Tribes	Counties in Emerald Corridor										
	Clark	Cowlitz	Island	King	Kitsap	Lewis	Pierce	San Juan	Skagit	Snohomish	Whatcom
Cowlitz	X	X				X	X				
Jamestown S'Klallam					X						
Lummi Nation			X	X	X		X	X	X	X	X
Muckleshoot				X	X	X	X				
Nisqually				X	X	X	X				
Nooksack			X	X	X		X	X	X	X	X
Port Gamble S'Klallam					X						
Puyallup				X	X	X	X				
Samish Nation			X	X	X		X	X	X	X	X
Sauk-Sulattle			X	X	X		X	X	X	X	X
Skokomish					X						
Squaxin Island				X	X	X	X				
Stillaguamish			X	X	X		X	X	X	X	X
Suquamish			X	X	X		X	X	X	X	X
Swinomish			X	X	X		X	X	X	X	X
Tulalip			X	X	X		X	X	X	X	X
Upper Skagit			X	X	X		X	X	X	X	X

Note: This table provides a general representation of the locations of tribal off-reservation interests that occur throughout Washington State, but individual tribes may have interests in additional locations.

Chapter 4 Endnotes

[1] "Washington Population 2018 (Demographics, Maps, Graphs)," n.d., at http://worldpopulationreview.com/states/washington-populations/.

[2] Washington State Recreation and Conservation Office ,2009, at http://www.rco.wa.gov/salmon_recovery/listed_species.shtml.

[3] Northwest Indian Fisheries Commission, *2016 Puget Sound Regional Report* (2016), at http://geo.nwifc.org/SOW/SOW2016_Report/PugetSound.pdf. Salmon Recovery-Species, listed under "Federal Endangered Species Act."

[4] Washington State Recreation and Conservation Office**.**

[5] Washington Department of Fish and Wildlife, *Tribal Hunting and Co-management: WDFW and Tribal Wildlife Management* (Olympia: Washington Department of Fish and Wildlife, 2013), at https://wdfw.wa.gov/hunting/tribal/co-management.html.

[6] Washington Department of Fish and Wildlife, Hunting Co-management Agreement between the Washington Department of Fish and Wildlife and the Squaxin Island Tribe, 2015, at https://wdfw.wa.gov/hunting/tribal/co-management.html.

5

Survey of Tribal–County Planning Relationships in Washington State

Two surveys of Washington county and tribal planning offices were conducted in 2018 and 2019 to ascertain the status of intergovernmental planning relationships, and a national survey of tribes and county planning agencies was conducted in 2019. Questions ranged from the size and scope of planning activities conducted by each county agency to the agency's experiences in intergovernmental cooperation and the occurrence of conflict.[1] The surveys assessed how each government agency viewed its professional relationships with other agencies and the type of interactions that occurred between tribes and counties. Results were aggregated to summarize responses from participating planning agencies. The information collected was organized into tables to depict the status of the relationships between tribes and county planning departments, to identify intergovernmental agreements in place, to summarize the nature of formal and informal communications occurring between the parties, to identify conflicts relating to land-use planning, and to indicate whether the parties supported an amendment to the Growth Management Act (GMA) to provide for direct tribal engagement in GMA planning. This section summarizes the results of the research (see appendix 4 for survey questions and responses).

Composition of Planning Staffs

Tribal planning personnel tend to be significantly smaller in number than county planning staff, suggesting a broader planning capacity at the county level. Tribal staff averaged between four and six professional planners in comparison to the average sixteen to twenty-four county staff (question 3, appendix 4).

Scope of Planning Activities

The scope of planning activities by each planning agency is relatively similar, but the distribution of time devoted to different planning activities can be different among the various agencies. Tribes devote considerable resources to economic-development activities as well as to land-use planning and regulation, environmental review, housing and community development, and transportation planning (question 4).

Reservation Ownership Characteristics

Each county and tribal respondent described a range of land-ownership types on reservations included in the survey, with most reservations containing a combination of tribal trust, individual trust, and tribal- and nontribal-owned fee lands. This land-tenure situation is common to all reservations that were established under treaty and subjected to the effects of the General Allotment Act. Reservations that were established by the U.S. Congress or by executive action in more recent years generally contain only trust-land ownership (question 5).

Disputes and Litigation

About half of the tribal and county respondents indicated their participation as a party to litigation or mediation. Those disputes have involved land-use, water-resources, natural-resources, and cultural-, environmental-, and treaty-rights issues. Resolution of most of those issues were decided either in favor of the tribes or by negotiated settlement, or the dispute was still pending resolution at the time of the surveys (questions 6–8).

Characterizing the Relationship Status

The nature of interaction among participating county and tribal planning departments vary. Most of the tribal planning departments identified their interactions with other parties as "good" or "very good."[2] Relationships identified as "Excellent" included two tribes and their associated counties. Relationships that were ranked as "Good" included seventeen tribes and counties. Two counties and associated tribes described their relationships as very positive. Relations described as either "Neutral" or "Poor" included four tribes and counties, based on occasional interactions when deemed necessary or when a county was required to communicate with a tribe due to proposed-project impacts potentially affecting tribal interests. Conflicts tended to focus on disagreements regarding environmental protection policies for fisheries, water management, utilities, and land use. Counties largely characterized

their relationship with tribes as generally neutral, with about 20% of respondents characterizing their relationships as "Poor" or "Conflictive" (question 18).

Professional Interaction

Sixty-six percent of tribal planners perceived their relationships with county planners as professional and cordial, whereas 22% viewed them as somewhat cordial. In comparison, only 28% of county planners characterized their relationships with tribal planners as professional and cordial, and nearly 60% saw them as only somewhat cordial (question 19). The frequency of meetings among tribal and county planners was relatively sporadic. Only one-third of the tribal respondents met with county planners monthly; one-third of the respondents met with county staff either every six months or once a year. One-third of the respondents have never met their county counterparts. About 42% of county respondents indicated meeting with tribes monthly, but the majority indicated that they met only annually or semiannually (question 20). Most county planning agencies apply some degree of authority within the boundaries of Indian reservations, including county regulations on land use, building, utilities, natural resources, cultural resources, public services and safety, and transportation (question 21).

Cooperation in Regional Planning

Regarding cooperative-planning interaction between tribal and county planning agencies, both governments indicated attempts to reach out to engage in some form of cooperation planning, and in most cases some form of interagency collaboration was formed (questions 9–10). The topics of greatest interest to tribes for improved coordination with counties included land use, the environment, natural resources, transportation, utilities, and public safety. Counties sought primarily to address issues concerning land use, the environment, and natural resources and secondarily to address interests in utilities and public services (question 11). Questioned whether the tribe or county participates in interjurisdictional planning either on or off the reservations, 75% responded positively (question 12). About half of the respondents indicated their mutual planning efforts focused mostly on off-reservation issues, and half focused on both on- and off-reservation issues (question 13). The most important tribal issues for mutual planning included: land-use planning, building and code administration, natural-resources management, utilities planning, public services, and historic- and cultural-resources management. For counties, the most important planning issues included land-use planning, environmental and natural-resources

management, and historic- and cultural-resources management (question 14). Although there appears to be a strong interest in interjurisdictional cooperation in planning, about 70% of the tribes and counties have not entered into a formal agreement or memorandum of understanding (MOU) (question 15), but all respondents indicated support for establishing a formal cooperative intergovernmental planning relationship (question 17).

Support for Amendment to the GMA

The surveys questioned whether county or tribal planning agency participants would support an amendment to the GMA to formalize coordination with tribes in land-use planning. Most of the counties responded that they did not think an amendment to the GMA requiring mandatory coordination with tribes was necessary, and only two counties supported such an amendment to the law. In contrast, most tribes indicated a preference for an amendment. A primary reason why counties did not support an amendment to the act concerned whether the state could mandate cooperation with tribes.

Hurdles in Forming Collaborative Relationships

About half of the tribal respondents generally agreed there is a need for collaboration but recognized many political hurdles that would first need to be jumped. More than half of the tribal respondents indicated a preference for building better relationships but were limited by staff resources. Most counties also recognized a need for better collaboration with tribes but also acknowledged that political conflicts persisted, making such collaborations difficult. Most counties indicated a preference to improve professional coordination but also indicated insufficient staff resources to devote to the effort. Another concern regarded how the different tribal approaches to planning may be inconsistent with the GMA (question 22). Other hurdles identified by tribal respondents included the frequency in staff turnover, lack of political support by legislative or executive bodies, the counties' limited understanding of Indian policy history and the federal trust responsibility, and ongoing litigation (question 23).

Findings from National Tribal–County Planners Survey

This subsection summarizes an analysis of a national survey sent to county and tribal planners. It presents significant findings from the data received. The data were analyzed using Qualtrics software, which includes analysis features to compare responses from Washington State planning agencies to responses from other states that participated in the survey. The sample size included forty-eight tribal agency participants in twelve states (table 5.1). The

sample size was sixty-six county participants in fourteen states (table 5.2). Washington State accounted for 20.5% of all county responses and 27.1% of all tribal responses.

Table 5.1. National Survey: County Responses

State	**Number of County Responses**	**Percentage of Total Responses**
California	16	24.2
Nevada	14	21.2
Washington	8	20.5
Michigan	7	10.6
Arizona	5	7.6
Minnesota	3	4.5
North Dakota	3	4.5
New Mexico	2	3.0
South Dakota	2	3.0
Wisconsin	2	3.0
Indiana	1	1.5
Oklahoma	1	1.5
Oregon	1	1.5
Virginia	1	1.5

Table 5.2. National Survey: Tribal Responses

State	Number of Tribal Responses	Percentage of Total Responses
Washington	13	42.1
California	11	22.9
Arizona	4	8.3
New Mexico	4	8.3
Oregon	4	8.3
Michigan	2	4.2
Minnesota	2	4.2
Nebraska	2	4.2
Nevada	2	4.2
North Dakota	2	4.2
Oklahoma	1	2.1
South Dakota	1	2.1

Occurrence of Litigation

Tribal and county responses to question 6 (occurrence of litigation) demonstrated statistical significance between groups. Tribal responses for Washington demonstrated a higher degree of litigation than in other states (table 5.3), with 42.9% of Washington tribes but just 12.1% of other tribes indicating involvement in litigation with counties. The number of counties in Washington indicating litigation with Indian tribes was also significantly higher than in other states, 37.5% compared to 12.7%. Of total responses (table 5.4), 78.7% (37) of Indian tribes reported no litigation occurred with counties, with 21.3% (10) reporting some litigation occurred. National county responses reported 14.9% (10) reporting some litigation with tribes, 80.6% (54) reporting no litigation, and 4.5% (3) citing pending litigation with Indian tribes.

Table 5.3. Tribal and County Responses Identifying the Occurrence of Litigation

Tribal Responses	**Yes**	**No**	**Pending**
Other states	12.1%	87.9%	0.0%
Washington	42.9%	57.1%	0.0%

County Responses	**Yes**	**No**	**Pending**
Other states	12.7%	83.6%	3.6%
Washington	37.5%	50.0%	12.5%

Table 5.4. Cumulative Responses from Tribes and Counties regarding the Occurrence of Litigation

Tribal Response	**Number of Tribes**	**Percentage of Total**
No	37	78.7
Yes	10	21.3

County Response	**Number of Counties**	**Percentage of Total**
Yes	10	14.9
No	54	80.6
Pending	3	4.5

Nature of Disputes

Analysis of question 7, regarding the nature of disputes, describes the topics in dispute for participants in past or current litigation. For Washington State tribes (figure 5.1), land use and water and natural resources were the primary topics of litigation with counties (28% of respondents). Environmental issues and treaty rights were also identified as topics in litigation (20%). Other disputes included cultural and environmental resources (14%). Washington State counties (figure 5.2) identified land use as the most prominent subject of disputes (40%), followed by environmental issues (30% of respondents) and water and natural-resources issues (29%). Tribal and county responses in Washington demonstrate disparities. Twenty-six percent of Washington Indian tribes identified water resources and natural resources as the primary sources of disputes (figure 5.1) compared to 10% of Washington counties. Counties and tribes in all other states identified land use, water resource, and natural resources as the primary topics of litigation. However, disparities exist between tribal and county responses regarding other topics in dispute, including the environment, cultural resources, and treaty rights.

Conflict Resolution

The resolution of conflicts in litigation between tribes and counties in Washington and between tribes and counties in other states differed significantly. In tribal responses (table 5.5), litigation was ruled in favor of tribes at a significantly higher rate in Washington (80%) compared to in other states (33.3%). Washington State also had a higher proportion of negotiated outcomes (20%) compared to other states.

Table 5.5. Tribal and County Responses Identifying the Outcomes of Litigation

Tribal Responses	Rulings in Favor of Tribes	Rulings in Favor of Counties	Rulings Pending	Negotiated Rulings
Other states	33.3%	0.0%	66.7%	0.0%
Washington	80.0%	0.0%	0.0%	20.0%

County Responses	Rulings in Favor of Tribes	Rulings in Favor of Counties	Rulings Pending	Negotiated Rulings
Other states	11.1%	11.1%	33.3%	44.4%
Washington	50.0%	0.0%	50.0%	0.0%

Table 5.6. Cumulative Responses of Counties and Tribes Indicating How Litigation Was Resolved

County Responses	
Pending resolution	38.5%
Negotiated settlement outcome agreeable to both parties	30.8%
Tribe prevailed	23.1%
County prevailed	7.7%
Tribal Responses	
Tribe prevailed	62.5%
Pending resolution	25.0%
Negotiated settlement outcome agreeable to both parties	12.5%

Initiating Contact to Engage in Cooperative Planning

Sixty-three counties responded to question 9 (initiating contact) (table 5.7). When asked if their county planning office had reached out to their tribal counterparts, 69.1% (38) of counties indicated they had, compared to 100% of Washington counties. Responses for Indian tribes showed similar responses to the counties' responses. Washington State tribes reported attempts to reach out to county planning offices (92.7%), compared to 71.9% of tribes from other states.

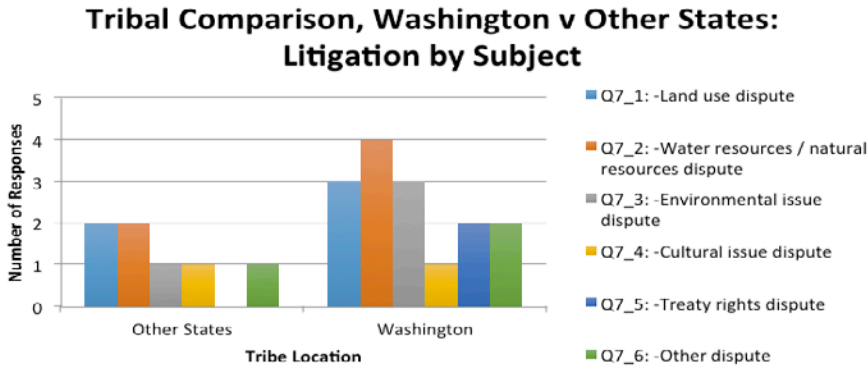

Figure 5.1. Disputes in litigation: Washington tribes versus tribes in other states.

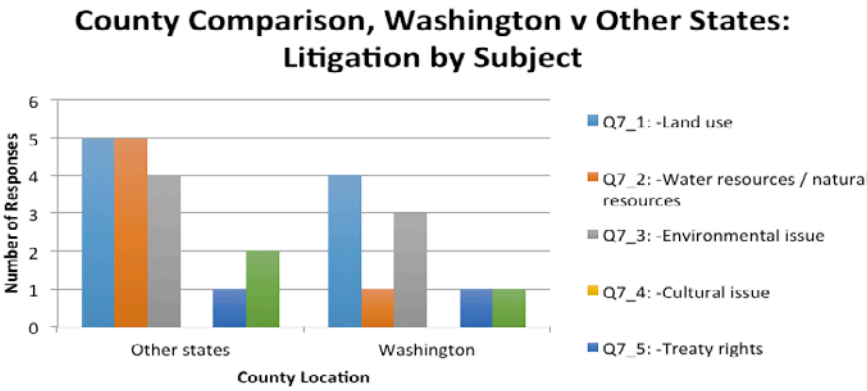

Figure 5.2. Disputes: Washington counties versus counties in other states.

Table 5.7. County and Tribal Responses Identifying Attempts to Reach Out to Planning Counterparts

County Responses	Yes	No	Under Consideration
Other states	69.1%	29.1%	1.8%
Washington	100.0%	0.0%	0.0%

Tribal Responses	Yes	No	Under Consideration
Other states	71.9%	9.4%	18.8%
Washington	91.7%	0.0%	8.3%

A comparison between the occurrences of litigation and engagement in cooperative planning is shown in table 5.8. Of all tribes that indicated they had engaged with county planning offices to engage in cooperative planning (question 9), 82.9% of indicated the absence of litigation (question 6). Similar responses are shown for all tribes that reached out to engage in cooperative planning with counties (85.7%). Tribes that had not sought to initiate cooperation with counties were more likely to have experienced litigation with counties (33.3%).

Table 5.8. Analysis of Tribal Cooperative Planning and the Occurrence of Litigation

Tribal Responses	(Q6) No	(Q6) Yes	(Q6) Pending
(Q9) Yes	82.9%	17.1%	0.0%
(Q9) Under consideration	85.7%	14.3%	0.0%
(Q9) No	66.7%	33.3%	0.0%

Similar associations are shown when comparing questions 6 and 9 in county responses (table 5.9). For counties that identified reaching out to tribes, 73.5% also indicated no history of litigation. Interestingly, 100% of counties that indicated they had not reached out to tribes also indicated no history of litigation. These results contrast with tribal responses, where only 66.7% that did not reach out to counties indicate no history of litigation (table 5.8).

Table 5.9. Analysis Comparing Attempts by Counties to Reach Out to Tribes and the Occurrence of Litigation

County Responses	(Q6) Yes	(Q6) No	(Q6) Pending
(Q9) Yes	20.4%	73.5%	6.1%
(Q9)Under consideration	0.0%	100.0%	0.0%
(Q9) No	0.0%	100.0%	0.0%

Initiating a Process for Tribal–County Collaboration

Question 10 assessed outcomes where tribal–county cooperation did occur (table 5.10). Of Washington tribes, 83.3% have had some form of success when entering collaborative-planning relationships with counties. A slightly smaller percentage of tribes in other states also indicated success in establishing cooperative relationships with counties (79.3%). Seventy-five percent of Washington State counties indicated a positive working relationship with tribes. Counties in other states similarly reported successful outcomes following under an established working relationship with their tribal counterparts (76.9%).

Table 5.10. Attempts to Form a Cooperative Relationship Led to Successful Outcomes

Tribal Responses	Yes	No
Other states	79.3%	20.7%
Washington	83.3%	16.7%

County Responses	Yes	No
Other states	76.9%	23.1%
Washington	75.0%	25.0%

Status of the Collaborative-Planning Relationship Either on or off Reservations

Counties in Washington showed a higher percentage of collaborative-planning experiences with tribes compared to counties in other states (table 5.11): 75% of Washington counties identified some form of intergovernmental planning with tribes on or off the reservation; 45% of county respondents from other states showed some engagement in coordinated planning with tribes, and 55% indicated an absence of coordination. For other states, tribal responses were similar to the county responses: 56% of tribes indicated the existence of intergovernmental planning compared to 43.8% that indicated no relationship existed. Washington State tribes also responded similarly to Washington counties, 78.6% indicating that intergovernmental planning was in place with counties compared to 21.4% that have not entered into any form of cooperative planning.

Table 5.11. County and Tribal Responses Indicating Participation in Intergovernmental Planning

County Responses	Yes	No
Other states	45.3%	54.7%
Washington	75.0%	25.0%

Tribal Responses	Yes	No
Other states	56.3%	43.8%
Washington	78.6%	21.4%

Formal Agreements

Regarding the use of formal agreements to engage in cooperative planning (table 5.12), Washington State demonstrated fewer instances of formal planning arrangements than other states. Tribes indicated a lower occurrence of MOUs in Washington, with 72.7% indicating that no MOUs or agreements exist.

Table 5.12. The Existence of Formal Intergovernmental Agreements between Planning Counterparts

Tribal Responses	**No**	**Yes**
Other states	55.6%	44.4%
Washington	72.7%	27.3%

County Responses	**Yes**	**No**
Other states	25.0%	75.0%
Washington	33.3%	66.7%

Willingness of Planners to Cooperate with Counterparts

Question 17 assessed the willingness of counties and tribes to cooperate in planning with their counterparts and showed unanimous support (100%) from counties and tribes in favor of doing so (table 5.13), compared to 93.1% of counties and 89.7% of tribes from other states.

Table 5.13. County and Tribal Planners' Support for Establishing Cooperative Planning Relationships

County Responses	**Yes**	**No**
Other states	93.1%	6.9%
Washington	100.0%	0.0%

Tribal Responses	**Yes**	**No**
Other states	89.7%	10.3%
Washington	100.0%	0.0%

Status of the Professional Planning Relationship

Differences in how relationships between tribal and county planners are viewed were highlighted in question 19, with contrasting results between county and tribal responses (table 5.14) as well as between Washington and other states. Seventy percent of Washington tribes identified their relationships with county planners as "continuously professional." By contrast, only 28.6% of Washington county planners identified their relationships with tribal planners as "continuously professional." Interestingly, 14.3% of Washington counties and 39.4% of counties in other states viewed their professional relationships with tribal planners as nonexistent.

Table 5.14. Tribal and County Responses Indicating Planning Relationship Status

Tribal Responses	**Continuously Professional and Cordial**	**Somewhat Professional and Cordial**	**Nonexistent**
Other states	43.3%	36.7%	20.0%
Washington	70.0%	20.0%	10.0%

County Responses	**Continuously Professional and Cordial**	**Somewhat Professional and Cordial**	**Nonexistent**
Other states	42.4%	18.2%	39.4%
Washington	28.6%	57.1%	14.3%

Frequency of Collaborative Professional Meetings

A correlation of questions 19 and 20 (table 5.15) associated the perception of planning relationships with the frequency of meetings between tribal and county planners. Both counties and tribes that described their relationships with planning counterparts as "nonexistent" also indicated they had never met with their planning counterparts or only on an annual basis: 71.4% of county and tribal respondents indicated not having formed professional relationships or having never met their planning counterparts. Those counties and tribes that have relationships also indicated meeting more frequently, at least twice or more each year.

Table 5.15. An Analysis between Planners' Relationships and Frequency of Meetings

County Responses	Have never met tribal counterparts	Meet 1 time annually	Meet 1 time every 6 months	Meet 1 time per month	Meet 1 time every 2 weeks
Continuously professional and cordial	11.1%	16.7%	38.9%	33.3%	0.0%
Somewhat professional and cordial	30.0%	50.0%	10.0%	10.0%	0.0%
Nonexistent or not applicable	71.4%	21.4%	7.1%	0.0%	0.0%

Tribal Responses	Have never met county counterparts	Meet 1 time annually	Meet 1 time every 6 months	Meet 1 time per month	Meet 1 time every 2 weeks
Continuously professional and cordial	25.0%	15.0%	10.0%	45.0%	5.0%
Somewhat professional and cordial	7.7%	38.5%	23.1%	23.1%	7.7%
Nonexistent or not applicable	71.4%	28.6%	0.0%	0.0%	0.0%

Recognizing Tribal Sovereignty and Jurisdiction

A higher proportion of Washington counties indicated their recognition of tribal jurisdiction than counties from other states (table 5.16). All Washington State counties indicated they "definitely" recognize tribal jurisdiction regarding land-use regulation within their reservations, compared to 72.7% of counties in other states. Nearly an identical proportion of tribes in Washington and in other states indicated that their associated counties "definitely" respected tribal planning jurisdiction on the reservation. However, 12.5% of tribes in Washington felt that counties "probably" don't respect their jurisdiction, compared to zero percent of Washington counties indicating that they may not or probably do not respect tribal jurisdiction.

Table 5.16. County Recognition of Tribal Land-Use Planning Jurisdiction on the Reservation

County Responses	Definitely yes	Probably yes	Might or might not	Probably not
Other states	72.7%	6.1%	18.2%	3.0%
Washington	100.0%	0.0%	0.0%	0.0%

Tribal Responses	Definitely yes	Probably yes	Might/might not	Probably not
Other states	63.3%	23.3%	13.3%	0.0%
Washington	62.5%	25.0%	0.0%	12.5%

County View of Tribal Self-Governance

As with county views toward tribal authority over reservation land use, most counties recognize a tribe's right to reservation self-governance (table 5.17), at a higher percentage than many tribes acknowledged. More than 85% of Washington counties recognize tribal self-governance on the reservation, as do most (82.8%) counties in other states. Interestingly, about 25% of tribal responses viewed that counties only partially recognize a tribe's self-governance authority.

Table 5.17. County Recognition of Tribal Self-Governance Authority over Reservation Affairs

Tribal Response	Recognize Authority	Partially Recognize	No Recognition
Other states	74.2%	25.8%	0.0%
Washington	62.5%	25.0%	12.5%

County Response	Recognize Authority	Partially Recognize	No Recognition
Other states	82.8%	17.2%	0.0%
Washington	85.7%	14.3%	0.0%

When counties were asked if they would be interested in receiving guidance on forming successful tribal–county partnerships, 100% of Washington counties indicated they would be interested compared to only 57.6% of counties from other states (table 5.18). All of the responding tribes from Washington also indicated support for receiving greater guidance, compared to 77.4% of tribes from other states. The responses indicate that both Washington counties and tribes appear strongly interested in learning about how to engage in cooperative planning.

Table 5.18. Interest in Receiving Guidance on Successful Tribal–County Planning Cooperation

Tribal-County Interactions in Emerald Corridor							
		Relationship	Inter Local	Current		Support GMA Amendment	
Tribe	County	Status	Agreement(s)	Conflicts	Meeting	Tribe	County
Cowlitz	Cowlitz						
	Clark	good	yes	yes			
Jamestown							
S'klallam	Clallam	good	no	no			
	Jefferson	good	no	no			
Lummi Nation	Whatcom	neutral/limited	no	yes	Infrequent		no
Muckleshoot	Pierce	good	no	no	infrequent	yes	no
	King	good	no	no	infrequent		no
Nisqually	Thurston	very good	yes	no	frequent		
Nooksack	Whatcom	neutral/limited	no	no	frequent		
Port Gamble							
S'klallam	Kitsap	good	yes	no	infrequent	no	no
Puyallup	Pierce	good	yes	yes	infrequent	yes	no
	King	good	yes	yes	frequent		no
Samish Nation	Skagit	good	yes				
Sauk-Suiattle	Skagit	good	yes	yes	infrequent	yes	yes
	Snohomish	neutral/limited	no	yes	infrequent		yes
Skokomish	Mason	good	yes	yes	infrequent		
Squaxin Island	Mason	good	no	yes	infrequent		
Stillaguamish	Snohomish	good	yes	yes	infrequent		
Suquamish	Kitsap	good	yes	no	frequent		no
Swinomish	Skagit	poor/conflictive	yes	yes	infrequent	yes	no
Tulalip	Snohomish	neutral/limited	yes	yes	frequent	yes	yes
Upper Skagit	Skagit	good	yes	yes	infrequent		

Lessons Learned Moving Forward

Tribes almost uniformly supported their inclusion in regional and county-wide planning under the Growth Management Act, improving the political relationship between tribal and county leadership as well as recognizing the need for greater understanding about tribal sovereignty and federal Indian policies. Counties acknowledged their obligation to multiple stakeholders, which often conflicted with tribal interests, and identified issues associated with their perceived responsibilities with respect to non-Indian property ownership and occupancy within reservations. Regarding counties' recognition of the tribe's rights to reservation land use planning, most acknowledged a tribal government's rights. Most tribes and counties indicated a desire to receive more guidance on forming successful tribal–county partnerships that will help to foster cooperation in planning.

Chapter 5 Endnotes

[1] The survey included two parts. An online survey in 2019 included fourteen tribal respondents (49% of Washington tribes) and eight counties respondents (20% of Washington counties). In addition to the online survey, the research incorporated a series of survey interviews conducted in 2018 by students in Western Washington University's "Native American Planning and Natural Resource Policy" class to further assess the nature of the relationship among tribal and county planning departments within Washington State. Twenty-five tribal planning departments (86% of Washington tribes) and nineteen county planning departments (49% of Washington counties) participated in the survey interviews.

[2] The survey results contrast with the telephone survey of western Washington tribes in 2019 regarding the identification of on- and off-reservation tribal interests discussed in section 3.0, where tribes generally described their relationships with neighboring counties as "poor."

6

Washington State's Public Policies and Tribal Participation

This section summarizes the legislative, regulatory, and agency policy frameworks affecting the inclusion of tribal governments in local planning under the Growth Management Act (GMA) and other related state enabling statutes.[1] A review of laws and regulations was performed though online archival research of the Washington State Legislature website, containing the Revised Code of Washington (RCW) and Washington Administrative Code (WAC). Additional information was collected through email and phone correspondence with state agency tribal liaisons and the Governor's Office of Indian Affairs.

Laws and Regulations

A review of the Revised Washington Code (RCW) identified thirty-four laws pertaining to tribal participation in comprehensive planning with local governments. Twenty-three of these laws, categorized under topical categories, concern natural resources, nine concern land use, and several other laws address parks and recreation, utilities, rural development, and economic development. Policies affecting housing, capital facilities, transportation, and ports are referenced only in RCW 43.376.050.[2]

Laws concerning natural resources primarily address water and fisheries management (fourteen of the twenty-three identified laws). Coastal or ocean management is referenced in three of the twenty-three natural -resource laws. The remaining laws that reference natural resources concern invasive-species management (three) and forest lands (two) (in RCW 43.376.050). Three GMA planning laws cover matters concerning land use: two laws concern archaeology and land development of properties containing Indian graves or archaeological artifacts; one law each concern conservation-land classification and government land transfers and sales. In addition to RCW 43.376.050, the remaining laws include the selection of Washington State Board of Health members under the utilities category, fire district services for tribal reservation lands under the rural-development category, selection of community economic-revitalization board members under the economic-development category, and removal of invasive species laws under the parks and recreation category.

Table 6.1. Laws Pertaining to Tribal Participation in Planning, Organized by Subjects

Laws	Land Use	Natural Resources	Housing	Capital Facilities	Utilities	Rural Development	Transportation	Economic Development	Parks and Recreation	Ports
RCW 27.44.050	X									
RCW 27.53.60	X									
RCW 36.70A.210	X									
RCW 36.70A.035	X									
RCW 36.70A.745	X									
RCW 36.70A.715	X									
RCW 36.125.050		X								
RCW 36.125.020		X								
RCW 43.06.338		X								
RCW 52.30.080						X				
RCW 64.04.130	X									
RCW 76.04.760		X								
RCW 89.08.500		X								
RCW 89.08.510		X								
RCW 90.46.005		X								
RCW 90.54.010		X								
RCW 90.71.250		X								
RCW 90.94.030		X								
RCW 90.94.020		X								
RCW 90.92.040		X								
RCW 90.92.050		X								
RCW 90.80.070		X								
RCW 77.85.050		X								
RCW 77.95.160		X								
RCW 77.100.110		X								
RCW 77.85.200		X								
RCW 17.10.201		X								
RCW 43.20.030					X					
RCW 39.33.010	X									
RCW 43.160.030								X		
RCW 43.376.050	X	X	X	X	X	X	X	X	X	X
RCW 79A.25.330		X							X	
RCW 79A.25.310		X							X	
RCW 79.155.110		X								
Number of laws	9	23	1	1	2	2	1	2	3	1

The compulsory characteristic of each law was assessed by reviewing the content of each law and highlighting key words or phrases that reflect either a compulsory or noncompulsory requirement under the law. Compulsory or mandatory language includes words such as *must*, *shall*, *require*(*d*), and *will*. Noncompulsory language includes words such as *may*, *encourage*(*d*), *should*, and *consider*. In addition to designating the compulsory nature of each law, the mode of interaction or communication was assessed based on the language contained within each law.

Table 6.2. Comprehensive Planning Laws Organized by Mandatory/Nonmandatory Language and Modes of Communication

	Mandatory/ Obligatory Language?		**Mode of Communication/Interaction**					
REGULATIONS	**Yes**	**No**	**Public Participation**	**Consultation**	**Invitation**	**Given Notice**	**Collaboration/ Cooperative Participation**	**Other**
RCW 27.44.050	X							X
RCW 27.53.60	X							X
RCW 36.70A.210		X					X	
RCW 36.70A.035	X		X			X		
RCW 36.70A.745		X					X	
RCW 36.70A.715		X					X	
RCW 36.125.050	X			X				
RCW 36.125.020	X				X			
RCW 43.06.338	X						X	
RCW 52.30.080		X					X	
RCW 64.04.130		X						X
RCW 76.04.760	X							X
RCW 89.08.500		X					X	
RCW 89.08.510		X					X	
RCW 90.46.005	X						X	
RCW 90.54.010	X						X	
RCW 90.71.250	X						X	
RCW 90.94.030	X				X			
RCW 90.94.020	X				X			
RCW 90.92.040	X				X			

RCW 90.92.050	X						X	
RCW 90.80.070	X					X		
RCW 77.85.050	X						X	
RCW 77.95.160	X						X	
RCW 77.100.110	X						X	
RCW 77.85.200	X						X	
RCW 17.10.201		X					X	
RCW 43.20.030	X						X	
RCW 39.33.010		X						X
RCW 43.160.030	X						X	
RCW 43.376.050	X			X				
RCW 79A.25.330		X					X	
RCW 79A.25.310		X					X	
RCW 79.155.110	X						X	
Total: 34	23	11	1	2	4	2	21	5

Of the thirty-four laws selected in this study, twenty-three contain mandatory language, and eleven contain nonmandatory requirements. The modes of participation and communication for the identified laws demonstrate a range of modalities. Collaborative and cooperative participation by tribes in local planning (twenty-one laws) was the most often cited requirement. Of the twenty-one laws encouraging collaboration and cooperative tribal participation, nine contain nonmandatory requirements, and twelve have mandatory requirements.

A total of forty Washington Administrative Code (WAC) regulations were further identified after online searches and communication with state agencies. Five state agencies are responsible for implementing these WAC regulations: Department of Ecology (DOE), Department of Commerce (DOC), Department of Health (DOH), Department of Transportation (DOT), and the Health Care Authority (HCA). Table 6.3 illustrates the distribution of regulations organized by agency responsible for their administration or enforcement. DOE is responsible for the largest number of regulations (twenty-seven). The number of regulations for all other state agencies is thirteen. No regulations attributed to the Department of Natural Resources (DNR), Department of Fish and Wildlife (WDFW), Department of Agriculture (WSDA), Utilities and Transportation Commission, Department of Social and Health Services (DSHS), or Department of Archaeology and Historic Preservation (DAHP) were identified in this review.

Table 6.3. Distribution of WAC Regulations by Responsible Agencies

Agency	No. of WAC Regulations
DOE	27
DOC	5
DOH	1
DOT	6
DAHP	0
DNR	0
WDFW	0
Dept. of Agriculture	0
Utilities and Transportation Commission	0
DSHS	0
HCA	1

Regarding the WAC, most of the regulations referring to tribal governments address natural resources (twenty-seven of forty regulations). Those regulations primarily involve two agencies, the DOE and the DOC. Transportation issues are addressed in seven of the forty WAC regulations, primarily pursuant to the authority of DOT.[3] Five regulations concern land use, and the DOH was associated with one regulation. RCW regulations regarding housing, capital facilities, rural and economic development, parks and recreation, and ports show no interactions with tribal governments.

