INDIAN GOVERNMENTS & WASHINTON STATE

AN EXAMINATION OF THE SIMILARITIES AND DIFFERENCES IN THEIR POSITIONS CONCERNING TRIBAL-STATE RELATIONS

INTRODUCTION

The Quinault Government has historically maintained a distant relationship with the government of the State of Washington, a position consistent with the long-held policy of conducting treaty relations with the United States of America, and not recognizing the exercise of state powers within Quinault territory. Despite this historical position, the Quinault has seen extensive intrusion by the State of Washington into traditional areas of Quinault jurisdiction. The state government has extended the exercise of its regulatory powers into the Quinault economy, social life and political life despite frequent protests and opposition by the Quinault Government. These intrusions have undercut the ability of the Quinault Government to effectively govern, and they have given rise to numerous jurisdictional conflicts and confrontations with the State of Washington.

Many of the eleven legal contests in which the Quinault Indian Nation is currently engaged (Quinault Indian National Policy Review: February 15, 1985:42) involve questions concerning the extent of state regulatory or jurisdictional powers within the boundaries of the Quinault Nation. The Quinault Indian Nation is also faced with proposed U.S. federal legislation concerning the state's power to regulate steelhead, control gaming activities on reservations and exercise powers that can affect tribal environmental and religious interests. In addition to these activities, the Quinault Indian Nation is engaged in bi-lateral negotiations with the State of Washington on fisheries matters and the Quinault Coastal Highway. Multilateral negotiations (involving the Quinault Indian Nation with other tribes and the State of Washington) are also in process or developing on fisheries issues, economic issues and the establishment of a framework for intergovernmental relations.

The Quinault Government is, therefore, actively defending and advocating Quinault interests in a wide range of jurisdictional conflicts with the State of Washington through litigation, federal legislation and negotiations. The frequency and range of contact with the State of Washington has markedly increased during the last twenty- five years as the state has sought to

"universally apply its laws and powers of governance within state boundaries". Economic, political, natural resource and land initiatives by the Quinault Indian Nation and other Indian Nations have been met by more intense state efforts to regulate and govern Indian National interests. The state has succeeded in a number of areas (notably in the area of taxation and regulation of non-Indians and their property within tribal territories) to persuade the U.S. Congress or the U.S. Courts that its governing authorities should either supercede Indian Government authorities or at least function concurrently with Indian Governments within tribal territories. When the state succeeds in such efforts in connection with any Indian Nation, Quinault interests are directly affected or compromised.

When the potential exists for state actions to directly affect or compromise Quinault sovereignty, the Quinault Government has acted to defend or advocate Quinault National interests. This has been true whether state intrusion is aimed directly at the Quinault Indian Nation or such intrusions are directed at neighboring Indian Governments. When neighboring Indian Nations are attacked, the Quinault Government has found it necessary to consult with their government to ensure that the possible outcome of that conflict does not affect Quinault interests. Therefore, what another Indian Nation does in relations with the State of Washington is of great importance to the Quinault. The individual and collective policies of Indian Nations concerning tribal-state relations are inevitably linked to Quinault tribal-state relations policies. It is for this reason that the Quinault Indian Nation has taken the lead in the National Commission on State-Tribal Relations, National Congress of American Indians, the Nation Tribal Chairmens' Association, and in the Conference of Tribal Governments to encourage the development of intertribal policies concerning tribal-state relations that don't undercut Quinault interests.

Quinault initiatives during the last ten years have contributed to the development of inter-tribal policies through the Conference of Tribal Governments specifically concerned with the conduct of tribal-state relations and intergovernmental conflict management. The Quinault Government sponsored the organization of a year long study on tribal- state relations through the Inter-Tribal Study Group on Tribal/State Relations as well. These efforts combined to form the basis for evolving policy positions currently being carried out by most tribes within the state. These Quinault initiatives have also contributed to an improved political climate between Indian Nations and the State of Washington so that bilateral and multilateral intergovernmental negotiations have become a more commonly used tool to resolve disputes.

Further progress in the development of new methods for resolving intergovernmental disputes with the State of Washington have been hampered, over the years, by virtue of the fact that the State of Washington did not have a clear or consistent set of policies toward Indian Nations and Tribes. Changing state administrations and representatives in the state

legislature rarely understood the past contacts between Indian Governments and the State of Washington; or understood the historical character of Indian Nations. Each succeeding change in state government produced a new round of conflict and confrontation.

The April 1985 publication of a Washington State Attorney General report entitled, The State of Washington and Indian Tribes may be an indication that the state will have a policy toward Indian Nations for the first time. While the Quinault must clearly reject the rational for some of the conclusions contained in the Attorney General's report, it may be possible to determine a new basis for dealing with the state to reduce tensions and define alternatives to intergovernmental conflict.

This analysis focuses on the politics of tribal-state relations, a description of state interests and positions, and a description of Indian Nation interests and positions. Referencing the announced positions of the Conference of Tribal Governments and the Inter-Tribal Study Group on Tribal-State Relations (which reflect Quinault National policy toward the State), and the Washington Attorney General's recently published report, we compare the relative positions of Indian Nations and the State of Washington to assess the major policy differences and the major areas of policy agreement.

Before this year, it was not possible to develop an analysis of intergovernmental policy positions between Indian Nations and the State of Washington with precision, because the state did not have a comprehensive statement of what its policies are toward Indian Nations. With the help of the Attorney General's Office, the State now has its first comprehensive statement of legal and political policy toward Indian Nations.

The Quinault Business Committee may now have the opportunity to more fully determine legal, legislative and political alternatives in its consideration of conflicts and confrontations with the State of Washington.

POLITICS OF TRIBAL-STATE RELATIONS

Struggles between sovereign nations represent the most perplexing form of conflict that exists in the world. Whenever two peoples set themselves apart as distinct nations, and they claim a separate and distinct right to decide their own political, economic and social character without external interference; it is nearly always inevitable that they will come into conflict with a neighboring nation. This conflict is not only born from the claims of distinction, but they are born from competition over the promotion or protection of various social, economic and political interests of a nation. If nations are separated by large gaps of land or sea, the tendency for conflict is greatly reduced. But, if nations share close geographical proximity, the tendency is toward greater tensions and outright conflict.

States within the international community have evolved extensive rules of conduct and various international institutions to reduce the possibility of international conflict. And, while these rules and institutions have their limitations, they do have some dampening affect on potential conflicts; and they do occasionally provide a means for conflict resolution.

But, conflicts between indigenous nations and tribes (like Indian Nations and Tribes in the United States) and a state (like the United States, and a state like the State of Washington) create unique conditions and circumstances that may be contemplated under international rules and institutions, however, they are not always applied. The result is that there are no consistent rules or institutions for resolving disputes between indigenous nations and states that have come to surround an indigenous nation. Such rules and institutions have yet to be created by the initiatives of indigenous nations as they deal with surrounding states.

The fact that Indian Nations and Tribes are surrounded by the United States of America and the State of Washington creates large political, economic and social problems for Indian peoples. But, it must be understood too, that the presence of Indian Nations within the borders of the United States and the State of Washington presents major political, economic and social problems for those states as well.

