

AWC EOE Webinar Series 2024 TRIBAL GOVERNMENT RELATIONS 101



Drew Pollom, Associate, Odgen Murphy Wallace, PLLC
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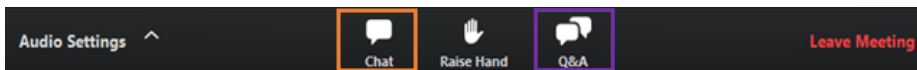


1

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2

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3

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4

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5

TRIBAL GOVERNMENT RELATIONS 101
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Drew Pollom
Associate
Ogden Murphy Wallace, PLLC

6

Our Objective

- “A Mile Wide and an Inch Deep.”
- To Explain the Basic Structures of Important Indian Law Principles and Statutes.
- Discuss the intersection of Washington Law and Native Nations

What is a Tribe?

- Native Nations are autonomous self-governing communities whose authority is derived from their inherent sovereignty, protected treaty rights, and authority delegated by Congress.
- Tribes will have both a Tribal Constitution as well as Tribal Codes.
- A Tribe's ability to govern itself is an inherent right it retains and is recognized through treaties and other Acts of Congress.
- “[t]hey have been always admitted to possess many of the attributes of sovereignty. All the rights which belong to self government have been recognized as vested in them.” *Worcester v. the State of Georgia*, 31 U.S. 515, 580 (1832).

Who are Tribal Members?

- Tribes may use several factors including ancestors on congressional rolls, enrollment based on parents or grandparents, and blood quantum to determine membership in the Tribal community.
- Tribal membership criteria is within the exclusive jurisdiction of the Tribes themselves.
- "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion..." *Morton v. Mancari* 417 U.S. 535, 554 (1974).

What is "Indian Country"?

- Indian Country is used in both case law and in statutes to define all lands within the limits of reservations under the jurisdiction of the United States, all dependent tribal communities, and all Indian allotments.
- "Trust Lands" are lands held by deed by the United States for a Tribe or Tribal Member for the use and enjoyment of the Tribe or Tribal Members. Trust lands are not subject to state regulations.
- "Restricted fee" land is land owned by an individual Native American or an Indian tribe which has a restriction on alienation, requiring the consent of the U.S. government before the land can be sold or alienated. Restricted fee lands are not subject to state regulations.
- "Fee" land is own either by a tribal member or non-tribal member and possibly subject to state or local regulation.
- "Tribal sovereignty is not coterminous with Indian country. *Cf.* 25 C.F.R. § 83.7(b) (1989) (in order to achieve federal recognition, a group of Indians need not inhabit formal "Indian country"; inhabitation of 'a specific area' or a 'community viewed as American Indian' is sufficient). Rather, tribal sovereignty is manifested primarily over the tribe's members." *Native Village of Venetie I.R.A. Council v. State of Alaska* 944 F.2d 548, 559 (9th Cir. 1991).

What is a Tribe's Inherent Sovereignty?

- Early Treaties and Royal Proclamations Recognized Indigenous Right to Self-Governance.
- “[t]hey have been always admitted to possess many of the attributes of sovereignty. All the rights which belong to self government have been recognized as vested in them.” *Worcester v. the State of Georgia*, 31 U.S. 515, 580 (1832).
- A Tribe's ability to govern itself is an inherent right they retain and recognized through treaties and other Acts of Congress.
- A Tribe's Inherent Sovereignty is similar to a City's right of governance under Home Rule.