Table 6.4. Regulations Involving Tribal Participation in Planning, by Subject

REGULATIONS	Land Use	Natural Resources	Housing	Capital Facilities	Utilities	Rural Development	Transportation	Economic Development	Parks and Rec	Ports
WAC 197-11-408	X									
WAC 173-26-201	X									
WAC 173-26-110	X									
WAC 173-270-030	X									
WAC 173-26-221		X								
WAC 173-26-251		X								
WAC 173-100-050		X								
WAC 173-100-090		X								
WAC 173-150-090		X								

WAC 173-157-200		X								
WAC 173-183-230		X								
WAC 173-200-090		X								
WAC 173-204-415		X								
WAC 173-270-040		X								
WAC 173-303-902		X								
WAC 173-340-600		X								
WAC 173-340-360		X								
WAC 173-340-720		X								
WAC 173-360A-0130		X								
WAC 173-360-530		X								
WAC 173-500-080		X								
WAC 173-501-030		X								
WAC 173-532-055		X								
WAC 173-700-100		X								
WAC 173-700-102		X								
WAC 173-700-220		X								
WAC 173-700-222		X								
WAC 182-546-5200							X			
WAC 246-290-100					X					
WAC 365-190-040		X								
WAC 365-190-060		X								
WAC 365-196-450	X									
WAC 365-190-080		X								
WAC 365-190-130		X								
WAC 468-12-510							X			
WAC 468-63-050							X			
WAC 468-63-040							X			
WAC 468-63-060							X			
WAC 468-86-050							X			
WAC 468-86-090							X			
	5	27	0	0	1	0	7	0	0	0

Regulations associated with natural resources pertain to a wide variety of topics, including water-resource inventory, toxics control, and waste management. Eight natural-resources regulations concern water management,[4] including instream flows, shoreline management, and groundwater resources. Four regulations concern wetland banks,[5] and six regulations involve model toxics control and dangerous-waste management.[6] Eight regulations involve special-protection designations for environmentally sensitive areas and critical areas[7] and for shorelines protection.[8]

Table 6.5. Regulations Organized by Mandatory/Nonmandatory Language and Modes of Participation

	Mandatory/ Obligatory Language?		Mode of Interaction					
REGULATIONS	Yes	No	Public Participation	Consultation	Invitation	Given Notice	Collaboration/ Cooperative Participation	Other
WAC 197-11-408	X						X	
WAC 173-26-201	X	X	X	X		X	X	
WAC 173-26-110	X		X					
WAC 173-270-030		X					X	
WAC 173-26-221	X			X		X	X	
WAC 173-26-251	X			X				
WAC 173-100-050	X		X					
WAC 173-100-090	X						X	
WAC 173-150-090		X					X	
WAC 173-157-200	X			X				
WAC 173-183-230		X					X	
WAC 173-200-090	X						X	
WAC 173-204-415	X			X				
WAC 173-270-040	X						X	
WAC 173-303-902	X						X	
WAC 173-340-600		X	X					
WAC 173-340-360	X		X					
WAC 173-340-720	X					X		
WAC 173-360A-0130	X		X					
WAC 173-360-530	X		X					

WAC 173-500-080		X					X	
WAC 173-501-030	X			X				
WAC 173-532-055	X		X					
WAC 173-700-100		X					X	
WAC 173-700-102	X							X
WAC 173-700-220	X				X			
WAC 173-700-222	X			X				
WAC 182-546-5200	X							X
WAC 246-290-100	X					X		
WAC 365-190-040	X		X					
WAC 365-190-060		X					X	
WAC 365-196-450		X					X	
WAC 365-190-080		X					X	
WAC 365-190-130		X						X
WAC 468-12-510	X					X		
WAC 468-63-050	X				X			
WAC 468-63-040	X				X			
WAC 468-63-060	X				X			
WAC 468-86-050		X					X	
WAC 468-86-090		X					X	
Total: 40	28	13	9	7	4	5	17	3

The provision for public participation with tribes was evident in nine regulations, of which six are mandatory, one nonmandatory, and one with both mandatory and nonmandatory provisions. The provision of consultation with tribes is evident in seven regulations, six with mandatory language and one with both mandatory and nonmandatory language. The provision requiring public notice to tribes is included in five regulations, four of which include mandatory language and one that has both mandatory and nonmandatory language. Collaboration and cooperative participation are evident in seventeen regulations, ten of which contain mandatory language and one that contains both mandatory and nonmandatory language.

Three regulations, WAC 365-190-130, WAC 182-546-5200, and WAC 173-700-102, involve other categories. WAC 365-190-130[9] pertains to fish and wildlife habitat-conservation areas, where counties are required to consider areas where tribes plant game fish. WAC 182-546-5200[10] addresses nonemergency-transportation contracts that must be negotiated in good faith with Indian tribal governments. WAC 173-700-102[11] addresses tribal wetland

banks, stating that tribal banks partially or totally located outside Indian country are subject to state and county regulations.

Agency-Level Interactions with Local Governments and Tribes
Agencies contacted for this investigation included the DOE, DOC, Department of Agriculture, DOH, DSHS, DOT, WDFW, Utilities and Transportation Commission, DAHP, Puget Sound Partnership, and the Recreation and Conservation Office.

Phone interviews held with state agencies' tribal liaisons and planners yielded common views held by agencies regarding county–tribe interactions. A common response highlighted the counties' general independence in carrying out GMA planning activities and the lack of agency authority to direct counties regarding coordination with tribal governments. The agencies believe they have the authority to engage in coordination with tribes, citing the Centennial Accord of 1989 and the Millennium Agreement of 1999, and the responsibility to foster intergovernmental cooperation with tribes.

The DOE affirmed that it provides no general guidance to counties through its adopted policies. However, DOE planners indicated an informal policy of encouraging counties to seek avenues for improving coordinating with tribes. The DNR's support for coordination with tribes is primarily through State Environmental Policy Act procedures, where applications to the DNR are not approved without formal review and comment from Indian tribes in instances where a proposed project may affect tribal interests in lands or natural resources. Tribes may join Forest Practice Review Boards where common interests occur, but it is not mandatory for counties to include or extend invitations to Indian tribes. The DNR's internal policies support notifying tribes of pending actions of interest to tribes that occur at the county level; however, the DNR does not formally provide guidance to counties regarding their interactions with tribes.

The DOC provides guidance to counties and local governments to assist them in GMA implementation but only limited guidance regarding the coordination of local plans with tribes. The *Short Course on Local Planning* guidance document is available to local governments, and short-course presentations are scheduled regularly throughout the state.[12] The short course comprises three-hour workshops providing insight on issues involving GMA planning, and at the request of a local government or a tribe the DOC provides a session addressing the interface between tribes and local governments.

WSDA also indicated that although no formal policies are in place requiring counties and local governments to coordinate with tribes, it did identify planning for critical-areas protection as an example where such plans would require prior tribal comment. A WSDA stewardship program requires the twenty-seven participating counties to engage with tribes when planning. The Voluntary Stewardship Program involves environmental conservation management and best agricultural practices. The DSHS and the Puget Sound Partnership indicated that there are no explicit policies providing counties or local governments guidance for coordination with tribes. The WDFW currently has no official policies to guide counties on interactions with Indian tribes, but senior tribal policy advisers described WDFW as currently developing agency policies regarding its communication and coordination with tribes.

The DAHP developed an agency guidance policy supporting tribal consultation, which is available to counties on the department's website.[13] The website provides information on tribal consultation through a guidebook, information on section 106 of the National Historic Preservation Act of 1966,[14] and the National Association of Tribal Historic Preservation Officers best practices. These documents provide information on forming agreements with tribes, and several tribes list their own preferred consultation methods at the DAHP website.

The DOT government-relations tribal liaison posts on its website tribal contact information for counties and local governments.[15] DOT policies regarding county and tribal coordination relates to Regional Transportation Planning Organizations and Metropolitan Planning Organizations. The DOT encourages local governments and organizations, counties, and Indian tribes to coordinate and cooperate in transportation-systems planning and local funding opportunities. Its website provides information on Tribal Transportation Planning Organizations,[16] which encourage the formation of cooperative relationships with regional and local governments and with nongovernmental entities to obtain funding for transportation projects.

Conclusion

The review of Washington State laws and regulations shows certain patterns and disparities. The promotion of intergovernmental cooperation between local governments and Indian tribes, including collaboration and consultation, are present but lack a necessary mandatory requirement. State agencies have taken progressive steps under the Centennial Accord to facilitate effective relationship building with tribes but generally only

informally encourage such collaboration at the local level. However, the promotion of inclusionary participation at the local level may be deterred due to the vague or nonmandatory language in many statutes regarding a requirement for tribal participation in growth-management activities. Effective intergovernmental cooperation occurs largely at the state–tribal level and on an ad hoc basis between local governments and tribes.

The guidance provided in state regulations and laws also shows disparities between different plan elements in comprehensive planning. Although natural resources are most prominently addressed in comparison to other comprehensive planning elements, policy guidance promoting tribal participation in local governments' comprehensive plans remains largely absent.

State laws and regulations acknowledge the importance of direct consultation with Indian tribes to address issues of mutual concern. Achieving meaningful coordination with tribes is well understood by most state agencies that have adopted government-to-government agreements with tribes. However, these government-to-government approaches fostering cooperation between tribal and local governments in comprehensive planning have been achieved in only limited cases. There remain inconsistency and gaps between state-agency practices in promoting intergovernmental cooperation with tribes and comprehensive planning practices at the local level.

Chapter 6 Endnotes

[1] The research for this section was conducted in part as a graduate research thesis by Elliot Winter in fulfillment of the requirements for a master's degree in environmental studies at Western Washington University, under the direction of academic supervisor Professor Nicholas Zaferatos.

[2] RCW 43.376.050 requires meetings with statewide elected officials and tribal leaders to address issues of mutual concern. RCW 43.376 pertains to the state's executive government-to-government relationship policy with Indian tribes.

[3] WAC 182-546-5200, DOH nonemergency-transportation broker and provider requirements.

[4] WAC 173-100-050, WAC 173-100-090, WAC 173-157-200, WAC 173-204-415, WAC 173-501-030, WAC 173-532-055, WAC 173-500-080, WAC 173-150-090.

[5] WAC 173-700-100, WAC 173-700-102, WAC 173-700-220, WAC 173-700-222.

[6] WAC 173-303-902, WAC 173-340-600, WAC 173-340-360, WAC 173-340-720, WAC 173-183-230, WAC 173-360A-0130.

[7] WAC 173-26-251, WAC 173-200-090, WAC 173-270-040, WAC 173-360-530, WAC 365-190-040, WAC 365-190-060, WAC 365-190-080, WAC 365-190-130.

[8] WAC 173-26-221.

[9] WAC 365-190-130, fish and wildlife habitat-conservation areas. Fish and wildlife habitat-conservation areas contribute to the state's biodiversity and are present on both publicly and privately owned lands. Designating these areas is an important part of land-use planning for appropriate development densities, urban growth area boundaries, open-space corridors, and incentive-based land-conservation and stewardship programs.

[10] WAC 182-546-5200, nonemergency transportation broker and provider requirements: "(2) Brokers. (f) Must negotiate in good faith a contract with a federally recognized tribe that has all or part of its contract health service delivery area, as established by 42 C.F.R. Sec. 136.22, within the broker's service region, to provide transportation services when requested by that tribe. The contract must comply with federal and state requirements for contracts with tribes. When the agency approves the request of a tribe or a tribal agency to administer or provide transportation services under WAC 182-546-5100 through 182-546-6200, tribal members may obtain their transportation services from the tribe or tribal agency with coordination from and payment through the transportation broker."

[11] WAC 173-700-102, applicability to tribal banks: "(2). Proposed tribal banks which are located outside of Indian Country and partially or wholly on lands under state jurisdiction are not covered under this section and are subject to the requirements of this chapter."

[12] *Short Course on Local Planning*, n.d., at https://www.commerce.wa.gov/serving-communities/growth-management/short-course/.

[13] DAHP website, at https://dahp.wa.gov/archaeology/tribal-consultation-information.

[14] Section 106 of the National Historic Preservation Act requires federal agencies to take into account the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation with a reasonable opportunity to comment. In addition, federal agencies are required to consult on the section 106 process with State Historic Preservation Offices, Tribal Historic Preservation Offices, Indian tribes (including Alaska Natives), and Native Hawaiian Organizations (National Park Service American Indian Liason Office, 2012).

[15] See the DOT website at http://wsdot.wa.gov/tribal/default.htm.

[16] See the DOT website at http://wsdot.wa.gov/planning/Tribal/default.htm.

7

The Status of intergovernmental Agreements in Washington State

Survey of Washington State Local and Tribal Intergovernmental Agreements

Forty current or recently expired memorandums of understanding (MOUs) and intergovernmental agreements (IGAs) executed between tribes and local governments in the Emerald Corridor were identified by searching online archives and government websites and by surveying county and tribal planning agencies. The subject matter of each agreement varies and often encompasses more than one issue of mutual concern, such as land use, natural resources, transportation, economic development, public safety, and public services. More than 25% of all agreements concern natural resources, including collaboration in habitat protection, salmon restoration, water quality, and minimum instream flows. These agreements demonstrate that coordination of government services is occurring among many tribes and local governments in the state.

The lack of a formal state requirement for guiding local governments in collaborative planning with Indian tribes has resulted in informal or ad hoc agreements. MOUs and IGAs between local governments are supported under Washington State governmental coordination policies (RCW 39.34RCW, RCW 17.10.201, and RCW 89.08.510) and executive-agency rules (WAC 173-500-080). MOUs and IGAs exist among all counties and local governments in the state, but not every tribe has entered into such agreements with their respective local governments. Several counties and tribes have formed working relationships to address a variety of planning issues of common interest to both governments.

Of the forty identified MOUs and IGAs executed between tribes and counties in the Emerald Corridor, between two and nine agreements have been made with several counties simultaneously. Several agreements occur among local governments within a county or between Indian tribes and local governments. Those agreements that include municipal governments and Indian tribes were counted as part of the total number of agreements with counties. A summary of these agreements is provided in subsection 7.2 below.

The greatest number of tribal agreements have been made with Whatcom County (nine). These agreements concern watersheds, natural resources, land-use planning, and services. All tribes in the Emerald Corridor have entered into at least one MOU or IGA with a county or a local government. The distribution of agreements among tribes and local governments is presented in table 7.1.

Table 7.1. Interlocal Agreements between Tribes and Local Governments in Washington State

Tribe	**Number of Agreements Identified**
Chehalis	1
Cowlitz	4
Jamestown S'Klallam	2
Lummi	6
Muckleshoot	1
Nisqually	3
Nooksack	5
Port Gamble S'Klallam	1
Puyallup	1
Sauk-Suiattle	2
Skokomish	1
Snoqualmie	1
Stillaguamish	3
Squaxin Island	1
Suquamish	1
Swinomish	3
Tulalip	3
Upper Skagit	1

Eleven categories for mutual collaboration were identified in these agreements (table 7.2). Natural-resources management is the most common subject matter. Public protection services are the subject of eight agreements supporting coordinated efforts between tribal and county or local government police enforcement. Each agreement provides for a termination clause upon notification to the other party, and each party recognizes the jurisdictional authority claimed by the other party. Table 7.3 identifies the subject matter of each agreement entered into with local governments by each tribe.

Table 7.2. Subject Matter Addressed in Various Agreements with Tribes in Washington State

Subject of Agreement	**Number of Agreements**
Capital facilities	2
Economic development	5
Health and human services	2
Housing	2
Land use	6
Natural resources	13
Police services	8
Ports	1
Rural development	2
Transportation	7
Utilities and services	6

Table 7.3. MOUs and IGAs between Counties and Tribes in the Emerald Corridor

MOU/IGA	Year	Land Use	Housing	Capital Facilities	Utilities and Public Services	Rural Development	Transportation	Economic Development	Natural Resources	Ports	Health and Human Services	Police and Jail Services
Chehalis & Thurston county	*2016*				■							
Cowlitz Tribe & Clark County	*2017*											■
Cowlitz Tribe & Clark County	*2016*				■							
Cowlitz Tribe & Cowlitz County Health and Human Services	*2016*										■	
Cowlitz Tribe & City of La Center	*2017*				■							
Jamestown S'Klallam Tribe & City of Squim	*2014*						■					
Jamestown S'Klallam Tribe & Clallam County	*2010*						■					■
Lummi Nation, Whatcom Co., Bellingham, PUD	*1998*								■			
Lummi Nation, Nooksack Tribe, Bellingham, Whatcom Co	*2000*						■		■			
Lummi Nation & Whatcom Transportation Authority	*2011*						■	■	■			
Lummi Nation Business Council & Whatcom County	*1993*	■					■	■	■			
Lummi Nation, Nooksack Tribe, Whatcom County, others	*2016*							■	■			
Lummi Nation & Whatcom County	*2017*							■	■			
Muckleshoot Tribe & King County	*2010*	■	■		■	■	■	■	■		■	
Nisqually Indian Tribe & Thurston County	*2011*						■					
Nisqually Tribe & City of Bonney Lake	*2016*											■
Nooksack Indian Tribe & Whatcom County	*2016*						■					
Nooksack Tribe & Whatcom County	*2016*								■			
Nooksack Tribe & Whatcom County	*2015*								■			
Port Gamble S'Klallam Tribe & Kitsap Public Health District	*2017*								■			
Puyallup Indian Tribe & Pierce County Fire District No. 14	*2017*				■							
Sauk-Suiattle Tribe & Snohomish County	*2017*						■	■				
Skokomish Tribe, Mason County Public Utility Dist No. 1	*2006*								■			
Snoqualmie, Tulalip Tribes, Carnation, Duvall, N. Bend	*2015*								■			
Squaxin Island Tribe & Mason County Sherriff's Office	*2016*											■
Stillaguamish Tribe & City of Stanwood	*2013*								■			
Stillaguamish Tribe & Snohomish County	*2017*											■
Suquamish Tribe, Kitsap County, City of Bainbridge Island	*2018*						■					
Swinomish Tribe & Skagit County	*1987*	■										
Swinomish Tribe & Skagit County	*1998*	■										
Swinomish Tribe & Skagit Council Of Governments	*2014*			■				■				
Tulalip Tribes & Snohomish County	*2013*											
Tulalip Tribes, Stillaguamish Tribe, Sauk-Suiattle Tribe	pending	■	■	■	■	■	■	■	■	■	■	■
Upper Skagit Tribe & Snohomish County	*2012*											

Examples of Tribal–Local Agreements in Washington State

Agreements among tribes and counties in Washington State include:

Confederated Tribes of Chehalis & Thurston County, March 3, 2016: Utility Services

This IGA between Thurston County and the Confederated Tribes of Chehalis provides for sewer, water, and street services on the reservation. The Chehalis Tribes agree to design and fund sewer mains, pump stations, vacuum stations, and manholes necessary to comply with county codes and standards. All permits from the tribes are approved through the county during and after the construction. The county agrees to the construction after review and acceptance of the designs. Disputes during the construction will be deferred to the tribal and county project engineer for a decision. Disputes are to be resolved in good faith, but if resolutions cannot be reached, both parties agree on a mediator for resolution.

Cowlitz Tribe & Clark County, April 18, 2017: Police Services

This IGA between Clark County and the Cowlitz Indian Tribe provides law enforcement and prosecution between the county and tribe. The tribe agrees to adopt Washington State criminal laws for use on the reservation, which grants the county the authority to enforce the adopted state laws on the reservation. This agreement also grants cities that are parties to the Mutual Aid Law Enforcement Agreement (2017) the ability to enforce the same adopted state laws on the reservation. County sheriffs or city police will hold Cowlitz tribal members detained for criminal incidents on the reservation until federal law enforcement is contacted and can transfer them. The Clark County Prosecuting Attorney's Office shall have jurisdiction to prosecute individuals. Clark County provides court services, detention, indigenous defense, juvenile services, and probation services for the reservation under the terms of the agreement. Dispute resolution under the agreement is based on good faith between the county and the tribe, but if the parties cannot agree, mediation will be conducted by a mutually accepted mediator.

Cowlitz Tribe & Clark County, May 24, 2016: PUD Services for Casino

This IGA between the Cowlitz Tribal Gaming Authority, the Cowlitz Tribe, and the Clark County Public Utility District (PUD) provides for water services. The agreement provides water services to the Cowlitz Tribal Gaming Authority and the Cowlitz Tribe. The Tribal Gaming Authority, with PUD approval, will construct water lines, and ownership of the water lines will be transferred to the PUD. In addition, the PUD agrees to construct water lines along other areas on the reservation. The term of this agreement is effective until both parties' obligations have been completed or the agreement is mutually terminated.

Cowlitz Tribe & City of La Center, December 2, 2017: Utility Services

This IGA between the Cowlitz Indian Tribe and the City of La Center provides for establishing utility services. The Cowlitz Tribe agrees to request approval from the federal government to grant the City of La Center a utility easement for future extension of the city's municipal sanitary sewer system to the reservation and future nontribal members who may live south of the reservation if Clark County approves an expansion of the city's urban growth boundary. The agreement lays out the steps for establishing the utility easement as well as the terms of the agreement. The agreement is to last in perpetuity unless terminated by a written document by either party with prior approval of the tribal council and the city council.

Cowlitz Tribe & Cowlitz County Health and Human Services, September 20, 2016: Healing of the Canoe Program

The IGA is an amendment to an existing agreement between the Cowlitz Indian Tribe and Cowlitz County Health and Human Services. The amendment continues funding for cultural elements and activities as part of the Healing of the Canoe Program for Cowlitz County youth.

Jamestown S'Klallam Tribe & City of Sequim, June 10, 2014: Tribe Funding City Roads

This IGA between the Jamestown S'Klallam Indian Tribe and the City of Sequim provides for the tribe to identify portions of city roadways in the tribe's Tribal Transportation Program road inventory for the purpose of funding for future projects. These roadways remain open to the public.

Jamestown S'Klallam Tribe & Clallam County, July 13, 2010: Police Services

This IGA between the Jamestown S'Klallam Indian Tribe and the Clallam County Sheriff's Office provides law enforcement resources to the tribe, utilizing the existing federal jurisdiction framework, supplemented by tribal law. County employees will enforce tribal law on the reservation, and any prosecutions shall occur in the Jamestown tribal court. The Clallam County Sheriff's Office may operate as the first-response entity for the FBI in certain circumstances and will enforce criminal law provisions of the state law that apply to non-Indians in Jamestown Indian country. This agreement involves funding from the U.S. Bureau of Indian Affairs (BIA) and provides service fees to the County Sheriff's Office. Disputes are referred to the county sheriff and the tribe's designee for settlement. The duration of this agreement is indefinite or until either party terminates it.

Lummi Nation, Whatcom County, Bellingham, & Bellingham PUD, October 29, 1998: Watershed Management ESHB 2514

The IGA is between the Lummi Nation, Whatcom County, City of Bellingham, and Whatcom County PUD No. 1. The purpose of the agreement is to establish the local decision-making group to develop and implement a watershed-management plan that fulfills the requirements and options authorized by Engrossed Substitute House Bill (ESHB) 2514. The agreement lays out the initial tasks for the planning unit as well as the objectives of the planning unit and other tasks. The tasks include: identifying funding sources, determining instream flows for fisheries resources, estimating water-right seniority, collecting data, and coordinating work with the fish-

habitat team created under ESHB 2496. The lead agency is Whatcom County. Any party may terminate its participation with written notice of intent and a formal termination letter.

Lummi Nation, Nooksack Tribe, Bellingham, Whatcom County, January 14, 2000: Watershed Planning

The IGA is between the Lummi Nation, Nooksack Tribe, PUD No. 1, City of Bellingham, and Whatcom County to establish administrative procedures to carry out RCW 90.82 (watershed planning). The agreement designates a fund, with the Whatcom County treasurer as the location for all acquired funds or operation, and said funds to be authorized for expenditure in accordance with procedures dated March 11, 1999. The agreement commenced on December 1, 1999, and continues indefinitely until cancelled by consensus of the parties.

Lummi Nation & Whatcom Transportation Authority, June 28, 2011: Transit Services

This IGA is between the Lummi Nation and Whatcom Transportation Authority (WTA) for establishing terms and conditions under which the Lummi Nation may operate its transit service within the WTA Public Transportation Benefit Area. The agreement allows the Lummi Nation to operate its transit service between points within the Lummi Reservation and various stops within Ferndale, Washington. The term of the agreement is for a one-year period from the date of the agreement and automatically renews on an annual basis until or unless the agreement is terminated with thirty days' written notice.

Lummi Nation & Whatcom County, May 1, 2017: Wetland Mitigation High Creek

The IGA between the Lummi Nation Wetland and Habitat Mitigation Bank and Whatcom County Flood Control Zone District provides for the payment of the High Creek Channel Maintenance and Sedimentation Collection Area Installation. The purchase of mitigation credits from the Lummi Nation Wetland and Habitat Mitigation Bank by the Whatcom County Flood Control Zone District offsets the impacts of the proposed project.

Lummi Nation, Nooksack Indian Tribe, Whatcom County, Cities of Bellingham, Blaine, Everson, Ferndale, Lynden, Nooksack, & Sumas, & Whatcom County PUD No. 1, December 14, 2016: Function of WRIA 1 Management

The IGA is between the Lummi Nation, Nooksack Indian Tribe, Washington State Department of Fish and Wildlife, Whatcom County, PUD No. 1 of Whatcom County, and the cities of Bellingham, Blaine, Everson, Ferndale, Lynden, Nooksack, and Sumas for the management and planning of Water Resource Inventory Area (WRIA) 1. The agreement incorporates the interlocal agreement of 1999, which established the Watershed Management Protection Joint Board, and the interlocal agreement of 2004, which established the WRIA 1 Salmon Recovery Board. Guiding principles, budgetary and financial authority, record keeping, and party participation are outlined in the agreement. Each entity participating in the agreement may cancel its participation at any time.

Lummi Nation Business Council & Whatcom County, November 3, 1993: Joint or Cooperative Projects

The interlocal agreement is between the Lummi Nation Business Council and Whatcom County and amends the interlocal agreement of August 25, 1992. The amended agreement provides for improvements to portions of Lummi Shore Road, improving infrastructure on, over, and under the rights-of-way of Lummi Shore Road. The agreement outlines funding through the three phases of the project and recommends the U.S. Army Corps of Engineers perform an emergency shoreline-protection project as well as environmental, drainage, and roadway improvements. The agreement may be terminated if either party does not comply fully with the terms.

Muckleshoot Tribe & King County, July 6, 2010: Formal Communication and Planning

The memorandum between the Muckleshoot Indian Tribe and King County provides for a good-faith government-to-government relationship and facilitation of communication and cooperation. The parties agree to discuss issues, concerns, policies, priorities, actions, and initiatives in which both parties may have interests. The

parties also agree to dispute-resolution mechanisms and cooperation in projects, studies, development and resource management, and protection of mutual areas of benefit. A policy committee is designated as an appropriate forum for discussion and agreements related to these subjects. This policy committee consists of the Muckleshoot Tribal Council chair and one additional member of the tribal council, the King County executive, and chair of the King County Council.

Nisqually Indian Tribe & Thurston County, February 22, 2011: State Route 510 Traffic Study

The IGA is between Thurston County and the Nisqually Indian Tribe for the performance of governmental activities. The agreement permits the parties to cooperate in the performance of a traffic study along the State Route 510 corridor. A professional engineer selected by the tribe and county will perform a traffic study. The tribe will also coordinate the traffic study with the Washington State Department of Transportation and the Thurston Regional Planning Council. Each party may terminate the contract upon thirty days' written notice.

Nisqually Tribe & City of Bonney Lake, January 26, 2016: Jail Services for Nisqually Tribe

The IGA is between the City of Bonney Lake, Pierce County, and the Nisqually Indian Tribe and provides for the housing of inmates in the Nisqually Tribal Jail. The agreement is in effect for a term of five years unless terminated at any point by either party.

Nooksack Indian Tribe & Whatcom County, October 17, 2016: S. Fork Nooksack River Bridge Replacement

The IGA between Whatcom County and the Nooksack Indian Tribe provides for the Potter Road/South Fork Nooksack River Bridge replacement project. Both parties in the agreement have received funding from federal sources for the replacement project. The tribe agrees to pay the county BIA funds as a contribution toward completion of the bridge-replacement project. The term of this agreement is from the date of execution and ended on December 31, 2017, unless terminated sooner or extended.

Nooksack Tribe & Whatcom County, February 23, 2016: Habitat Restoration and Monitoring

> The IGA is between Whatcom County Parks and Recreation and the Nooksack Indian Tribe for salmon-recovery efforts funded by the Salmon Recovery Funding Board. The agreement includes two parcels of land within WRIA 1 for the enhancement of salmon habitat. The agreement outlines the project parameters for the enhancement projects. The agreement may be terminated by the grantee at its own discretion. The agreement lasts for a period of twenty years.

Nooksack Tribe & Whatcom County, August 12, 2015: LIO Ecosystem Recovery Plan

> Whatcom County Public Works and the Nooksack Indian Tribe entered into an IGA for the provision of technical support to the Whatcom Local Integration Organization (LIO) for tasks associated with developing the Whatcom LIO Ecosystem Recovery Plan and two-year implementation plan. Whatcom County is acting as the fiscal agent for the WRIA 1 joint board to execute this agreement under the LIO grant agreement with the Puget Sound Partnership.

Port Gamble S'Klallam Tribe & Kitsap Public Health District, February 21, 2017: Environmental Health Services

> This IGA between the Kitsap County Public Health District and the Port Gamble S'Klallam Tribe provides for environmental health services to the tribe. The agreement details the Public Health District's provision of an environmental health specialist for food-safety training, inspection, and consultative services to the Port Gamble S'Klallam.

Puyallup Indian Tribe & Pierce County Fire District No. 14, November 29, 2017: Emergency Medical Services and Fire Services to Tribe

> This IGA between Pierce County Fire District No. 14 and the Puyallup Indian Tribe provides for emergency medical services and fire protection. The agreement establishes that Fire District No. 14

will provide fire protection and emergency medical services to all persons located on tribal property within Pierce County and within the boundaries of the Fire District. The term of the agreement is for an indefinite period unless terminated by either party with sixty days' written notice or immediately with cause. Disputes are settled under mediation, moving to arbitration if mediation fails, and then to court if all dispute-resolution methods have failed.

Sauk-Suiattle Tribe & Snohomish County, July 7, 2017: Equipment Maintenance and Repair

This IGA between the Sauk-Suiattle Tribe and Snohomish County provides for the maintenance and repair of construction equipment and tribal vehicles. The term of the agreement is from August 1, 2016, through December 21, 2020, and may be extended for an additional five years with mutual agreement from the parties.

Skokomish Tribe & Mason County PUD No. 1, August 31, 2006: Hood Canal Water Quality Protection

The MOU between the Skokomish Indian Tribe, PUD No. 1, and Mason County provides for the improvement and protection of water quality within Hood Canal. The memorandum pertains to sewage disposal in the lower Hood Canal for the protection of public health and of marine and near-shore resources. The memorandum outlines the understanding and responsibilities of each party in the improvement of water quality, including developing planning strategies, taking action, monitoring water quality, ensuring compatibility with local, state, and tribal plans, reporting information, and funding the project.

Snoqualmie Tribe, Tulalip Tribes, Cities of Carnation, Duvall, North Bend, and Snoqualmie, & Town of Skykomish, July 1, 2015: WRIA 7 Planning

This IGA for the Snoqualmie and South Fork Skykomish Watershed within WRIA 7 is entered into by King County, the Cities of Carnation, Duvall, North Bend, and Snoqualmie, the Town of Skykomish, the Tulalip Indian Tribes, and the Snoqualmie Indian Tribe. The agreement provides for long-term watershed planning

and the protection of salmon, bull trout, and steelhead. The agreement provides a structure of communication, coordination, and implementation of watershed planning within the Skykomish and Snoqualmie watersheds.

Squaxin Island Tribe & Mason County Sherriff's Office, April 1, 2016: Cooperative Police Services on Reservation

The MOU between the Squaxin Island Tribe and the Mason County Sherriff's Office (MCSO) provides for cooperative law enforcement services on and off the reservation. The MCSO provides for the tribe to be apprised of any investigation related to the tribe. The MCSO is permitted to make arrests on state warrant for an Indian or non-Indian on and off the reservation. The tribe may make an arrest on tribal warrant for an Indian or non-Indian on or off the reservation within the usual and accustomed fishing grounds or within unclaimed lands on which the tribe has treaty hunting and gathering rights. State officers may serve state search warrants on the reservation, and the MCSO may conduct any resulting search in compliance with tribal law. The MCSO will also obtain assistance from the tribe when serving search warrants on reservation. The agreement establishes permission for detention of Indians and non-Indians on and off the reservation as well as permits the transfer of detained individuals between the MCSO and the Squaxin Island Tribe. The term of the agreement is ten years from the date of signing unless terminated by either party with thirty days' written notice.

Stillaguamish Tribe & City of Stanwood, May 1, 2013: Coordinated Watershed Management

This MOU between the Stillaguamish Tribe and the City of Stanwood provides for coordinated watershed improvements on the Stillaguamish River. It acknowledges the mutual responsibility for Chinook salmon and other species under the state Growth Management Act and the U.S. Endangered Species Act of 1973. The term of this memorandum is open until either party gives written notice of cancelation.

Stillaguamish Tribe & Snohomish County, October 9, 2017: Jail Services

This IGA provides for jail services between Snohomish County and the Stillaguamish Indian Tribe. It authorizes the county to provide jail services to the tribe. The tribe and tribal inmates are subject to county ordinances, policies, and procedures. Tribal officers, employees, or agents will have access to tribal inmates, and the tribe will arrange for transportation and security of tribal inmates to the jail and to tribal court. Either party has the right to terminate the agreement at any time or without cause with ninety days' notice. This agreement may be extended for up to two additional three-year terms.

Suquamish Tribe, Kitsap County, City of Bainbridge Island, City of Poulsbo, Kitsap Transportation Benefit Area, February 20, 2018: State Route 305 Study

This IGA between the Kitsap County Transportation Benefit Area, the City of Bainbridge Island, the City of Poulsbo, Kitsap County and the Suquamish Tribe provides for the participation in the State Route 305 (SR 305) Needs and Opportunities Study. The study establishes transportation-system performance measures and develops a list of strategies and project priorities for corridor improvements along the length of SR 305. Dispute resolution is laid out in three steps, starting with informal discussions with designated representatives, moving to nonbinding mediation if a solution or agreement cannot be reached in the first step, and eventually moving to nonbinding arbitration if the parties are not able to mutually resolve a dispute through mediation.

Swinomish Tribe & Skagit County, 1987: Model Land-Use Agreement

The MOU is between the Swinomish Indian Tribe and Skagit County for the establishment of procedures for the formulation and administration of a cooperative land-use-planning program. It designates responsibilities and areas of interests between the two governments. The Swinomish Planning Advisory Board is designated as the facilitator of disputes and must monitor the progress of cooperative planning processes and make recommendations to the County Planning Commission and Swinomish Planning Commission.

Swinomish Tribe & Skagit County, April 14, 1998: Cooperative Land-Use Planning Program

> The IGA furthers the 1987 MOU by identifying cooperative implementation steps in administering the Swinomish Tribe and Skagit County joint comprehensive plans. A unified process for permit review is established in the memorandum, with applications being submitted to both or either government agencies. If an application is filed with one agency, that application will be forwarded to the planning department of the other government. The memorandum was signed with the provision of a biannual review of the agreement and modifications as needed thereafter.

Swinomish Tribe & Skagit Council of Governments, May 21, 2014: Regional Planning

> This MOU is an agreement between the Cities of Anacortes, Burlington, Mount Vernon, and Sedro-Woolley; the Towns of Concrete, Hamilton, La Conner, and Lyman; Skagit County; Skagit PUD No. 1; the Port of Anacortes; the Port of Skagit County; Skagit Transit; the Swinomish Tribal Community; and the Samish Indian Nation for the establishment of a regional agency, the Skagit Council of Governments. The purpose of the agreement is regional transportation planning, metropolitan planning, public works, economic development, and the study of regional and governmental problems. It is also meant to foster economic development and other regional planning activities designated by the governments. This council of governments fulfills the roles of a Regional Transportation Planning Organization and a Metropolitan Planning Organization.

Tulalip Tribes & Snohomish County, May 30, 2013: Coordinated Planning and Info Sharing.