As we observed earlier, it is a natural tendency of a nation or state to promote and defend its interests against any and all neighbors who appear to threaten its sovereignty or distinctiveness as a people. This natural tendency is made more difficult when a country includes within its boundaries various states which claim sovereignty, and indigenous nations which also claim sovereignty. This condition exists in countries like Australia, Canada, the United States, India, the Soviet Union, Yugoslavia, New Zealand, Mexico and Nigeria. In multi-national republics like the United States, the central government shares political powers with the various states in a federal system.

This system provides the rules and institutions for resolving conflicts between the states, and between the states and the central government. This system does not, however, provide that indigenous nations share in political power with the various states and the central government. And, this system, does not provide rules and institutions for resolving disputes between Indian Nations and the various states or the central government. No ongoing political system has evolved to remedy these conflicts, so U.S. governmental institutions and rules are used instead.

The resulting "solutions" have not always been beneficial to the interests of Indian Nations. Indeed, Indian Nations have often suffered "erosion" of powers or outright denial of powers as a result of U.S. Administrative, Legislative or Judicial determinations. Over the last decade, many Indian Nations have moved toward reinstituting a tested method of conflict

resolution: Negotiations. This method has been used by Indian Nations for thousands of years in dealings between themselves; and, more recently in dealings with the United States. It is this method that is now contemplated as a viable alternative to use of U.S. courts, legislation and administrative determinations to resolve disputes with the State of Washington.

Since the late 1970s, Indian Nations surrounded by the State of Washington, have increasingly called for the formalization of negotiations on a government-to-government basis as a method for resolving fundamental and particular disputes. Despite these calls, no substantial movement toward negotiations was achieved until various federal court decisions intervened in the context of fisheries management, regulation and control. The State's uncertainty about its own powers, prevented it from meeting Indian Nations. When the courts set out demands for negotiations, the State was compelled to negotiation under conditions that were not considered favorable to state interests. Yet, negotiations did finally begin in the 1980s.

The willingness of Indian nations to negotiate can be traced to successes in some litigation against the state and greater confidence in self-governing powers. The willingness of the state to negotiate can be traced to political pressures from state citizens, the federal congress and the U.S. courts. Under these circumstances, self- preservation became an important factor increasing state willingness.

These conditions do not exist on all issues that make up tribal-state disputes. The consequence is that Indian Nations and the State will probably be less willing to negotiate many fundamental issues and a number of major conflicts such as water rights, subsurface rights, jurisdiction over non-Indians within reservation boundaries and tribal regulation of economic activities within tribal boundaries. To deal with these issues and the fundamental issues of governance, it will be necessary either to create conditions favorable for negotiations, or increase tension in a variety of areas to force litigation. The first of these is clearly preferable. Understanding the politics surrounding tribal-state relations and the interests of both the State and the various Indian Nations is essential to creating those favorable conditions.

WASHINGTON STATE GOVERNMENT TRIBAL-STATE POLICY POSITION

Since its founding in 1889, and before while a territory, the State of Washington has been uncertain about the range and extent of its governmental powers in relation to individual Indian people and Indian Nations and Tribes. Despite the limitations imposed on State government powers by the Enabling Act and the State Constitution ("... the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the said limits owned or held by any Indian or held by any Indian or Indian

tribes; and that until the title thereto shall have been extinguished by the United States ..." and Article 26 Section 2) the State is, never-the-less, compelled to determine "how to govern a complex, interdependent society with independent 'sovereignties' existing as jurisdictional enclaves within its borders." (SWIT:7)

Federal/Indian policy is seen as having shifted between terminating tribes and promoting their self-determination, thus causing the State to react to policy rather than formulate its own. Not until the late 1960s and early 1970s did the state begin to formulate its own policies. Prior to this time, the State relied upon "caution" and test- case litigation to determine the range of its powers. With tribal leadership participation, the State published its first formal statement on Indian Affairs proposed policy in the form of a 1971 Indian Affairs Task Force Report entitled, Are You Listening Neighbor and a second report in 1973 entitled, We Speak, Will You Listen.

While these reports produced some policy modifications among some agencies of the State government (notably the Department of Social and Health Services), and occasional adjustments in the Office of the Governor; Statewide policies remained fragmented.

In 1984, the Washington State Attorney General's Office formed a task force "to trace the history of positions taken by the Office of the Washington Attorney General involving Indians and Indian tribes, and to set forth the factors the Attorney General and other state decision makers should consider in setting future policies or taking future positions." (SWIT:1) The resulting report, The State of Washington and Indian Tribes (April, 1985), relying in part on a 1977 analysis by Tim Burke of the Office of Program Research of the Washington State House of Representatives entitled, "The Legal Relationship Between Washington State and Its Reservation-Based Indian Tribes", constitutes the most comprehensive description of existing and potential Washington State policy concerning individual Indian people and Indian Nations and Tribes. Its contents are spelled out in outline form, below.

STATE INTERESTS AND POLICY POSITIONS
State Interests

The State may have various interests in any given issue. Like a private entity, it may have a proprietary interest. These interests frequently are land interests held by the Department of Natural Resources or some other entity, like the Parks and Recreation Commission or the University of Washington. To the extent that activities of Indians or assertions of tribes impact these proprietary interests, the State may have an obligation to resist in order to protect the value of the property. (SWIT:113)

The State also has jurisdictional interests. As a sovereign entity with only limited federal constitutional restrictions, the State should not relinquish its

governing power lightly. ... interest centers on the universal application of a number of laws designed to protect the public interest, such as consumer protection laws and environmental laws. To the extent that Indian reservations could become enclaves for relaxation of such laws, the effectiveness of the generally applicable State laws would be reduced. * * * The United States and various tribes contend that the State has no jurisdiction to impose its law within the boundaries of Indian reservations. However, the State interest is uniformity of enforcement and uniformity of strictness of law for the benefit of all citizens. (SWIT:113-114)

... the State often represents "*parens patriae*" interests on behalf of its citizens. * * * ... in setting policy, non-Indian interests must be considered. (SWIT:114)

Legal and Policy Positions
Private non-Indian Interests

* * * in setting policy, non-Indian interests must be considered. * * * the interests of the sport and commercial fishermen are important. * * * the interests of the State's timber industry must be considered, as well as the interests of the State's fishing and tourist industries. Often, these interests will compete with one another, but weighing competing interests is common to State policy-making powers. (SWIT: 115)

Private Indian Interests

Private Indian interests are no different than private non-Indian interests except that they may have special treaty protections, exercised through a member's tribe. These simply must be recognized as a matter of the supremacy of federal law. (SWIT:115)

Tribal Interests

Tribes ... have protected treaty interests, but, unlike the individuals, they also have sovereign interests, analogous in some respects to those of a state. However, the scope and nature of such tribal sovereign interests have not been defined with precision." (SWIT:116)

Federal Interests

The United States is a key actor in any Tribal-State conflict. As trustee for the tribes, the United States, through Congress, has the power to define tribal powers. * * * any position taken by the State must consider current federal statutes and policies. After considering such federal land policies, the State may accede to the federal position, recognizing the constitutional supremacy of federal law. (SWIT:118)