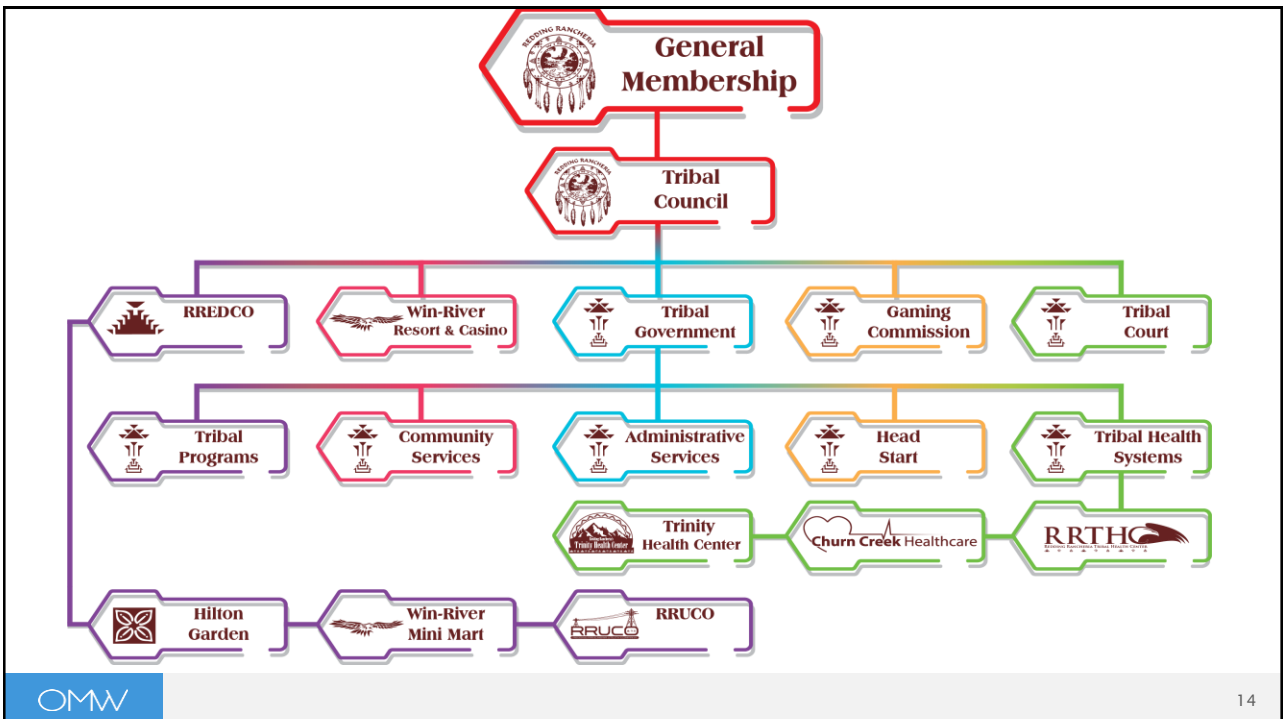
What is a Tribe's Treaty Protected (or Reserved) Right?

- It's a right not preserved by the Tribe's Inherent Sovereignty, but is retained by either a written treaty with the United States or by some other federal action like an Executive Order.
- "They were given unqualified assurance of that by Governor Stevens himself without any suggestion that the Indians' exercise of those rights might some day, without authorization of Congress, be subjected to regulation by non-Indian citizens through their territorial or state government." *United States v. State of Washington*, 384 F.Supp. 312, 334 (W.D. WA. 1974).
- "The Klamath River Reservation was established by Executive Order in 1855 and included the area in question. In 1891, by Executive Order, the Klamath River Reservation was made part of the Hoopa Valley Reservation. The Act of June 17, 1892, provided that 'all of the lands embraced in what was Klamath River Reservation' reserved under the 1855 Executive Order, are 'declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights . . ." *Mattz v. Arnett* 412 U.S. 481, 481 (1973).

What is a Congressionally Delegated Power?

- These are powers that are not retained through inherent sovereignty or through a Treaty but are instead delegated to the Tribes via an Act of Congress.
- Clean Water Act (CWA) Section 518(e) expressly provides for Indian tribes to play essentially the same role in Indian country that states do within state lands, authorizing EPA to treat eligible federally recognized Indian tribes in a similar manner as a state (TAS) for implementing and managing certain environmental programs.
- “[t]he EPA’s construction of the 1987 amendment to the Clean Water Act--that tribes may establish water quality standards that are more stringent than those imposed by the federal government--is permissible because it is in accord with powers inherent in Indian tribal sovereignty.” *City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996).

13



14

Tribal Sovereign Immunity

- “Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the common-law immunity from suit traditionally enjoyed by sovereign powers.” *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 188 L. Ed. 2d 1071, 82 USLW 4398 (2014) (internal citations omitted).
- A Tribe’s sovereign immunity can only be waived by either an Act of Congress or through an express waiver by the Tribe.
- Tribal sovereign immunity can extend to tribal corporations (Including casinos, gas stations, and construction companies)