> This MOU between the Tulalip Tribes and Snohomish County provides for the establishment of coordinated long-range planning and information sharing. Its goals are to reduce conflict and to achieve consistency between the two governments' comprehensive plans. This memorandum includes the Tulalip Reservation and extends beyond the exterior boundaries of the reservation to

unincorporated Snohomish County, where the tribe has reserved off-reservation treaty rights. One focus of the memorandum is to address nontribal fee lands and nontribal members' interests on the Tulalip Reservation.

Tulalip Tribe, Stillaguamish Tribe, & Sauk-Suiattle Tribe: Tribal Element in County Comprehensive Plan (draft)

This pending MOU between the Tulalip Tribes, the Sauk-Suiattle Tribe, the Stillaguamish Tribe, and Snohomish County provides for the incorporation of tribal elements into the county comprehensive plan. The plan outlines goals for the incorporation of tribal culture, improvement of communication and the establishment of regular and meaningful consultation and collaboration with tribes, and the establishment of coordinated planning and resolution on issues of mutual concern. Each tribe will outline specific goals, objectives, and policies to be incorporated into the Snohomish County Comprehensive Plan. This proposed agreement has not been approved by the Snohomish County government.

Upper Skagit Tribe & Snohomish County, September 5, 2012: Jail Services

This IGA between Snohomish County and the Upper Skagit Tribe provides for jail services for the tribe. When the tribe desires to jail tribal inmates at the county facility, the agreement establishes protocols for booking and transfer. The agreement also stipulates tribal responsibility for transporting inmates to and from court and county responsibility for providing transportation to medical facilities. The agreement term is from June 1, 2012, to December 31, 2017, or until terminated by either party.

8

Model Agreements for Establishing Intergovernmental Planning Coordination

This section provides guidance for structuring intergovernmental agreements (IGAs) between Indian tribes and local governments. The guidance addresses the process for developing and adopting a memorandum of agreement (MOA) for tribal participation in the formulation of region-wide planning policies (RPPs) as well as for establishing a collaborative process to develop comprehensive plans for Indian reservations.

Framework for Developing Interlocal Agreements with Indian Tribes

This section sets forth a "model agreement" among counties, cities, county Public Utility Districts (PUDs), port districts, and Indian tribes having regulatory authority over lands within the watershed, bioregion, or ecosystem described ("planning region") for a collaborative process for developing, approving, and adopting RPPs and for a collaborative process in developing comprehensive plans for Indian reservations.

Definitions

- *Planning region*: Describes the geographical boundaries of the area subject to the agreement
- *Counties*: Identifies the counties that will be parties to the agreement
- *Cities* and *towns*: Identifies the cities and towns that will be parties to the agreement
- *County PUDs*: *Identifies any county PUD that will be a party to the agreement*
- *GMA deadlines*: The deadline for RPPs shall be no later than two

years prior to the deadline contained in the Growth Management Act for the county's next comprehensive plan revision.
- *Ports*: Identifies any port authorities that will be parties to the agreement
- *Indian tribes*: Identifies all of the federal recognized Indian tribes that will be parties to the agreement

Purposes and Intent

It is the intent of the parties entering into IGAs to cooperate and provide visionary leadership on regional plans, policies, and issues. It is the purpose of such agreements to enhance the parties' ability to improve the present health, safety, convenience, and welfare of their citizens and to plan for the future development in a manner that achieves a region-wide pattern of community building, land use, and conservation that reflects the environmental, economic, aesthetic, and social values of all of the region's residents.

The IGA is intended to improve the parties' collective ability to address pertinent issues in an integrated, coordinated, and ongoing manner and to respond flexibly and intelligently to events that affect the welfare of the region's citizens. The agreement is also intended to encourage the effective design and implementation of appropriate tools—both regulatory and nonregulatory—that can provide the means to manage and direct growth in a manner that meets the goals of the Washington State Growth Management Act (GMA).

Indian Tribes

Indian tribes ("tribes") that have chosen to become parties to this agreement do so voluntarily and in a spirit of cooperation. They are not required to comply with the GMA but join in the regional planning process as a neighbor and participating governmental entity in the planning region described in this agreement. Their power and authority is inherent and not derived from the State of Washington. Each signatory tribe is a federally recognized sovereign government and a self-governing community under federal law. Tribes have inherent governmental authority to make and enforce laws that regulate the lands and activities within their reservations and that regulate the activities of their members when they exercise off-reservation treaty rights. Enrolled members of Indian tribes are citizens of the United States and the State of Washington as well as citizens of their own tribes. Because of Indian tribes' unique sovereign status, the State of Washington and the federally recognized tribes within (and adjacent to) Washington entered into two agreements that

recognized their respective sovereign status and established a "government-to-government" relationship: the Centennial Accord, signed in 1989, and the Millennium Agreement, signed in 1999. Those two agreements provide a basis and serve as a framework for the tribes' consent to enter into this agreement.

Indian Reservations

Like the state, many Indian tribes are fully engaged in planning for the future on their reservations. Tribes are planning for future population growth, increased demand on natural resources, the need for expanded utility infrastructure, and the impacts of climate change on low-elevation populations and on the ecosystems that support treaty-protected natural resources. As responsible local governments, many Indian tribes also now provide many of the urban services required to support urban development on Indian reservations.

Urban Growth Areas on Indian Reservations

The GMA has required counties to consult with cities and each city to propose an appropriate urban growth area (UGA) within which the city is located. If the county and city cannot mutually agree on a UGA, the city may appeal the county's decision to the state Department of Commerce. For UGAs located within Indian reservations, it is essential that counties also consult with the tribe where the UGA will be located and mutually agree with that tribe on the location and boundary of any reservation UGA.

Lands Not within Reservations

Like cities and local utility districts within the planning region, Indian tribes have interests beyond the boundaries of their respective jurisdictions. Cities and tribes are concerned about surface and groundwater that supply potable water for their residents. They are also concerned about regional transportation; the location of public facilities, such as schools, libraries, and sewer, water, and other utility infrastructure; economic development, including access to fiber optic cable and high-speed internet and telecommunication services; employment; affordable housing and the provision of other social services; the protection of natural resources that provide recreational and commercial opportunities for their residents; and the impacts from climate change. In addition to these municipal interests, tribes also have important interests in treaty-protected off-reservation natural resources, including salmon and shellfish harvest, hunting and gathering

activities, and habitat protection. Taken together, all of the parties to this agreement—including tribes—have a collective interest in planning for and protecting lands beyond their jurisdictional boundaries and throughout the planning region. The parties therefore agree that tribes will be active members of the Region-wide Planning Policies Committee ("RPP Committee") and that tribes will work together with other regional governments to address the policy topics identified in section 8.7.1 and to develop RPPs that meet the needs of all the residents in the planning region. The parties recognize that there may be disagreement over broader statewide issues and that those issues may be best addressed on a statewide rather than local level.

Reservation Comprehensive Plans

In addition to participation in the development of the RPPs, one or more of the signatory tribes may also desire to enter into a joint planning process with the county in which it is or they are located as well as with other local governments that share mutual interests with the tribe to revise and update their respective comprehensive plans. Unlike cities, the county has assumed partial regulatory jurisdiction for lands held in fee title located within certain Indian reservations. In order to alleviate the potential conflict that can result from the concurrent application of two inconsistent regulatory programs within the reservation, the parties agree to consider a coordinated comprehensive land-use-planning process to revise the comprehensive plans of the tribe and county for land areas contained within the boundaries of the reservation. The tribe and the county would implement separate comprehensive land-use-policy programs under their separate and individual powers and authorities in a manner that would not limit or transfer any degree of jurisdiction held by either or any of the parties or be interpreted or misconstrued as a recognition of jurisdiction by one party over another. A model intergovernmental agreement for establishing a coordinated process for developing comprehensive plans for an Indian reservation is provided in subsection 8.8.

Preparing a Region-wide Planning Policy

The RPP Committee shall be responsible for developing and drafting policies pertaining to those items listed in subsection 8.7.1 ("Policy Topics") of this agreement.

To assist in regional cooperation and the development of complimentary comprehensive plans, it is the intent of the parties to this agreement to

cooperatively develop and support a planning organization to recommend RPPs and thereby to ensure the adoption of consistent comprehensive planning policies throughout the region. The primary functions of this planning organization shall be to:

- Develop, as appropriate, policies for transportation, growth management, natural resources, environmental quality, and other topics determined by the GMA Committee's Steering Committee;
- Provide agreed to and accepted data and analysis to support local and regional decision making;
- Build community consensus on regional issues through information sharing and citizen involvement at the local level; Build intergovernmental consensus on regional plans, policies, and issues, and advocate for local implementation;
- Establish a mechanism to systematically and logically update the county-wide planning policies (CPPs) as necessary; and
- Develop procedures for siting regional essential public facilities that will include regional input.
-

Policy Topics - RPPs will be developed to address the following subjects:

- Methods to implement comprehensive plans and UGAs that meet the population forecast provided by the Washington Office of Financial Management following the 2020 federal census
- Means to promote contiguous and orderly urban development and provision of urban services
- Siting of region-wide and state-wide public capital facilities
- Region-wide transportation facilities and strategies
- Provision and distribution of affordable housing for all economic segments
- Joint planning by affected counties, cities, and tribes within UGAs
- Promotion of economic development and employment, including the development of future commercial and industrial facilities
- Fiscal impact
- Environmental quality, including the potential impacts of climate change;
- Protection of natural resources

Membership of the RPP Committee - Each of the parties shall be represented on the RPP Committee by one elected member and one nonelected

member. Each representative may designate an alternate to attend meetings in the representative's absence.

Committee Meetings - Regular meetings of the RPP Committee shall be held monthly on the _____ day of each month at _____. The committee co-chairpersons may call special meetings with appropriate public notice. A Technical Advisory Committee consisting of city, county, and tribal planners shall be established to work at the direction of the CPP Committee

Citizen Participation - All meetings of the RPP Committee shall be publicized beforehand, and a time period for public comment shall be provided at each meeting. Each member entity shall provide for a public review of the draft policies among their constituent communities after the RPP Committee has referred the policies to each jurisdiction for review and ratification.

Attendance and Voting at Meetings - Each representative of the RPP Committee, elected and nonelected, shall have one vote on any item considered by the CPP Committee. Attendance shall be taken at all meetings, and a quorum established. A quorum shall consist of the attendance of one-half of the voting members plus one additional voting member. Decisions will be made by consensus. When consensus cannot be reached, issues will be decided by a super majority vote of 60% of those members present.

Officers - The RPP Committee shall appoint two co-chairpersons. One shall be a member representing a participating city, and one shall be a member representing the county. The duties of the co-chairpersons shall be to chair meetings of the RPP Committee and to execute such documents as may be approved by the committee.

Ratification of the RPP Document - The final draft of the completed RPP document will be referred by the RPP Committee to each of the parties to this agreement for public review and approval. Each jurisdiction may vary the process by which it approves the final draft document as long as it complies with the timeline set by the RPP Committee and meets the basic requirements of the planning-enabling legislation.

Staff Support and SEPA Responsibility - Participating counties, cities, and tribes receiving funding for the purpose of implementing the GMA shall provide staff support to the RPP Committee. It will be the responsibility of each member entity to provide for applicable review processes,

including the State Environmental Policy Act (SEPA), as necessary and as otherwise required by applicable laws.

Schedule for Adoption of County-wide Policies - A schedule attached to this agreement shall be prepared and adhered to in the development, approval, and adoption of RPPs.

County Adoption of RPPs - The Board of County Commissioners for each county that is a party to this agreement shall have the discretion to decline to adopt any specific RPP or set of RPP amendments proposed by the RPP Committee but may not change the proposed RPP or RPP amendments in any manner whatsoever. Any party may appeal the adoption of the RPPs or amendments to the RPPs as provided by the GMA (RCW 36.70A) or by applicable regulations in the Washington Administrative Code (WAC 197-11).

Withdrawal and Termination - Any party may withdraw from this agreement by providing sixty (60) days' written notice to the other parties. Any withdrawing party shall remain liable for costs incurred by the RPP Committee until the effective date of withdrawal. The parties hereto may terminate this agreement at any time by unanimous vote of the parties.

Amendments to Processes and Procedures in This Memorandum - Changes to processes and procedures in this agreement may be made by a majority vote of members of the RPP Committee.

Term - This agreement shall commence on the date that it is approved by all of the parties and shall remain in effect for a period of eighteen (18) months. This agreement shall automatically renew for a period of twelve (12) months unless terminated pursuant to subsection 8.7.11.

Jurisdiction - Nothing in this agreement shall limit or waive the regulatory authority or jurisdiction of any of the parties to this agreement.

Dispute Resolution

- *Application***.** This subsection applies only to the process for development of RPP recommendations unless otherwise agreed upon in writing by the voting parties.
- *Good-Faith Efforts***.** The parties shall seek in good faith to resolve any dispute arising out of or relating to this agreement and any policy, recommendation, statement of position, or other matter. In the event such dispute or conflict arises, the parties agree that, notwithstanding such dispute or conflict, they will make a good-faith effort to cooperate in continuing to work toward the successful completion of the activities envisioned by this agreement.

- *Notice of Dispute***.** If in disagreement with any RPP recommendation, the disputing party or parties shall provide the chairman of the RRP Committee with a signed written notice of such disagreement, identifying generally the nature of and circumstances that caused the disagreement.
- *Invocation of Alternative Dispute Resolution (ADR).* If the disagreement is not resolved to the disputing party's satisfaction within sixty (60) calendar days of submitting the written statement, the disputing party may invoke nonbinding ADR procedures as set forth below.
- *Cost of ADR Procedures.* The parties agree that half of the cost of any ADR procedures shall be borne by the disputing party or parties and the other half by the RPP Committee, with each party bearing its own preparation costs.
- *ADR Procedures.* The parties shall mutually agree on a mediator. If the parties cannot agree on a mediator, the parties may agree to use a neutral mediation service to appoint a mediator. The method and rules for any ADR procedure shall be as agreed by the parties, or if the parties cannot agree, mediation shall be administered in a manner determined by the mediator. All mediation proceedings shall be conducted within the planning region unless otherwise mutually agreed upon in writing by the parties. In the event that mediation does not result in an acceptable settlement within ninety (90) days from the selection of a mediator, the RPP Committee is authorized to take a final binding vote. The time periods specified in this subsection may be shortened, if necessary, to meet any compliance deadline imposed by a decision of the Growth Management Hearings Board, the courts, or the state legislature.

9

Growth Management Act Legislation, the Voluntary Stewardship Program, and A Roadmap to Washington's Future

Washington State Growth Management Act

In 1990, the Washington State Legislature adopted the Growth Management Act (GMA), which required counties and cities to adopt comprehensive plans and development regulations to implement the act's thirteen planning goals. The legislation required the counties to convene a meeting with all of the cities (towns were included in the definition of city) in the county, to negotiate a "framework agreement" to establish a collaborative process and a framework for the adoption of county-wide planning policies (CPPs), and to adopt thereafter comprehensive plans and development regulations consistent with those CPPs. The legislative process defined in RCW 36.70A.210 was to be "collaborative" and "consensus based," but it did not include or require the participation of Indian tribes[1] (or state utility districts or other service providers) in this foundational process. Among other things, the county and cities were required to establish urban growth areas (UGAs) in their comprehensive plans and protections for critical areas in their development regulations. The GMA required counties and cities to review their adopted comprehensive plans and development regulations to ensure consistency with the GMA according to the schedule set forth in RCW 36.70A.130—by the end of 2005, 2006 or 2007. Thereafter, comprehensive plans and development regulations had to be reviewed and, if necessary, revised ten years later and then every eight years after that.

Conflicts over Critical-Areas Protections: Legislature Calls "Time Out" and the Voluntary Stewardship Program

In 2006, in reaction to a series of challenges brought to the Growth Management Hearings Board involving the protection of critical areas and the impacts on agricultural lands, the Washington State Farm Bureau filed state initiative I-933, which would have required the state to pay compensation to property owners for the costs of property regulation. The initiative was soundly defeated, but the concerns resonated with many state legislators, and in 2007 the legislature imposed a three-year "time out" on changes to critical-areas ordinances that applied to agricultural lands. During the time out, the legislature provided funding for the William D. Ruckelshaus Center to meet with stakeholders and come up with an agreement that would resolve the conflict.[2]

Given the consensus nature of the process and set against the backdrop of the Washington Supreme Court's "no harm" rule, the Ruckelshaus Center submitted its final report recommending a voluntary program to protect critical areas on agricultural lands. In 2011, the legislature adopted the Ruckelshaus recommendations and enacted the Voluntary Stewardship Program (VSP) (RCW 36.70A. 700-760), to be administered by the State Conservation Commission. The legislation gave counties two options: (1) opt in to the voluntary program and opt out of compliance with RCW 36.70A.060, the GMA provision requiring the adoption of development regulations to protect critical areas on agricultural lands or (2) continue to comply with those GMA requirements to protect critical areas on agriculture lands. Before opting in, counties were required to provide notice to and confer with local tribes. For those counties that opted in, the legislation created a new "technical panel" (RCW 36.70A.705) comprising the directors (or designees) of four state agencies—the Departments of Ecology, Fish and Wildlife, and Agriculture and the Conservation Commission—to provide guidance and review "work plans" prepared by "Watershed Groups" appointed by the counties to implement the program. To participate, a county had to adopt an ordinance before January 22, 2011, stating that the county had elected to participate, identifying watersheds that would participate, and recommending watersheds for consideration as "state priority watersheds." As of December 2014, twenty-eight of the thirty-nine counties in Washington had opted in. Compliance was contingent on state funding and subject to an as yet to be determined "regulatory backstop" if the director of the Conservation Commission did not approve the work plans within

the time provided or did not agree, after consulting with and acting on the recommendation of a Statewide Advisory Committee, that the work plans' goals and protection benchmarks had been met by the statutory deadlines. The period for compliance is "not later than ten years after receipt of funding," and the remedy for noncompliance is a requirement that the county adopt the same development regulations adopted by one of four counties named in the statute or adopt development regulations approved by a Growth Management Hearings Board that "adequately protected critical areas functions and values."

Two mandatory elements of the VSP are important to tribes. One is a requirement that the Watershed Group appointed by a county "must include . . . at a minimum, representatives of . . . tribes that agree to participate" (RCW 36.70A.715). The second is that the Statewide Advisory Committee appointed by the Conservation Commission shall include two representatives of tribal governments who are "invited to participate" by the Conservation Commission and the Governor's Office (RCW 36.70A.745).[3]

The Ruckelshaus Center's *Road Map to Washington's Future*

The state legislature funded the Ruckelshaus Center to conduct an assessment of the state's "framework for managing growth including a process to articulate a statewide vision and collaboratively map a path to that future."[4] The Ruckelshaus Center defined the broad nature and scope of the assessment, which took a little more than two years to complete. The Ruckelshaus Center reached out to many sectors of the state, including Indian tribes, to obtain their insight and input for the final report it produced, titled *A Road Map to Washington's Future*.[5] The report reviewed the status and effectiveness of eighteen areas of state legislation, including the GMA, the Shoreline Management Act, the State Environmental Policy Act, as well as "the laws, agencies, lands and institutions" of federal and tribal governments.

The final report includes several recommendations for major "transformational and systemic change." In particular, these recommendations encourage the state legislature to partner with tribes to create a meaningful framework with which to consider issues of mutual concern and to enact comprehensive amendments to state and tribal laws that implement a common and coordinated vision for the future of the state.

The major takeaways from *Road Map to Washington's Future* for Indian tribes include:

Recommendations for Transformational and Systemic Change

- *Adaptive Planning at a Regional Scale*. This would involve a paradigm shift from county-focused planning toward a regional ecosystem-, watershed-, or bioregion-based approach. This approach would involve multiple counties, cities, towns, and other local governments working together to address transportation, housing, employment, economic development, and natural-resource issues in a manner that would transcend jurisdictional boundaries. The final report recommends the development of "mechanisms for the integration of regional and state growth management."

  > *Action Item 2.1 specifically recommends that these groups should "consult with tribal governments, to determine if and how they may want to be involved in such a process."*

- *Government-to-Government Consultation*. The final report recommends that the state "enhance the role of tribal governments in the growth planning framework" and establish a formal "government-to-government" consultation process.

  > *Action Item 2.2 specifically recommends that the state "initiate government-to-government consultation with tribes . . . to discuss the key questions asked in the* Road Map to Washington's Future *Report."*

- *Climate Adaptation and Mitigation*. The final report recommends that the state address how to mitigate or adapt to the impacts of a changing climate as part of its growth-management planning. The report notes that some Indian tribes have taken the lead in planning for climate change by incorporating sea-level rise and tsunami hazard information into their long-term planning efforts.

  > *Action Item 3.1 specifically recommends that the state "coordinate with tribe's climate action planning, strategies, and initiatives."*

- *Statewide Water Planning*. The final report notes that water resources in the state are not adequately planned for, that water laws are complicated, that the impacts of climate change on water in different parts of the state need to be understood and addressed, and that additional data are needed to inform water policy.

Action Item 4.1 specifically recommends that the state "establish a collaborative process to develop a statewide water plan for sustainably protecting, managing, and developing water resources in the state for current and future generations" and "begin with government-to-government consultation between the State and the Tribes to discuss the development of a state-wide water plan."

Recommendations to Improve the Existing Growth-Planning Framework

- *Integrate Equity into Growth Planning*. The final report recommends that the state "look at State and local policies, investment and programs through a race and social justice lens" and "do more to reduce current disparities." The report emphasizes a need to shift toward relationship building and understanding." For far too long, tribal issues and concerns have been viewed by many as an "Indian problem," when in reality those issues are often of common interest to multiple demographic groups. Concerns about the environmental health of fisheries and natural resources are shared in common by all citizens of the state.
- *Protection of Historical and Archaeological Resources*. The final report recommends that the state "convene a collaborative process, with, at a minimum, representatives of cities, counties, *tribes,* state agencies, ports, business, development, planning and environmental organizations to identify areas of agreement for reforming the State Environmental Policy Act (SEPA)."

  The report recommends that this process "begin with government-to-government consultation between the State and the Tribes to discuss SEPA reform."
- *Incorporate Water and Sewer Districts into the GMA Planning Process*. The final report observes that water, sewer, and other public-purpose districts had been left out of the GMA planning process and that their exclusion had caused conflict and competition among cities, counties, and special-purpose districts that made implementation of the GMA difficult. For tribes, the Public Utility Districts' purposes are generally in alignment with tribal natural-resources-management goals in that they provide for urban development in designated UGAs where public utilities are available and minimize the withdrawal of groundwater from aquifers that are hydrologically connected to streams and tributaries where salmon spawn.

- *State Agency Coordination with and Support for Regional Plans*. The final report focuses on the need to require state agencies to comply more actively with the GMA, to provide support to local governments, and to help coordinate and enforce the implementation of regional growth-management plans. A corollary to that observation is the need to include "explicit statutory direction" to state agencies to monitor and ensure that individual county comprehensive plans and development regulations are in compliance with the GMA and that together they provide a cohesive and consistent statewide growth-management framework.

- *Annexation*. The final report describes a number of related issues, including the cost of extending urban governmental services into UGAs and the loss of county property tax revenues when land is annexed and becomes part of a city or town. The report recommends "a collaborative process with, at a minimum, representatives of cities, counties, special districts, boundary review board, planning and environmental organizations" to "streamline the process" and "reduce conflict." This collaborative process should also include tribes, which on many if not most Indian reservations have identified UGAs (even if they call them something else) and provide many of the governmental services needed to support growth in these areas. State legislation should recognize that tribes have a primary role in managing and providing for growth on their reservations.

There appears to be an alignment of interests between tribes and the state, but to date Indian tribes have not had a meaningful way to participate in the legislative effort to adopt measures that would implement a collective vision for the state's future. *A Road Map to Washington's Future* provides a pathway forward to incorporate tribes into the growth-management-planning process. The current GMA refers repeatedly to incorporating "citizens" into the planning process but limits the "coordination requirement" to counties, cities, and other jurisdictions that adopt plans pursuant to state authority, thereby excluding tribal plans and tribal interests that extend beyond reservation boundaries. The Ruckelshaus Center has recommended a promising new pathway toward the inclusion of tribes to achieve this common end.

Chapter 9 Endnotes

[1] Notwithstanding the exclusion of tribes in GMA planning, certain counties and tribes have found mutual benefit in cooperating in collaborative planning. In 1994,

Skagit County adopted a resolution recognizing the three tribal governments in the county as "sovereigns" and committed to working with them on a government-to-government basis. The county also entered into a joint comprehensive planning effort with the Swinomish Tribe to develop a comprehensive plan for the Swinomish Reservation. The tribe adopted its first comprehensive plan in August 1996, and in May 1997 Skagit County adopted a comprehensive plan that included a Swinomish Growth Management Area based on the joint planning effort with the Swinomish Tribe.

[2] Later in 2007, the Washington Supreme Court issued its decision in a case brought by the Swinomish Indian Tribe adopting the "no harm" rule, interpreting the GMA requirement to "protect" critical areas to mean only that counties must maintain the status quo and "do no harm" when adopting GMA development regulations. In 2010, the legislature extended the time out for another three years, to 2013.

[3] In 1988, prior to the GMA, Skagit County established the Swinomish Rural Village as part of a coordinated effort with the Swinomish Tribe to create something similar to a subarea plan for the Swinomish Indian Reservation. Following the adoption of the GMA, on January 13, 1992, Skagit County and the cities (and towns) of Anacortes, Burlington, Mount Vernon, Sedro-Woolley, and La Conner approved and entered into a framework agreement by unanimous consent as required by the GMA that created the County-wide Planning Policy Committee, with representatives of each of jurisdiction. The framework agreement was revised in 2002 and replaced the County-wide Planning Policy Committee with the current GMA Committee, which operates by majority rule rather than by unanimous consent. The first set of county-wide planning policies was jointly adopted in 1992 and later amended in 1996, 2000, 2007 and 2016.

On December 19, 2011, Skagit County adopted Ordinance 20110013, stating that it had elected to participate in the VSP, to include the entire county and all of its watersheds in the program, and to nominate the Samish and Skagit watersheds for consideration as priority watersheds. The ordinance amended its critical-areas regulation to replace development regulations that protected critical areas on agricultural lands with the voluntary program and thereby eliminated the requirement that it comply with a current order of the Growth Management Hearings Board by December 28, 2011, a deadline that was just nine days away. Although the Washington Supreme Court confirmed the "no harm rule" advocated by the county, it also found that the county's development regulations failed to provide monitoring and adaptive-management processes that complied with GMA and to provide benchmarks against which to compare future data and determine whether critical areas were being harmed or not. By opting in to the VSP, the county was no longer required to comply with this part of the Supreme Court decision.

On September 16, 2014, the county approved Resolution 20140287, declaring its intention to "opt in" to the VSP. On November 10, 2014, the county approved

Resolution 2014, appointing members to its VSP Watershed Group. The Swinomish Tribe chose not to participate in the county VSP because it viewed the VSP as a lengthy process controlled primarily by agricultural interests and without a well-defined "regulatory backup" and because of the unlikely possibility that the Conservation Commission director and the Statewide Advisory Council would find the county work plan to be deficient. The county submitted its work plan to the commission on May 19, 2017, and the plan was formally approved on July 6, 2017.

[4] In 2017, the Washington State Legislature funded the William D. Ruckelshaus Center for a two-year project to create a "Road Map to Washington's Future." The purpose of the project was to "articulate a vision of Washington' s desired future and identify additions, revisions, or clarifications to the state's growth management and planning framework needed to reach that future." The final report, released in 2019, is available at: https://ruckelshauscenter.wsu.edu/a-roadmap-to-washingtons-future/

[5] During the Ruckelshaus assessment, one tribe suggested that the assessment would be more inclusive and complete if sponsored by all sovereign governments in the state (the state and then twenty-nine federally recognized Indian tribes) to include a broader set of issues and concerns, such as important tribally identified issues. The benefit of this approach would have been to achieve "buy in" from tribes that have significant interests in off-reservation natural-resource management as well as other concerns. It could also have facilitated the development of an institutional framework envisioned by the Centennial Accord and Millennium Agreement to enable better communication and problem solving between the legislature and the tribes.

10

Principles Guiding Inclusionary and Cooperative Planning at the Local Level

This study's goal is to facilitate an effective approach to inclusionary regional planning—a process that involves federally recognized Indian tribes in Washington's planning process. To achieve this goal, the study seeks first to establish a common knowledge base to inform planning agencies of tribal interests affected by regional planning under the Growth Management Act (GMA). The study also further presents a procedural protocol to guide the formulation of working relationships between tribes and local government agencies based on a number of principles for cooperative planning and, in particular, pertinent to cooperative processes that include Indian tribes.

Limitations in the GMA

The GMA implicitly precludes the direct participation of tribes in the state's mandated growth-management-planning process. Although an important goal of the GMA is to attain the coordination of comprehensive plans among adjacent jurisdictions, it requires the coordination of only those plans that are adopted pursuant to state law (RCW 36.70A.040) or with "counties or cities" that share a common boundary. In both cases, tribes are precluded from the state's vision for coordinated planning because tribes are not subject to the state law. Amendments to the GMA should be considered to overcome this implicit exclusion of tribes from the GMA's requirements by prescribing methods for guiding local government coordination of regional plans with neighboring tribes, thereby more fully achieving the outcome of coordinated regional planning. The method of local government coordination should be based on established intergovernmental relations procedures as enacted under federal and Washington State executive policies.

The Federal Approach: "Cooperative Federalism"

The U.S. Environmental Protection Agency (EPA) was created under the Nixon administration in 1970 and its first administrator, William D. Ruckelshaus, set a strong tone of environmental protection. Under the federal Clean Air Act, enacted that same year, Administrator Ruckelshaus developed a new model of "cooperative federalism" that envisioned a federal–state partnership that would acknowledge both the national interest in environmental management as well as the states' historic responsibility over public health and welfare. With financial assistance from the federal government, states adopted State Implementation Plans," or SIPs, which established state regulatory standards at levels that were as strict or stricter than the federal requirements. The EPA initially retained direct federal authority over its clean-air requirements, but once it approved states' SIPs, states would exercise their delegated federal authority SIPs while remaining under federal supervision to ensure the SIPs were adequately enforced. In 1972, Congress enacted the Water Pollution Control Act, and the EPA followed with a final rule that reserved EPA enforcement and excluded state regulatory authority over Indian wastewater facilities and discharges. In 1974, the EPA adopted additional clean-air regulations authorizing delegated authority to enforce Prevention of Significant Deterioration rules directly to Indian tribes on their reservations. A new procedure called "treatment as a state" certification was established to approve Indian tribes for delegation of federal enforcement authority over Tribal Implementation Plans (TIPs).

An EPA Indian Work Group was established in 1978 to formulate an official Indian policy, and in December 1980 EPA deputy director Barbara Blum signed the first federal Indian policy (the Blum Memo), embracing the new era of federal Indian self-determination. The principal basis for this policy was the recognition that states generally lacked regulatory jurisdiction on Indian reservations and that the reservation environment could not be fully protected by states, leaving that responsibility to the EPA. The EPA's decision implemented the agency's new philosophy of cooperative federalism that was extended to the tribes in a manner similar to its relationship with the states. In 1984, EPA administrator William Ruckelshaus signed the EPA Indian Policy for the Administration of Environmental Programs on Indian Reservations and made it the first official statement of Indian policy by a federal agency. The policy built on the earlier Blum Memo and embraced President Ronald Reagan's twin self-determination themes of working with tribes on a government-to-government basis and encouraging tribes to assume governmental roles in federal programs affecting reservation life. It

also went further by including a separate set of implementation guidelines to ensure that agency staff actively implemented the official Indian policy.

Cooperative federalism retains an important oversight role for the federal government to ensure that SIPs and TIPs are consistent and don't have inconsistent impacts on adjacent jurisdictions that share a common border. Both states and tribes are federal partners in the enforcement of federal environmental laws, and by reserving the right to approve their respective implementation plans, the federal government is able to ensure the consistency of environmental laws and their enforcement.

Washington's Centennial Accord and Millennium Agreement

Since the early 1980s, the approach used by Washington State's executive branch has emphasized cooperation and negotiation over litigation to resolve regional conflicts regarding natural resources. In 1987, the state's Departments of Natural Resources, Ecology, Fish and Wildlife, and Labor and Industries signed the historic Timber, Fish, and Wildlife Agreement with tribes, environmental groups, and private-industry groups rather than litigate recently adopted regulations promulgated by the Forest Practices Board. This cooperation led to two more historic agreements—the Centennial Accord of 1989 and the Millennium Agreement of 1999—between the governor and the then twenty-six federally recognized Indian tribes in the state, which proclaimed a new government-to-government relationship between the state and tribal governments. Like the EPA Indian Policy of 1984, the Millennium Agreement is accompanied by a separate set of implementation guidelines. Building on the important policy statements of the Centennial Accord, the Millennium Agreement and its implementation guidelines provide specific measures to make sure that agency staff actively implement the official policy. Together, these agreements have significantly improved the way state agencies work with tribes. Nearly every executive agency now has a tribal liaison that is responsible for understanding the tribes' interests, concerns, and rights and for facilitating a government-to-government dialogue to resolve potential conflicts.

The Millennium Agreement has many similarities with the EPA Indian Policy. Both documents were preceded by a statement of general principles and followed some years later by more specific and far-reaching documents. Like the EPA Indian Policy, the Centennial Accord and Millennium Agreement comprise multiple documents:

- A Gubernatorial Proclamation signed by Governor Booth Gardner

publicly announcing the new policy

- The Centennial Accord, signed by Governor Gardner and the then twenty-six federally recognized Indian tribes
- The Millennium Agreement, signed by the governor and the then twenty-eight federally recognized Indian tribes
- The implementation guidelines adopted by the governor and the twenty-eight federally recognized Indian tribes

The agreements are founded on the principal of the government-to-government relationship and set forth a framework for establishing and implementing that relationship. Their ultimate purpose is get local governments and tribes to work together to "successfully address issues of mutual concern" and "to improve the services delivered to (Indian and non-Indian) people by the parties." To do that, the parties must seek to make sure that "communication is clear, direct and between persons responsible for addressing the concern." Above all, the goal is to "institutionalize the relationship within the organizations represented by the parties." On the state side, the governor's chief of staff, with the assistance of the Governor's Office of Indian Affairs is responsible for implementing the agreement provisions and overseeing compliance with the agreement by the director of each state agency. On the tribes' side, officials from each tribe are responsible for ensuring that each state agency is aware of that tribe's organizational structure, decision-making process, and tribal staff responsible for addressing each issue of mutual concern. Specific provisions of the Millennium Agreement include:

- Strengthening government-to-government relationships
- Developing a consultation process, protocols, and action plans
- Enhancing communication by strengthening the Governor's Office of Indian Affairs and the Association of Washington Tribes
- Encouraging the Washington State Legislature to establish a similar structure to address issues of mutual concern
- Educating the citizens of the state through a comprehensive educational effort to promote a better understanding of tribal history, culture, treaty rights, and contemporary tribal and state government institutions
- Working together to engender mutual understanding and respect and

to fight discrimination and racial prejudice

- Enhancing economic and infrastructure opportunities, protecting natural resources, and providing educational opportunities and social and community services to all of our citizens
- Developing Centennial Accord plans for each state agency that include a dispute-resolution process to engage in consultation to clarify issues and to ensure that each party understands the positions and interests of the other parties

In 2006, the state legislature created Tribal Affairs Committees in both houses. In 2012, some of the responsibilities under the Centennial Accord and Millennium Agreement were adopted by the legislature in the State Tribal Relations Act (RCW 43.376). Among other things, the act requires

- State agencies to make reasonable efforts to collaborate with Indian tribes on issues of mutual concern and to develop a consultation process for issues involving specific Indian tribes;
- State agencies to designate a tribal liaison who reports directly to the head of each state agency and to ensure that tribal liaisons receive appropriate training regarding the particular nature of tribal sovereignty;
- State agencies to submit annual reports to the governor describing agency activities involving Indian tribes; and
- The Governor and statewide elected officials to meet with leaders of Indian tribes at least once a year to discuss issues of mutual concern.