New versus Old Issues

Whether an issue is a new one, with little history behind it, or an old one, with decades of history, may impact the State's approach to a resolution of the controversy. For example, in the areas of fishing rights or taxation, there have been decades of controversy and litigation, with the accompanying emotional build up. In that context, negotiations are less successful than in new issues, such as the liquor controversy, where negotiations can be conducted without dredging up past conflicts. (SWIT:118)

Sovereignty versus Issues of Benefits

Another dichotomy is the nature of the issue: whether it is one of sovereignty or one of benefits. Tribes and states are less willing to negotiate about permanent issues, such as governmental power, than they are to negotiate about specific delivery of services or benefits to citizens, Indian or non-Indian. * * * The exception to this may be when the sovereignty issue has been substantially resolved. (SWIT:118)

Willingness and Ability of Parties to Litigate or Negotiate Prior to 1966, tribes had difficulty suing in federal court. * * * Congress enacted a law [Act of Oct. 10, 1966, P.L. 89-635, 80 Stat. 880] allowing tribes to sue in federal court without reference to the amount in controversy. * * * with the enactment of the Civil Rights Attorneys Fees Act in 1976 [Act of Oct. 19, 1976, P.L. 94-559, 90 Stat 2641] * * * increases the willingness and incentive of the parties to litigate. (SWIT:119)

The willingness, ability, and incentive of non-Indian citizens to commence litigation may also affect State decisions. * * * Tribal immunity may also affect whether litigation should be commenced. Unless waived, that doctrine makes it difficult to effectively maintain suit against an Indian tribe. (SWIT:120)

A policy of negotiation can be successful only if all parties are able and willing to negotiate. When the negotiation is with one tribe, there may be some progress. * * * Negotiations are much more complex and difficult when more parties are involved. * * * The divided nature of some actors presents another problem in negotiation * * * Because of the volatile politics of Indian affairs, the parent agency of both, the Department of the Interior, may be unwilling or unable to take an official position for the United States, thereby making negotiations impossible. Likewise, when the State of Washington negotiates an issue, various interests may require attention. For example, in negotiating water issues, the State may speak in its capacity as a sovereign, a landowner, and as a representative for private landowners. * * * Similarly, tribal governments, like state governments, do not speak with one voice. Tribal councils may have positions at odds with tribal chairmen, just like the

Governor and the Legislature may take opposing views. (SWIT:121)

SYNOPSIS OF "The State of Washington and Indian Tribes" OVERVIEW

The sovereign power of the State is directly involved in the jurisdictional cases, most notably the extent of state power to control gambling, to tax, or to regulate fish, wildlife, and water. Another emerging category is state property rights, which involve resources where the State claims an ownership interest, such as tidelands or timber. (SWIT:29)

Fish and Game

The central dispute in fishing litigation has involved interpretation and implementation of the fishing clause of the Steven's treaties. ("...right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory...") (SWIT:58)

Forced to mediate among competing allocation demands of various groups of commercial fishermen, including Indian fishermen, the State of Washington adopted 'equality of access' by all groups to the resource as the controlling standard. This created a policy that state fishing laws, including license requirements, applied to all Indian residents of the State. (SWIT:59)

Before the Supreme Court, the Office of the Attorney General Argued the historical position of the State of Washington * * * That the correct interpretation of the phrase 'in common with all citizens of the territory' meant that each individual fisherman, Indian and non-Indian alike, had the right to participate in the fishery on a nondiscriminatory basis and that Indian treaty fishermen could not be denied access to the fishery to exercise that right. (SWIT:66)

Current Policy: Although litigation in the fisheries area has been highly publicized, the importance of negotiation and cooperation to resolve disputes should not be minimized." * * * "There is ... the difficult question of which laws, state or tribal, apply to non-Indians who hunt and fish within Indian reservations. The Office of Attorney General ... urged State policymakers to develop a cooperative agreement with the Indian tribes to delineate their respective responsibilities of on-reservation management and enforcement activities. (SWIT:73-74)

Hunting

The Office of Attorney General has consistently advised that the State's game laws apply to Indians off reservation, but not on reservation. [Footnote #120: ...The Office has also advised that state agencies may regulate the

possession of game taken off-reservation once the Indian or (non-Indian) leaves the confines of the reservation. ... state law applies to non-Indians hunting within a reservation.] (SWIT:75)

Current Policy: Because the question of Indian hunting has not been extensively litigated in this state, any decision-making on the subject of Indian hunting must thus proceed more on legal theory than on existing case precedent. If these issues are pressed, the State, tribal policymakers and their legal advisors, including the Office of the Attorney General, will have to face these important issues. (SWIT:77)

Land Claims

...claims to lands underlying 'navigable waters' have spawned considerable litigation in recent times. * * * 'Equal Footing Doctrine' * * * which is constitutional in scope, means simply that when states other than the original thirteen entered the Union, they entered on an `equal footing' i.e., with all the same rights and powers, as the original thirteen. Because the original thirteen states owned the lands beneath navigable waters, additional states, such as Montana and Washington, likewise owned those lands. (SWIT:30)

In a series of cases the State asserts that it has "proprietary interests. Moreover, the State also has an interest in protecting citizens of this State from severe disruptions of existing property relationships. Should the United States and the tribes succeed in winning these cases, ownership of tidelands and submerged lands, ... would be placed in doubt, long established understandings of title, public rights of way and easements, and access rights to the water will be disturbed. (SWIT:35-36)

Liquor

Historically, there has been no tradition of liquor regulation by tribes. (SWIT:77)

In the area of liquor, the Attorney General's Office position has been consistent since 1978 when the first Washington tribe began unauthorized reservation liquor sales.

In 1975, the Office issued AGLO 1975 No. 11, which discussed the applicability of state law to liquor transactions in 'Indian country.' That opinion, based on the United States Supreme Court decision in United States v. Mazurie, stated that 18 U.S.C. 1161 mandated that liquor transactions in 'Indian country' must conform to both state law and tribal ordinance. This Office has consistently advised that `in conformity with' state law means that all state liquor law provisions (including licensing and taxing) must be complied with by anyone, Indian or non-Indian, individual or tribal entity,

who deals in liquor in 'Indian country'." (SWIT:78-79)

Current Policy: ... to pursue the existing federal district court litigation to a conclusion and to continue the negotiation process to allow other tribes to be state liquor vendors. (SWIT:84)

Regulatory Issues

Jurisdiction over Indian matters is a function of territory, subject matter, and the status of the individuals regulated. The issues typically involve the extent of state regulatory power over Indians and non-Indians within Indian country, but more recently questions of whether tribal governments may regulate non-Indian activity occurring within their reservations, either concurrently with the state or exclusively...