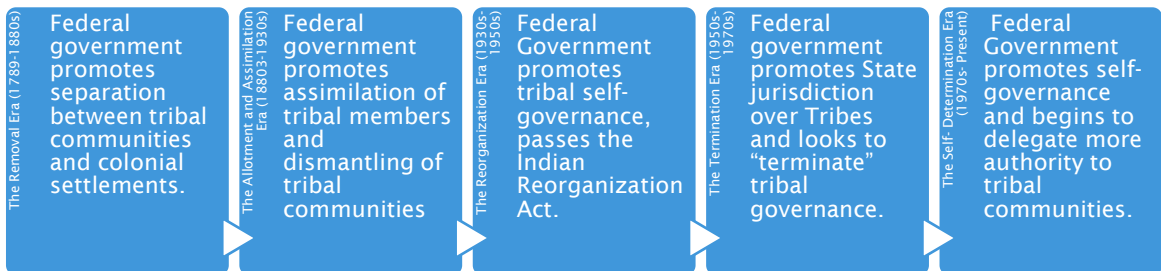
Tribal Civil Jurisdiction

- “[t]he general proposition is that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Montana v. United States*, 450 U.S. 544, 565 (1981).
- “A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” *Montana v. United States*, 450 U.S. 544, 565 (1981).
- “A tribe may also retain 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 political integrity, the economic security, or the health or welfare of the tribe.” *Montana v. United States*, 450 U.S. 544, 566 (1981).

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

- Congress has “plenary jurisdiction” over the affairs of Tribes and Tribal members.
- “Congress, the Court concluded, has the power "to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so."...*United States v. Dion*, 476 U.S. 734, 738 (1986).

The Evolution of Federal Indian Law Policy



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

- States generally lack civil and criminal jurisdiction over Indians within Indian country, absent federal legislation.
- In 1953, Congress gave six states — Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin — criminal jurisdiction over tribal members and other people on reservations. This legislation, known as PL 280, also permitted other states to opt for similar jurisdiction. Tribal consent was not required, and tribes were not consulted.
- “The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session.” RCW 37.12.010.

Tribal Economic Development

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

Tribal Run and Owned Businesses

Tribal Business can be formed in several ways:

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

Can a Tribe Assert Taxes against Non-Tribal members?

- “The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services...to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction...” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1981).
- “Indian tribes enjoy authority to finance their governmental services through taxation of non-Indians who benefit from those services. Indeed, the conception of Indian sovereignty that this Court has consistently reaffirmed permits no other conclusion.” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1981).

Do State Taxes Apply?

- “The Indian traders statutes, 25 U.S.C. § 261 *et seq.*, incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange, see *Warren Trading Post Co. v. Arizona Tax Comm’n*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965), but no similar intent is evident with respect to sales by Indians to nonmembers of the Tribe. The Washington Enabling Act, 25 Stat. 676, reflects an intent that the State not tax reservation lands or income derived therefrom, **but the present taxes are assessed against nonmembers of the Tribes and concern transactions in personalty with no substantial connection to reservation lands.**” *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155–56 (1980).
- “The State’s taxation of the Casino amenities would raise their cost to nonmember patrons or reduce tribal revenues from these sales. **Even if gaming was not thereby reduced, the impact would be contrary to IGRA’s broad policies of increasing tribal revenues through gaming and ensuring that tribes are the primary beneficiary of their gaming operations to promote economic development, self-sufficiency, and strong tribal governments.**” *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 936 (8th Cir. 2019).

Interlocal Cooperation Act Chapter 39.34 RCW

- Native Nations are defined as public agencies of purposes of the Interlocal Cooperation Act and can enter into an ILA like any other agency.
- Native Nations have entered into ILAs for a wide variety of services agreements, including fire services, wastewater services, law enforcement services, and revenue sharing.
- ILAs are a tool to find partnership with Native Nations.



Tribal Participation in the Growth Management Act

•[RCW 36.70A.040](#) – Allows tribes to voluntarily participate in the local governments' comprehensive planning process.

•[RCW 36.70A.085](#) – Cities with a Port element must collaborate development with the city, port, and tribe(s).

•[RCW 36.70A.106](#) – Requires Commerce to share submittals with tribes. Tribes will indicate Commerce which jurisdiction's submissions will be transmitted.

•[RCW 36.70A.110](#) – Requires local jurisdictions to work with tribes to coordinate urban growth. Tribes must opt-in to coordinate with the jurisdiction.

•[RCW 36.70A.190](#) – Requires Commerce to provide facilitation services. Federally recognized tribes may request assistance from Commerce to resolve issues related to proposed changes to local comprehensive plans and development regulations.

•[RCW 26.70A.210](#) – Requires counties to invite tribes to participate in developing countywide planning policies.



Takeaways for Municipalities

- Native Nations are sovereign governments, and your relationship with them is a ***government-to-government relationship***.
- Like municipalities, Native Nations have their own internal governmental structures and are responsive to their constituents in the same manner that a municipality is responsive to their constituents.
- Like municipalities, Native Nations are planning for a future that is unique to their needs.
- ***Native Nations are partners for municipalities.***

OMW

Drew Pollom
dpollom@omwlaw.com

OGDEN MURPHY WALLACE
OMWLAW.COM