Notwithstanding these legislative efforts, the state legislature has not developed a government-to-government framework comparable to the Centennial Accord and Millennium Agreement. The GMA is an example of how tribes are marginalized or altogether ignored by the state legislature in the regional planning process. Tribes are largely relegated to the position of "stakeholders" in this process and thus have to compete with representatives of private industry, property owners, and local agricultural interests. These local and regional planning processes minimize, overlook, or ignore tribal interests, and, as a consequence, tribal issues are left unresolved and all too often end up in state and federal courts. In contrast, both the Centennial Accord and the Millennium Agreement specifically ask the state legislature and other independent state boards, commissions, and agencies to create and participate in government-to-government relationships with tribal governments to ensure the "government-to-government relationship"

described in the agreements is broadly implemented throughout the state and on the reservations.

Adapting the Cooperative Federalism Policy to the GMA

The federal EPA Indian Policy of 1984 can serve as a model for adapting Washington State land-use policy to support the inclusion of tribes in GMA planning. Pertinent principles from the EPA Indian Policy include the following:[1]

- *Principle 6.* "The Agency [EPA] will encourage cooperation between tribal, state, and local governments to resolve environmental problems of mutual concern."

  > Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments are neighboring states, tribes, or local units of government. Accordingly, EPA will encourage early communication and cooperation among tribes, states, and local governments. This is not intended to lend federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.

- *Principle 7.* "The Agency will work with other federal agencies that have related responsibilities on Indian reservations to enlist their interests and support in cooperative efforts to help tribes assume environmental program responsibilities for reservations."

  > EPA will seek and promote cooperation between federal agencies to protect human health and the environment on reservations. We will work with other agencies to clearly identify and delineate the roles, responsibilities and relationships of our respective organizations and to assist tribes in developing and managing environmental programs for reservation lands.

Pathways toward State Support of Cooperative Land-Use Management

The following adaptation of these federal Indian policy principles is presented to guide the formulation of inclusionary relationships in regional planning among the state, counties, and tribal governments in the implementation of the GMA.

GMA Tribal Relations Guiding Principles

- *Principle 1.* The state will encourage cooperation between tribal and local governments to resolve land-use and environmental problems of mutual concern. Sound planning requires the cooperation and mutual consideration of neighboring governments, whether those governments are neighboring tribes or local units of government. Accordingly, the state will encourage early communication and cooperation among tribes and local governments, recognizing that in the field of growth-management planning problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.
- *Principle 2*. The state will work with tribes to support cooperative efforts to assist tribes in assuming responsibilities for reservation planning in a manner that is consistent with the GMA wherever possible. The state will seek and promote cooperation between the tribes and counties to more fully consider tribal interests in off-reservation ceded areas in the protection of cultural and environment resources relating to those tribal interests.
- *Principle 3*. The state will provide assistance to local governments and tribes wishing to enter into mutual agreements for the conduct of cooperative planning.
- *Principle 4*. The state will establish through administrative regulations and in consultation with the tribes a process for tribal inclusion in all aspects of its implementation of the GMA.
- *Principle 5*. The state will develop a dispute-resolution mechanism to forward issues to state agencies or the Office of the Governor when tribes and local governments cannot reconcile their differences.

Guidelines for Establishing the Consultation Process at the Local Level

The following principles and implementation guidelines serve as steps toward establishing a local–tribal consultation process based on a government-to-government relationship, as at the federal and state level. The federal and state consultation principles are equally applicable to the context of the local government–tribal government relationship.

GMA Local Government–Tribal Government Relations Guiding Principles

- *Principle 1.* Local governments and the tribes should cooperate in GMA planning to resolve land-use and environmental issues

of mutual concern. Sound planning requires the cooperation and mutual consideration of neighboring governments, whether those governments are tribes or local units of government. This principle recognizes that in the field of growth-management planning, problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.

- *Principle 2.* Local governments and tribes should seek to strengthen their relationship under a government-to-government partnership. The intergovernmental relationship should emphasize enduring channels of communication and the institutionalization of the process of regional inclusion.
- *Principle 3.* Local governments and tribes should designate a liaison to coordinate the consultation process and establish systems of communication, protocols, and action plans to identify and address issues of mutual interest. The parties should seek to mutually enhance economic and infrastructure opportunities, protect natural and cultural resources, and improve social and community services to all citizens of the region.
- *Principle 4.* Local governments and tribes should mutually work toward educating the citizens of the region to promote a better understanding of tribal history, culture, treaty rights, and both tribal and local government institutions.
- *Principle 5.* When disputes cannot be resolved in GMA planning and prior to any litigation, local governments and tribes should engage in formal consultation to clarify issues and make sure each party understands the positions and interests of the other parties. (See appendix 6, "Centennial Accord Policy: Washington State Attorney General").

Implementation Guidance

- *Commitment to Consultation.* Local governments and tribes should voluntarily commit to consulting on matters of mutual interest. Communication between tribal and local governments should be direct and involve the appropriate government staff to clarify interests of concern and to foster collaborative outcomes. The commitment to consultation and coordination should be memorialized through a written intergovernmental agreement (IGA).
- *Clarification of Mutual Interests and Plan to Coordinate Government*

Actions. The scope of policies, issues, and contemplated actions should be identified as the framework for establishing the consultative intergovernmental relationship. Either party to the IGA may identify an issue of concern and bring that concern to the attention of the other party for consultation and resolution. If consultation is deemed not to be required, a formal notification to the other party of a pending action may be sufficient. Early in the consultative process, designated representatives from each government should meet to identify the interests to their respective governments.

- *Issues That Require a Consultation Process***.** The need for consultation will vary depending on the nature of each issue. Any party to the IGA should be able to initiate a formal consultation. Any decision or action by a local government that directly affects an identified tribal interest, the tribe's reservation land base, or the tribe's off-reservation treaty rights should trigger the consultation process.

- *Good-Faith Effort toward a Timely Response to a Consultation Request.* Any parties to the IGA should ensure that a timely response to any request for consultation is provided to the other parties.

- *Direct Engagement of Governmental Officials.* Based on the government-to-government relationship, tribes and local governments engaged in the consultation should be represented by elected officials as well as by designated agency officials responsible for identifying the interests that require consultation and collaboration to resolve the identified issue.

- *Respect and Integrity between the Parties***.** Mutual respect and trust are fundamental elements to establishing a positive consultative relationship. The sharing of information as well as clarification of each government's goals and policies are important for understanding policy differences or conflicts that may exist. Open and constructive communications among the parties is essential in establishing a successful consultative and coordinated partnership between local and tribal governments.

Conclusion

The Emerald Corridor does lack a regional planning framework that embraces a plurality of visions, inclusive of tribal rights and interests. However, that situation can change by amending the GMA to embrace inclusionary and pluralistic language that provides opportunities for tribal participation in the regional planning process. Government-to-government

agreements between the federal government and Indian tribes have been effective following the enactment of the EPA Indian Policy in 1984 and other federal Indian policies. Likewise, the relationship governed by the Centennial Accord and the Millennium Agreement have proven to be effective in forging cooperative relations between the state and the tribes as well. The intergovernmental coordination principles guiding the EPA Indian Policy and the Centennial Accord and Millennium Agreement should be applied as a model to guide consultation and planning cooperation at the local level. Amendments to the GMA that adequately provide for inclusionary regional planning among the state, local governments, and the tribes would provide the necessary mandate for establishing a new framework of inclusionary regional planning in Washington State.

Chapter 11 Endnotes

[1] The EPA Indian Policy can be found at https://www.epa.gov/tribal/epa-policy-administration-environmental-programs-indian-reservations-1984-indian-policy.

11

Growth Management Act Legislation: Identifying Amendments to Enhance Tribal Participation in Washington State's Growth Management Planning

This section identifies inclusionary provisions to sections of RCW 36.70A and RCW 47.80.060 that are intended to demonstrate measures that can provide for the inclusion of Indian tribes in Washington State's growth-management-planning framework. These inclusionary provisions require good-faith efforts on the part of counties, cities, and tribes in the development of mutually beneficial comprehensive plan policies and development regulations that align pursuant to the Growth Management Act (GMA). It is important to note that any individual tribal government has not yet endorsed these recommendations.

Statute RCW 36.70A

Recommended legislative amendments to these regulations are shown in bold and underlined in the following excerpted passages.

RCW 36.70A.010. Legislative findings.

> The legislature finds that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state. It is in the public interest that citizens, communities, local governments, **Indian Tribes**, and the private sector cooperate and coordinate

with one another in comprehensive land use planning. Further, the legislature finds that it is in the public interest that economic development programs be shared with communities experiencing insufficient economic growth.

RCW 36.70A.011. Findings—Rural lands.

The legislature finds that this chapter is intended to recognize the importance of rural lands and rural character to Washington's economy, its people, and its environment, while respecting regional differences. Rural lands and rural-based economies, **including rural Indian reservations,** enhance the economic desirability of the state, help to preserve traditional economic activities, and contribute to the state's overall quality of life.

The legislature finds that to retain and enhance the job base in rural areas, rural counties must have flexibility to create opportunities for business development. Further, the legislature finds that rural counties must have the flexibility to retain existing businesses and allow them to expand. The legislature recognizes that not all business developments in rural counties require an urban level of services; and that many businesses in rural areas fit within the definition of rural character identified by the local planning unit.

Finally, the legislature finds that in defining its rural element under RCW 36.70A.070(5), a county should foster land use patterns and develop a local vision of rural character that will: Help preserve rural-based economies and traditional rural lifestyles; **facilitate economic development and environmental stewardship partnerships in rural lands community development between tribal and local governments,** encourage the economic prosperity of rural residents; foster opportunities for small-scale, rural-based employment and self-employment; permit the operation of rural-based agricultural, commercial, recreational, and tourist businesses that are consistent with existing and planned land use patterns; be compatible with the use of the land by wildlife and for fish and wildlife habitat; foster the private stewardship of the land and preservation of open space; and enhance the rural sense of community and quality of life.

RCW 36.70A.020. Planning goals.

> The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:
>
> [(1) through (10) omitted.]
>
> (11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions, **including Indian Tribes,** to reconcile conflicts.

RCW 36.70A.030 - Definitions.

> **"Indian Tribe" or "Tribe" refers to a federally recognized Indian Tribe with a reservation located within the exterior boundaries of the State of Washington.**

RCW 36.70A.035. Public participation—Notice provisions.

> (1) The public participation requirements of this chapter shall include notice procedures that are reasonably calculated to provide notice to property owners and other affected and interested individuals, tribes, government agencies, businesses, school districts, group A public water systems required to develop water system plans consistent with state board of health rules adopted under RCW **43.20.050**, and organizations of proposed amendments to comprehensive plans and development regulation. Examples of reasonable notice provisions include:
>
> [Provisions (1)(a)–(1)(e) omitted.]
>
> **(1)(f) Notice to an Indian Tribe shall be provided by mail addressed to the Chairman of the Tribe with a copy to the Tribe's Director of Planning.**

RCW 36.70A.040. Who must plan—Summary of requirements—Resolution for partial planning—Development regulations must implement comprehensive plans.

> **(8) An Indian Tribe may adopt a resolution indicating its intention to initiate a parallel planning process for the reservation over which it exercises governmental authority and to coordinate with the county and cities that are either required to comply pursuant to subsection (1) of this section or voluntarily choose to comply with the provisions of RCW Chapter 36.70A pursuant to subsection (2) of this section. The county and cities shall coordinate and cooperate with Indian Tribes located within the county that have voluntarily chosen to participate in the county planning process pursuant to this provision.**

RCW 36.70A.080. Comprehensive plans—Optional elements.

> (2) A comprehensive plan may include, where appropriate, subarea plans, each of which is consistent with the comprehensive plan. **Counties and cities may develop a subarea plan in cooperation with an Indian tribe that includes elements of an Indian reservation comprehensive plan enacted by the tribe.**

RCW 36.70A.085. Comprehensive plans—Port elements.

> **(9) Where a port district is located within or adjacent to an Indian reservation, cities and ports shall consult with the affected Indian tribe in the development of a Port Container Element.**

RCW 36.70A.100. Comprehensive plans—Must be coordinated.

> The comprehensive plan of each county or city that is adopted pursuant to RCW **36.70A.040** shall be coordinated with, and consistent with, the comprehensive plans adopted pursuant to RCW **36.70A.040** of other counties or cities with which the county or city has, in part, common borders or related regional issues **and the comprehensive plans adopted by Indian Tribes that have voluntarily chosen to participate in the planning process pursuant to RCW 36.70A.040.**

RCW 36.70A.110. Comprehensive plans—Urban growth areas.

(1) Each county that is required or chooses to plan under RCW **36.70A.040** shall designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. Each city that is located in such a county shall be included within an urban growth area. An urban growth area may include more than a single city. An urban growth area may include territory that is located outside of a city only if such territory already is characterized by urban growth whether or not the urban growth area includes a city, or is adjacent to territory already characterized by urban growth, or is a designated new fully contained community as defined by RCW **36.70A.350**. **When an Indian Tribe has voluntarily chosen to participate in the planning process pursuant to RCW 36.70A.040, the county and the Tribe shall coordinate their planning efforts and include any areas planned for urban growth in the Tribe's comprehensive plan. Municipal and nonmunicipal urban growth areas designated pursuant to this section, new fully contained communities designated pursuant to RCW 36.70A.350, master-planned resorts designated pursuant to RCW 36.70A.360, or major industrial developments designated pursuant to RCW 36.70A.365 shall not be created on that Tribe's reservation inconsistent with that Tribe's policies and without that Tribe's consent.**

RCW 36.70A.210. Countywide and multi-county planning policies.

(1) The legislature recognizes that counties are regional governments within their boundaries, and cities **and Indian tribes** are primary providers of urban governmental services within urban growth areas **and on Indian reservations**. For the purposes of this section, a "countywide planning policy" is a written policy statement or statements used solely for establishing a countywide framework from which county and city comprehensive plans are developed and adopted pursuant to this chapter. **This framework shall ensure that city and county comprehensive plans are mutually consistent and consistent with the land use, economic development, and transportation components of tribal plans as required in RCW 36.70A.100**. Nothing in this section shall be construed to alter the land-use powers of cities.

[(2) and (3) omitted.]

(4) Federal agencies and Indian tribes shall be invited and encouraged to participate in and cooperate with the countywide planning policy adoption process.

[(5) omitted.]

(6) Cities, tribes and the governor may appeal an adopted countywide planning policy to the growth management hearings board within sixty (60) days of the adoption of the countywide planning policy.

RCW 36.70A.210. Countywide planning policies.

(4) Federal agencies **and Indian tribes** may participate in and cooperate with the countywide planning policy adoption process. Adopted countywide planning policies shall be adhered to by state agencies.

RCW 36.70A.213. Extension of public facilities and utilities to serve school sited in a rural area authorized—Requirements for authorization—Report.

(5) This chapter does not prohibit the extension of public facilities and utilities outside urban growth area boundaries necessary to serve tribal community and economic development activities consistent with an adopted tribal comprehensive plan in partnership with state or local governments.

RCW 36.70A.250. Growth management hearings board—Creation—Members.

(1) A growth management hearings board for the state of Washington is created. The board shall consist of seven members qualified by experience or training in matters pertaining to land use law or land use planning and who have experience in the practical application of those matters. All seven board members shall be appointed by the governor, two each residing respectively in the central Puget Sound, eastern Washington, and western Washington regions, plus one board member residing within the state of Washington. At least three members of the board shall be admitted to practice law in this state, one each residing respectively in the central Puget Sound, eastern Washington, and western Washington regions. At least three members of the board shall have been a city or county **or tribal** elected official, one each residing respectively in the central Puget

Sound, eastern Washington, and western Washington regions. After expiration of the terms of board members on the previously existing three growth management hearings boards, no more than four members of the seven-member board may be members of the same major political party. No more than two members at the time of their appointment or during their term may reside in the same county.

RCW 36.70A.367. Major industrial developments—Master planned locations.

(7) Any county seeking to designate an industrial land bank under this section must:

[(7)(a) and (7)(b) omitted.]

(7)(c) Provide notice pursuant to RCW 36.70A.035 and initiate consultation with Indian tribes.

RCW 36.70A.745. Statewide advisory committee—Membership.

(1)(a) From the nominations made under (b) of this subsection, the commission shall appoint a statewide advisory committee, consisting of: Two persons representing county government, two persons representing agricultural organizations, and two persons representing environmental organizations. **The commission, in conjunction with the governor's office, shall also invite participation by two representatives of tribal governments.**

Statute RCW 47.80 Board membership.

In order to qualify for state planning funds available to regional transportation planning organizations, the regional transportation planning organizations shall provide voting membership on its executive board to the state transportation commission, the state department of transportation, port districts within the region, any incorporated city, **and any tribal government situated in the region**. It shall further assure that at least fifty percent of the county and city local elected officials who serve on the executive board also serve on transit agency boards or on a regional transit authority.

Conclusion

Washington State currently lacks a regional planning framework that embraces a plurality of visions and is respectful of the rights and interests of Native American tribes. However, that can change by amending the GMA to embrace the inclusion of tribes in the regional planning process. There may be many challenges and hurdles to attaining such an inclusionary approach. The mandatory relationship governed under the provisions of the Centennial Accord and the Millennium Agreement have proven to be effective in fostering intergovernmental cooperation and the coordination of statewide public policy. Government-to-government agreements supporting coordinated plans between Washington counties, cities, and tribes have been shown to be effective in attaining the state's GMA goal for coordinated regional planning. The framework in these agreements should be used as a model in guiding future inclusionary planning at the local and regional governmental level. The GMA amendments proposed in this section further Washington State's growth management goals and furthers its commitment to a government-to-government relationship with Washington Indian tribes.

12

The Legal Case Law regarding Tribal Rights and Jurisdiction

Indian tribes are not required to comply with the state's Growth Management Act (GMA), but they are essential partners in any regional planning process to plan for future population growth and to provide transportation, housing, and other public services; to support that growth; and to achieve the other goals of the GMA. Their powers are not derived from the State of Washington and with limited exceptions tribes are not subject to state laws. Tribes are, in the words of the U.S. Supreme Court, "domestic dependent sovereigns" that exercise inherent powers and authority—aboriginal powers that have never been given up by tribes—but within limits created by both the federal courts and the federal legislature. Tribes also possess off-reservation natural-resource rights reserved in treaties with the United States and exercise federal authority granted or delegated to them by the federal government.

Like the state and local governments, many tribes now provide most or all of the public services to residents of their reservations that residents elsewhere receive from cities or towns in the state. As tribes continue to provide more and more of these "municipal-like services," they have become the "missing pieces" in the state's growth-management planning efforts. Tribes are fully engaged in providing public services for residents of the reservation and planning for their future. They are planning for future population growth, increased demand on natural resources, the need for expanded utility infrastructure, and the impacts of climate change on low-elevation populations and ecosystems that support treaty-protected natural resources. One thing is certain, urban growth will occur on Indian reservations, and regardless of whether the state designates specific geographic areas within reservations as "urban growth areas" or not, it is no longer possible to plan for future growth without including tribes in a cooperative planning process

to provide the urban services that will support that growth. This section provides a brief summary of the legal basis for the range of tribal authorities, interests, and governmental services provided by tribes that are part of the increasingly complex web of jurisdictional relationships and that must be taken into account in the regional planning process.

Tribal Authority over Reservation Lands

Tribal governments exercise sovereign powers and authority over both their members and their territory except as those powers have been limited by federal statute, by treaty, or by federal courts (*United States v. Wheeler*).[1] Inherent tribal powers of self-government enable tribes to fully exercise most forms of civil jurisdiction over Indians and non-Indians alike. Tribes exercise their civil authority in two ways. They exercise *legislative jurisdiction* when they adopt laws that regulate the activities and control the conduct of people and property. And they exercise *adjudicatory jurisdiction* when they create tribal courts to resolve disputes between two or more litigants arising from those rights created by tribal and other applicable laws. When a court is asked to resolve a dispute, a threshold question is the extent of the tribe's *legislative authority* to adopt a particular tribal law or regulation and whether that law applies to the people and property involved in the dispute or not. In 1997, the U.S. Supreme Court announced a new principle that "a tribe's adjudicatory jurisdiction does not exceed its legislative jurisdiction."[2] As a consequence, federal courts consider the extent and limits of tribal land-use (regulatory) authority in both of these contexts.

The exercise of *police power* to enforce civil and criminal laws over their territories is a fundamental power that tribes exercise to regulate the conduct of individuals within a tribe's jurisdiction, including the authority to regulate land use through zoning, building codes, and other legislative measures.[3] *Criminal jurisdiction* over nonmembers, however, was sharply curtailed by the U.S. Supreme Court in a landmark case in Washington State.[4] Although tribes have lost the power to enforce criminal laws against most non-Indians, they have retained the inherent power to exclude from their territory those persons they deem undesirable or threatening to their well-being. The power does not extend over non-Indians who own fee land or have interests in fee land within the reservation or over their guests and invitees. The U.S. Congress subsequently made two exceptions to the decision in Oliphant v. Suquamish Indian Tribe in separate legislative measures—the so-called Duro Fix and the Violence against Women Act (VAWA).

In 1990, the U.S. Supreme Court held in *Duro v. Reina*[5] that an Indian

tribe did not have criminal jurisdiction over an Indian who was a member of another tribe. At the urging of tribal leaders, Congress approved an amendment to the Indian Civil Rights Act in 1991 that recognized that Indian tribes have *inherent power* to exercise criminal jurisdiction over all Indians—members of the tribe that created the tribal court where the criminal law is being prosecuted and members of other tribes. "Indian" was defined in the act to mean any person who would be subject to the jurisdiction of the United States as an Indian under the federal Major Crimes Act of 1885 (sec. 1153, title 18) if that person were to commit an offense listed in that section in Indian Country to which that section applies. This legislation became known as the "Duro Fix" and recognized the tribe's inherent authority, which had been implicitly divested by the Court in *Oliphant*, rather than a delegation of federal authority.

The reauthorization of the VAWA in 2013 affirmed tribes' "inherent power" to exercise criminal jurisdiction over all persons, including non-Indians, who commit domestic violence or dating violence or who violate protection orders in Indian country. VAWA created a framework for interested tribes to voluntarily opt in and exercise criminal jurisdiction over non-Indians who commit these selected crimes and harm a Native person. VAWA expired in 2018, and bipartisan efforts to reauthorize VAWA broke down in November 2019, with one of the core disagreements centering on tribal criminal jurisdiction over nonmembers. The U.S. House of Representatives approved reauthorization earlier in the year; two separate reauthorization bills were introduced in the Senate, and both measures include provisions to restore tribal criminal jurisdiction.

Reservation Land-Use Authority

Indian-Owned Lands -- Most of the land owned by tribes, their members, and members of other tribes is owned in trust for them by the federal government. Tribal laws regulating land use and other activities are enforceable on trust land when those laws are approved by the federal government and on fee land owned in fee by tribes and their members. In a Washington case, the U.S. Ninth Circuit Court of Appeals upheld tribal land-use jurisdiction and barred county jurisdiction over reservation fee-simple lands held by individual Indians. Kim Gobin and Guy Madison, members of the Tulalip Tribes, submitted applications to the tribes to rezone and subdivide a twenty-five-acre parcel of land located on the reservation. Gobin's proposed subdivision would connect to septic systems; water would come from wells or private water systems; and only a county road would provide access to

Gobin's proposed subdivision. The tribes approved the applications, but Snohomish County asserted that construction could not begin because the project violated county density requirements and other use regulations. The Ninth Circuit also ruled that by making this person's fee lands freely alienable and encumberable, Congress did not authorize county jurisdiction over those lands, nor did exceptional circumstances warrant county jurisdiction to apply.[6]

Non-Indian-Owned Fee Land: The Montana Decision -- The current federal rule regarding when tribes can exercise their authority to regulate the conduct of non-Indians on fee lands within the reservation was set forth in 1981 by the U.S. Supreme Court in the landmark case of *Montana v. United States*,[7] which held that tribes do not have inherent power to regulate nonmember activities on fee land, except in two circumstances: (1) a tribe may regulate "non-members who enter consensual relationships with the tribe or its members," and (2) a tribe may regulate conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of a tribe." The Court reasoned that tribes had been implicitly divested of their sovereignty to regulate relations between Indians and non-Indians by virtue of their dependent status and that the exercise of tribal authority beyond what is necessary to defend tribal self-government was inconsistent with that dependent status. But even after that case, federal courts generally affirmed tribes' land-use authority to regulate activities on non-Indian fee lands whenever the impacts of those activities fell within the second *Montana* exception. In a decision on the Quinault Reservation in 1982,[8] the Court upheld a broad view of tribal land-use authority over nonmembers on fee lands where there was a significant "tribal interest."

Conversely, the courts have upheld the principle that state law does not apply to Indian tribes and their affairs on the reservation without express congressional consent. Unless Congress expresses a clear intent to permit the application of state regulation over a particular Indian activity, state regulation is presumed to be preempted.[9] In *Washington v. Confederated Tribes of the Colville Indian Reservation*,[10] the Supreme Court recognized that tribal authority is divested only when its exercise is inconsistent with overriding federal interests: "Tribal sovereignty is dependent on, and subordinate to, only the federal government, not to the states."

Conflicts over Checkerboarded Land Ownership -- Land-use regulation on Indian reservations is complicated by the complex checkerboarding of trust and fee land ownership on many reservations, and, as a result, tribal efforts to

operate reservation planning programs are challenged and resisted by non-Indian landowners, who demand state or local government intervention to shield them from tribal authority. This conflict originated with the General Allotment Act of 1887, which introduced individual Indian ownership to the once communally owned reservations and authorized the transfer of Indian-owned trust parcels to nonmembers in fee ownership. The act encouraged settlement on reservations by non-Indians, and, as a result, Indian reservations are often a patchwork of land ownership, including trust lands held by the federal government for the tribes, allotted lands held in trust for individual tribal members, fee lands purchase by non-Indians from tribal members, federal public lands, and state and county lands.

Zoning Authority: The Brendale Decision -- The current federal rule regarding when tribes can exercise their zoning authority to regulate the conduct of non-Indians on fee lands within the reservation was set forth by the U.S. Supreme Court in 1989 in another landmark case, *Brendale v. Confederated Bands of the Yakima Indian Nation*,[11] which held that the Yakima Tribe could exercise its zoning authority in one area of the reservation but not in another. The Yakima Tribe brought suit in federal court to prohibit the application of county zoning laws to two areas of the reservation—one referred to as the "closed" area and the other as the "open" area—and to obtain a determination that the Yakima Tribe's zoning authority was exclusive in both cases. The *Brendale* litigation comprises two separate and distinct cases. In the first case, Philip Brendale, a nonmember Indian, sought to subdivide his 160-acre fee-simple landholding into smaller lots to be used for trailer sites and recreational cabins. Brendale's land was located within a portion of the Yakima Indian Reservation's "closed area," which was 97% trust land and only 3% fee lands and where access by the general public had been restricted since 1972. The tribe's zoning ordinance established five land-use districts: agriculture, residential, commercial, industrial, and restricted. The closed areas were in the restricted zone, which was limited to the harvesting of wild crops, grazing, hunting and fishing, and camping due to their important religious and spiritual significance to the tribe. Construction in this area was limited to the tribe and the U.S Bureau of Indian Affairs (BIA) in association with natural-resource-management activities. The county zoning designation for the closed areas was "forested watershed," which permitted a range of uses, including residential development, campgrounds, lodging, restaurants, and general stores. Brendale's proposed subdivision conformed to Yakima County zoning but conflicted with the tribe's "restricted"-area zoning designation.

The second case involved Stanley Wilkinson, a non-Indian fee landowner who proposed subdividing a thirty-two-acre parcel into twenty parcels in the area of the reservation referred to as "open." Approximately one-half of the "open" area was held in fee ownership, with prevailing uses consisting of rangeland, agriculture, residential, and commercial uses. Unlike the closed area, access to the open area by nonmembers was not restricted, and the county and local municipalities provided urban services in the open area. Eighty percent of the population within the open area was non-Indian. Most of the non-Indians and most of the non-Indian fee land were in Toppenish, Wapato, and Harrah, three incorporated towns on the reservation. Tribal zoning of the Wilkinson parcel was agriculture, allowing a minimum lot size of five acres. County zoning designated the parcel as "general rural" use, allowing a minimum lot size of one acre. Similar to Brendale's petition, the proposed Wilkinson subdivision conformed to county zoning regulations but conflicted with tribal zoning codes.

The U.S. District Court held that the tribe had authority to zone nonmember fee lands in the closed area but not in the open area. On appeal, the Ninth Circuit Court held that land-use authority over both the open and closed areas fell within the second *Montana* exception and that the Yakima Nation's zoning authority applied in both areas. The Ninth Circuit ruling further found that the "strength of tribal interests over the closed area justified exclusive tribal zoning of Brendale's property" and remanded the case involving Wilkinson's property to the district court to balance tribal and county interests in zoning nonmember fee lands located in the open area.

When *Brendale* was appealed to the U.S. Supreme Court, the Court split and issued three separate opinions: four justices held that the tribe lacked zoning authority over non-Indian-owned fee lands in both areas; three justices held that the tribe possessed zoning authority over non-Indian-owned fee lands in both areas; and two justices held that the tribe possessed zoning authority in the closed area but not in the open area. The result in the Brendale case was a five-to-four decision that the tribe retained authority to zone nonmember lands in the closed area of the reservation. The result in the Wilkinson case was a six-to-three decision that the tribe had lost its authority to zone such lands in the open area.[12] The Court reaffirmed that the tribe had exclusive authority to regulate Indian trust lands on the grounds that state authority to regulate such lands had been "preempted by extensive federal policy and legislation."[13] The Court construed *Montana*'s second exception narrowly and concluded that by restricting access to the closed area, the tribe was able to exercise its basic power to exclude, thereby preserving the essential character

of that area.

Although the county did not appeal the lower court's decision that the tribe's zoning authority in the closed area was exclusive, Justice John Paul Stevens considered the possibility that the county and tribe might have overlapping and concurrent jurisdiction in a manner similar to the application of federal laws to lands that are also subject to either state or tribal laws. Recognizing the potential problems, Justice Stevens pointed out that the resulting conflict "is neither inevitable nor incapable of resolution by a tolerant and cooperative approach to the problems that are generated by the continuing growth and complexity of our diverse society." Justice Harry Blackmun, however, thought concurrent tribal and county zoning jurisdiction was unworkable because it would have "the practical effect of nullifying the zoning authority of both sovereigns in every instance" and "defeat the efforts of both sovereigns to establish comprehensive plans for the systematic use of the lands within their respective jurisdictions."

Determining Whether There Is a Threat of Harm -- Recent court rulings have further defined the nature and measure of the threat of harm necessary to support a tribe's authority to exercise civil jurisdiction over non-Indians on fee lands. In 2013, the Ninth Circuit Court of Appeals' decision in *Evans v. Shoshone-Bannock Land Use Policy Commission*[14] overturned an earlier district court decision dismissing a motion for a preliminary injunction that barred tribal court proceedings against a non-Indian landowner and his contractor for failing to obtain a tribal building permit for a single-family home on fee land. The landowner's fee land was located in Pocatello, a city in Power County, Idaho, which was also on the Fort Hall Indian Reservation. The plaintiffs claimed that the Shoshone-Bannock Land Use Policy Commission and the Fort Hall Business Council did not have land-use authority to regulate the construction of the single-family residence on fee land and that they should not have to appear in tribal court or comply with the tribe's stop-work order posted on the property. The Ninth Circuit reversed the decision of the district court and held that (1) construction of a single-family house on land owned in fee simple by non-Indians in an area that already had seen comparable development on the reservation did not threaten or have any direct effect on the tribe's political integrity, economic security, or health or welfare, and (2) the tribe did not have regulatory authority over nonmember's construction.

In an earlier case in *Plains Commerce Bank v. Long Family Land and Cattle Company*,[15] the U.S. Supreme Court found that a tribal court did not have

jurisdiction to hear a case involving alleged discrimination in the sale of a home on reservation fee land, reasoning that the first *Montana* exception was limited to non-Indian conduct on the land and did not apply to the sale of the land itself. Regarding the second *Montana* exception, the Court found that such conduct must do "more than injure the tribe"; it must "imperil the subsistence" of the tribe" and have "catastrophic consequences."

In a case decided in November 2019, the Ninth Circuit considered a case that involved activities conducted on fee land on the Fort Hall Reservation that did "imperil the subsistence" of the tribe.[16] FMC Corporation operated an elemental phosphorus plant on fee land on the Fort Hall Reservation and stored tons of hazardous waste on the property. The U.S. Environmental Protection Agency (EPA) declared the land a Superfund Site in 1990 and brought suit against *FMC* for violating the Resource Conservation and Recovery Act of 1976. A consent decree settling the lawsuit required FMC to obtain permits from the tribe and pay the tribe $1.5 million per year for a permit to store the hazardous waste. FMC complied, paid the annual fee for four years, and then stopped payment when it stopped operating the plant. The tribe sued in tribal court and in 2014 obtained a judgment ordering FMC to pay $19.5 million for unpaid tribal permits fees and $1.5 million annually going forward.

The Ninth Circuit affirmed the district court's judgment enforcing the tribal court decision and held that the tribe had both regulatory (legislative) and adjudicatory jurisdiction over FMC under both of the exceptions in *Montana v. United States*. After describing the first two *Montana* exceptions, the Ninth Circuit in *FMC* described a "Third *Montana* Exception," citing another *Montan*a case:[17] "Third, a Tribe may regulate the conduct of non-members on non-Indian fee land when that regulation is expressly recognized by federal statute or treaty." Under the first *Montana* exception, the Ninth Circuit found that the tribe had entered into a consensual relationship when it signed the tribal permit to store the hazardous waste and that the permit requirements and fees constituted a form of regulation. Under the second exception, the court held that FMC's storage of hazardous waste on its fee lands within the reservation met the standard set in *Plains Commerce Bank* by doing "more than injure the tribe" and did in fact "imperil the subsistence or welfare" of the tribe. Citing *Plains Commerce Bank*, the Ninth Circuit said, "A tribe may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security, *or from non-members conduct on the land that does the same*." Citing *Brendale* and *Montana v. U.S. EPA*, the court also said, "Threats to tribal natural resources, including those that affect tribal cultural

and religious interests, constitute threats to tribal self-governance, health and welfare."

Without examining the "Third *Montana* Test" but recognizing the nexus between that test and the second *Montana* test, the Ninth Circuit went on to say that "we have previously recognized that threats to water rights may invoke inherent tribal authority over non-Indians" (on fee lands) and that "due to the mobile nature of pollutants in surface water it would in practice be very difficult to separate the effects of water quality impairment on non-Indian fee land from impairment on tribal portions of the reservation—a water system is a unique resource. The actions of one user have an immediate and direct effect on other users."[18]

Federal Authority—the Third *Montana* Exception

Federal Legislation -- In contrast to matters concerning inherent tribal land-use authority, the enactment of comprehensive federal environmental legislation that began in the 1960s represented the assertion of a national interest over state interests in order to ensure that all areas of the nation were uniformly protected from air, water, hazardous-waste, and solid-waste pollution. The EPA was created by the Nixon administration in 1970, and under the federal Clean Air Act (CAA) enacted that same year the EPA developed a new model of "cooperative federalism" that envisioned a federal–state partnership and provided federal financial assistance to states that adopted State Implementation Plans (SIPs) that established state regulatory standards at levels that were as strict or stricter than the federal requirements. The EPA initially retained direct federal authority over its CAA requirements, but once the EPA approved states' SIPs, states enforced their own state laws while remaining under federal supervision to ensure that the SIPs were adequately enforced. Four months after the CAA was enacted, EPA adopted the first National Air Quality Standards, and two years after that Congress enacted the Federal Water Pollution Control Act (FWPCA, the "Clean Water Act"). The EPA followed with a final rule that reserved EPA enforcement of the FWPCA—and excluded state regulatory authority—over Indian wastewater facilities and discharges, and then it adopted another final rule under the CAA that delegated authority to enforce new Prevention of Significant Deterioration Standards directly to Indian tribes on their reservations.