* * * before Congress enacted Public Law 280, the extent of state regulatory authority over Indians within Indian country was unclear. Generally, federal protection of tribal self-government precluded either criminal or civil jurisdiction in state court over Indians or their property absent the consent of Congress. However, state regulation of non-Indians, especially where that regulation had no effect on Indians, tribes, their property, or federal activities, generally was upheld. (SWIT:84-85)

The Attorney General takes the position that the governor lacks the authority to unilaterally recede the State's Public Law 280 jurisdiction over an Indian reservation. (SWIT:88) ...states are generally considered to have exclusive jurisdiction over offenses by non-Indians against non-Indians in Indian country. (SWIT:89)

The Office of the Attorney General filed an amicus brief [*Oliphant v. Suquamish Tribe*] ... in support of the non-Indian, contending that the exercise of criminal jurisdiction over non-Indians was inconsistent with tribal authority. (SWIT:90)

The problem in determining the extent of tribal jurisdiction over non- Indians is now one of defining and measuring the tribal interest when exercising jurisdiction over non-Indians. (SWIT:95)

Two factors complicate the problem of tribal civil jurisdiction. First, the non-Indians who are subject to tribal jurisdiction have no right to participate in tribal government, through the ballot box or any other means. Second, since the issue here is one of tribal sovereignty, which antedates the constitution itself, this sovereignty is not subject to the normal constitutional restrictions and safeguards to which all other types of government -- federal, state or local -- are subject in this Nation. (SWIT:95)

The crucial distinction in the gambling cases appears to be whether

Washington statutes controlling, for instance, bingo, are 'civil/regulatory' or 'criminal/prohibitory' in nature. In *Hatch*, the district court concluded that Washington's laws were civil/regulatory. (SWIT:99)

In 1925, the Attorney General advised that Indians are required to procure licenses for operating motor vehicles outside of reservations on Indian country, regardless of their federal status. In 1953, the Attorney General informally advised that the State may enforce state traffic laws on public highways running through Indian Reservations. * * * ...the Washington Supreme Court ... left open the possibility for the state legislature to provide reciprocal registration for tribally- owned vehicles. (SWIT:101-102)

Under ... [RCW 37.12.010(1)] the State retains jurisdiction over Indians on Indian reservations to enforce the State's compulsory school attendance laws .... (SWIT:107)

As early as 1913, the Attorney General formally advised the Department of Labor and Industries that state industrial insurance laws applied to non-Indian employers doing business in Indian country. The Office of Attorney General has more recently advised the Department that those laws apply to any employer doing business on reservations, so long as that employer is not a tribe or one of its members. (SWIT:108)

Before Congress passed the Indian Child Welfare Act, the Department of Social and Health Services had developed a policy of cooperation and support of tribal efforts to preserve their family structure and tribal heritage. (SWIT:109)

The State from time-to-time gives economic assistance to Indian Tribes or other groups of Indians for various purposes. This Office convinced the court (*Anderson v. O'Brien*) that Indian tribes possess sufficient attributes of sovereignty 'to qualify the tribe as [an] entity with wholly public functions'. (SWIT:110)

Taxation

The first opinion of the Office reflects a cautious approach. In 1898, Attorney General Patrick Winston advised the prosecuting attorney for Clallam County that United States law protects a tribal Indian from taxation of his person property, though he recognized `some doubt about this question.' Early state law "seemed to say that state jurisdiction to tax exists unless preempted by federal law or treaty -- the same approach which the Office generally follows today. (SWIT:49-50)

Following the change in federal policy from one of reservation termination to one of self-determination in the 1960s, the role of the Attorney General shifted to more of a litigation role. This occurred because more cases were

brought by Indians and Indian Tribes and because the various Indian Tribes and members of those Tribes became engaged in business activities that involved non-Indians, such as liquor and cigarette sales. (SWIT:53)

Current Policy: Questions of state power to tax have been substantially resolved after the _COLVILLE_ case. Accordingly, the major policy issue is the extent to which the State should inject itself into disputes between non-Indians and tribal taxing authorities. (SWIT:58)

Water Resources

* * * the history of the conflict between the State and Indians centers on three issues: The application of the state codes, particularly the permit systems, within the boundaries of Indian reservations; the applicability of the state adjudication system to Indian water rights; and the nature and scope of Indian reserved water rights. (SWIT:37)

The Office has defended successfully a number of challenges to state court jurisdiction pursuant to the McCarran Amendment over adjudication of reserved rights. Courts have made the following rulings:

1. Washington Courts have jurisdiction to determine the validity of reserved rights claimed by the United States in a 'general adjudication' for an Indian tribe or an Indian.

2. The Washington court system, rather than the federal court system, is the preferred court for adjudicating federal Indian reserved rights in a general water rights adjudication. The United States' removals of state court proceedings to federal court have been held erroneous.

3. The United States' (as trustee for a tribe) representation in a general adjudication proceeding is binding upon Indian tribes as to the scope and extent of rights quantified for them in such proceedings.

4. 'Disclaimer' provisions of Washington's Constitution (Article 26, section 2) and its related federal `enabling act' (25 Stat. 676) do not bar states from joining the United States, as trustee for an Indian tribe, in a general adjudication proceeding. (SWIT:41-42)

Current Policy: * * * where appropriate and possible, negotiations as an alternative or adjunct to litigation. In the field of water rights regulation, certainty is of major importance, both for the user of water, who must know the scope, nature, and priority of his or her right, and for the water manager, who must know the scope of the various rights for purpose of regulating rights. Accordingly, for the benefit of the users and for the benefit of the regulators, some answers to these questions must be obtained either through federal legislation or from the courts. ...given the reluctance of

Congress to legislate in the area, litigation in this area may continue to be necessary to clarify and bring certainty to a confusing and important area of the law. (SWIT:49)

STATE CONCLUSIONS

One reason that the State of Washington and its Indian citizens have frequently been in court is because no one truly understands exactly what position an Indian tribe occupies within the federal system.

The United Stats has a federal system of shared national and state authority. Indian tribes, however, occupy a unique position in the federal system. While tribes possess undefined governmental powers, they are not the equivalent of states or foreign nations. (In terms of the federal system) in a governmental sense, tribes are truly sui generis.

A unique attribute of tribal governments is that, unlike the national, state, or local governments, those who reside within the boundaries of reservations are not necessarily entitled to participate in the selection of those who make tribal laws. Indeed, non-members constitute the majority of many reservations. This is at odds with a basic notion of the American democratic tradition: Consent of the governed. Indeed, it is that very difference between tribal and other governments which has been one of the sources of friction between tribes and non-Indian citizens of the State.

2. A major source of friction is that frequently the tribal claims are actively asserted to change the status quo which has been in existence for approximately one hundred years. Such claims thus threaten long established life patterns, ownerships, and livelihoods.

3. Congress, which enjoys plenary power over Indian tribes, has complicated the picture further by taking various positions throughout history regarding the nature and extent of tribal sovereignty. The vacillations of federal policy have ranged from terminating tribal existence and sovereignty to, at other times, encouraging tribal growth and self determination.

The dominance of federal policy has often left the State of Washington reacting to federal policy, rather than developing and implementing its own policy. When federal policy has embraced the view of enhancing strong, independent tribal governments, and urged a theory of Indian immunity from state laws, the level of litigation has increase. Conversely, when federal policy has been to terminate tribes and assimilate them into society, the level of litigation has decreased.

4. Current federal policy is succinctly stated as one of strong recognition of tribal sovereignty. Consequently, the State is left with a difficult objective: How to govern a complex, interdependent society with independent

"sovereignties" existing as jurisdictional enclaves within its borders.

5. The uncertainties surrounding the status of Indian tribes within the federal system, together with frequent federal policy shifts, have combined to encourage disputes between the State of Washington and Indian tribes within its borders.

6. All Tribal-State disputes are not alike. They involve different issues, different factors, and different sets of tribal, state, federal, and individual interests. Further, the various disputes have different histories. Because of these differences, different approaches to dispute resolution both are necessary and desirable. Tribal-State disputes, like many other disputes in our society, may be resolved by three major avenues: Negotiation, Litigation, and Legislation.

7. The type of conflict between the State and Indians varies with the types of tribe and the status of the Indian. There are varied types of tribes in the State: Treaty-Tribes, Executive Order Tribes, and Non- Treaty Tribes. Further, some tribes have substantial land bases; others have substantially diminished land bases; some have no land base at all. Some Indians claim special status by association with a treaty or executive order tribe. Others can claim no such status because they are not descendants of a member of such a treaty or executive order tribe, they do not meet the eligibility test for membership, or they have opted to separate themselves from tribal association.

8. Although an analysis of the State's legal contacts with its Indian citizens shows many questions have been answered, many important issues remain unresolved. The most significant current issues include claims by certain tribes to ownership of state tidelands, the assertion of civil jurisdiction by tribes over non-Indians, and tribal claims to certain portions of state waters, yet unquantified, located within the State of Washington.

INDIAN GOVERNMENT TRIBAL-STATE POLICY POSITION

Whether "large" or "small", located east or west, or traditional or untraditional, Indian Nations and Tribes surrounded by the State of Washington have historically held to the view that the state has no legitimate governing powers inside of Indian Country. Despite the issue, and despite public assertions to the contrary, Indian governments have consistently regarded the State of Washington as an "evil intruder" in the internal interests of Indian Nations. While these views remain essentially consistent today, Indian Governments began to refine these views into clearly stated policy positions during the early 1970s. And finally, at the end of that decade, Indian Government policy positions were spelled out in considerable detail in the form of a series of Resolutions emphasizing six areas relating to

relations between Indian Nations and the State of Washington.

Natural Resources, Human Resources, Fisheries, Jurisdiction, Intergovernmental relations and Indian Government/State Government Powers became the headings for policy emphasis of Indian Governments, thus reflecting the more particular interests and concerns Indian Governments had in relations with the State of Washington. To amplify and clarify these policy positions, Indian Government officials formed a special Study Group in 1979 to develop an analysis of alternative methods for resolving conflicts between Indian Governments and the state. The Study Group report, Tribes & States In Conflict, A Tribal Proposal, and the policy resolutions adopted by the Conference of Tribal Governments in 1977 and 1979 constitute the clearest and most comprehensive statements of inter-tribal policy views concerning tribal-state relations since the establishment of the State of Washington in 1889. Since these positions have been essentially reaffirmed by Indian Governments as recently as April 1985, they will serve as the basis for discussion in this paper.

INDIAN GOVERNMENT INTERESTS AND POLICY POSITIONS

Indian National Interests

The fullest political, economic and social development of Indian Nations is essential for their perpetual survival and prosperity. (COTG: Resolution #2-032385) Intrinsic to our right of tribal self- government is the responsibility to protect and develop Indian people. The fulfillment of this responsibility must be in accordance with established sovereign tribal legal rights, spiritual beliefs, social institutions and customs, and the relationship to the land. (COTG: Resolutions 021577)

Policy Positions

Tribal self-government is the most basic of all inherent Indian rights. Tribal self-government is an inherent and aboriginal right derived from the sovereign status of Indian Tribes and Nations * * * self-government includes the power of a tribe to establish its own form of government, to determine tribal membership, to maintain land records of all land over which the Tribe has jurisdiction, to prescribe rules of inheritance, to levy taxes, to regulate property and resources within the jurisdiction of the Tribe, to control the conduct of persons ... and to administer justice and preserve law and order ... for all citizens and all activities beneficial to the people. (COTG: Resolution 021577)

Indian Nations have, from time-to-time, conveyed certain of their powers to the United States government, but while doing so, they have reserved other inherent powers, and, through conveying certain powers through their constitutions and various agreements each Indian Nation has impliedly reserved the right to reassume powers previously conveyed to the United

States. (COTG: Resolution #2-032385)

(Indian Governments shall) bring their positions on government-to-government relations to the attention of other Indian governments, the United States government, the State of Washington and county governments that it shall be their policy to conduct negotiations with only the top decision-makers of the various governments. (COTG: Resolution #2-032385)

By virtue of Treaties and other agreements, the United States of America is obliged to exercise its trusteeship to promote and guarantee the political, economic and social advancement of Indian Nations, the elevation of Indian government to a position of equality, and promote the self-determination of Indian Nations toward the end that they may freely choose their own political, economic and social future without external interference. (COTG: Resolution #2-032385)

The U.S. Government, as a whole, is the responsible entity with which Indian Nations have concluded treaties and agreements; no single agency or instrumentality of the U.S. government is exempt from fulfilling the obligations of its trusteeship, as defined by international charters. (COTG: Resolution #2-032385)

* * * establish a formal dialogue between Indian governments and the State of Washington for the purpose of establishing a framework for the conduct of formal government-to-government relations. (COTG: Resolution #2-032385)

* * * establish formal discussions between Indian Governments and the President of the United States for the purpose of establishing a formal structure, procedures and guidelines for the conduct of government-to-government relations .... (COTG: Resolution #2-032385)

SYNOPSIS OF COTG AND "Tribes & States in Conflict" OVERVIEW

Tribal self-government is the most basic of all inherent Indian rights. Self-government is an inherent and aboriginal right derived from the sovereign status of Indian Tribes and Nations. The right of self- government extends to all areas under the jurisdiction of Tribes, and to all persons within those areas, including those lands within the exterior boundaries of a reservation, those lands and tidelands outside the boundaries of a reservation which are held in trust by or for a Tribe, the ceded portions of original tribal lands wherein Indians have special rights, such as hunting and fishing, and all such lands and resources which may at any future time come under the jurisdiction of Indian Tribes or Nations.

Fishing Issues

The right of Indian Tribes to authorize tribal fishing is an aboriginal right reserved by treaty * * * Indian tribes reserved certain lands for their permanent homes, such that said reservations, lands and waters are not within the territorial jurisdiction of the State of Washington * * * it is the responsibility of an Indian tribe to manage its fisheries in accordance with its legislation, and the responsibility of the State of Washington to manage its fisheries by appropriate legislation.