EPA Indian Policy -- An EPA "Indian Work Group" was established in 1978 to formulate an official Indian Policy, and in December 1980 Deputy Director Barbara Blum signed the first federal Indian policy (the 1980 Blum

Memo) embracing tribes' authority to regulate the reservation environment. The Blum Memo implemented the agency's new philosophy of cooperative federalism—only this time with tribes as well as with states. A revised Blum Memo was later adopted in 1984 as the EPA Indian Policy for the Administration of Environmental Programs on Indian Reservations, which embraced President Ronald Reagan's twin self-determination themes of working with tribes on a "government-to-government" basis and encouraging tribes to assume governmental roles in federal programs affecting their reservations. Cooperative federalism retained an important oversight role for the federal government to make sure that SIPs and Tribal Implementation Plans (TIPs) didn't have inconsistent or conflicting impacts on adjacent jurisdictions that share a common border. Both states and tribes were federal partners in the new cooperative framework, and by reserving the right to approve their respective implementation plans, the federal government was able to ensure the consistency and cohesiveness of environmental laws and effective enforcement. The U.S. Supreme Court has since upheld the federal trust obligation for the protection of Indian resources as a fiduciary duty to Indian tribes,[19] and Congress has affirmed the treatment of tribes as states for the purposes of implementing environmental programs[20] under a variety of environmental statutes.

To implement the EPA Indian Policy, the EPA adopted a more formal procedure called "treatment as a state" and established a certification program to approve Indian tribes for delegation of federal enforcement authority over TIPs and federal funding to create reservation environmental programs. The EPA's interim final rules, released in 1988 and 1989, established the criteria for tribes to qualify for "treatment as a state" under the Clean Water Act, the Public Water System program, and the Underground Injection Control program under the Safe Drinking Water Act. Once a tribe qualifies, it is eligible to receive funding to develop reservation-wide environmental protection programs.

Congress reaffirmed the EPA's policy of working on a government-to-government basis with tribes when it amended the provisions of the Safe Drinking Water Act in 1986, the Comprehensive Environmental Response, Compensation, and Liability Act in 1986, and the Clean Water Act (or FWPCA) in 1987.[21] The amendments recognized the EPA's obligation to treat tribes as states and provided for the delegation of responsibility for implementing environmental programs and regulating the reservation environment to tribes.

When Congress authorizes tribes to exercise civil regulatory authority, it can do so in two ways. It can directly delegate federal authority so that tribes become an extension of the federal government, or it can affirm the inherent authority of tribes that is already exercised by tribes or affirm inherent authority that has previously been determined by federal courts to have been implicitly divested by virtue of tribes' status as "domestic dependent sovereigns." An example of direct delegation is the federal liquor-control laws that make it a federal offense to sell or introduce liquor on an Indian reservation unless such action is in conformity with a duly adopted tribal ordinance.[22] Another example is the adoption of the CAA regulations of 1990, which allow tribes to be certified for "treatment as a state" and adopt clean-air regulations. The EPA has treated this procedure as a "direct delegation of federal authority," and courts have upheld that interpretation.[23]

An example of a court affirming inherent authority that had not been previously divested is the Ninth Circuit's decision in *Montana v. U.S. EPA*, where the court stated that the EPA appropriately applied the second *Montana* test to determine and delineate the tribe's inherent authority to regulate water on the fee lands of nonconsenting nonmembers: The court confirmed the EPA's determination that the activities of nonmembers posed such serious and substantial threats to tribal health and welfare that tribal regulation was essential. The court stated, "We have previously recognized that threats to water rights may invoke inherent tribal authority over non-Indians. A tribe retains the inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the health and welfare of the tribe."

Citing *Colville Confederated Tribes v. Walton*,[24] the Ninth Circuit said in *Montana*, "This includes conduct that involves the tribe's water rights" (internal citations omitted). *Colville* also supports the EPA's generalized finding that due to the mobile nature of pollutants in surface water, it would in practice be very difficult to separate the effects of water-quality impairment on non-Indian fee land from impairment on the tribal portions of the reservation: "A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users."[25]

An example of a court affirming inherent authority that had previously been determined to be implicitly divested is the U.S. Supreme Court's decision in *United States v. Laura*,[26] where the court confirmed the criminal jurisdiction of tribes over nonmember Indians, which had been determined to be implicitly divested in *Oliphant*, supra, including any person who would be

subject to the jurisdiction of the United States under the federal Major Crimes Act. Similarly, pursuant to the National Indian Forest Resources Act of 1990 and the American Indian Agricultural Resources Management Act of 1993, Congress has confirmed that tribes may enforce tribal civil laws against non-Indians who trespass on tribal lands. Tribes must first comply with the 1993 act's procedural requirements and obtain federal approval, but thereafter tribal trespass actions are to be governed by tribal law.

Challenges to EPA Clean Air Regulations in Nance v. EPA -- The plaintiffs in *Nance v. EPA*,[27] including the owners of a strip mine located outside the boundaries of the Northern Cheyenne Reservation, challenged approval by the EPA of the Northern Cheyenne Tribe's redesignation of its reservation from Class II to Class I air-quality standards pursuant to the EPA's Prevention of Significant Deterioration regulations based on the following claims, among others: (1) the EPA failed to consider the effects of such redesignation on strip mining located outside of the reservation boundaries; (2) the CAA did not authorize the delegation to Indian tribes of the power to redesignate their reservations, and if it did so authorize, the authorization was unconstitutional; (3) the redesignation affected a taking of the petitioner's coal-mining interests without due process and without just compensation, in violation of the Fifth Amendment to the Constitution; and (4) the delegation of redesignation authority to the Indian governing bodies affected land use outside the reservation area and thus violated the Tenth Amendment to the Constitution.

The Ninth Circuit confirmed that the CAA authorized the EPA to allow tribes to set their own air-quality goals on their reservations and upheld the EPA's delegation of authority to the tribe. The court based its opinion on the inherent sovereignty of Indian tribes and the principle of deference to an agency's interpretation of a statute. The court concluded by saying that

> within the present context of reciprocal impact of air quality standards on land use, the states and Indian tribes occupying federal reservations stand on substantially equal footing. The effect of the regulations was to grant the Indian tribes the same degree of autonomy to determine the quality of their air as was granted to the states. We cannot find compelling indications that the EPA's interpretation of the Clean Air Act was wrong. Nor can we say that the Clean Air Act constitutes a clear expression of Congressional intent to subordinate the tribes to state decision making.

Challenges to EPA Resource Conservation and Recovery Act Regulations: Wash DOE v. EPA. The plaintiff in *Washington State Department of Ecology*

v. U.S. Environmental Protection Agency[28] challenged the EPA's denial of the state's request that it be delegated the authority to regulate hazardous-waste-related activities under regulations adopted by the EPA pursuant to the Resource Conservation and Recovery Act (RCRA) of 1976 in all parts of the state, including the activities of all persons, Indians and non-Indians, on "Indian lands." In 1982, the state's governor submitted an application for interim authorization pursuant to RCRA section 3006(c), which asserted that the RCRA authorizes the State of Washington to regulate the hazardous-waste-related activities of Indians on reservation lands. After the requisite review and public comment, the EPA approved Washington's application for interim authorization "except as to Indian lands."[29] The EPA determined that the RCRA did not give the state jurisdiction over Indian lands, that states could possess such jurisdiction only through an express act of Congress or by treaty, and that the EPA would retain jurisdiction to operate the federal hazardous-waste-management program on Indian lands in the State of Washington.

Several Washington tribes submitted Amicus (Friend of the Court) Briefs in support of the EPA and the EPA Indian Policy. The tribes expressed their fear that their reservations would become "dumping grounds" for off-reservation hazardous wastes if the state were permitted to control the hazardous-waste programs on the reservations. The Ninth Circuit reasoned that whether that fear was well founded or not, the United States in its role as primary guarantor of Indian interests legitimately may decide that such tribal concerns can best be addressed by maintaining federal control over Indian lands.

The court held that the EPA regional administrator properly refused to approve the proposed state program because the RCRA did not authorize the states to regulate Indians on Indian lands and the state was unable to point to any other source of authority for extending state jurisdiction over Indian lands. The court reasoned that even though the RCRA did not directly address the problem of how to implement a hazardous-waste-management program on Indian reservations and the legislative history of the RCRA was silent on the issue, the court must defer to the reasonable interpretation of the agency responsible for administering the statute. The court took notice of the memorandum from Deputy Director Barbara Blum in 1980 that referred to the EPA's and the federal government's commitment to tribal self-regulation in environmental matters and the EPA's policy to "promote an enhanced role for tribal government in relevant decision making and implementation of Federal environmental programs on Indian reservations."[30] Citing *Nance*, the Ninth Circuit concluded that "the tribal interest in managing the reservation

environment and the federal policy of encouraging tribes to assume or at least share in management responsibility are controlling." The court recognized the vital interest of the State of Washington in effective hazardous-waste management throughout the state, including on Indian lands, but concluded that the "absence of state enforcement power over reservation Indians . . . does not leave a vacuum in which hazardous wastes go unregulated. EPA remains responsible for ensuring that the federal standards are met on the reservations. Those standards are designed to protect human health and the environment. The state and its citizens will not be without protection."

What the Future Holds -- An underlying principle of zoning is that although the value of private property may be affected by certain imposed use restrictions, private landowners receive a reciprocal benefit by being assured of predictable and compatible adjoining land uses. When two governments pursue independent and checkerboard zoning schemes, individual landowners may lose the protection of reciprocal benefits as a consequence of the restrictions placed on their property. Although federal courts have attempted to provide some clarity for determining the circumstances in which tribal land-use authority will apply to non-Indian fee lands, the underlying premise in *Brendale* will continue to create legal uncertainty and ultimately preclude the development of a clear test to determine when tribal authority applies and when it doesn't. That is because *Brendale* is at odds with the fundamental principles of land-use planning and growth management that promote comprehensive, consistent, predictable, and well-integrated land-use plans. The trend in case law has been to limit the *inherent authority* of tribes to regulate non-Indian activities on fee lands where there is no overriding federal interest and to broaden tribes' authority to adopt regulations that protect the tribes' "health and welfare" in areas where the federal government has chosen to protect federal interests by regulating the environment and protecting natural resources. By their inclusion in the federal government's policy of "cooperative federalism" and their incorporation into the federal statutory and regulatory scheme, tribes have benefited from both direct delegations of federal authority and the revitalization of inherent tribal authority that would have otherwise been taken away by the federal courts' policy of implicit divestiture. The Ninth Circuit has essentially rewritten the *Montana* test in its *FMC v. Shoshone Bannock* decision in 2019. The court announced that "the Supreme Court held that there are three bases for tribal regulatory jurisdiction over non-member activities on fee land within the boundaries of a reservation—the so-called Montana exceptions" and then went on describe the three exceptions: (1) the consensual-relationship

exception, (2) the exception for threats to the tribe's political integrity, economic security, or health and welfare, and (3) express authorization of a tribe's regulation by federal statute or treaty. Given this new formulation, it will be much easier for tribes in western Washington to meet the third *Montana* exception (and the second *Montana* exception to the extent it is conflated with the new third exception) by adopting civil land-use regulations such as those that protect the "health and welfare" of the tribe by regulating and protecting tribal groundwater, marine and fresh surface water, marine water and freshwater habitat that support treaty-reserved hunting and fishing rights, archaeological and traditional cultural sites, the distribution of potable water, and the collection and disposal of wastewater.

The Delivery of Urban Services on the Reservation

With revenues from tribal taxes on retail sales, fuel sales, utility sales, and leaseholds on trust land; from gaming and other economic enterprises; and from grants and other federal assistance, tribes are actively building the infrastructure and the delivery of public services on their reservations. These services include law enforcement, water and sewer utilities, housing, transportation, health services, and community commercial activities.

Public Safety - Although tribes generally lack criminal jurisdiction over nonmembers,[31] tribal police officers are the primary source of police protection for all of the residents on most reservations. Tribal police officers are authorized to stop and detain any individual who has violated a criminal law in order to determine whether the individual is a member of that reservation's tribe, a member of another tribe, or a non-Indian. Tribes may detain non-Indians for violating applicable state law, turn them over to state or county police officers, and later provide witness testimony.[32]

Except as limited by federal legislation, tribal criminal jurisdiction over Indians is complete, inherent, and exclusive.[33] Tribes exercise exclusive jurisdiction over victimless crimes and non-major crimes committed by Indians against Indians, and they share jurisdiction with the federal government over crimes committed by Indians against non-Indians. Although the U.S. Supreme Court has not ruled on the question, tribes have concurrent jurisdiction with the federal government over the thirteen crimes named in the Major Crimes Act.[34] The latter issue has been rendered less important by the Indian Civil Rights Act of 1968,[35] which limited tribal courts to handing down sentences of not more than one year or a fine of $5,000 or both for any one offense. Tribes' criminal jurisdiction over Indians who were members of another tribe was limited briefly by an adverse decision

of the U.S. Supreme Court in *Duro v. Reina*, but that ruling was promptly overturned by Congress, which recognized and affirmed tribes' inherent criminal jurisdiction over members of other tribes.[36]

Except as otherwise provided by federal law, states and counties have no criminal jurisdiction over Indians who commit crimes against Indians or non-Indians. States do have criminal jurisdiction over non-Indians who commit crimes on the reservation. The federal law in this case is Public Law 280,[37] which authorizes states to extend their criminal jurisdiction onto the reservation. Washington chose to extend its jurisdiction in two ways—first by applying statute that limited criminal jurisdiction to all Indian reservations and second by extending full criminal jurisdiction over reservations where the tribe formally requests such extension of jurisdiction. The mandatory jurisdiction applies to anyone who commits a crime on the reservation, except to Indians who commit crimes on trust land owned by the federal government, but with eight enumerated exceptions, the most notable of which are crimes committed while operating a motor vehicle. About half the tribes in Washington requested full criminal jurisdiction, but the state agreed to return this jurisdiction to six tribes pursuant to a federal procedure called "retrocession"—the Quileute, Chehalis, Swinomish, Skokomish, Muckleshoot, Tulalip, and Colville tribes—during a ten-year period from 1986 to 1995. Retrocession was enthusiastically endorsed by the state and local law enforcement authorities because the federal government was providing funding to tribes that had their own police departments—and exclusive jurisdiction over crimes committed by Indians—but not to tribes that had requested the state to exercise full criminal jurisdiction on their reservations. Counties provide police protection to the rural areas of the county but not to cities and towns that pay for and provide their own police departments to protect larger urban populations.

As populations grew on Indian reservations, county police departments were unable to provide sufficient numbers of deputies to patrol the reservations, respond to increasing numbers of calls, and enforce state criminal laws. The state and counties were more than happy to have tribes take over the primary responsibility for all law enforcement on the reservation but to provide "municipal-like service" to the reservation community. One example of this relationship today is the cross-deputization agreement between the Swinomish Tribe, Skagit County, and neighboring cities and towns, which allows tribal police to act as both tribal and state police officers and simply refer criminal cases against non-Indians to the county sheriff's office for prosecution in Skagit Superior Court. The average response time for a tribal

police officer answering an emergency 911 call on the reservation is three to four minutes, whereas the comparable time for a county sheriff's deputy is closer to thirty minutes and in some cases more than an hour. To meet this need, the Swinomish Tribe provides a police department with fourteen patrol officers, two community service officers, five support staff, two detectives, and seven fish and wildlife officers as well as a tribal court system with a judge, bailiff, court clerk, prosecutor, and public defender. Tribal officers patrol the reservation seven days a week and twenty-four hours a day.

Managing Water Resources - Surface and groundwater on or adjacent to an Indian reservation is subject to a tribe's reserved water right in terms of both quantity and quality, and that right is based on federal law, not state law. Water rights are a complicated subject in any state, but in Washington the basic state rule is that rights to water are based on an "appropriative system," and seniority is based on first in time and first in use—the date you first began to use the water, the amount of water you put to beneficial use, and the amount of that original quantity of water that you continue to use over time. Federal Indian water rights, even though separate from state water rights, incorporate the seniority system of the state's appropriative system. A tribe has a priority date as of the time the reservation was created[38] (1854 or 1855 in Washington) in an amount that is sufficient to "accomplish the purposes of the reservation" and where that purpose is to support agriculture enough water to irrigate all of the "practicably irrigable acreage" on the reservation. It is an implied right and need not have been specifically identified when the reservation was set aside for the tribe. These rights are referred to as "Winters Rights," and, unlike state water rights, cannot be lost as a result of diminished or nonuse.[39]

The quantity of the federally reserved water right, however, has not been determined for most of the reservations within the state. A major uncertainty in federal water law is the fact that there are both dormant and never-exercised water rights that have never been quantified. Without such a reserved water right, courts have held the reservation would be of no value. Courts have also held that Winters Rights include groundwater as well as surface water, and a corollary to that right is the right to water of undiminished quality. This right of quality protection is derived from the "equitable apportionment doctrine" that imposes a duty on sister states to protect water quality and prevent the diminishment of quality enjoyed by neighboring states.[40] However, tribes must actually be using water from a groundwater aquifer or show that it is otherwise "necessary to fulfill the purpose of the reservation" to have standing to bring a challenge to actions

that potentially are degrading the quality of the water subject to the tribe's Winters Rights.[41]

Washington State has enacted comprehensive codes covering all phases of water-resource management. The surface water code[42] and the groundwater code[43] provide permit systems for the right to withdraw and use water to provide certainty in water-resource management. These codes also provide for a general adjudication[44] of existing water rights granted under common law. The state's water code permit system has been applied to waters within Indian reservations since 1917. In an informal opinion, the Washington State attorney general said that Washington's water right permit system "allowed a non-Indian to divert waters, located on non-Indian lands within an Indian reservation, if those waters exceeded the amounts needed to satisfy prior rights, including the reserved rights of Indians."[45] The "excess waters" analysis[46] was later upheld in *Tulalip Tribes of Washington v. Walker*.[47] However, where the watershed is located entirely within the boundaries of an Indian reservation, the state's regulatory jurisdiction is preempted.[48]

A further complication arises in the transfer of reserved Winters Rights to non-Indian ownership. A tribe's ability to alter the purposeful use of a reserved right to another use remains problematic. In *Colville Confederated Tribes v. Walton*,[49] the Ninth Circuit Court ruled that "no change to another use may be made until the reserved right is first exercised for the use for which it was reserved." Non-Indian purchasers of trust land acquire water rights equal to those of the Indian seller.[50] However, unlike an Indian landowner, the non-Indian purchaser may lose all or portion of the water right if it is not put to use with "reasonable diligence" following the transfer of title. In recent decades, tribes in Washington have developed comprehensive resource and environmental protection policies as important components of their self-governance. Tribal water codes generally rely on the tribe's inherent sovereign authority to manage their federally reserved water rights.

Tribal Water and Sewer Utilities - The management of reservation water sources, the delivery of safe drinking water, and the disposal of harmful wastewater fall squarely within the second exception of the *Montana* test for tribal authority to manage and regulate. Water systems provide healthy, filtered, and safe potable water to residents who would otherwise be forced to use water from wells—some shallow and some not well maintained—that have potentially harmful amounts of minerals, heavy metals, and other particles and organisms, including fecal coliform from humans and other mammals. Sewer collection systems dispose of human and other forms of

waste from residents who would otherwise be forced to dispose of their wastewater in septic fields or into public waterways—with no more than primary treatment—which can adversely affect groundwater, marine life, and the people and animals that consume both.

Tribes are also "putting pipe in the ground" and extending water and sewer services to homes throughout the checkerboard of fee and trust lands on the reservation. Many tribes do this by creating Public Utility Districts and operating those utility systems separately and independently from other tribal functions. When tribes provide those services, they are doing so to protect the health and welfare of the tribe and of all of the residents of the reservation—Indian and non-Indian. In *Lummi Indian Tribe v. Hallauer*,[51] the U.S. District Court for the Western District of Washington acknowledged the tribes' interest in regulating water and sewer and the Lummi Tribe's authority in this particular case to assert its jurisdiction over non-Indians on fee lands within the reservation and to require them to hook up to the tribe's sewer system. The court recognized the tribal interest in regulating the lands and houses of non-Indians, especially since the health and welfare of people on the reservation were at stake. The court said, "Regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. The same is true regarding the importance of a sewer system to the Lummi Reservation."

These tribal public utilities provide services to trust and fee land, members and nonmembers, Natives and non-Natives. They also provide transparency for rate setting and billing, staffing, expenditures for system maintenance, financial reserves, and capital-facility construction. Even more so than land-use planning and zoning authority, it just doesn't make sense from a practical perspective to have two pipe systems (water or sewer) side by side in the ground separately serving checkerboarded fee and trust lands.

Transportation - Tribes have a significant interest in making sure that local and regional transportation systems are safe and well maintained and that they provide appropriate access to tribal enterprises and public facilities. Various roads on the reservation are owned and maintained by tribes and the federal government as well as by states, counties, and private parties. The BIA maintains a list of BIA roads on its Indian Reservation Roads Inventory, and funds are awarded annually to tribes based on the number of miles of roadway on the inventory for each tribe's reservation. The BIA jointly administers the Tribal Transportation Program with the U.S. Highway Administration, which is funded from the Highway Trust Fund.

Participating tribes develop Transportation Improvement Programs that include a five-year plan with funding requirements for planning, design, construction, and maintenance activities, including funding for specific projects. The plan is sent to the BIA Division of Transportation for review, and, when approved, it is forwarded to the Federal Lands Highway Office for final approval. The plan can be renewed at the end of the five-year period or, as most tribes do, can be updated and extended annually.

In 2012, the federal government passed the Moving Ahead for Progress in the 21st Century Act, which calls for regional transportation planning that will "provide the foundation for the nation to compete in the global economy and will move people and goods in an energy efficient manner." Federal transportation legislation authorized the creation of Regional Transportation Planning Organizations (RTPOs), which include a broad spectrum of local governments and agencies focused on regional transportation planning.[52] The state establishes the composition of RTPOs to enhance the planning, coordination, and implementation of statewide strategic long-range transportation plans and Transportation Improvement Programs for nonmetropolitan areas.[53] The RTPOs include "multijurisdictional organizations of nonmetropolitan local officials or their designees who volunteer for such organization and representatives of local transportation systems who volunteer for such organization." The duties of RTPOs include "considering and sharing plans and programs with neighboring regional transportation planning organizations, metropolitan planning organizations, and, where appropriate, tribal organizations."[54]

In Skagit County in the early 1990s, Washington State established the Skagit Council of Regional Governments (SCOG) as the RTPO for Skagit County pursuant to RCW 36.64.080. The SCOG currently includes representatives of the county and the cities, towns, and ports in the county as well as of Skagit Transit, Skagit Public Utility District No. 1, the Swinomish Indian Tribe, and the Samish Indian Nation. On the council board, every member has one vote except the county, which has three votes—one for each of the three county commissioners. The SCOG has also created a Transportation Policy Board pursuant to RCW 42.30.020(2), with separate responsibilities and members and voting to do much of the day-to-day duties, including representation of the multicounty Skagit-Island County Regional Transportation Planning Organization. The SCOG sets regional priorities for federal project funding, and, as voting members, the Swinomish and Samish Tribes advocate for those projects most needed by their tribal communities as well as the region.

The SCOG agreement refers to the Growth Management Act (GMA) and its requirement that local governments adopt transportation plans that are consistent with comprehensive land-use plans. In many respects, the SCOG is a model for regional planning that includes more than just the county, cities, and towns that are currently designated under the GMA as responsible for the adoption of county-wide planning policies. The federal law anticipates the inclusion of more than one county, and the SCOG already includes port districts, public utilities, and Indian tribes. This type of council may well pave the way for future planning based on watersheds, ecosystems, and bioregions.

Successful transportation improvements often require a coordinated regional effort. The State Highway 20 intersection on the Swinomish Reservation illustrates this concern. This dangerous intersection experienced a high occurrence of traffic accidents and fatalities and was recognized by all governments concerned as a major public-safety problem. In the mid-1990s, the tribe conducted a study to identify cost-effective solutions and assumed the lead-agency role for coordinating project planning. The Washington Department of Transportation, Skagit County, and the SCOG supported the tribe's highway-improvement project. Funding through the Federal Highway Administration was matched by state and regional funds, and the first phase of highway improvements were successfully completed in 2003.

Taxation

Like other governments, tribes need revenue to pay for the myriad services they provide to tribal members and the general population of the reservation, including public safety (police, fire, emergency management), land-use planning, tribal courts, education (day care, preschool, and K–12), medical services, housing, and many other services. Most governments rely on tax revenues, including property taxes, retail sales taxes, business and occupation taxes, tobacco and liquor taxes, fuel taxes, and utility taxes. In general, tribes are recognized as having the power to levy a tax as a fundamental exercise of its tribal sovereignty.[55]

Tribally owned reservation businesses are exempt from federal income tax, and state tax laws generally do not apply to tribal businesses or to reservation trust properties. For a variety of reasons, however, federal courts have prohibited tribes from assessing many of the taxes on non-Indians that the state and neighboring cities, towns, and the county receive. To fill that void, tribes have had no choice but to raise private revenue from business and enterprises on trust lands that those same courts have held to be exempt from certain taxes. The biggest source of revenue is gaming. Tribes have been found

to be exempt from state and federal taxes on their gaming operations, and this exemption has extended to the prizes that have been won and the purchases that have been made by their native and nonnative guests and patrons. This power derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activity within that jurisdiction.

Tax on Tribal Members - Most of the land owned by tribes, their members, and members of other tribes is owned in trust for them by the federal government and exempt from taxation by the state. Although tribes have always been assumed to have the power to tax their own members, they have been reluctant to impose taxes directly on tribal members due to the poverty of a significant portion of the tribal population.

Tax on People Doing Business on the Reservation - The courts have generally upheld tribal taxes on nonmembers. One of the first cases in Washington occurred on the Colville Reservation. In *Washington v. Confederated Tribes of the Colville Reservation*,[56] the U.S. Supreme Court held that a tribe could tax the non-Indian purchasers of cigarettes on the reservation, reasoning that federal courts had for some time recognized the power of tribes to tax "non-Indians entering the reservation to engage in economic activity." The Court also held that a tribal tax is not preempted by a state tax on the same activity. The Court explained in *Merrion v. Jicarilla Apache Tribe*[57] that the tribes' power to tax is based on inherent tribal authority and not just on the authority to exclude non-Indians from the reservation. That ruling changed in 2001 in *Atkinson Trading Post v. Shirley*,[58] when the Supreme Court applied the *Montana* test and held that the Navajo Tribe lacked the power to impose a hotel-occupancy tax on guests of a hotel operated by a nonmember on fee land within the reservation even though the hotel benefitted from tribal police and fire protection. The new rule was that a tribes' power to tax did not extend beyond tribal land. Tribes have since successfully imposed utility taxes on telephone and cable TV companies.[59] In Washington, tribes have been permitted to impose taxes on utilities because the service takes place on trust land and the company has a consensual relationship with the tribe.[60]

Tax and Encumbrances on Title on Fee Land - The U.S. Supreme Court has ruled that a tribal court does not have jurisdiction to hear a case involving the sale of non-Indian fee land and by implication to impose a tax on the sale of that land.[61] In a related case, the U.S. District Court for the Western District of Washington has held that a tribe may put a fee landowner on

notice that it has such authority and file that notice with the local county auditor and thereby create an encumbrance on the landowner's fee title.[62] This case involved a challenge by non-Indian fee landowners on the Tulalip Reservation to a Memorandum of Ordinance filed by the Tulalip Tribes with the county assessor that appeared as a special exception to the coverage of a homeowner's title insurance policy. The memorandum stated that the Tribes have land-use regulatory authority over all properties—including fee lands—located within the reservation's exterior boundaries and that such lands are subject to a one percent real estate excise tax on any sale or transfer of the land. The plaintiffs were three married couples, each of whom owned a house on fee land on the reservation and who sought declaratory and injunctive relief in the district court against the tribes, claiming that the Memorandum of Ordinance unlawfully encumbered their property, placed a cloud on their title, and rendered it unmarketable. The plaintiffs asked the court to, among other things, declare that the tribes were without right to regulate or levy a tax on the plaintiffs' property and to quiet title to the plaintiffs' fee land, free and clear of any encumbrances arising from the regulatory ordinance or real estate excise tax. The court agreed with the tribes, however, and granted the tribes' motion to dismiss, stating that the plaintiffs' claims were premature and "not ripe" for adjudication and that the plaintiffs had not demonstrated "that there is a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality, to warrant the issuance of a declaratory judgment."[63]

Taxes on Lessees of Trust Land - Tribes have recently been able to replace county-imposed taxes on property owned by non-Indian lessees on trust land with tribal taxes on the lessee's possessory interest or the use and occupancy of trust land. In a case referred to as the *Great Wolf Lodge* decision, the Ninth Circuit Court of Appeals held that state and local governments lack the power to tax permanent improvements built on non-reservation land owned by the United States and held in trust for an Indian tribe pursuant to 25 U.S.C. §465.[64] The court had applied its reasoning in an earlier case, *Mescalero Apache Tribe v. Jones*,[65] holding that the exemption of trust lands from state and local taxation extends to permanent improvements on such lands, regardless of whether the improvements are owned by non-Indians or not.

Taxes on Non-Indian-Owned Business - Courts use a balancing test to determine whether states can tax or regulate non-Indians who engage in commerce on Indian reservations. The legal test balances federal and tribal interests against those of the state and considers the degree to which each government regulates and provides services to the activity that is taxed.[66]

When states are permitted to tax, the result is often double taxation, which can cause reservation businesses to become less competitive and can discourage further private investment. Litigation can also increase tensions between states and tribes that can adversely affect other efforts in tribal–state cooperative endeavors. In Washington, a federal district court recently held that the county and state could impose their retail sales tax, business and occupation tax, and personal-property tax on non-Indian business owners and their customers on land leased from an Indian tribe. The plaintiffs, the Tulalip Tribes and the United States, challenged the enforcement of these taxes by the State of Washington and Snohomish County within Quil Ceda Village, a municipality incorporated by the Tulalip Tribes and located on land held in trust for the Tulalip Tribes.[67] The court found that the only real interest of the tribes that was being impeded was the tribes' ability to collect the full measure of its own taxes. Courts have said, "There is no requirement that a State tax imposed on non-Indians for reservation activities be proportional to the services provided by the State."[68] Under *White Mountain Apache Tribe v. Bracker*, in order to preempt a state tax, a court must essentially conclude that "the State has had nothing to do with the on-reservation activity, save tax it."[69]

In the absence of an extensive federal regulatory scheme governing the activity being taxed, Supreme Court and Ninth Circuit precedent have all but closed the door on preemption of a state's generally applicable tax on activities between non-Indians, concerning non-Indian goods, on an Indian reservation, particularly where the state has not "abdicated" responsibility to the tribe and continues to provide government services to the taxpayers in question.[70]

Economic Development

Tribes have had few alternatives to fill the void created by federal court decisions that significantly limit their ability to raise tax revenue from sources commonly used by state, county, and local governments. Gaming as well as other tribal enterprises that are owned and operated by a tribe has been held to be exempt from state taxation, and tribes have utilized these tax exemptions to operate tribal enterprises and impose tribal taxes on those activities that aren't taxed by the state. To advance their economic-development objectives, tribal governments have found it necessary to resolve state taxation conflicts in order to attract capital financing and investment and to ensure a stable reservation business environment. The resolution of tax conflicts has come about through litigation as well as through cooperation.

Tribes have entered into a number of compacts with states to share tax revenues rather than litigate or appeal decisions in federal district courts. Most tribes in Washington have compacts that address tax sharing for tribal sales of fuel, liquor, cigarette, and tobacco products.

Economic development has therefore become a primary means for alleviating the chronically depressed economic conditions that persist on most Indian reservations, where more than 39% of reservation Indians live below the federal poverty line—four times the national average. The development of a self-sustaining tribal economy requires access to affordable private capital, a skilled labor force, competent management, and access to markets. By means of tribal inherent governing powers and proprietary reservation resources, reservation conditions can be improved through the dual process of expanding the reservation economy and establishing a stable reservation tax base.

Tribal Interests off Reservation: Treaty Rights

Tribes in western Washington reserved several related off-reservation proprietary rights in treaties they signed with the United States in 1854 and 1855. Courts have affirmed these rights as aboriginal rights, common-law property rights, and reserved treaty rights.[71] They all stem from a central provision included in all the treaties with minor variations:

> **Article 5.** The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens.

Treaty Fishing Rights - Anadromous Fish—The Boldt Decision. In a landmark case in 1974, federal district court judge George Boldt issued a decision commonly referred to as the "Boldt Decision" in the case *United States v. Washington*.[72] The case was brought by the United States and seven Indian tribes against the State of Washington for limiting and preventing tribes from fully exercising their treaty-reserved fishing rights. Additional tribes intervened after the litigation had commenced. At the outset and as part of the court's pretrial order, the case was divided into two phases. Phase I would address the nature of the treaty right to take anadromous fish and the allocation of fish between treaty and nontreaty fishers. Phase II would address the issue of whether the right included the harvest of hatchery fish and the

right to protect the habitat of fish.

Phase I—Allocation of Anadromous Fish - In Phase I, the district court's decision was entered in 1974, affirmed on appeal by the Ninth Circuit Court of Appeals in 1976,[73] and then affirmed with minor amendment on appeal by the U.S. Supreme Court in 1979.[74] These decisions collectively allocated the harvest of all salmon and steelhead in the case area between treaty and nontreaty fishers and required fifty–fifty sharing of the "harvestable catch" on a "run by run, river by river basis."[75] Indian tribes were permitted to exercise their treaty right to harvest salmon in each of their respective "usual and accustomed grounds and stations," or U&As. The size of the tribes' U&As varied between the smaller river fisheries of upriver tribes and the larger marine areas of coastal tribes that in some cases span multiple counties, marine areas, and watersheds. The Supreme Court construed the 50% treaty share as a maximum allocation subject to further reduction if a lesser amount would provide a "moderate living" for Indians and reaffirmed an earlier decision involving the Puyallup Tribe that recognized state authority to regulate fishing where "reasonable and necessary for conservation."[76]

To implement the decision, the district court required the state and tribes to adopt an annual salmon-management plan and established a fisheries advisory board to facilitate the resolution of disputes. Preseason planning begins in late February and early March of each year in a series of meetings known as the "North of Falcon" process, wherein federal, state, and tribal fishery managers plan the Northwest's recreational and commercial salmon fisheries. The name refers to Cape Falcon in northern Oregon, which marks the southern border of active management for Washington salmon stocks. The North of Falcon planning process coincides with the March and April meetings of the Pacific Fishery Management Council, the federal authority responsible for setting ocean salmon seasons three to two hundred miles off the Pacific Coast. The Pacific Fishery Management Council makes recommendations to the U.S. secretary of commerce regarding ocean commercial troll and recreational fishing seasons and catch limits off the coasts of Washington, Oregon, and California.

The North of Falcon process begins when run-size forecasts are first available. Wild and hatchery run sizes for all salmon species from various areas of the state and expected Alaska and Canadian harvest levels are considered as fishery managers and the public determine the timing of fisheries that will meet conservation goals for all salmon stocks. Professional biologists from various state, tribal, and federal management agencies analyze the

biological consequences of various options for the outside (ocean) fisheries and the inside (Puget Sound, coastal, and Columbia River) fisheries. For Washington State, escapement levels (the number of fish allowed to return to spawning areas to reproduce) for rivers on the ocean, rivers on the Strait of Juan de Fuca, and the eight major terminal areas in Puget Sound are set, the remaining number of fish in each run of fish returning to each river (called the "harvestable catch") is estimated, and that number is divided in roughly equal shares for treaty and nontreaty fisheries. Based on these estimates, Washington State and the tribes agree on an overall salmon-management plan for the upcoming fishing year and adopt written agreements governing various terminal areas (e.g., Grays Harbor, Skagit River).