Current Policy: Indian Tribes seek to join with the State of Washington to co-manage and enhance the fishery resource whenever that resource is within the territorial jurisdiction of the State * * * that the State of Washington and the Indian Tribes have a mutual obligation and duty to ensure that the fishermen of the State and the Indian Tribes each obey the fishing regulations designed to protect the resource and guarantee a full harvest Indian fishermen. (COTG: Res. Fishing Issues 021577)

Human Resources

Tribal sovereignty is inherent and original, derived not from grants of authority by the United States, but from Indian governments, cultures, and social institutions which have been established since time immemorial. Intrinsic to our right of tribal self-government is the responsibility to protect and develop [Indian people]. The fulfillment of this responsibility must be in accordance with established sovereign tribal legal rights, spiritual beliefs, social institutions and customs, and [the] relationship to the land. * * * The negative assimilation - termination policies, practices, and effects which characterize some of the current federal and state health, education, employment and social welfare serves delivered to Indian People must be replaced with positive services. (COTG: Resolution Human Services 021577) * * * tribal citizenship is determined by domestic tribal law and not by sovereigns external to the tribe. Each tribe ... has retained its independent authority to determine its own membership. (TSC:8)

Current Policy: Indian Tribes are not political sub-divisions of State governments ... are distinct political entities with inherent and original powers of self-government, whose members enjoy a dual citizenship as citizens of the State in which they reside and as members of their Tribes.

... Tribal governments have the right [and responsibility] to plan, regulate, provide and protect our own human resource services to tribal members and the right to regulate human services provided by federal and state governments in order to ensure the delivery of such services ....

... calling for tribal governments and the Governor of Washington State to establish a series of compacts and agreements declaring the principles of State-Tribal relations in the areas of health, education, employment and social welfare services. These compacts and agreements shall also outline the

mutually agreeable methods for the development of procedures by which federal and state human services are delivered to all Indian People eligible for such services. (COTG: Resolution Human Services 021577)

Jurisdiction

The area now known as the State of Washington was part of a territory occupied by Indian Tribes from time immemorial. Indian tribes exercising an inherent right of self-government had exclusive jurisdiction and authority over all matters prior to the non-Indian arrival. * * * as a condition of becoming a state, the State of Washington adopted a Constitutional provision [Article. 26, Sec. 2] that forever disclaims jurisdiction over Indian lands * * * there are certain instances where particular tribes' territorial limits extend beyond and to the exclusion of the territory over which the State of Washington claims jurisdiction, * * *neither P.L. 83-280 nor Washington State's assumption of jurisdiction took any of the legitimate inherent authorities tribes possess; thus, any of the authorities exercised by the State are merely concurrent with tribal jurisdiction and not exclusive. (COTG: Resolution Jurisdiction 021577)

Current Policy:

The Tribes have long sought to establish an open dialogue on the areas of overlap or conflict of jurisdiction as one government to another ... without such dialogue on many of these conflicts, adversary proceedings have been initiated before Federal courts ... Such court proceedings are time-consuming and costly to both the State and the Tribes. * * * pledge a responsible exercise of the jurisdiction they now exercise * * * unanimously call for the repeal of P.L. 83-280 * * * (COTG: Resolution Jurisdiction 021577) Ally Indian Government views with the minority opinion contained in the U.S. Supreme Court's 1978 ruling in _Oliphant vs. Suquamish Tribe_ which states: "In the absence of affirmative withdrawal by treaty or statute [we are] in the view that Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation." (TSC:24)

Natural Resources

Indian people have basic property [proprietary interest] rights and interests in the natural resources of this entire area [land now within the boundaries of Washington State]. These rights and interests [are] recognized in at least five ways: aboriginal possession, treaties, act [s] of Congress, executive action, and purchase. Any authority that the State of Washington has obtained to regulate the natural resources within the State applies by virtue of the Enabling Act of the State, only to those rights which were specifically taken from the Indian people either by treaty, executive order, or act of Congress. (COTG: Resolution Natural Resources 021577) * * * The tribes,

not the federal government, own the land, and most federal officials agree that the federally reserved water rights for public lands do not apply to Indian lands. (TSC:33) * * * Tribes throughout the United States actually retain full sovereign authority over water rights because none of the treaties ever granted such authority to the federal government. (TSC:35) The U.S. and the State of Washington have only to gain by supporting tribal efforts to protect their own environment and by acknowledging tribal authorities in these areas. ((TSC:33)

Current Policy: Indian rights to their ... natural resources ... are ... for the exclusive use and benefit of Indians and [they] are not public rights to be controlled by the unilateral action of the United States or the state of Washington * * * Indian resource rights are inherent sovereign rights derived from aboriginal ownership. Such Indian rights may extend beyond reservation boundaries to ceded lands or to usual and accustomed places. * * * All Indian title and ownership applies not only to land, but to all natural resources contained thereon and adjacent to those lands, and the paramount nature of aboriginal water rights as defined in the Winter's Doctrine. * * * the Tribes' ownership rights to tidelands extend to the continental shelf and beyond and the Tribes' use of water extend to all waters. * * * Tribes' rights to the use of water ... include, but are not limited to, the potential and future needs of tribal and allotted lands and applies to all waters that traverse upon, flow under, or arise upon Indian lands. (COTG: Resolution Jurisdiction 021577)

Tribal Government

... self-government includes the power of a Tribe to establish its own form of government, to determine tribal membership, to maintain ... land records of all land over which the Tribe has jurisdiction ... to prescribe rules of inheritance, to levy taxes, to regulate property and resources within the jurisdiction of the Tribe, to control the conduct of persons within the jurisdiction of the Tribe, and to administer justice and preserve law and order in areas under tribal jurisdiction for all citizens and all activities beneficial to the people. (COTG: Resolution Tribal Government 021577) * * * The power to tax or not to tax is essential to the development of effective self-sufficient tribal governments and economies. (TSC:39) The challenges to tribal powers to tax can best be resolved at a mutual negotiating table with tribal, federal and state governments, not in U.S. courts. (TSC:40) Taxation is a privilege of sovereignty, not race ... tribes alone should ultimately decide what taxes are appropriate for all persons, non-Indian and Indian alike, within reservation boundaries. (TSC:37) * * * The question of whether the tribes should be fully integrated into the U.S federal system or whether the tribes should remain separate has never been resolved. (TSC:x) * * * The State of Washington has no authority, including Public Law 83-280, to tax Indian lands, resources or activities * * * The State government has no right or authority to interfere or limit the manner in which Indian tribes organize their governments * * * The State of Washington has never had nor shall it ever

assume any jurisdiction or governmental power which belongs to a Tribal Government without the full and informed consent of that Indian Tribe. (COTG: Resolution Tribal Government 021577)

Tribal Government/State Government Relations

Tribal governments have the authority to deal with other units of government pursuant to the powers of government without limitation; and the Washington State government has the authority to deal with other units of government pursuant to its Enabling Act, but is limited in its authority by the national government to deal with Tribal governments. * * * It is the responsibility of tribal governments to work toward friendly relations with the State government to ensure that the rights and interests of Indians are preserved and protected. * * * Because of the physical proximity of Indian Nations and Tribes to the State of Washington, both governments conflict over authorities and responsibilities in the areas of jurisdiction, natural resource protection and development and protection of Indian people. (COTG: Resolution Tribal Government/State Government Relations 021577) * * * The best way to establish clarity in tribal-state relationships is to reach a formal agreement in which the tribes, the state and the federal government mutually agree. (TSC:49) The recognition of tribes [by all three governments] as being outside of the U.S. federal system is a necessary prerequisite to any consideration of an effective intergovernmental mechanism. (TSC:52) * * * ...Indian Nations possess inherent political powers which originate with their pre-existing and original national character rather than possessing political powers derived from the United States and its constitution. (COTG: Resolution #2-032385)

Current Policy: Indian Governments have a desire to bring their positions on government-to-government relations to the attention of other ... governments ... and to conduct negotiations with only the top decision-makers of the various governments. * * * ...the definition of government-to-government relations requires that each party to intergovernmental negotiations accept the sovereignty of the other, unconditionally. Government-to-government relations between Indian Governments, and with the United States or state governments are, by definition, bilateral unless multilateral relations or negotiations are first formalized. * * * Indian Nations have, from time-to-time conveyed certain of their powers to the United States government, but, while doing so, they have reserved other inherent powers, and, though conveying certain powers through their constitutions and various agreements each Indian Nation has impliedly reserved the right to reassume powers previously conveyed to the United States. * * * The U.S. Government as a whole, is the responsible entity with which Indian Nations have concluded treaties and agreements; no single agency or instrumentality of the U.S. Government is exempt from fulfilling the obligations of its trusteeship, as defined by international law. (COTG: Resolution #2-032385) * * * ... both tribal governments and the Washington State government [should] seek agreement on the degree and extent of governmental

responsibilities for serving and protecting Indians. (COTG: Resolution Tribal Government/State Government Relations 021577) * * * Continue efforts to establish a formal dialogue between Indian governments and the State of Washington for the purpose of establishing a framework for the conduct of formal government-to- government relations. (COTG: Resolution #2-032385)

INDIAN GOVERNMENT CONCLUSIONS

By virtue of Treaties and other agreements the United States of America is obliged to exercise its trusteeship to promote and guarantee the political , economic and social advancement of Indian Nations, the elevation of Indian government to a position of equality, and promote the self-determination of Indian Nations toward the end that they may freely choose their own political, economic and social future without external interference. (COTG: Resolution #2-032385)

2. The question of whether the tribes should be fully integrated into the U.S. federal system or whether the tribes should remain separate has never been resolved. (TSC:x) The recognition of tribes as being outside of the U.S. federal system is a necessary prerequisite to any consideration of an effective intergovernmental mechanism. (TSC:52)

Thoughtful and careful action must be taken by tribal governments to clarify their political relations with the state government and the U.S. government to avoid being overwhelmed by political and economic forces which seek the use of tribal resources for non-tribal benefit. (TSC:63)

3. Clearly defined and structured intergovernmental relations between Indian governments, state government and the U.S. government are essential to maintaining or ensuring the existence of Indian tribes. * * * The tribes are (currently) dependent upon U.S. created mechanisms for conflict resolution which means that the tribes really have no say in the rules by which problems of jurisdiction are resolved. * * * The result has been that tribal interests have only been protected if and when the United States chooses to protect them. (TSC:63)

4. The principal beneficiary of tribal-state conflicts has increasingly been the United States federal government. It is the U.S. government which is becoming more powerful in its regulation and control over tribal and state resources. * * * Tribal governments are increasingly under the control of administrative agencies of the federal government, while state governments are increasingly obliged to take their direction from these same agencies of government in Washington, D.C. (TSC:64) The courts and the legislative branches of the U.S. federal system have been unable to resolve controversies with external entities like tribes. The federal system is not

designed to deal with external entities. (TSC:4)

5. Tribes must resolve to define their political identity either within the U.S. federal system * * * resolve to define a clearly structured relationship with the United States which formalizes their political association [or] * * * resolve to define their political identity as independent of the United States. (TSC:64) The fundamental problem of the tribes in the United States today is a political one, not a legal one. The political relationship between the tribes on the one hand and the federal system of governments on the other remains undefined. (TSC:17) The external political character of tribes, their geographical proximity to the United States and the States, and the dual-citizenship of Indians combine to confuse intergovernmental disputes involving the tribes and the State. * * * Jurisdictional disputes ... typically involve issues that affect the exercise of government inside and outside of tribal territories. (TSC:11)

6. Tribes must pursue a course of action which promotes the establishment of a Tri-governmental Mechanism between the United States, the State and the Tribes which is established through negotiations and empowered to facilitate conflict resolution. (TSC:64)

TRIBAL AND STATE POSITIONS COMPARED
Competing Sovereignties

Both the State of Washington and each of the Indian Nations assert their separate sovereignties. The State suggests that its sovereignty is very little impaired by the federal government, while each Indian nation argues that its sovereignty is inherent and limited only to the extent that a particular nation has conveyed some of its sovereignty to the United States.

By virtue of geography, each Indian nation constitutes a threat to the state's sovereignty and its ability to secure "universal application of a number of laws designed to protect the public interest". The state views Indian Nations as a threat to its powers of governance "to the extent that Indian reservations could become enclaves for relaxation of such laws, the effectiveness of the generally applicable State laws would be reduced."

Also due to geography (sharing borders inside the boundaries of the State of Washington, Indian Nations regard efforts by the state to universally apply its laws by extending such laws within the boundaries of a reservation as a threat to Indian national sovereignty, and the ability of Indian Governments to effectively apply tribal laws for the benefit and interests of Indian citizens. State encroachments are also seen as undercutting tribal economies and socially destabilizing.

The competition between Indian national sovereignty and state sovereignty tugs and pulls at the governments of both political entities, and both seek

relief through federal, tribal or state legislation, litigation within federal, tribal or state courts; or they seek to resolve differences through direct negotiations. Neither the state, nor the Indian nations have made measurable gains through litigation. Both admit that litigation tends to deal with narrowly defined issues which, even if they are resolved, leave the broader issues untouched. Neither is particularly satisfied with dependence upon federal legislation since, when an issue tends to be too "controversial" the Congress simply doesn't act.

Tribal and state legislation tend to increase the intensity of competition and confrontation, especially when these enactments are done without tribal-state consultations. Negotiations have only been used as a means of reducing competitive tensions for a relatively short period of time. The level of faith in negotiations as a viable alternative is only in its formative stages of development.

Confidence in negotiations is directly related to the degree of confidence each party has in the prospects of a workable and acceptable solution. Not until 1980, when the Conference of Tribal Governments and the Inter-Tribal Study Group on Tribal State Relations completed Tribes & States in Conflict; and 1985 when the Washington State Office of the Attorney General completed The State of Washington and Indian Tribes has it become possible to examine the relative positions and interests of the two entities. Such a comparison can provide important information that may indicate areas of general agreement, areas of potential agreement and areas where both parties must concentrate their efforts to improve the possibilities for mutually acceptable solutions to broad areas of policy differences.

Indian Nations and the U.S. Federal System

The relationship of Indian Nations to the U.S. federal system of governments is a topic that concerns both the State government and the Indian governments. The Washington State Attorney General's Office touches on the subject directly and indirectly throughout The State of Washington and Indian Tribes. General uncertainty about how Indian Nations fit into the federal system is regarded by the Washington Attorney General as "one reason that the State of Washington and its Indian citizens have frequently been in court ...." This uncertainty quickly leads to confusion throughout the Attorney General's report.

The report's authors assert that the state should recognize the sovereignty of Indian Nations and give a wide berth to the federal government's policy of self-determination. But, at the same time, the report strongly argues that the state must insert itself into Indian territories to protect certain "private Indian interests" and certain "private non-Indian interests", as well as certain state "proprietary interests". Absent any clear direction from the U.S. Congress or the U.S. Constitution, the state believes it should test its questions concerning the extent of its powers inside Indian Country through

court proceedings, federal legislation or negotiations with Indian Nations.