Pursuant to those agreements, the state adopts recreational and commercial fishing regulations for its 50% share, and the tribes adopt regulations to harvest their 50% share for their own commercial, ceremonial, and subsistence fisheries. Generally speaking, tribal regulations provide for more fisheries in terminal areas (rivers and the mouths of rivers) to accommodate traditional fishing practices by Indian fishers in small boats with smaller nets, and state regulations provide for more preterminal (deep-water) fisheries in the ocean, the Strait of Juan de Fuca, and Puget Sound to accommodate commercial charter boat fishing and related activities as well larger gillnet, troll, and purse seine fishers. State recreational fishing in rivers (terminal areas) is generally limited, and in some seasons and in some rivers it is not permitted at all. This restriction has led to conflict and confusion regarding why Indian commercial fishermen are allowed to fish in rivers when non-treaty commercial fishers are not. Aside from allowing more Indians to access the fisheries, tribes prefer to let more fish return to the river so that they can better protect endangered and weak fish stocks. Fish that are harvested in deep-water (preterminal) fisheries are often a combination of two or more runs of fish, and it is harder to determine how many of each run are present and ultimately caught.

Phase I—Allocation of Non-anadromous Fish - The Boldt Decision dealt with "anadromous" fish (such as salmon and steelhead) but did not deal with nonanadromous fish (such as halibut and ground fish) and shellfish (such as clams, oysters, crab, shrimp, and geoduck). The United States and sixteen tribes filed a claim seeking a declaration of the nature and extent of their shell fishing rights as a separate subproceeding in the original *United States v. Washington* litigation in 1989. U.S. district judge Edward Rafeedie issued his decision in 1994, ruling that tribes have a reserved treaty right to take half of the natural production of shellfish on private tidelands and in

marine waters. The right includes access across private property when there is no other reasonable way to access those tidelands and the right to half of the harvest of natural shellfish below commercial shellfish beds. Fear that the court would allow tribal access across private properties prompted private-property interests to become involved, organizing under United Property Owners of Washington.[77] The district court ordered the parties to negotiate and to submit either a jointly agreed upon implementation plan or separate proposals provided that agreement could not be reached.[78] After announcing its initial decision, the court conducted a six-day "implementation trial" in order to receive evidence regarding proposed plans to implement the decision. Following the parties' submission of their competing plans, the district court adopted its implementation plan.[79] Thereafter, the court made several important rulings, and in response to motions to reconsider its earlier decision, it amended its decision.[80] On appeal, the Ninth Circuit Court of Appeals affirmed with minor changes in a ruling by Judge Rafeedie in 1998.[81]

The Ninth Circuit Court confirmed that the tribes are entitled to harvest all species of shellfish, that the tribes' usual and accustomed grounds and stations do not vary by species of fish, and that the tribes are entitled to harvest shellfish on privately owned tidelands. The court modified the tribes' right to harvest shellfish on commercial beds to half of the natural or "pre-enhanced" shellfish beds of commercial growers and extended the right to shellfish beds owned by the state (the state is not a "citizen" for purposes of the exception to tribal harvest). The state appealed the Ninth Circuit's decision to the U.S. Supreme Court, but the Court chose not to hear the appeal and denied certiorari (cert.).[82]

Phase II—Environmental Protection - In 1976, the plaintiffs commenced Phase II of the case by filing amended and supplemental complaints claiming (1) that hatchery-bred and artificially propagated fish should be included in the allocable fish population and (2) that the treaty right includes the right to have treaty fish protected from environmental degradation. These issues were raised in Phase I but reserved for decision in Phase II.[83] The tribes sought the district court's implementation of an environmental impact process that would be triggered whenever a state agency contemplated a state or a private action that could affect the size or quality of a fish run. The plaintiffs moved for summary judgment on both the hatchery and environmental right issues but did not address whether the defendants had violated the environmental protection right or what remedies would be appropriate if they had. The court granted the plaintiffs' motion for summary judgment on both issues, concluding that "the most fundamental prerequisite to exercising the right to

take fish is the existence of fish to be taken" and that "implicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made degradation."[84] The decision was vacated on appeal by the Ninth Circuit, which held that the plaintiffs had not asserted "concrete facts which underlie a dispute in a particular case."[85] Federal courts are authorized to resolve actual disputes and cases in controversy, but they are not allowed to issue rulings on general principles of law.

Cooperative Efforts—In the Shadow of the Vacated Phase II Environmental Right

Since 1985, the tribes' potential treaty right to protect the habitat of fish and wildlife has been a serious concern to the state, local-resource industries, and local government. The potential threat of litigation has prompted greater cooperation and mediated solutions in a variety of habitat-protection matters.

Cooperative Fisheries Management - Seeking to redress and implement the provisions of the Stevens treaties guaranteeing the tribes' reserved rights to fish, *U.S. v. Washington* established the tribes as comanagers of the resource. Because of the continued resistance by both the state and tribes to overcoming their adversarial positions, the federal court assumed direct management of the fishery resource. In 1984, a tribal–state plan for cooperative management of fisheries in Puget Sound was finally jointly developed and approved by the federal district court, which effectively replaced the role of the court with the direct participation of the tribes.

The Pacific Salmon Treaty - This treaty was negotiated by the United States and Canada in 1985 to resolve conflicts over the interception of salmon stocks returning to both Canadian and U.S. rivers of origin. The Canadian interest was primarily with impacts to salmon returning to the Fraser River, which travel to Alaska and return via either the inside Johnstone straits in Canada or the "outside" of Vancouver Island and through the Strait of Juan de Fuca and the U.S. San Juan Islands. U.S. interests were primarily with impacts to Puget salmon returning through Canada either on the inside or outside of Vancouver Island. The Pacific Salmon Commission was created by the U.S. and Canadian governments to implement the treaty and to provide regulatory recommendations to each country. The commission includes direct representation by tribal leaders.

Watershed Planning - In 1986, statewide watershed-planning efforts were commenced in a joint intergovernmental educational effort to involve broad fisheries interests and to develop solutions to problems affecting natural

resources. The process included more than ten thousand participants and produced recommendations for a statewide enhancement program. Specific enhancement projects were proposed to resolve key problems contributing to depressed natural-salmon stocks. Subregional planning teams were organized to develop Comprehensive Resource Production and Management Plans for each drainage area in an effort to advance the watershed-planning approach.

Timber Fish and Wildlife Agreement - Following more than a decade of litigation among timber landowners, tribes, environmental organizations, and state natural-resource agencies, twenty-four separate parties, including the timberland company Weyerhaeuser and the Washington Department of Natural Resources (DNR), successfully negotiated the landmark Timber, Fish, and Wildlife Agreement (TFW) in 1987.[86] The TFW addressed tribal concerns regarding forestry and timber-harvest practices and their impact on both salmon habitat and the cultural and archaeological resources in off-reservation areas. The TFW process represented a policy shift toward government-to-government cooperation with tribes and has been referred to as the historical "New Deal for Washington forests."[87] It ended end years of litigation and a history of conflict with Indian tribes over forest-management practices.

Sustainable Forestry Roundtable - In the late 1980s, the DNR sought the assistance of tribal governments and other TFW participants to establish a cooperative effort to address agency regulatory issues involving the state Forest Practices Board, local governments, and other interested groups. Following eighteen months of discussions, the group proposed legislative and regulatory reforms that included direct tribal participation. Although the state legislature declined to enact the proposal, it is another example of state–tribal cooperation to address environmental impacts to treaty-reserved natural-resource rights.

Water Resource Planning: Chelan Agreement - In 1990, a water-resources agreement was developed by 175 Washington leaders with various constituencies in water resources. That effort culminated during a retreat held at Lake Chelan in what is referred to as the "Chelan Agreement," which outlined the basic goals and principles for cooperative water-resource planning. The goals addressed the primary concerns of tribes in maintaining to sufficient water quantity and quality in rivers and streams that provide fish and wildlife habitat. Demonstration projects involving two watersheds continue to address complex issues related to the allocation of water resources in Washington State.

Puget Sound Water Quality Management - The Washington State Legislature created the Puget Sound Water Quality Authority in 1985 and designated a seat on the authority for tribal representation. This authority provides a forum with direct tribal involvement in a state decision-making body that oversees broad programs and makes policy recommendations to the legislature and state agencies to protect and enhance the water quality of Puget Sound.

The Centennial Accord and Millennium Agreement - Washington's governor and twenty-six federally recognized tribes signed the Centennial Accord in 1989, affirming the government-to-government relationship between the tribes and the state and outlining a process for implementing a cooperative intergovernmental approach to resolving fisheries and natural-resources-management issues as well as social welfare, economic development, and intergovernmental jurisdictional concerns. The accord required each state agency to initiate a procedure to implement the government-to-government policy and a plan of accountability. The parties signed the Millennium Agreement ten years later in 1999 to further develop and institutionalize the coordination process.

DNR Tribal Policy - Although not an executive agency of the state governor, the DNR issued its own independent tribal policy in 1991 recognizing the sovereign status of the state's federally recognized Indian tribes. The policy commits the department to more fully understand and appreciate the unique values and cultures represented by the tribes and directed department executives and managers to meet regularly with their respective tribal counterparts. The policy's goal is to prioritize mutual concerns that require priority attention and staffing by the department and to resolve those concerns on an organizational level.

Phase II Environmental Right Confirmed—the Culvert Case

Although significant progress was made in cooperative efforts to protect the forest and marine environments of fish in the 1980s and 1990s, those efforts increasingly came up against the intransigence of vested political influence, particularly in the areas of rural well development and agricultural practices. Following failed mediation efforts to resolve growth-management issues associated with the protection of instream flows (state water rights for fish) and the ongoing impact of agricultural activities on riparian habitat, tribes began exploring the basis for a test case to establish the environmental protection right that was vacated by the Ninth Circuit in 1985. What they found were several internal reports by Washington State regarding the impacts of state-owned culverts that blocked salmon passage under state

roads and highways. In 1990, the Washington Department of Transportation (WDOT) and the Washington Department of Fish and Wildlife (WDFW) had entered into a memorandum of understanding to conduct an inventory of fish-passage-barrier culverts on WDOT rights-of-way and in 1997 presented a report to the state Legislature that found that 249 linear miles and 1.6 million square meters of salmon habit were blocked by barrier culverts and that removal would produce an additional 200,000 adult salmonid annually. The report noted that these estimates would increase when the WDOT completed assessments on the remaining 186 barrier culverts. That same year the state legislature created the Fish Passage Task Force, which later determined that new barrier culverts must be prevented and the rate of barrier correction must be accelerated. By 1999, it was estimated that state barrier culverts blocked about 1,000 linear miles of streams suitable for salmon habitat and that if these culverts were replaced or modified to allow fish passage, several hundred thousand additional mature salmon would be produced every year.[88]

The Culvert Case in the District Court - In 2001, the United States and twenty-one Indian tribes initiated a request for determination as a subproceeding in the original *United States v. Washington* case, asking the district court "to find that the State of Washington has a treaty-based duty to preserve fish runs and [to] compel the State to repair or replace culverts that impede salmon migration to and from spawning grounds." In 2007, the court granted summary judgment in favor of the United States and the tribes, concluding that the dispute involved the kind of "concrete facts" that were lacking in the case previously vacated by the court. The court held that "the right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon the State to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest. The Court further finds that the State of Washington currently owns and operates culverts that violate this duty." [89]

Having ruled on the legal question of the nature and existence of the treaty right, the district court scheduled a trial on the remedies addressing when and how the state would repair or replace barrier culverts that blocked fish passage. At the time of the trial in 2009, the parties agreed that the WDOT had 807 barrier culverts that blocked 1,000 miles of stream and almost 5 million square meters of upstream habitat. The DNR had another 51 barrier culverts, and the Washington State Parks and Recreation Commission had 28. Following the trial, the court delayed its ruling so that the parties would

resume their settlement negotiations, but that did not occur. Before issuing a ruling, the court directed the parties to file supplemental memoranda to assist it in drafting a remedial injunction.[90] The state refused to participate and chose not to submit recommendations for an injunction, preferring instead to deny that a treaty right even existed and to take an all-or-nothing approach on appeal. The court issued a final decision and a permanent injunction against the state in 2013. The court found that on average the WDOT was completing 8 barrier culvert replacements per year and that it would take more than one hundred years for the WDOT to replace the "significantly blocking" culverts that existed in 2009. The court also found that the WDOT had reported a net increase of 78 barrier culverts during the intervening three years between the trial and the final decision, which included the replacement of 24 barrier culverts during that same time period. The court concluded that at this rate "the problem of barrier culverts in the Case Area will never be solved." The court noted that the failure to replace culverts was not a funding issue, as the state had alleged; that, on average, even a larger barrier culvert replacement project costs less than $700,000; and that the WDOT's annual budget was $9.9 billion. The permanent injunction set a deadline of October 31, 2016, for WDFW, DNR, and Parks and Recreation Commission to provide fish passage through all barrier culverts. Despite a request by the United States to set a five-year deadline for the Washington WDOT, the court set the following multitier deadline for "high-priority culverts"[91] at 90% by 2030 (seventeen years) and for "low-priority culverts"[92] at the useful life of the culvert or sooner as part of a highway project.

The Culvert Case in the Ninth Circuit - On appeal to the Ninth Circuit Court of Appeals, the state contended that it had no treaty-based duty to avoid blocking salmon-bearing streams and at oral argument made the claim that it had the right "to block every salmon-bearing stream feeding into Puget Sound." The Ninth Circuit considered the state's position in light of the history of the case and declared, "For more than 100 years, the State of Washington deliberately and systematically prevented the Tribes from engaging in the off-reservation fishing promised under the Treaties. The State eventually came to employ surveillance planes, high powered boats, tear gas, Billy clubs and guns against tribal members engaged in off-reservation fishing. In 1970, the United States brought suit against Washington State to enforce the Treaties."

And in referring to the Washington State Supreme Court's order barring state agencies from complying with the district court's original injunction by Judge Boldt, the Ninth Circuit stated: "The District Court entered a detailed injunction which the State strenuously resisted. The Supreme Court affirmed

the injunction stating 'it is . . . absurd to argue . . . both that the state agencies may not be ordered to implement the decree and also that the District Court may not itself issue detailed remedial orders as a substitute for state supervision.'" The Ninth Circuit concluded "The current proceeding is a continuation of the suit brought by the United States in 1970," and "the State has fought the proceeding tooth and nail."

The Ninth Circuit affirmed the lower court's ruling and the permanent injunction but went further, ruling that "even in the absence of an explicit promise, we would infer a promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." Prior to this ruling, the U.S. Supreme Court had said only that the tribes 50% share could be no more than what is needed to provide a "moderate living." Here the Ninth Circuit referred to the moderate-living standard as both a minimum and a maximum amount the treaty provided for. The Ninth Circuit denied a petition for rehearing (by the original three-judge panel), denied a petition for a rehearing "en banc" (by a larger panel of Ninth Circuit judges), and then, when a majority of judges failed to vote for an en banc hearing, denied rehearing a third time following a call for a vote (by all nonrecused Ninth Circuit judges) by a judge who was not part of the three-judge panel.[93]

The Culvert Case in the U.S. Supreme Court - The U.S. Supreme Court granted the state's petition for certiorari (i.e., agreed to hear the appeal) on January 12, 2018, heard oral argument on April 18, 2018, and issued the following one-sentence judgement on June 11, 2018: "The judgement is affirmed by an equally divided court. Justice Kennedy took no part in the decision of this case."[94] Justice Kennedy had previously participated in an appeal of the case while sitting as a judge on the Ninth Circuit Court of Appeals. Because there was a four-to-four vote to approve the lower court's ruling in its entirety, it was not necessary to issue a majority opinion. Much of the debate at oral argument focused on whether the tribes had a treaty right to protect salmon habitat and the state had any treaty-based duty to refrain from blocking fish passage with barrier culverts. The state also argued for limitations on the nature of the treaty right and for a minimum standard for the size of the impacts necessary to trigger the right and to allow tribes to bring future claims. Although a majority opinion may have done just that, the approval of the lower-court judgment did what that court pointed out in its decision. Cases are decided on the facts of each case and not on "hypothetical facts in cases not before us and giving an improper advisory opinion."[95]

Reserved Water for Fisheries

Salmon and steelhead require certain minimum levels of water in streams and tributaries where they spawn and reproduce. Dams, wells, and the level of the winter snowpack affect water levels, which are typically at their lowest during the spawning period in July and August. The tribes' treaty-based right to protect these instream minimum-flow levels is most likely drawn from the tribe's Winters Rights and the Phase II environmental right to protect the habitat of fish.

Winters Rights - When an Indian reservation is established in a treaty where the purpose of the reservation expressly or implicitly includes fishing, then water is also reserved in quantities sufficient to sustain that use.[96] The water source has generally been limited to water within, crossing, or bordering a reservation. The U.S. Supreme Court has referred to Winters Rights as applying to waters that are "appurtenant" to the reserved land.[97] But in one earlier case the Court held that the water right extended to an off-reservation source.[98] In Washington, treaty fishing rights extend to the tribe's "usual and accustomed fishing areas" and generally include fishing in rivers and streams that border and sometimes cross the reservation but extend far beyond the reservation's borders. This is true of reservations located on marine waters at the mouths of rivers as well as of the reservations of upriver tribes, such as the Nooksack, Upper Skagit, Sauk-Suiattle, and Muckleshoot Tribes.

Phase II Environmental Rights - The recent decision in the "Culvert Case" has confirmed that tribes have a treaty-based right that imposes a duty on the state to refrain from building or operating culverts that diminish fish passage and thereby the number of fish that would otherwise be available for tribal harvest. What other rights and duties that treaty right encompasses will be for future courts to determine, but it would not be a very large expansion of the treaty right to include the duty on the state and others to refrain from withdrawing water from spawning areas below certain minimum levels that would block or prohibit salmon and steelhead from spawning and reproducing. Some streams and tributaries now go dry during droughts and extremely dry weather. Rivers can produce only so many adult fish, and the loss of significant percentages of river spawning areas can easily have impacts that compare to the impacts caused by barrier culverts. The treaties that created the reservations also included the treaty right to harvest fish and shellfish. Case law on Winters Rights and Phase II environmental rights will undoubtedly converge in cases brought by tribes based on particular sets of facts and circumstances, and those decisions will add to the decision in the

Culvert Case to form a more comprehensive definition of the treaty right to protect the habitat of fish and shellfish.

General Stream Adjudications - Two of the biggest obstacles to tribes' attempts to assert water rights are the time and expense to quantify those rights in general stream adjudications. This quantification generally involves bringing a lawsuit that includes every party that is using or has a potential claim to use water from a watershed, and such lawsuits can take decades to complete. For most water users, including tribes, a general stream adjudication is prohibitively expensive, so it is often easier to quantify water rights by negotiation, administrative action, or legislation. For example, the U.S. Congress has approved water-right settlement agreements for the Ak Chin and Gila River Reservations in Arizona.[99] The Washington State Department of Ecology has adopted administrative rules known as "instream-flow rules" that create water rights for fish with a seniority date based on the date the rule was adopted. For example, in 2001 the department adopted an instream-flow rule in the Skagit River watershed. The rule essentially grandfathered in the agricultural uses of large farm owners that secured state water rights prior to 2001—rights that would otherwise have been junior to treaty-based water rights with a priority date of 1855, when the Indian reservations were created. In a subsequent challenge by Skagit County, the department amended the rule to exempt quantities of water for water rights secured after 2001 to support rural wells and other forms of development. The Swinomish Tribe challenged the amended rule, and the state Supreme Court ruled that the Department of Ecology did not have authority to amend the 2001 rule under the administrative procedures it chose to use.[100]

Title to Indian water rights is held by the United States in trust for the tribe, and the United States is an indispensable party in any litigation involving those rights. In 1952, Congress waived its sovereign immunity to suit and consented to be sued in state courts in federal legislation referred to as the "McCarran Amendment."[101] The McCarran Amendment has been held to apply to Indian Winters Rights, and even though reserved Indian water rights are subject to adjudication in state courts, the nature and extent of those rights are defined by federal common law.[102] The State of Washington has adopted as part of its water codes provisions for a *general adjudication*[103] and has participated in several state adjudications.[104] The representation of the United States, as a trustee for a tribe, in a general adjudication proceeding is binding upon Indian tribes as to the scope and extent of rights quantified for them in such proceedings.[105] Federal courts have concurrent jurisdiction to quantify and resolve conflicts over water rights, but they generally abstain in

favor of state courts unless a federal lawsuit has proceeded well beyond the filing of a complaint.[106] Federal courts have adjudicated reserved tribal water rights where it was necessary to protect tribal fisheries.[107]

Archaeological Sites and Traditional Cultural Properties

Tribes ceded vast areas in the State of Washington in return for the rights they retained in the treaties they signed with the United States and agreed to relocate from these areas to the Indian reservations that were reserved in the treaties. As a consequence, tribes have varied and broad interests in archaeological sites and other traditional cultural properties associated with their ancestral homes off of the reservation. Congress has passed a number of laws to protect these interests and to require input and consultation with tribes when actions by the federal government affect these interests.

National Historic Preservation Act - The National Historic Preservation Act of 1966 (NHPA, 16 U.S.C. 470) requires federal agencies to consult with tribes whenever their actions may affect properties that are of historic value to tribes. Section 106 of the act is a federal review process called the "106 process," which requires the federal government to consult with tribes whenever a federal or federally assisted undertaking will affect a historic property to which a tribe attaches religious or cultural significance. The 106 process applies regardless of the location of the historic site. Historic properties include anything that fits within a category of the law known as a "traditional cultural property." A traditional cultural property does not have to be characterized by physical evidence of human activity but may instead be a place in the natural environment that is relatively undisturbed and where the cultural values and historic significance are intangible. States and tribes implement the NHPA with federal funding that supports a State Historic Preservation Office and a Tribal Historic Preservation Office. The officer in charge of the state office is referred to as the SHPO, and the officer in charge of the tribal office is referred to as the THPO. The THPO is responsible for participating in the 106 process for any federal activity on the reservation—such as a federal road or a wastewater-treatment facility—and on non-Indian-owned fee lands.

Native American Graves Protection and Repatriation Act - In 1990, Congress adopted the Native American Graves Protection and Repatriation Act (NAGPRA, 25 U.S.C. 3001–3013) to clarify the ownership of cultural items excavated or discovered on federal or tribal lands. Indian burial remains and associated funerary objects belong first to lineal descendants and, if the descendants cannot be identified, to the tribe on whose lands the objects are

found or to the tribe that aboriginally occupied the land where the objects are found. The act requires every federal agency and every museum or institution receiving federal funds to repatriate cultural objects in their possession to the appropriate individuals or tribe. The act has a criminal provision that prohibits the trafficking of Native American remains and cultural items.[108]

Chapter 12 Endnotes

[1] *U.S. v. Wheeler*, 435 U.S. 313 (1978).

[2] *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

[3] *Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982); *Santa Rosa Band v. Kings County*, 532 F.2d 655 (9th Cir. 1975); *Snohomish County v. Seattle Disposal Co*., 70 Wash. 2d 668, 425 P.2d 22, cert. denied, 389 U.S. 1016 (1967).

[4] *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978).

[5] 495 U.S. 676 (1990).

[6] *Gobin & Madison v. Snohomish County v. the Tulalip Tribes of Washington*, 2002 (No. 00-36031, D.C. No. CV-99-01432- RSL).

[7] 450 U.S. 544 (1981).

[8] *Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982).

[9] Public Law 280, enacted by Congress in 1953, exemplifies such an express delegation by transferring the jurisdictional authority over most crimes and certain civil matters to six states. Public Law 280 was amended in 1968 to require tribal consent to further state jurisdiction in all future cases. However, no tribes have since consented. The amendment also permitted states to retrocede criminal or civil jurisdiction acquired under Public Law 280. Public Law 280 specifically excluded the regulation and taxation of trust land and exempted the hunting and fishing rights of Indians. In *Santa Rosa Band v. Kings County*, the court confirmed that Public Law 280 did not transfer regulatory powers over Indian reservations to the states.

[10] 447 U.S. 134 (1980).

[11] 492 U.S. 408, 106 L.Ed.2d 343, 109 S. Ct. 2994 (1989).

[12] Basing his dissenting opinion on a broader interpretation of *Montana's* second exception, Justice Blackmun supported the tribe's right to zone all reservation fee lands because the loss of the long-term benefits of comprehensive land management would have a significant impact on tribal interests.

[13] See also *Santa Rosa Band of Indians v. Kings County*, 532 F. 2d. 655, 658 (9th Cir., 1975), cert. denied, 429 U.S. 1038 (1978).

[14] No. 13-35003, 2013 WL 6284359 (9th Cir. 2013).

[15] 554 US 316 (2008).

[16] *FMC Corporation v. Shoshone Bannock Tribes*, No. 17-35840 (9th Cir. 2019).

[17] *Montana v. U.S. EPA*, 137 F.3d 1139 (9th Cir. 1998).

[18] *Montana v. U.S. EPA*, 1139 at 1141.

[19] See *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 224 (1983); *Blue Legs v. BIA*, 867 F.2d 1094 (8th Cir. 1989).

[20] In *Arizona Public Service Co. v. EPA* (211 F.3d 1280, 1300, D.C. Cir. 2000), the federal courts were again called upon to determine whether a provision of the CAA delegates to Indian tribes the authority to enforce the CAA on nonmember fee-owned land within a reservation. The district court upheld the provision as a delegation based on its review of specific language in the statute, which it found to establish an express delegation.

[21] Under section 518, the amendments to the Clean Water Act in 1987 directed the EPA to promulgate regulations that treat tribes as states for implementing a variety of Clean Water Act programs. Programs are include in section 518 (Title II, Construction Grants), section 104 (Research, Investigations, and Training), section 106 (Grants for Pollution Control), section 303 (Water Quality Inventory), section 308 (Inspections, Monitoring, and Entry), section 309 (Federal Enforcement), section 314 (Clean Lakes), section 402 (National Pollution Discharge Elimination System), and section 404 (Dredge and Fill Material). Section 518 further directs the EPA to establish a mechanism to resolve conflicts resulting from differences between state and tribal water-quality standards.

[22] *United States v. Mazurie*, 419 U.S. 544 (1975).

[23] *Arizona Public Service Company v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000).

[24] 647 F.2d 42, 52 (1981).

[25] *Montana v. U.S. EPA*, 1135 at 1141 (9th Cir. 1998).

[26] 541 U.S. 193 (2004).

[27] 645 F.2d 701 at 714 (9th Cir. 1981).

[28] 752 F.2 1465 (9th Cir. 1985).

[29] 48 Fed. Reg. 34954 (1983).

[30] See EPA Policy for Program Implementation on Indian Lands (Blum Memo), dated December 19, 1980.

[31] *Oliphant v Suquamish*, 435 US 191 (1978).

[32] *State v. Haskins*, 887 P.2d 1189 (Montana Supreme Court 1994).

[33] *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

[34] 18 U.S.C. 1153.

[35] 25 U.S.C. 1302.

[36] 25 U.S.C. 1301 (2).

[37] 18 U.S.C. §1162, 28 U.S.C. §1360, and 25 U.S.C. §§1321–1326.

[38] See *Cappaert v. United States*, 426 U.S. 128, 138–42 (1976).

[39] Based on *United States v. Winters*, 207 U.S. 563 (1908).

[40] *Agua Caliente Band v. Coachella Valley Water District*, 849 F.3d 1262 (9th Cir. 2017).

[41] *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District* (U.S. D.C. C.D. Calif., Apr. 19, 2019).

[42] RCW 90.03.

[43] RCW 90.44.

[44] In RCW 90.03.110–245 and RCW 90.44.220–230.

[45] Washington Attorney General (1985:39).

[46] The opinion contradicted an earlier Washington State Attorney General's Office opinion in 1928 that concluded that the state's water-rights laws could not be applied within the Colville Indian Reservation because of the preemptive impact of 25 U.S.C. sec. 381 (Letter of February 28, 1928).

[47] Snohomish Co. Sup. Ct. No. 71421 (Feb. 7, 1963).

[48] In *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), aff'g in part and rev'g in part 460 F.Supp. 1320 (E.D. Wash. 1979), cert. denied, 454 U.S. 1092 (1981), and in *United States v. Anderson*, 738 F.2d 1358 (9th Cir. 1984).

[49] 647 F. 2d, at 46–49.

[50] *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), at 342.

[51] No. C79-682R, 9 Indian Law Reporter 3025 (W.D. Wash. 1982).

[52] 23 USC 134 and 135; 49 USC 5303 and 5304.

[53] 23 USC 135(m)(1); 49 USC 5304(l)(1).

[54] 23 USC 135(m)(2) & (4)(G); 49 USC 5304(l)(2) & (4)(G).

[55] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *New Mexico v. Mescalero*

Apache Tribe, 462 U.S. 324, 332 (1983).

[56] 447 U.S. 134 (1980).

[57] 455 U.S. 130 (1982).

[58] 532 U.S. 645 (2001).

[59] *Reservation Telephone Co. v. Henry*, 278 F-Supp.2d 1015 (D.N.D. 2003).

[60] *Willman v. Washington Utilities and Transportation Commission*, 117 P.3d 343 (Wash. 2005).

[61] *Plains Commerce Bank v. Long Family Land and Cattle Company*, 554 US 316 (2008).

[62] *Mitchell v. Tulalip Tribes of Washington*, No. C17-1279, 2017 WL 5010129 (W.D. Wash. Nov. 2, 2017).

[63] *Mitchell v. Tulalip Tribes*, citing *United States v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003).

[64] *Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153 (9th Cir. 2013).

[65] 411 U.S. 145 (1973).

[66] See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and *Washington v. Confederated Tribes of the Colville Reservation*.

[67] *Tulalip Tribes v. Washington*, 349 F.Supp.3d 1046 (2018).

[68] *Gila River Indian Community v. Waddell*, 91 F.3d 1232 (1996); *Salt River Pima-Maricopa Indian Community v. State of Arizona*, 50 F.3d 734 (9th Cir. 1995).

[69] 448 U.S. 136 (1980).

[70] *Tulalip Tribes v. Washington.*

[71] See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 220 (1985).

[72] 384 F. Supp. 312 (W.D. Wash. 1974).

[73] *United States v. Washington*, 520 F.2d 676 (9th Cir. 1976).

[74] *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

[75] Ceremonial and subsistence catch were ordered to be included, and harvests by nonresidents of Washington taken from Washington State fish runs will not be included as part of the non-Indian share.

[76] *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968).

[77] United Property Owners of Washington sought to join the litigation and

participated in earlier settlement negotiations seeking to prohibit Indians from gaining rights of access across privately held shoreline properties. The organization's membership originally comprised on-reservation non-Indian property owners, but due to the shellfish litigation its membership expanded to include off-reservation coastal property owners not previously engaged in issues involving treaty-claimed rights.

[78] *United States v. Washington*, 873 F.Supp. 1422 (W.D. Wash 1994).

[79] *United States v. Washington*, 898 F. Supp. 1453 (W.D. Wash. 1995).

[80] *United States v. Washington*, 909 F. Supp. 787 (W.D. Wash. 1995).

[81] *United States v. State of Washington*, 157 F.3d 630 (9th Cir. 1998).

[82] Cert. denied, 119 S. Ct. 1376 (1999).

[83] *Final Decision I, supra* n.2, 384 F. Supp., at 328, 344–345.

[84] *United States v. Washington*, 596 F. Supp. 187 (W.D. Wash. 1980).

[85] *United States v. Washington*, 759 F.2 1353 (9th Cir. 1985).

[86] *Timber, Fish, and Wildlife Agreement: A Better Future in Our Woods and Streams*, final report (Olympia: Washington State Department of Natural Resources, 1987).

[87] *Seattle Times*, 1986.

[88] *United States v. Washington*, 20 F.Supp.3d 828, Order on Cross Motions for Summary Judgment, 20 F. Supp. 3d 890 (W.D Wash. 2007); 20 F. Supp. 3d 986 at 1000, Memorandum and Decision (W.D. Wash. 2013).

[89] *United States v. Washington*, 20 F.Supp.3d 828, Order on Cross Motions for Summary Judgment, 20 F. Supp. 3d 890 (W.D Wash. 2007).

[90] See Ninth Circuit opinion in *United States v. Washington*, 853 F.3d 946 (Amended Opinion 9th Cir. 2017).

[91] High-priority culverts are those culverts with more than two hundred linear meters of accessible habitat upstream from the culvert. The Washington DOT may defer replacing culverts that block up to 10% of salmon habitat to the end of those culverts useful life.

[92] Low-priority culverts are those culverts with less than two hundred meters of upstream habitat.

[93] *United States v. Washington*, 827 F.3d 836 (Opinion 9th Cir. 2016); *United States v. Washington*, 853 F.3d 946 (Amended Opinion 9th Cir. 2017)**;** Order on Petition for Rehearing in No. 13-35474 (9th Cir. May 19, 2017).

[94] *United States v. Washington*, 584 U.S. __ (2018), 138 S. Ct. 1832 (2018).

[95] *United States v. Washington*, 584 U.S. __ (2018), 138 S. Ct. 1832 (2018).

[96] *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981).

[97] *Cappaert v. United States*, 426 U.S. 128 (1976).

[98] *Arizona v. California*, 376 U.S. 340 (1964).

[99] Public Law 95-328 (1978).

[100] *Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013). The ruling is significant because it affects future urban development in the county, which relies on the groundwater exemption to meet the state's requirement for water availability before a development permit can be issued.

[101] 43 U.S.C. sec. 666 (1982).

[102] *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

[103] In RCW 90.03.110–245; RCW 90.44.220–230.

[104] See Yakima River system water-rights-related decisions in *Dept. of Ecology v. Acquavella*, 131 Wn.2d 746 (1997); *Dept. of Ecology v. Yakima Reservation Irrigation District*, 121 Wn.2d 257 (1993); *Dept. of Ecology v. Acquavella*, 100 Wn.2d 651 (1983).

[105] See also *Nevada v. United States*, 103 S.Ct. 2906 (1983); *Arizona v. California*, 460 U.S. 605 (1983).

[106] *Colorado River Water Conservation District*, supra.

[107] *United States v. Adair*.

[108] 18 U.S.C. 1170.

APPENDICES

Appendix 1

Growth Management Act Legislation Reform: The 2019 Centennial Accord Annual Meeting

A.1.1 Roundtable Agenda on Tribes and the Growth Management Act

November 6, 2019. Little Creek Resort, Shelton, WA

AGENDA—ROUNDTABLE DISCUSSION—TRIBES AND THE GMA

IMPLEMENTING RECOMMENDATIONS ON ENGAGING INDIAN TRIBES IN GROWTH MANAGEMENT PLANNING PROCESS

1. Welcome—Craig Bill, Director, Governor's Office of Indian Affairs
2. Introductions by Roundtable Members
    a. Nicholas Zaferatos, Professor of Urban Planning, Western Washington University
    b. Joseph Tovar, One of the Principle Researchers, Ruckelshaus Center Final Report
    c. Allan Olson, General Manager, Swinomish Indian Tribe
    d. Larry Wasserman, Former Environmental Policy Advisor, Swinomish Indian Tribe
    e. State Agency Staff—TBD
        i. Lisa Drown, Director, Department of Commerce
        i. Dave Anderson, Department of Commerce
        ii. Mary Verner, Department of Ecology
        iii. Jay Manning, Chair, Puget Sound Partnership
        ii. Ernie Rasmusson, Tribal Liaison, Department of Ecology
        iv. Paula Reid, Department of Health
3. Ruckelshaus Center Final Report—Action Item 2.2: How best can the State and the Tribes initiate "government-to-government" consultation to consider

the recommendations contained in the Final Report?

a. What would the respective roles of the Governor and the State Legislature in this process be?

b. How best can the State and Tribes work together to enhance the role of tribal governments in the growth management planning framework?

4. Ruckelshaus Center Final Report—Action Item 2.1: How best could a regional based approach to growth management planning be developed that includes additional governmental entities including tribes?

   a. How best can the State and Tribes work together to develop "mechanisms for integration of regional and state growth management."

5. Ruckelshaus Center Final Report—Action Item 3.1: How best can the State "coordinate with tribes on climate action planning, strategies and initiatives"?

6. Ruckelshaus Center Final Report—Action Item 4.1: How best can the State and Tribes "establish a collaborative process to develop a statewide water plan"?

A.1.2 Summary of Outcomes of the Roundtable—Tribes and the GMA

Centennial Accord 2019 Meeting, November 6, 2019, Little Creek Resort, Shelton, WA

1. Overall, almost all participants supported the idea of the State playing a larger, potentially more prescriptive, role in growth management. Participants feel that the GMA puts too much discretion on local legislatures, and that every amendment is focused on weakening GMA goals.

    a. Participants asked the legislature and Governor to work on specifically assigning state agencies a stronger role in dealing with unavoidable issues like climate change, emergency management, and water.

    b. Several participants noted that Commerce's current involvement and ownership over Growth Management lacks adequate enforcement authority.

    c. Director of Ecology Bellon committed to being more closely engaged on GMA issues, and encouraged more extensive inter-agency collaboration.

    d. Senator McCoy closed the meeting by saying that there is no political will at the legislature to take up comprehensive GMA reform.

2. The Voluntary Stewardship Program was mentioned as a successful model, but still feels like the legislature and the State are abdicating to local interests where Tribes have not felt adequate representation in the past.

    a. Participants suggested amending the GMA to require tribal consultation at the county level.

    b. At the very least, participants suggest that Tribes should have more than just ad hoc input on comprehensive planning. Many participants noted that even something as simple as increased outreach would positively impact tribal representation in planning.

3. Time and focus need to be spent on creating a government-to-government relationship between the tribes and various local governments related to the GMA.

    a. Participants suggested amending the GMA to create an opt-in mechanism for tribes as we build new coordination and partnership models.

    b. Tribal representatives noted several times that a contributing issue is a lack of understanding by county officials regarding treaty rights. They suggest additional outreach and education to facilitate greater collaboration.

    4. Participants noted that the GMA addresses some forms of conservation and sustainability, but that the language should be updated to more closely

reflect current environmental circumstances.

5. A state-level comprehensive plan was brought up, but several participants encouraged we move towards regional state level strategies that amount to a plan instead of the current county-by-county planning system.

a. Watershed-level regional planning is a framework that already exists and could be utilized.

b. Director Maia Bellon suggested a Statewide Advisory Committee on Growth Management Reform in 2020/21.

A.1.3 Report Out—November 7, 2019—Centennial Accord Meeting

Centennial Accord 2019 meeting. Little Creek Resort, Shelton, WA

Work Session on Growth Management Act

Yesterday, approximately 25 representatives of tribes, state agencies, the state legislature, the University of Washington and Western Washington University joined in a roundtable discussion hosted by the Swinomish Tribe to review the recommendations of two recent reports on the future of state growth management planning in the state of Washington. As you may already know, counties and cities will be required to update their comprehensive plans in a few years and tribes have largely been excluded from this process in the past. Roundtable attendees included representatives of the Tulalip, Squaxin Island, Jamestown S'Klallam and Umatilla tribes including Chairman Ron Allen and Chairman Brian Cladoosby; representatives of the state Department of Ecology, Department of Commerce, Department of Fish and Wildlife, the Department of Health and the Puget Sound Partnership, including Director Maia Bellon from Ecology, Director Laura Blackmore from Puget Sound Partnership, Dave Anderson, who leads Ecology's GMA implementation program and Senator Jonathon McCoy from the state legislature.

The roundtable discussion focused on three broad recommendations contained in the Ruckelshaus Center's Final Report that was released in June of this year: (1) the creation of a government-to-government consultation process to guide the review and implementation of a broad range of issues and recommendations on the GMA, (2) replacing county by county planning with a more regional or eco-system based approach that includes multiple counties, tribes, cities and public service providers, and (3) increasing state and agency oversight over the implementation and enforcement of the GMA and other environmental legislation.

The group identified a number of important issues as well as some significant obstacles to creating a direct role for tribes in the state growth management planning process. Some tribal representatives reported that they had developed positive working relationships with County and neighboring city governments while other tribal representatives reported that it was difficult to get local governments to even meet to discuss issues of mutual concern. Senator McCoy advised the group in no uncertain terms that the state legislature—as a whole—had no interest in taking up measures that would provide for consultation and collaboration with Indian Tribes on growth management.

However, attendees agreed that addressing critical environmental issues—such as threats to the survival of killer whales, endangered salmon, climate change and

statewide water issues—could not wait and that the costs of implementing the recent culvert decision and the costs of litigating new basin wide water stream adjudications similar to the Acquavella water rights case that took 40 years to litigate might provide the incentive to move past the current "status quo" and consider the "transformational and systemic changes" recommended by the Ruckelshaus Report. Everyone agreed that the time might be right for tribes and the state to address these issues in a broad collaborative manner under the auspices of the Centennial Accord.

Director Bellon noted that it was the first time in her 7-year tenure as Ecology Director that she had been in a meeting with representatives of the Department of Commerce to talk about growth related issues and that there was a need for more interdepartmental coordination on growth management planning. These comments were echoed this morning by tribal leaders concerned with the "silo approach" used in the past to resolve individual issues on a case-by-case basis and the need for "bold steps" to address what are increasingly complex and intertwined issues.

ACTION ITEM: The group met for over two hours and with broad support of state agencies and tribes was unanimous in their recommendation that the Governor and tribes meeting today should make integrating tribes into the GMA planning process a priority work task and create a workgroup comprised of tribal representatives and representatives of at least the following state agencies:

1. The Department of Commerce
2. The Department of Ecology
3. The Department of Fish and Wildlife
4. The Department of Health
5. The Department of Transportation

A.1.4 Centennial Accord Meeting Recommendations

2019 CENTENNIAL ACCORD RECOMMENDATIONS ON "GMA AND THE TRIBES" AND WWU BULLITT REPORT CONTRIBUTIONS

Centennial Report-Outs
1. State play a more prescriptive role in GMA • Strengthen Commerce's enforcement authority • Assign state agencies a stronger role in climate change, emergency management, and water • More extensive (state) inter-agency collaboration
2. The Voluntary Stewardship Program abdicating to local interests w/o tribal involvement
3. Amend GMA to require tribal consultation • Creating government-to-government relationship between the tribes and local governments • Build new coordination and partnership models • Increased outreach to positively impact tribal representation in planning
4. Amending the GMA to create an opt-in mechanism for tribes
5. Outreach and education on tribal rights to facilitate greater collaboration.
6. State-level comprehensive plan v. regional state level strategies • Watershed-level regional planning as GMA framework
7. Establish Statewide Advisory Committee on Growth Management Reform in 2020/21

A.1.5 MINUTES - November 6, 2019, Centennial Accord Roundtable: Tribes and the GMA

Little Creek Resort, Shelton, WA
Roundtable Session on Tribes and the Growth Management Act
11:20 a.m. Meeting opens

Alan Olsen, General Manager of Swinomish: opening comments and introductions

In attendance: Nick Zaferatos, WWU Faculty, Joe Tovar, UW Faculty, Dave Anderson, Dept. of Commerce, Paula Reeves, Laura Lackmore, Amy Windrope, John Flannegan, Governor's Office, Joe Hope, John Snyder, Mike Martinez, Gordon Wright, Ernie Rasmusson, Michael Risotto, Kevin Lion, Dawn Vivian, tribal lobbyist, Eric Day, Swinomish, Zam Deshields, Pat Brigham, Maya, Director of Dept. of Ecology, Amy Trainer, Swinomish, John Nasky, Utilities and Transportation Commission, Michelle Zuckerberg, Craig Bill, Office of Indian Affairs, Jim Peters, Senator McCoy

Chairman Brian Cladoosby—(provides background regarding Swinomish Tribe Treaty). Treaty says no white man will be allowed to live on the reservation without permission of tribe or BIA. Year 1855. In 1870s, expensive natural resources were found. Black Hills best example: gold. Extractors had to come up with a way to get control of resources. Dawes Act was passed. Destructive. 90 millions acres of native land lost across the nation. 130 million acres reduced to 40 million. Result, and following the Allotment Act, tribes ended up with checkerboard reservations. Interesting that when DAWES act was passed and tribal members were given own property. If BIA determined tribal leaders to be "Civilized.". . . Tribal land became taxable. . . . Now, lots of WA State reservations are checkerboard due to past foreclosures. BIA around the nation protected some of the tribes' land from encroachment, but not the majority. Swinomish was not immune. 50% of its land was lost. Swinomish had an issue with county and who had control of which parts of their land. Came up with an agreement and plan that mirrored Skagit County Building and zoning codes, fees, everything in 1994. Developer tried to come in to develop 1,000 acres of Swinomish. Shut down due to the plan from 1994. Set up a joint planning board: two tribal representatives, two county representatives, and one independent appointee. If someone wanted to develop on Swinomish land the board would review the proposal.

Amy Windrope—(seeking clarification) Regulations are mirrored? Does that give the tribe jurisdiction over fee title?

Chairman—Someone can go to county or Swinomish to get an permit. Policies

(of Tribe and County) are identical.

Alan Olsen - Developers can't pit one side against the other to get a building ordinance because policies are identical/mirrored.

Chairman—Growth Management Act passed in 1990. One reason was that, in Kent Valley, all the industrial was built over farmland. They said wait, we need to create a mechanism so this can't happen all over the state. In 1990, Nick was there, at Swinomish, working with our legislator, to try to get tribes incorporated into the Growth Management Act at that time. She (a state legislator) and (other) legislators were sure they did not want tribes as a part of this. Because of this, tribes were not included in the Growth Management Act. We were basically written out, ignored. As if we didn't exist. Many of us have worked with Bill and are looking to come up with recommendations for (overcoming conflicts in) land use.

Craig Bill—(gives thanks to attendees). 30th year. This conversation has been a long time in the making. Look forward to the conversation.

Alan Olsen—Timing seems to be perfect. Here we are after hours of trying to work out what GMA means on the ground between local entities like tribes and counties. An exciting thing: the idea that the state might need a larger role in implementing GMA. Maybe letting counties and tribes fight it out. Kicking the can down the road that the legislature is letting the tribes fight it out. Voluntary Stewardship Program, also kicking the can down the road. Doing voluntary things but having a regulatory backstop. Not spelled out very well. Can just do minimal things for a long period of time. One thing that's come out in a recent report are transformational and systemic (outcomes). Agenda for today: talk about 4–6 things affecting tribes. County to county planning process really isn't working. More people needed at the table. Water districts, sewer districts, housing authorities. It's turned me from a GMA skeptic to a bit of an optimist about going forward. I'm not sure how we go forward. One goal in 1990 agreement was to create a government relationship between the tribes and state legislature, like has been done with the governor's office. What does it look like? How is that done? We need to figure it out. In addition to regional planning, the report discusses the state having a more active role in implementing GMA. Report talks about need for legislature to specifically assign state agencies with a stronger role in dealing with unavoidable issues, like climate change. The river system in the state of Washington needs to be healthy, form the backbone of the state. GMA plan has to protect it. It's time to not think we have to protect the status quo. Farmers are struggling, margins are thin, and I get it. But they seem to have a "do no harm" "I can't do anything about it" "Sorry I can't help." There's got to be a way to find an accommodation. As long as they are safely locked in the status quo, It's time to give up the status quo. Help people make the move with transformational and

systemic change, as laid out in the report.

Nick from WWU—This conversation is all about the problems of the exclusion of tribes in the State's planning model. GMA requires coordination among all the entities that do planning under the GMA. Parallel effort of WWU research project, about halfway through, examining the related problems of Washington State's lack of a regional planning framework that includes tribes. (Reading directly from report regarding a state-wide and national survey of tribes and county cooperation in land use planning). We're still far from suggesting forms of resolution. So far we've learned that where coordination in planning with tribes does occur, it happens on an ad hoc basis. Like local governments, tribes are doing all the same kinds of planning. The research attempts to identify the range of planning done at the local level by tribes. (Continues reading). Where communications with tribes occur, it's almost always through informal means. Tribes' concerns are often ignored. (Continues reading findings from report regarding recommendations on successful models for Interlocal coordination in GMA planning).

Joe from UW—I was co-lead on WA Future Projects for two years (Ruckelshaus Report). I can talk about the report but can't speak for the center because my contract ended and I don't represent them anymore. Over two years we had 50 workshops around the state to ask people from the state's tribes. Volume one of the report includes what we heard from those workshops. The one thing we definitely heard is that people want a future in which we include what to do in crises. People don't have the capacity or revenue to do what's required of them by law. What do the people who really are about this have to say? What do they want to do? That's why we're here today.

Alan Olsen—Voluntary stewardship program had work groups with tribal representatives on them. First time tribes were in the room. There's at least the beginning of a model for how drafting legislation can go forward. Tribes can opt in voluntarily. Four pages of discussion points typed up for this meeting.

(Passing out copies)

Question one: action item 2.2—second transformational change in report. (Reading aloud point 2.2)

Kat from Umatilla—How do you get the counties to recognize the tribes are a legal part of the solution and are participants? Some counties ask, "What are you guys doing here?"

Nick from WWU—To what extent do the state folks see a necessity to be more directive to the counties?

Kat—It's not just the planning. It's education, outreach. How do you do the

outreach to not only the counties but also the landowners? Some landowners "I don't have the time for this." It's a huge ask for people to volunteer to participate in this but how is the outreach going to occur to get people there and to get people to recognize that tribes are not part of the tribes, are part of the solution.

Alan Olsen—That's why we're here today. Also, It's now part of the fabric of the state of WA, we have this opportunity to go forward and figure out how to do it. Original bill has the tribal inclusion in the literature. It got stripped out. It's a good time now. . . . There's a way that sovereigns can work together to achieve common ends. If we don't have transformational and systemic change, we aren't going to get there.

Gordon Wright—I don't think certain community leaders from the counties and other agencies understand how transformative . . .

Patty Dobin (Tulalip)—GMA impacts my tribe on a daily basis and what impacts us, as much is the county itself and many of the council members do not recognize that we're equal. My county is the most prejudiced county around. I've worked for ten years with the county to try to do something as simple as a comprehensive plan with Snohomish County. . . . I have to prove that I'm equal in the state. Thanks to my ancestors work, standing firm, I'm now recognized as equal. 80% of our economic development endeavors and they get the best healthcare and can buy food for their kids and buy homes. Yet after ten years, Snohomish won't recognize that there are three tribes (Stillaguamish, Sauk-Suiattle, Tulalip). To talk about whales, are we at/beyond the tipping point? We have to come together some way. For all of us Washingtonians, money and greed impact our life the most. My county doesn't talk with us about development. How much housing is needed? Over half of my tribe goes without houses. The most critical thing we need as humans, salmon, whales, birds, is water. We're running out of water. Every time the county approves a permit, our aquifer draws down. I quit working with Snohomish County when they wouldn't include Tulalip in their comp plan. Snohomish County knows if they do something up in our mountains, we'll come after them. I appreciate this study. I'm not sure what the solution is. We're still at a time when we're educating on what is a treaty, what is an Indian? People are still asking questions like, "Why now? You lost the war." What anyone does impacts my way of life.

Kat from Umatilla—To educate people, we have learned that through collaboration and partnership we can accomplish a lot. But we're still dealing with, "Why are you here?" That's why outreach is so important. We're going to live and die on our reservation; we're not going anywhere. There's so much education that is needed to say that tribes aren't bad. Tribal leaders have learned that if you take care of the land around you, it takes care of you. But non-natives haven't learned that. A lot of education needs to occur to get people on the same page.

Alan Olsen—(introduces Senator McCoy) There are a lot of issues that need to be resolved. If you look at the big picture, a lot of little issues get resolved but if you break things down and separate them, they can't be solved.

Joe from UW—I'm learning a lot today. Everybody is interested in doing something, there are many stakeholders. You as tribes need to figure out what you want to see and work with local agencies to talk about it.

Kat—When are we all going to get in the same room?

Nick from WWU—Should this be on the agenda of the centennial?

Kat—What is the schedule? Is there a schedule?

Alan Olsen—There is no schedule. We've been through the last iteration, 10 or 15 years it took its course through the voluntary stewardship program. And we're realizing that tribes aren't involved. There are different focuses of power in the State. Here's the starting place because we've got a framework. Now we've got the growth management act that is going to revisit the GMA. Starting with a centennial accord meeting to decide if this is an important topic. One of my goals for this meeting is to spend the last 15 minutes to talk about next steps. We wanted to get this group together and determine what the next step is.
Kat—Does the plan address conservation? The Growth Management Act?

Dave Anderson—The law has a number of specific requirements related to conservation. The requirements at the state level aren't terribly specific. They say you have a responsibility to protect critical areas and the primary driver of those decisions should be science. How to take action is left up to the local actors, cities, and counties, to decide how they're going to meet those requirements.

Maya—We saw our State for the first time ever not pass a capital budget in 2017 over one small piece (water connection piece), let alone the transportation piece, the really complex development issues that tribes are pointing out, like millions of people coming to WA over the next ten years. That does not seem right. I shouldn't, as a state agency, be the one to sue the local government when we've got other arms of the state that oversee the Growth Management Act. The system is not set up the right way for us to have success at the end of the day. It's awkward for the Dept. of Commerce. I think it is a ripe time to have a more holistic discussion and have it not be just on Commerce. If we don't have some of the voices that know about the issues most deeply at the table, it's a big problem. As a state agency director, Dept. of Ecology, I commit us to being engaged in the process. I'd love to be in the room to talk about connecting our work.

Paula Reeves, Dept. of Health—We're one of the few states that doesn't require a state level plan. We need a plan that we revisit every three years to make sure we're following the guidelines.

Joe from UW—Important to talk about strategy. People said they didn't want to call it a state level plan because that's from the 1930s. Some of the things can't be done by the cities, there needs to be a regional look.

Paula Reeves—State agencies do a good job planning individually, for each agency, but there are needs to be a collective plan.

Amy Windrope—We have shared priorities with tribes and we agree with the frustrations with how the GMA play out on the landscape. It is a very frustrating model. County governments do not understand the rights and the treaties—one of our key problems. It's a barrier to progress. Tribes can lead the way on this.

Laura Blackmore, Watershed Planning—We collaborate at a regional level. If there is a way to use the infrastructure we already have going, I'd be very interested in having that conversation.

Amy—The previous meeting we talked about how our budget constraints are limiting our ability to be effective co-managers. When GMA comes up, legislators aren't coming looking for how to expand GMA. If we stood together with the tribes on a positive, not defensive position, we will be a force to be reckoned with. If we don't' stand together, any positive element of GMA will be chipped away.

Scott Weeds, General Counsel for Spokane Tribe, practices exclusively on behalf of the tribes for land use—Initial lesson: particularly in WA, the GMA puts way too much discretion on local legislatures. They win when decision-making is pushed down to the most local level. GMA is amended all the time in WA State. I'm not optimistic that at the local level people are going to wake up and do the right thing. I am much more convinced that it's going to happen at the state level. Do we have the political will in Olympia to make transformative changes to the GMA in the next two years? What are the chances of bearing fruit? Rarely do the studies, reports and recommendations turn into changes at the ground.

Chairman Ron Allen—GMA is 20+ years old and I have no idea who in the state is monitoring where it's successful and not. I have no doubt it's any different in Seattle than in Forks. Nobody likes top-down driving. You want laws to solve long-term problems but to be flexible. Different counties have different needs. When I look at the report, there is no question in my mind that the GMA needs to be updated. We, the tribes, are part of the solution. We're partners in the solution of the health of WA State. How do we weave the tribes in? Because of the success that the tribes have achieved in the last 20 years, tribal leadership finds itself in a very complicated world, not a linear world, a multi-tiered world. Now we're on everybody's radar. We're busy. It's hard to get a tribal leader at the table. But we will delegate. As long as we've got our representatives at the table, we'll make it work. There's not a tribe that doesn't have protecting the environment as its priority.

Senator McCoy—No, there is no appetite to take GMA up. When it's mentioned, their hair goes on fire. Counties don't want to negotiate. They figure they have the power now and they're going to keep it. They don't want to relinquish anything. In their view, working with the tribes is relinquishing. Some of them work for the tribes and understand the treaty rights but now they feel they've got to take care of their constituents. I feel that's unfortunate because at these meetings I tell folks, if you just consult with the tribes, they will more than likely tell you how to get the job done as cheaply as possible. They just don't want to go down that road. I'm on the Hirst water committee.

Chairman Ron Allen—Is there an appetite to refine where there are flaws?

Senator—Again, their negotiating point is my way or the highway.

Kat—Recently took a tour at the Yakima Nation, where they're talking about innovation in water management and coming up with a plan between different parties. Through the partnership, they are looking at the basin as a whole. If we want things to change, we need to point out a good example. This example could be statewide. I'm pushing to get others to visit the basin, to see an example. To say, this is how the Yakima integrated plan is working, for water use for the next 30 years and beyond. If we don't have those examples, then we need to be creating some. OR is coming over and OR is talking about it as well. But we have to push it.

Maya—I suggest working with some of our staff here about how to report out. (Gov't agency leaders called out of the room for another meeting.)

Rep. from Dept. of Commerce (Lisa Brown's office)—We absolutely want to be involved in this conversation.

1:30 p.m. Meeting closes.

Notes compiled [without review] by the Office of the Governor

Appendix 2

Agreement Template for Coordinated Planning for Indian Reservations

MEMORANDUM OF UNDERSTANDING FOR ESTABLISHING A COORDINATED PROCESS FOR DEVELOPING COMPREHENSIVE PLANS FOR INDIAN RESERVATIONS

This Memorandum of Understanding is made and entered into by and between the _____ Indian Tribe, a federally recognized Indian Tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934 ("Tribe") and _____ County, a political subdivision of the State of Washington ("County"). The Tribe and County (collectively referred to as "governments") hereby acknowledge and agree as follows:

1. Mutual Points of Understanding

a. In order to alleviate the potential conflict that could result from the concurrent application of two inconsistent regulatory programs within the boundaries of the reservation, the Parties agree to initiate a coordinated comprehensive land-use-planning process for land areas contained within the boundaries of the reservation.

b. The Tribe and the County will be implementing separate comprehensive land-use-policy programs under their separate powers and authorities that regulate land-use activities on the reservation.

c. The Tribe has assumed regulatory jurisdiction for all lands within the exterior boundaries of its reservation, regardless of ownership type, and the County has assumed partial regulatory jurisdiction for those lands held in fee title lying within the exterior boundaries of that reservation.

d. The Parties recognize the need for due-process representation of all residents of the reservation.

e. The coordinated comprehensive planning effort is not intended

to limit or transfer any degree of jurisdiction held by either or any of the Parties, nor is it to be interpreted or misconstrued as a recognition of jurisdiction by one party over another.

f. It is in the interest of the residents of the region, the County, and the Indian reservation, that a coordinated regional planning process be established in which the Tribe and County cooperate and share resources in the development of a common comprehensive land-use plan.

g. In order to implement a coordinated regional planning process, the parties recognize that voluntary cooperation and an attitude of good faith toward the joint planning process is a prerequisite for successful coordinated planning.

2. Strategic Activities for Coordinated Planning

The Parties further recognize and have identified the following strategic activities that should be completed in order to bring about a successful coordinated comprehensive planning process:

a. The Tribe and the County mutually recognize the benefits of establishing a long-term, government-to-government planning and regulatory relationship in order to jointly commence a process for the update of the Tribal and County Comprehensive Land-Use Plans; of formulating a single synthesized Comprehensive Plan; and of investigating alternative methods for the administration of the land-use plan and other land-use-related regulatory codes for those land areas lying within the exterior boundaries of the Tribe's reservation.

b. The Tribe and the County recognize the benefits of actively pursuing future joint-planning studies that address regional concerns to both the County and the Tribe.

c. The Tribe and the County recognize that an Advisory Planning Board should be appointed, representing both the Tribe and the County, for the purposes of initiating a coordinated comprehensive planning update process and for the purposes of identifying and updating requirements to both the County plan and the Tribe plan in an effort to attain compatibility between the plans.

d. The Tribe and the County recognize that in order to facilitate a coordinated comprehensive planning process for the reservation, the County should modify its existing Comprehensive Plan and designate those land areas within the reservation as a new

"reservation subarea" with its own distinct goals and objectives.

e. The Tribe and the County recognize that an operational and organizational strategy for jointly administering a land-use policy should be established that will consider: (1) the jurisdictional claims to land-use regulation by both parties and (2) each government's concern with respect to fair and adequate representation of all people residing on the reservation. This proposed organizational strategy outlines a procedure for implementing the provisions of mutually agreed upon Comprehensive Land-Use plans.

3. The Planning Process

Pursuant to this Memorandum of Understanding, the Tribe and the County acknowledge their commitment to pursue a process leading toward the coordination of land-use-planning and regulatory activities on that Tribe's reservation and have identified the following three major elements of a program to commence that process:

3.1 Commitment for Coordinated Planning

a. The Tribe and the County may consider entering into a Sphere of Influence Agreement as an interim measure of land-use coordination while the planning process is under way.

b. The Tribe and the County may formulate an Advisory Planning Board representing the Tribe and the County, which shall oversee the implementation of a joint comprehensive planning process.

c. Both the County and the Tribe will consider the provision of professional staff support to the Advisory Planning Board to facilitate the process of updating both Tribal and County Comprehensive Plans.

d. The Advisory Planning Board may initiate review and drafting of the plan document and present recommendations to the County and Tribal Planning Commissions for public review and adoption by their respective governing bodies.

3.2 Composition of the Advisory Planning Board

a. The composition of the Advisory Planning Board will provide for equal representation and appointment by the Tribe and County and may include a neutral facilitator who can also act as the board chair. For example, the Advisory Board may comprise nine (9) members, with appointments made mutually by the Tribe and the County. The positions on the board could be filled as follows: a representative

of the County's and the Tribe's Planning Commissions (two positions); the planning directors of the respective governments (two positions); two positions appointed at-large and nominated by the County; two positions appointed at-large and nominated by the Tribe; and a neutral facilitator that also serves as the board's chairperson (one position).

b. The board will serve at the discretion of and shall make its recommendations to the Tribe and the County.

c. The board will complete its assigned tasks and responsibilities within the one-year (1-year) anniversary of its members' appointments.

3.3 Operational Procedures

a. In order to administer an updated Comprehensive Land-Use Plan and subsequent regulatory codes, an administrative procedure should be developed by the Advisory Planning Board that outlines procedures for joint administration of the plan and associated regulations.

b. The Advisory Planning Board would serve as a representative board making recommendations to each government's Planning Commission regarding land-use activities on the reservation.

c. The Advisory Planning Board should investigate alternatives for the resolution of any disputes, if any, between the Tribe and County in the implementation of the plan and regulatory codes on the reservation and should make recommendations on such procedures to each government's governing bodies.

4. Term of Memorandum of Understanding

This Memorandum of Understanding shall commence on the date that it is approved by both the Tribe and County and shall remain in effect for a period of eighteen (18) months. Either party may terminate this Memorandum of Understanding provided written notification of such intent to terminate is transmitted to the other party(ies) within thirty (30) days of actual termination. It is anticipated by the parties that following the term of this agreement, a subsequent agreement shall be drafted and approved whereby the parties will mutually agree on methods to offer administration and maintenance of a coordinated land-use policy.

5. Jurisdiction

Nothing in this agreement shall limit or waive the regulatory authority

or jurisdiction of either party. IN WITNESS WHEREOF, this Memorandum of Understanding serves to document an understanding between the _____ Tribe and _____ County with respect to establishing a coordinated regional land-use-planning process by and between the parties, and the parties hereto have executed the Memorandum of Understanding on the day and year of the last signature below:

_____ County Board of Commissioners

_____

_____

_____

_____ Indian Tribe

_____

_____

_____

Appendix 3
Select Court Decisions, Policies, and Statutes

Court Decisions and Policies

Alaska v. Native Village of Venetie Tribal Government, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998).

Arizona v. California, 460 U.S. 605 (1983).

Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

Arizona Public Service Co. v. EPA, 211 F.3d 1280, 1300, D.C. Cir. (2000).

Atkinson v. Haldane, 569 P. 2d. 151. Alaska (1977).

Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

Blue Legs v. BIA, 867 F. 2d 1094 (8th Cir. 1989).

Blue Legs v. United States Environmental Protection Agency, 668 F. Supp. 1329, D.S.D. (1987).

Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408, 106 L.Ed.2d 343, 109 S. Ct. 2994 (1988).

Braxton v. U.S., 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed. 2d 385 (1991).

Bryan v. Itasca County, 426 U.SS. 376 (1976).

Bugenig v. Hoopa Valley Tribe, 266 F. 3d 1201, Court of Appeals (9th Cir. 2001).

California v. Cabazon Band of Indians, 480 U.S. 202 (1987).

Cappaert v. United States, 426 U.S. 128 (1976).

Cardin v. DeLaCruz, 671 F. 2d. 363 (9th Cir. 1982), cert. denied, 459 U.S. 967 (1982).

Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

Clinton, W. "Memorandum on Government-to-Government Relations with Native American Tribal Governments." Weekly Compilation of Presidential Documents 30 (17) (1994): 936–37.

Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, C.D.Cal. (1985).

Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), aff'g in part and rev'g in part 460 F. Supp. 1320 (E.D. Wash. 1979), cert. denied, 454 U.S. 1092.

Confederated Salish and Kootenai Tribes v. Namen, 665 F. 2d. 951 (9th Cir. 1982).

Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization, 724 F.3d 1153 (9th Cir. 2013).

Confederated Tribes of the Yakima Indian Nation v. Whiteside, 825 F.2d 529 (9th Cir. 1987).

Cotton Petroleum v. State of New Mexico, 490 U.S. 163, 104 L.Ed.2d 209, 109 S. Ct. 1698 (1988).

County of Oneida v. Oneida Indian Nation, 470 U.S. 220.

County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 106 L.Ed.2d 343, 109 S.Ct. 2994 (1988).

Dept. of Ecology v. Acquavella, 100 Wn.2d 651 (1983).

Dept. of Ecology v. Acquavella, 131 Wn.2d 746 (1997).

Dept. of Ecology v. Yakima Reservation Irrigation District, 121 Wn.2d 257 (1993).

Drysdale v. Prudden, 195 N.C. 722, 143 S.E. 530, 536 (1928).

Duro v. Reina, 495 U.S. 676, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990).

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

Evans v. Shoshone-Bannock Land Use Policy Commission, 4:12–CV–417–BLW (U.S. D.C. D. Idaho, 2012).

Frontenelle v. Omaha Tribe, 430 F. 2d. 143, 8th Cir. (1986), cert. denied, 107, S. Ct. 2461 (1987).

Gobin, Kim; Guy Madison v. Snohomish County; v. the Tulalip Tribes of Washington, No. 00-36031, D.C. No. CV-99-01432-RSL (2002).

Knight v. Shoshone and Arapahoe Indian Tribes, 670 F. 2d. 900, 10th Cir. (1982).

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak and Salazar v. Patchak, 567 U.S. No. 11–246 (2012).

McCarren Amendment, 43 U.S.C. sec 666 (1982).

McClanahan v. Arizona State Tax Commission, 441 U.S. 164 (1973).

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976).

Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998), cert. denied, 521 U.S. 921 (1998).

Montana v. United States, 450 U.S. 544 (1981).

Morton v. Mancari, 417 U.S. 535 (1974).

Muckelshoot Indian Tribe v. Trans-Canada Enterprises, Ltd., 713 F. 2d. (9th Cir. 1983).

Nance v. EPA, 1981. 645 F.2d 701 (9th Cir.), cert. denied (1981).

National Farmers Union Ins. Co., v. Crow Tribe, 471 U.S. 845 (1985).

Nevada v. Hicks, 533 U.S. 353 (2001).

Nevada v. United States, 103 S.Ct. 2906 (1983).

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S. Ct. 2378 (1983).

Obama, B. "Memorandum for the Heads of Executive Departments and Agencies: Tribal Consultation." Presidential documents, Federal Register 74 (2009): 215.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

Puyallup Indian Tribe v. Port of Tacoma, 717 F. 2d. 1251 (9th Cir. 1983).

Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968).

Puyallup Tribe v. Department of Game, 443 U.S. 165 (1977).

Rice v. Rehner, 463 U.S. 713, 103 S. Ct. 3291 (1983).

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

Santa Rosa Band of Indians v. Kings County, 532 F. 2d 655 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1978).

Seminole Nation v. United States, 316 U.S. 286 (1942).

Skagit Audubon Society, et. al. v. Skagit County and Agriculture for Skagit County et al., No. 00-2-0018c.

Snohomish County v. Seattle Disposal Company, 70 Wash. 2d. 668, 425 P. 2d. 22, cert. denied, 389 U.S. 1016 (1967).

Snow v. Quinault, 709 F. 2d. 1319 (9th Cir. 1983), cert. denied, 104 S. Ct. 2655 (1984).

Solem v. Bartlett, 465 U.S. 463, 466, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984).

South Dakota v. Bourland, 508 U.S. 679, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993).

South Dakota v. Yankton Sioux Tribe, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998).

State of Washington, Department of Ecology v. United States Environmental Protection Agency, 752 F.2d 1465 (9th Cir. 1985).

Strate v. A-1 Contractors, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997).

Suquamish Tribe v. Aam, No. C82-1549V W.D. Wash. (1986).

Swinomish Indian Tribal Comm'y v. Dep't of Ecology, Sup. Ct. State of Washington, Docket No.: 87672-0 (2013).

Tulalip Tribes of Washington v. Walker, Snohomish Co. Sup. Ct. No. 71421 (1963).

Tyndall v. United States, No. 77-0004, D.D.C. (1977).

United States v. Anderson, 738 F.2d. 1358 (9th Cir. 1984).

United States v. Cascade Natural Gas Corp., No. C76-550V, W.D. Wash.

United States v. Kagama, 118 U.S. 375, 384 (1886).

United States v. Mitchell, 463 U.S. 206 (1983).

United States v. Navaho Nation, 537 U.S. 488 (2003).

United States v. Payne, 264 U.S. 446 (1924).

United States v. Pend Oreille County Public Utility District no. 1., No. C-80-116-RMB E.D. Wash. (1984).

United States v. Washington, 506 F. Wupp. 187, W.D. Wash. (9th Cir. 1980), No. 91-3111 (1984).

Unites States v. Washington, Subproceeding no. 89-3 (2004).

United States v. Washington, 641 F. 2d. 1368 (9th Cir. 1981), cert. denied, 454 U.S. 1143 (1982).

United States v. Washington, 384 F. Supp. 312, W.D. Wash. (1974); Aff'd, 520 F. 2d. 676 (9th Cir.), cert. denied, 423 U.S. 1086 (1976).

United States v. Washington, 506 F. Supp. 187 (W.D. Wash. 1980); en banc appeal dismissed (9th Cir.), No. 91–3111 (1984).

United States v. Wheeler, 435 U.S. 313 (1978).

United States v. Winnebago Tribe, 542 F. 2d. 1002 (8th Cir. 1976).

United States v. Winters, 207 U.S. 563 (1908).

United States v. Yakima Tribal Court, 806 F. 2d. 853 (9th Cir. 1986), cert. denied, 107 S. Ct. 2461 (1987).

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).

Washington v. Environmental Protection Agency, 752 F.2d 1465 (9th Cir. 1985).

Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979).

Washington Game Department v. Puyallup Tribe, 414 U.S. 44 (1973).

Washington State, Surface Water Code, RCW 90.03.

Washington State, Ground Water Code, RCW 90.44.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

Williams v. Lee, 358 U.S. 217 (1958).

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

Federal Indian Statutes

Northwest Ordinance of 1787, Act of August 7, 1787, 1 Stat. 50

> This act, ratified by Congress in 1789, established the U.S. government's relationship to tribes as having a similar status to that of a foreign nation and declared a policy of "utmost good faith" toward Indians, their lands, and their properties.

Non Intercourse Act of 1790 and 1834, 25 U.S.C. sec. 177, 1 Stat. 137, 1790, and 4 Stat. 729, 1834

> This act established that no purchase, grant, lease, or other conveyance of lands or of any title or claim thereto, from any Indian nation or tribe of Indians shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

Treaties Statute of 1871, 25 U.S.C. sec. 71

> In 1871, Congress prohibited further treaty making with Indian tribes by declaring that "no Indian Nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

Major Crimes Act of 1885, 18 U.S.C. sec. 1153

> Offenses committed within Indian country. (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely murder, manslaughter, kidnapping, maiming, a felony, sexual offenses, assault with intent to commit murder, assault with a dangerous weapon, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any

of the above offenses, within the exclusive jurisdiction of the United States. (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

General Allotment (or Dawes) Act of 1887, 25 U.S.C. sec. 331–334; 339, 341, 348, 349, 354, 381

This act authorized the allotting of the tribal lands to individual tribal members, the land to remain in trust for twenty-five years. The stated reason for allotment was to provide for tribal members to become self-supporting members of their communities. The result was that after the twenty-five-year trust period, the land became eligible for state taxation, resulting in the loss of millions of acres of Indian land to non-Indian ownership.

Dead and Down Timber Act: Act of February 16, 1889, 25 U.S.C. 196

This act provided for the allotment of lands in severalty to Indians on reservations.

Indian Appropriations Act of March 3, 1909, 35 Stat. 783

This act provided for the first directed appropriation of funds for Indian forestry programs as an exercise of federal trust responsibility over Indian resources.

Indian Reorganization Act of 1934 (Wheeler-Howard Act), 25 U.S.C. sec. 461–479

This act represented a new approach to tribal sovereignty and a commitment to protect Indian culture. Tribes had the opportunity to vote to accept or reject the restructured form of tribal government mandated by the act. The form of government drawn up by this act was based on a written constitution mandating open elections and has frequently been compared to a municipal government. Additional provisions in the act include: section 461, "Allotment of Land on Indian Reservations," prohibited further allotment of land after June 18, 1934; section 463, "Restoration of Lands to Tribal Ownership," provided for the protection of existing rights; section 476, "Organization of Indian Tribes; Constitutions and Bylaws; Special Election," established the rights of any tribe to organize for its common welfare and to adopt an appropriate constitution and bylaws, effective when ratified by a majority vote of the tribe's adult members; section 477, "Incorporation of Indian

Tribes; Ratification by Election," authorized the secretary of the interior, upon petition by at least one-third of the adult Indians in a tribe, to issue a charter of incorporation to that tribe. The constitution also vested the following rights and powers: to employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the secretary of the interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the federal, state, and local governments.

Johnson-O'Malley Act of 1934

This act permitted the federal government to contract with state and local governments and private contractors for various reservation services. Indian people on the reservations thus became entitled for the first time to some state welfare services, and Indian children entered the public-school system.

Indian Claims Commission Act of 1946, 25 U.S.C. sec. 70a

The Indian Claims Commission granted blanket permission for suits for compensation for land or other resources taken from Indian tribes.

Indian Country Statute, 18 U.S.C. sec. 1151

This statute defined the term Indian country to mean (a) all land within the limits of any Indian reservation under the jurisdiction of the U.S. government, notwithstanding the issuance of any patent, and including the right-of-way running through the reservation; (b) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof and whether within or without the limits of a state; and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

House Concurrent Resolution 108 of 1953, 67 Stat. B132. (1953)

This document included the recommendation that all Indian tribes and individual members thereof should be freed from federal supervision and control and from all disabilities and limitations specifically applicable to Indians. It further declared that the secretary of the interior should examine all existing legislation and treaties dealing with Indians and report to Congress his recommendations on this legislation to accomplish the purposes of this resolution.

Public Law 83-280 of 1953, 67 Stat. 588 (1953) as amended. 18 U.S.C. sec. 1162, 25 U.S.C. sec. 1321–1326, 28 U.S.C. sec. 1360

18 U.S.C. sec. 1162. "State jurisdiction over offenses committed by or against Indians in the Indian country." This section of the act made possible the termination of a tribe. Tribes that were deemed ready for termination were paid a per acre fee, and the unique relationship between the tribe and the federal government was then terminated. What tribes soon discovered was that the termination of the reservation meant the termination of federal benefits and services as well as the termination of the tribe as a sovereign institution.

25 U.S.C. sec 1321, 1322. Enacted as part of the Indian Civil rights Act of 1968, these two statutes modified Public Law 280 to require, before any other state may assume civil or criminal jurisdiction over Indian country, "the consent of the Indian Tribe . . . affected by such assumption."

25 U.S.C. sec. 1323. "Retrocession of jurisdiction by State." Authorized the United States to accept a retrocession by any state of all or any measure of the criminal or civil jurisdiction, or both, acquired by the state pursuant to the provisions of the title.

Menominee Termination Act of 1954, Ch. 303, 68 Stat. 250 (1954), repealed 1973

The purpose of this act was to provide for orderly termination of federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin.

Indian Civil Rights Act of 1968, 82 Stat. 25 U.S.C. sec. 1301–1341

The purpose of this act was to protect individual Indians from their own tribal governments and to present a limitation on tribal sovereignty. The act mandates that tribal governments must provide many of the same protections provided by the U.S. Constitution. Congress did recognize the sovereignty issue by omitting from the act some rights recognized in the Constitution that would have clearly conflicted with traditional Indian practices.

National Environmental Policy Act of 1969, 83 Stat. 852-856, Public Law 91-190

This legislation requires federal agencies, including the Bureau of Indian Affairs, to consider the effects of their undertakings on natural and cultural resources.

Alaska Native Claims Settlement Act of 1971, 85 Stat. 688, Public Law 92-203

This act provided for the settlement of certain land claims by Alaska natives. The act revoked reservations and Indian allotment authority in Alaska. Under this act, the role of the Bureau of Indian Affairs was diminished.

Menominee Restoration Act of 1973, 25 U.S.C. sec. 903–903f

> Federal recognition was extended to the Menominee Indian Tribe of Wisconsin, and tribal rights and privileges were reinstated.

Indian Finance Act of 1974 (Act of April 12, 1974), 25 U.S.C., sec. 1451

> This act established the policy of Congress to help develop and utilize Indian resources. Indians would fully exercise responsibility for the utilization of management of their own resources in order to enjoy a standard of living from their own productive efforts comparable "to that enjoyed by non-Indians in neighboring communities."

Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. sec 450. Pub. L. 93-638

> This act provided for (1) maximum Indian participation in the government and education of Indian people; (2) full participation of Indian tribes in programs and services for Indians conducted by the federal government; (3) development of Indian human resources; (4) educational assistance; (5) rights of Indian citizens to control their own resources.

Civil Rights Attorneys Fees Act of 1976, Act of October 10, 1976. Pub. L. 89-635, 80 Stat. (codified at 28 U.S.C. sec. 1362, 1976)

> This act provided the tribes the right to obtain attorney fees if they prevailed in certain types of litigation, thus increasing the tribes' incentive to litigate.

American Indian Religious Freedom Act of 1978, 92 Stat. 469 (1978) (codified in part 42 U.S.C. sec. 1996)

> This act explicitly recognizes the importance of traditional Indian religious practices and directs all federal agencies to ensure that their policies will not abridge the free exercise of Indian religions.

Indian Child Welfare Act of 1978, 25 U.S.C. sec. 1901–1963

> This act addressed the long-standing problem of large numbers of Indian children being transferred from their natural parents to non-Indian parents pursuant to state adoption and guardianship proceedings.

Indian Gaming Regulatory Act of 1988, 25 U.S.C., sec. 2703

> This act establishes the statutory basis for the operation, regulation, and protection of Indian tribal gaming activities.

Native American Graves Protection and Repatriation Act (NAGPRA) of 1990, 25 U.S.C., sec. 3001

> NAGPRA was enacted as a sweeping federal human rights law to provide four important protections over Native American cultural resources: (1) it increases protections for Indian graves located on federal and tribal lands and provides for native control over cultural items obtained from such lands in the future; (2) it outlaws commercial traffic in Native American human remains; (3) it requires all federal agencies and federally funded museums and universities to inventory their collections of dead Native Americans and associated funerary objects and to repatriate them to culturally affiliated tribes or descendants on request; and (4) it requires all federal agencies and federally funded museums to repatriate Native American sacred objects and cultural patrimony under procedures and standards specified in the act.

Tribal Self-Governance Act of 1994, H.R. 4842. Title II

> This act establishes that the tribal right of self government flows from the inherent sovereignty of Indian tribes and nations; recognizes the special government-to-government relationship with Indian tribes, including the right to self-governance; finds that although progress has been made, the federal bureaucracy has eroded tribal self-governance and dominates tribal affairs; transfers to tribal governments, upon tribal government request, control over funding and decision making for federal programs, services, functions, and activities or portions thereof as a more effective way to implement the federal policy of government-to-government relations with Indian tribes; and strengthens the federal policy of self-determination.

Appendix 4

Survey Tables—Washington Tribes and Counties Survey Responses

Compiled: November 2, 2018, and March 5, 2019

Q3 - What is the size of your Tribal/County planning staff? (Defined as working under the direction of the Planning Director, or designee, and performing a range of duties typical of planners—land use, regulatory, economic development, housing, transportation, GIS, natural resources, environmental review).

Tribal Response

#	Answer	%	Count
1	1–3	21.43	3
2	4–6	71.43	10
3	7–10	7.14	1
4	11–14	0.00	0
	Total	100	14

County Response

#	Answer	%	Count
1	1–3	12.50	1
2	4–6	0.00	0
3	7–10	12.50	1
4	11–14	25.00	2
5	15–18	12.50	1
6	19–22	12.50	1
7	23–26	0.00	0
8	more than 27	25.00	2
	Total	100.00	8

Q4 - What activities fall under your Tribe's/County's planning department?

Tribal Response

#	Answer	%	Count
1	Land use and comprehensive planning	18.33	11
2	Development regulation	13.33	8
3	Environmental review	8.33	5
4	Utilities planning	8.33	5
5	Housing and community development	11.67	7
6	Economic development and gaming	8.33	5
7	Transportation planning	21.67	13
8	Other	10.00	6
	Total	100.00	60

County Response

#	Answer	%	Count
1	Land use and comprehensive planning	23.53	8
2	Development regulation	23.53	8
3	Environmental review	23.53	8
4	Utilities planning	0.00	0
5	Housing and community development	8.82	3
6	Economic development and gaming	2.94	1
7	Transportation planning	8.82	3
8	Other	8.82	3
	Total	100.00	34

Q5 - Does the reservation(s) contain a “checkerboard” land-tenure condition, or is it entirely in federal trust? Identify all that apply.

Tribal Response

#	Answer	%	Count
1	Tribal-owned federal trust lands	25.00	14
2	Individual Indian trust allotments	21.43	12
3	Tribal-owned fee-simple lands	23.21	13
4	Individual Indian fee-simple lands	14.29	8
5	Non-Indian-owned fee-simple lands	16.07	9
	Total	100.00	

County Response

#	Answer	%	Count
1	Tribal-owned federal trust lands	30.00	6
2	Individual Indian federal trust allotments	10.00	2
3	Tribal-owned fee-simple lands	25.00	5
4	Individual Indian fee-simple lands	15.00	3
5	Non-Indian-owned fee-simple lands	20.00	4
	Total	100.00	

Q6 - Has your Tribe/County been a party in litigation or mediation with a local county or municipal government?

Tribal Response

#	Answer	%	Count
1	Yes	46.15	6
2	No	53.85	7
3	Pending filing litigation	0.00	0
	Total	100.00	13

County Response

#	Answer	%	Count
1	Yes	37.50	3
2	No	50.00	4
3	Pending	12.50	1
	Total	100.00	8

Q7 - If yes, what did the dispute concern?
Tribal Response

#	Answer	%	Count
1	Land use	20.00	3
2	Water resources/natural resources	26.67	4
3	Environmental issue	20.00	3
4	Cultural issue	6.67	1
5	Treaty rights	13.33	2
6	Other	13.33	2
	Total	100.00	15

County Response

#	Answer	%	Count
1	Land use	40.00	4
2	Water resources/natural resources	10.00	1
3	Environmental issue	30.00	3
4	Cultural issue	0.00	0
5	Treaty rights	10.00	1
6	Other	10.00	1
	Total	100.00	10

Q8 - How was the dispute resolved?

Tribal Response

#	Answer	%	Count
1	Tribe prevailed	80.00	4
2	County/municipality prevailed	0.00	0
3	Negotiated settlement outcome agreeable to both parties	20.00	1
4	Pending resolution	0.00	0
	Total	100.00	5

County Response

#	Answer	%	Count
1	Tribe prevailed	50.00	2
2	County prevailed	0.00	0
3	Negotiated settlement outcome agreeable to both parties	0.00	0
4	Pending resolution	50.00	2
	Total	100.00	4

Q9 - Has your planning office ever attempted to reach out to a tribal/county government in order to engage in cooperative local planning?

Tribal Response

#	Answer	%	Count
1	Yes	92.31	12
2	No	0.00	0
3	Under consideration	7.69	1
	Total	100.00	13

County Response

#	Answer	%	Count
1	Yes	100.00	8
2	No	0.00	0
3	Under consideration	0.00	0
	Total	100.00%	8

Q10 - Did that [attempt] lead to establishing a working relationship with your tribal/county counterpart?

Tribal Response

#	Answer	%	Count
1	Yes	84.62	11
2	No	15.38	2
	Total	100.00	13

County Response

#	Answer	%	Count
1	Yes	75.00	6
2	No	25.00	2
	Total	100.00	8

Q11 - Which issues would be most important to mutually discuss with your local tribe/county?

Tribal Response

#	Answer	%	Count
1	Land use	11.84	9
2	Environment	14.47	11
3	Natural resources	11.84	9
4	Transportation	17.11	13
5	Utilities	13.16	10
6	Public services	13.16	10
7	Public safety	13.16	10
8	Other	5.26	4
	Total	100.00	76

County Response

#	Answer	%	Count
1	Land use	25.93	7
2	Environment	25.93	7
3	Natural resources	18.52	5
4	Transportation	3.70	1
5	Utilities	3.70	1
6	Public services	7.41	2
7	Public safety	7.41	2
8	Other	7.41	2
	Total	100.00	27

Q12 - Does your tribe/county currently participate in interjurisdictional planning with a county or municipal government, either on or off the reservation?

Tribal Response

#	Answer	%	Count
1	Yes	76.92	10
2	No	23.08	3
	Total	100.00	13

County Response

#	Answer	%	Count
1	Yes	75.00	6
2	No	25.00	2
	Total	100.00	8

Q13 - Does your cooperation in intergovernmental planning concern mostly on-reservation issues or mostly off-reservation issues or both?

Tribal Response

#	Answer	%	Count
1	Mostly on-reservation issues	10.00	1
2	Mostly off-reservation issues	40.00	4
3	Both on- and off-reservation issues	50.00	5
	Total	100.00	10

County Response

#	Answer	%	Count
1	Mostly on-reservation issues	0.00	0
2	Mostly off-reservation issues	42.86	3
3	Both on- and off-reservation issues	57.14	4
	Total	100.00	7

Q14 - Please Identify the types of planning your planning office is engaged in with local/tribal governments.

Tribal Response

#	Answer	%	Count
1	Land-use planning	14.29	6
2	Building and permit code administration	11.90	5
3	Environmental management	9.52	4
4	Natural-resources management	11.90	5
5	Utilities planning	14.29	6
6	Public services	11.90	5
7	Public safety	11.90	5
8	Historic/cultural-resources management	11.90	5
9	Other	2.38	1
	Total	100.00	42

County Response

#	Answer	%	Count
1	Land-use planning	33.33	7
2	Building and permit code administration	4.76	1
3	Environmental management	19.05	4
4	Natural-resources management	14.29	3
5	Utilities planning	0.00	0
6	Public services	4.76	1
7	Public safety	4.76	1
8	Historic/Cultural-resources management	19.05	4
	Total	100.00	21

Q15 - Is there a formal intergovernmental agreement or memorandum of understanding in place?

Tribal Response

#	Answer	%	Count
1	Yes	30.00	3
2	No	70.00	7
	Total	100.00	10

County Response

#	Answer	%	Count
1	Yes	28.57	2
2	No	71.43	5
	Total	100.00	7

Q17 - If no procedure is in place for cooperative intergovernmental planning, would you support establishing a cooperative relationship with county/tribal planners?

Tribal Response

#	Answer	%	Count
1	Yes	100.00	9
2	No	0.00	0
	Total	100.00	9

County Response

#	Answer	%	Count
1	Yes	100.00	4
2	No	0.00	0
	Total	100.00	4

Q18 - How would you characterize your government's relationship with your neighboring government regarding the following issues?

Tribal Response

#	Question	Excellent (%)		Good (%)		Neutral (%)		Poor (%)		Conflictive (%)		Total
1	Land-use planning	0.00	0	62.50	5	25.00	2	0.00	0	12.50	1	8
2	Environmental management	0.00	0	44.44	4	33.33	3	11.11	1	11.11	1	9
3	Treaty rights	11.11	1	55.56	5	11.11	1	11.11	1	11.11	1	9
4	Economic development	11.11	1	66.67	6	0.00	0	11.11	1	11.11	1	9
5	Utilities	12.50	1	12.50	1	37.50	3	25.00	2	12.50%	1	8
6	Transportation	11.11	1	66.67	6	11.11	1	11.11	1	0.00	0	9
7	Historic/ cultural issues	0.00	0	25.00	2	75.00	6	0.00	0	0.00	0	8
8	Consideration of non-Indian resident interests on the reservation	0.00	0	25.00	2	50.00	4	12.50	1	12.50	1	8

County Response

#	Question	Excellent (%)		Good (%)		Neutral (%)		Poor (%)		Conflictive (%)		Total
1	Land-use planning	0.00	0	42.86	3	28.57	2	28.57	2	0.00	0	7
2	Environmental management	0.00	0	28.57	2	57.14	4	0.00	0	14.29	1	7
3	Treaty rights	0.00	0	28.57	2	57.14	4	0.00	0	14.29	1	7
4	Economic development	0.00	0	16.67	1	66.67	4	16.67	1	0.00	0	6
5	Utilities	0.00	0	0.00	0	83.33	5	16.67	1	0.00	0	6
6	Transportation	0.00	0	33.33	2	50.00	3	16.67	1	0.00	0	6
7	Historic/ cultural issues	0.00	0	14.29	1	71.43	5	14.29	1	0.00	0	7
8	Consideration of non-Indian resident interests on the reservation	0.00	0	0.00	0	85.71	6	0.00	0	14.29	1	7

Q19 - As a professional planner, how would you characterize the relationship you have with your county/tribal planning counterpart?

Tribal Response

#	Answer	%	Count
1	Continuously professional and cordial	66.67	6
2	Somewhat professional and cordial	22.22	2
3	Nonexistent or not applicable	11.11	1
	Total	100.00	9

County Response

#	Answer	%	Count
1	Continuously professional and cordial	28.57	2
2	Somewhat professional and cordial	57.14	4
3	Nonexistent or not applicable	14.29	1
	Total	100.00	7

Q20 - How often do planners meet with tribal/county planners?

Tribal Response

#	Answer	%	Count
1	1 time or more per week	0.00	0
2	1 time per 2 weeks	0.00	0
3	1 time per month	33.33	3
4	1 time every 6 months	22.22	2
5	1 time annually	11.11	1
6	Have never met	33.33	3
	Total	100.00	9

County Response

#	Answer	%	Count
1	1 time or more per week	0.00	0
2	1 time per 2 weeks	0.00	0
3	1 time per month	42.86	3
4	1 time every 6 months	14.29	1
5	1 time annually	42.86	3
6	Have never met	0.00	0
	Total	100.00	7

Q21 - Does the county government apply its jurisdiction within the exterior boundaries of the reservation?

Tribal Response

#	Question	Yes (%)		In some minor respect (%)		No (%)		Total
1	In land-use planning	44.44	4	11.11	1	44.44	4	9
2	In building activities	44.44	4	11.11	1	44.44	4	9
3	In provision of utilities	55.56	5	11.11	1	33.33	3	9
4	In natural resources	33.33	3	11.11	1	55.56	5	9
5	In cultural resources	22.22	2	11.11	1	66.67	6	9
6	In public services	55.56	5	11.11	1	33.33	3	9
7	In public safety	55.56	5	22.22	2	22.22	2	9
8	In transportation	44.44	4	22.22	2	33.33	3	9

County Response

#	Question	Yes (%)		In some minor respect (%)		No (%)		Total
1	In land-use planning	57.14	4	0.00	0	42.86	3	7
2	In building activities	71.43	5	0.00	0	28.57	2	7
3	In provision of utilities	40.00	2	0.00	0	60.00	3	5
4	In natural resources	28.57	2	28.57	2	42.86	3	7
5	In cultural resources	28.57	2	28.57	2	42.86	3	7
6	In public services	50.00	3	16.67	1	33.33	2	6
7	In public safety	57.14	4	42.86	3	0.00	0	7
8	In transportation	66.67	4	33.33	2	0.00	0	6

Q22 - What are the major hurdles you face in forming a more supportive and collaborative relationship with county/tribal planners in your region?

Tribal Response

#	Question	Strongly agree (%)		Somewhat agree (%)		Neither agree nor disagree (%)		Somewhat disagree (%)		Strongly disagree (%)		Total
1	There is little need to collaborate	0.00	0	44.44	4	0.00	0	11.11	1	44.44	4	9
2	Too many political conflicts persist	11.11	1	44.44	4	22.22	2	0.00	0	22.22	2	9
3	Don't know how to initiate a working relationship	0.00	0	0.00	0	22.22	2	55.56	5	22.22	2	9
4	Would like to improve relationships but insufficient staff	22.22	2	44.44	4	11.11	1	22.22	2	0.00	0	9
5	Tribal council not supportive of working with county	11.11	1	11.11	1	0.00	0	66.67	6	11.11	1	9
6	Treaty rights are viewed as obstacles	11.11	1	11.11	1	0.00	0	55.56	5	22.22	2	9
7	Tribal sovereignty is viewed as obstacle	0.00	0	33.33	3	22.22	2	33.33	3	11.11	1	9
8	County planning operates too differently from tribal planning	0.00	0	33.33	3	22.22	2	33.33	3	11.11	1	9

County Response

#	Question	Strongly agree (%)		Somewhat agree (%)		Neither agree nor disagree (%)		Somewhat disagree (%)		Strongly disagree (%)		Total
1	There is little need to collaborate	0.00	0	28.57	2	14.29	1	0.00	0	57.14	4	7
2	Too many political conflicts persist	42.86	3	0.00	0	28.57	2	14.29	1	14.29	1	7
3	Don't know how to initiate a working relationship	0.00	0	0.00	0	42.86	3	42.86	3	14.29	1	7
4	Would like to improve relationships but insufficient staff	14.29	1	28.57	2	42.86	3	0.00	0	14.29	1	7
5	County council not supportive of working with tribe	0.00	0	0.00	0	0.00	0	42.86	3	57.14	4	7
6	Treaty rights are viewed as obstacles	0.00	0	0.00	0	57.14	4	0.00	0	42.86	3	7
7	Tribal sovereignty is viewed as obstacle	0.00	0	14.29	1	42.86	3	0.00	0	42.86	3	7
8	Tribal planning operates too differently from county planning	0.00%	0	28.57	2	42.86	3	0.00	0	28.57	2	7

Q23 - Please identify any other hurdles that prevent developing a more positive working relationship with the county/tribe.

Tribal Response

- Existing agreements binding or preventing change in relationship
- Turnover in staff, politicians; understanding the historical perspective and federal mandates
- Litigation. Local governments come off as greedy. Great deal of distrust.
- Political turnover, staff turnover on both sides
- Limited staff resources on both sides
- Politics

County Response

- Shoreline Issues, ownership of tidelands, conflicting authority for implementation of NPDES [National Pollution Discharge Elimination System] permitting

Q24 - Please list any suggestions that would help facilitate a better working relationship with the county/tribe.

Tribal Response

- "Tribes have voting power in regional/countywide planning groups." "Tribal Elected officials have relationships with local jurisdiction elected."
- "Beyond Nation to Nation/Tribal Council–County Commissioners, have a working relationship with the on-the-ground staff within the departments."
- "County needs to respect tribal sovereignty. If it were other than a tribe they'd offer incentives but with tribes they seem to want to get them over the barrel. It's borderline extortion."
- "Work staff to staff as opposed to politician to politician. Use your leverage as top tier employer within the county to get your point across."
- "Separation from elected officials and key gov. operational staff."

County Response

- "This is a challenging issue with many stakeholders and interests, we continue to explore getting to yes and finding ways to collaborate with the challenge of land owner interests without representation on the tribal board of directors."

Q25 - Does the county recognize the tribe's jurisdiction regarding land-use planning within the reservation?

Tribal Response

#	Answer	%	Count
1	Definitely yes	66.67	6
2	Probably yes	22.22	2
3	Might or might not	0.00	0
4	Probably not	11.11	1
5	Definitely not	0.00	0
	Total	100.00	9

County Response

#	Answer	%	Count
1	Definitely yes	100.00	7
2	Probably yes	0.00	0
3	Might or might not	0.00	0
4	Probably not	0.00	0
5	Definitely not	0.00	0
	Total	100.00	7

Q26 - How would you characterize the county's views toward the tribe's assertion of possessing self-governance authority over the affairs of the reservation?

Tribal Response

#	Answer	%	Count
1	Does not recognize the tribe's right to self-govern its reservation	11.11	1
2	Partially recognizes the tribe's right to self-govern its reservation	22.22	2
3	Recognizes the tribe's right to self-govern its reservation	66.67	6
	Total	100.00	9

County Response

#	Answer	%	Count
1	Does not recognize the tribe's right to self-govern its reservation	0.00	0
2	Partially recognizes the tribe's right to self-govern its reservation	14.29	1

3	Recognizes the tribe's right to self-govern its reservation	85.71	6
	Total	100.00	7

Q27 - Would you be interested in receiving information on successful tribal–county partnerships that help foster cooperation in planning?

Tribal Response

#	Answer	%	Count
1	Yes	88.89	8
2	No	11.11	1
	Total	100.00	9

County Response

#	Answer	%	Count
1	Yes	100.00	7
2	No	0.00	0
	Total	100.00	7

Appendix 5

Centennial Accord Policy: Washington State Attorney General

CENTENNIAL ACCORD PLAN

Washington State Office of the Attorney General

I. The Role of the Attorney General in State Government

The Attorney General for the state of Washington is an independent constitutional officer and the legal adviser to state agencies, officers and officials. Among the duties assigned to the Attorney General by law is the duty to "represent the state and all officials, departments, boards, commissions and agencies of the state . . . in all legal or quasi legal matters . . . and advise all officials, departments, boards, commissions, or agencies of the state in all matters involving legal or quasi legal questions . . ." RCW 43.10.040. With few exceptions, the Attorney General is the exclusive source of legal counsel and representation for state officers and agencies.

Because of its role in state government and its comprehensive legal duties and responsibilities, the Attorney General's Office (AGO) is involved in a wide array of issues which potentially impact state agencies and tribal governments in their relations with one another. Because of this unique role, the AGO may be in a position to assist with communications and the facilitation of solutions that employ the diverse expertise and resources of multiple agencies and officials.

II. Overview of the Centennial Accord Plan

This plan covers AGO commitments and the process for consent, consultation and notice. Section IV describes the specific situations where the AGO will request consent from Tribes. Consent in this plan entails receipt of free, prior and informed consent prior to taking the actions specified in this plan that directly and tangibly affect Tribes, rights or tribal lands. Section V and VI describe the consultation between the AGO and Tribes. Consultation is a process where the AGO will share information regarding AGO actions with affected Tribes to ensure a complete understanding of the action and to identify and address tribal concerns. Specifically, Section V describes consultation prior to the AGO initiating litigation and Section VI states that Tribes may request consultation with the AGO. Section VII describes situations where the AGO will provide

notice of AGO actions to Tribes.

In this plan, "Tribe" refers to the federally recognized American Indian Tribes in Washington State or the governing body of that Tribe. "Tribal land" includes "Indian Country" as defined in federal law as well as trust lands and lands which have been identified by a Tribe to the AGO as containing cultural, historic or archaeological resources.

III. Contacts within the Attorney General's Office

- Yasmin Trudeau, Legislative Director and Tribal Liaison
    - Liaison for External Affairs
    - 1125 Washington Street SE
    - P.O. Box 40100
    - Olympia, WA 98504-0100
    - Phone: (206) 516-2993
    - Email: Yasmin.Trudeau@atg.wa.gov

- Kristen Mitchell, Deputy Attorney General
    - Liaison for Legal Affairs
    - 1125 Washington Street SE
    - P.O. Box 40100
    - Olympia, WA 98504-0100
    - Phone: (360) 664-2961
    - Email: Kristen.Mitchell@atg.wa.gov

IV. Consent from Tribes on Certain AGO Actions

The AGO will receive free, prior and informed consent prior to taking certain actions specified in this section that directly and tangibly affect Tribes, rights or tribal lands.

A. Actions Subject to Consent

(1) Unless prior consent is received, the AGO will not initiate an AGO program or project that directly affects a Tribe that the AGO undertakes under the independent authority of the Attorney General. Consent will not be requested related to AGO investigations, litigation, employment and other internal business decisions, or in circumstances where a failure to act may subject the AGO to sanction from a court.

(2) AGO actions on behalf of any other entity in the AGO's role as legal counsel to state officials, agencies, departments, boards, and commissions are not subject

to consent. Consent also will not and cannot, be requested on statutory duties and functions of the AGO, including but not limited to issuing legal opinions and formulating ballot titles for state initiatives or referendum measures.

(3) Consent will not be requested on broad issues that impact many or all Washington Tribes, because a requirement for "consensus" from all affected Tribal governments would be both impractical and inconsistent with the independent sovereignty of each Tribe.

(4) Actions specifically covered in the consultation and notice requirements of this plan are not subject to consent. The requirements for notice and consultation are covered in Sections V, VI and VII of this plan. However, the AGO may choose to request consent for programs and projects outside the scope of this section.

B. Request for Consent

(1) The AGO will request consent by sending notification to the chair of the Tribe's governing body or to any person identified by the Tribes to receive the request. The AGO will send a copy of the request to each member of the Tribe's governing body.

(2) The request will provide clear information about the AGO program or project and describe its potential impact to the Tribe.

(3) Tribes may identify persons to receive the request by sending the name, address and contact information to an AGO Tribal Liaison.

C. Consent

(1) Consent is a written resolution from the governing body of the affected Tribe.

(2) If a Tribe does not respond within the timeframe designated in the request then the AGO will interpret that as a grant of consent.

(3) If a Tribe responds to a request for consent by objecting to the project or program, the AGO may request consultation with the Tribe to see if issues raised by the Tribe can be addressed.

V. Consultation with Tribes prior to Litigation Initiated by the AGO

The goal of consultation is to further the government-to-government relationship between Tribes and the State, and ensure the mutual respect for the rights, interests and obligations of each sovereign. A further goal of consultation is to share information regarding AGO actions to ensure a complete understanding of the action and to identify and address tribal concerns. Consultation is independent of and in addition to any other public participation process required

by law.

A. Litigation Consultation

(1) To the extent consistent with the Rules of Professional Conduct, and with the goal to avoid litigation whenever possible, the AGO will consult with a Tribe prior to filing civil litigation against a Tribe or a business owned by a Tribe. The AGO may request consultation on other issues to further the goals of this plan.

B. Consultation Request

(1) The AGO will request consultation by sending notification to the chair of the Tribe's governing body or to any person identified by the Tribe to receive notice. The AGO will send a copy of the notice to each member of the Tribe's governing body. Tribes may identify persons to receive notice by sending contact information to an AGO Tribal Liaison.

(2) The notice will provide clear information about the dispute or issue.

(3) The notice will provide a time of no less than thirty days for the Tribe to respond to the AGO accepting the invitation to consult or declining consultation. Thirty days will run from the date of actual receipt or five days after date of mailing for notices sent by first class mail. The notice will clearly state the timeframe for response and how to respond.

(4) If a statute of limitations, court rule, or other factor requires the AGO to provide less than 30 days notice, the AGO will clearly identify the deadline in the notice and make every reasonable effort to consult within the time available.

(5) If the Tribe does not respond within thirty days of receipt of the notice, or the amount of time provided under (4), the AGO may conclude that the Tribe has declined consultation on the project.

C. Consultation Process

(1) Where a Tribe accepts the invitation to consult, the AGO will contact the Tribe to establish a mutually agreed timeline for completion of consultation. The AGO will communicate any time constraints on the process.

(2) The AGO and the Tribe will identify to each other a point of contact and persons who will participate in the consultation. The AGO and Tribe's point of contact will schedule any necessary meetings. Whenever feasible, the Attorney General or Chief Deputy will personally participate in the consultation.

(3) The AGO will work in good faith during the consultation process to identify and address the Tribe's concerns.

(4) The Tribe may choose how to provide feedback and identify concerns including whether in writing, verbally during a meeting or in other form.

(5) The AGO will provide a response to the Tribe detailing how the AGO will respond to the Tribe's feedback and concerns.

VI. Consultation with the AGO at the Request of Tribes

The AGO is always open to consultation at the request of Tribes on any issue or topic contemplated by the Centennial Accord. The AGO is also amenable to assisting Tribes in resolving disputes with state agencies or officials or with the AGO itself. The nature and extent of the consultation or dispute resolution process may vary depending on the role the AGO occupies in relation to the issue or topic. Tribes may request consultation with the AGO or AGO participation or assistance with dispute resolution by contacting the Attorney General or an AGO Tribal Liaison.

VII. Notice to Tribes of Other AGO Actions

The AGO will provide notice to Tribes prior to:

- Proposing legislation that may directly affect Tribes, rights or tribal lands;
- Filing an amicus brief that may directly affect Tribes, rights or tribal lands.

The AGO will provide notice to Tribes after:

- Filing a ballot title for a state initiative or referendum measure with the Office of Secretary of State on an initiative or referendum measure that directly affects Tribes, rights or tribal lands.

A. Notice to Tribes

(1) The AGO will send notice to the chair of the Tribe's governing body or to any person identified by the Tribes to receive notice. The AGO will send a copy of the notice to each member of the Tribe's governing body. Tribes may identify persons to receive notice by sending the name, address and contact information to an AGO Tribal Liaison.

(2) The notice will provide clear information about the action [and] the timelines associated with the action and will provide information for the Tribe to contact the AGO for additional information.

DATED this 10th day of May, 2019.

Appendix 6

Planning Directors Report Distribution

	Tribe	Tribal Planning Director
1	Chehalis	Bryan Sanders
2	Cowitz	Kim Stube
3	Jamestown	Leanne Jenkins
5	Lummi	Tim Ellis
6	Muckleshoot	Krongthip Sangkapreecha
7	Nisqually	Joe Cushman
8	Nooksack	vacant
9	Port gamble s'klallam	Joe Sparr
10	Puyallup	Dan Kain
11	Samish	Ryan Walters
12	Sauk-suiattle	Adrienne Smallwood
13	Skokomish	Jackie Smith
14	Stillaguamish	Casey Stevens
15	Suquamish	William Crowell
16	Swinomish	Zam Deshields
17	Tulalip	Julia Gold
18	Upper skagit	Dan Tolliver

	County	County Planning Directors
1	Clark	Oliver Orjiako
2	Cowlitz	Elaine Placido
3	Clallam	Mary Ellen Winborn
4	Whatcom	Sam Ryan
5	Pierce	Melanie Halsan
6	King	Adrienne Quinn
7	Thurston	Allison Osterberg
8	Whatcom	Sam Ryan
9	Kitsap	Louisa Garbo
10	King	Adrienne Quinn
11	Skagit	Hal H. Hart
12	Snohomish	Barb Mock

Washington Indian Tribes
and the Growth Management Act
Toward Inclusionary Regional Planning