State officials have only raised the questions about the "position Indian tribes occupy in the federal system". Though the issue is regarded as fundamental to the conflicts between Indian Nations and Washington State, any possible answers continue to elude them -- leaving them with the view that "Indian tribes ... occupy a unique position in the federal system. * * * "...they are not the equivalent of states or foreign nations. In a governmental sense, tribes are truly sui generis (one of a kind). The failure, or inability to fully deal with this question, appears to contribute to state insecurity in its on-again, off-again relations with Indian Nations. Lacking any clear understanding of the subject, the state approaches it responsibilities within state boundaries as if there are no Indian Nations -- only minority populations called Indians. Indian Nations as sovereign entities with governmental powers are only considered when there is a controversy over jurisdictional matters. And these controversies are viewed as having increased markedly.

Indian Nation relationships to the U.S. federal system of governments was indirectly dealt with by the Conference of Tribal Governments between 1977 and 1985. The subject was directly dealt with by the Inter-Tribal Study Group on Tribal/State Relations. Like the state, Indian Governments touch on the question and strongly suggest that it is fundamental to the conflicts they have with the state and with the federal government, but, also like the state, most Indian Governments are uncertain about their specific relationship to the federal system. The Conference of Tribal Governments indirectly touches on the subject by asserting that Indian Governments exercise "inherent and not derived" governmental powers, and the Conference has called for the establishment of a framework to conduct government-to-government relations with the state and the federal government. Both ideas strongly indicate a recognition by Indian Governments that they are different and somehow separate from the state government and the federal government, and the system which binds these governments together.

The Inter-Tribal Study Group on Tribal/State Relations, however, is much more explicit on the subject. The Study Group simply declares that Indian Nations and Tribes are outside of the U.S. federal system. The Study Group proceeds, then, to assert that a Tri-Party Intergovernmental Mechanism should be established to facilitate conflict resolution between Indian Nations, the state and the United States. They note, in this connection, that The recognition of tribes as being outside of the U.S. federal system is a necessary prerequisite to any consideration of an effective intergovernmental mechanism.

The State of Washington and the various Indian Nations implicitly recognize that the question of Indian Nations' relationship to the U.S. federal system is a fundamental issue that must be resolved if the many jurisdictional conflicts are to be resolved. The State's failure or inability to deal with the issue

squarely promises to further complicate its relations with Indian Nations. Many Indian officials consider the issue "too controversial" and seem unwilling to deal with it squarely, thus further complicating and exacerbating conflicts. While the Inter-Tribal Study Group on Tribal/State Relations noted that it is the responsibility of Indian Nations to define the political position each will take in relation to the federal system, no government has actively pursued this suggestion.

Despite the general unwillingness or inability to deal with the fundamental political issue in terms of Indian Nation relationship to the federal system, Indian Governments are willing to approach the issue under a different label: Government-to-Government Relations or Relations on a Nation-to-Nation Basis. While these terms deal with exactly the same fundamental issue now raised by the Washington Attorney General and in the report of the Inter-Tribal Study Group on Tribal/State Relations, it seems, somehow more palatable to both parties to speak in terms of government-to-government relations. This term, of course, implies that there is a separation between the governments, a distance between the governments, which must be defined within a framework of principles, structures, guidelines and rules. The fact remains, that both parties do recognize that the fundamental question of what position Indian Nations occupy in relation to the U.S. federal system of governments must be answered either in the short- term, or the long-term, before jurisdictional conflicts between the state and Indian Nations can be resolved.

Responsibilities of Governance - Claimed Jurisdiction

Lacking any specific guidelines against which to measure, the State of Washington and the various Indian Nations assert broad powers of governance limited only by the relationship each has with the U.S. Federal Government. Both claim the right to exercise governmental powers over property and citizens within their boundaries, and both argue that they have the right to exercise governmental powers in adjacent territories: Indian governments claim governance over certain activities and people located in "ceded territories", and, the state government claims governance over at least non-Indians and their property inside tribal territories.

Furthermore, both the state and Indian Nations assert that their governing powers are absolute, subject to their separate agreements with the federal government. Neither contests the right of the other to exercise governmental powers. The point of conflict, however, arises in the gray area of "ceded territories" and "non-Indians living on reservations. In addition, economic and natural resource interests of the state and Indian Nations becomes a point of controversy between the governments.

Economic activity on a reservation or within neighboring communities affects the ability of the state or the Indian Nation to effectively govern. Each seeks to regulate economic activity to protect individual interests, corporate

interests and the viability of the state community or tribal community. Similarly, each seeks to exercise governance over taxation as a means to promote social policy as well as a method for ensuring the viability of the respective governments. Because of differing public economic and social goals, that seem unreconcilable, neither the state or the Indian Nation seems willing to either share governing powers or withdraw many forms of governance to resolve points of conflict.

Governance over various natural resources also produces serious conflict. Water, fisheries, forests, and wildlife are claimed by both governments over which their governing powers extend. Both regard these resources as economic resources as well as natural wealth necessary for the sustenance of their respective citizens. For the state and Indian Nations, exercise of governance over these resources is claimed to be absolute despite the great difficulty both have demonstrating such governance.

Though jurisdiction is essentially the same as the question of governance, the power to formulate, apply and administer laws, it is often placed in a separate category. The State and Indian Nations each claim the right and the power to legislate within their domains and to enforce the laws enacted by their respective legislative bodies. Neither suggests that the other lacks the general power to legislate and enforce laws. "Subject matter" is the overriding concern for both governments. Both governments stress the importance of fully applying their laws, but their is no clear delineation between areas of jurisdiction except for fragmented public laws enacted by the U.S. Congress and very narrow determinations made by the U.S. Supreme Court.

As was noted earlier, the issue of jurisdiction is considered critical to both governments. But, fundamental to this issue is the question of the position Indian Nations occupy in the federal system of governments. If, as the State of Washington Attorney General's report suggests, Indian Nations hold a unique place in the federal system, but what that place is remains undefined, the state and Indian Nations will remain locked in controversy and conflict for many generations to come -- just to test the division and definition of jurisdictional powers subject-by-subject.

If, however, the Inter-Tribal Study Group on Tribal/State Relations and the Conference of Tribal Governments are correct in their suggestion that Indian Nations are separate and distinct entities, and they are outside the federal system of governments, then the prospects for resolving the extent of state and Indian Nation jurisdictional powers may be achievable within a decade. This of course would be the case if Indian Nations moved to establish government-to-government relations with the United States and then individually defined their political relationship.

Indian Governments oppose any insertion of State powers within Indian Country on grounds supported by the noted lawyer, Felix Cohen. Cohen

observes in The Handbook on Federal Indian Law: "Indian country ... is territory, wherever situated, within which tribal law is generally applicable, federal law is applicable only in special cases designated by statute, and state law is not applicable at all. This conception of the Indian country reflects a situation which finds its counterpart in international law in the case of newly acquired territories, where the laws of those territories continue in force until repealed or modified ..." (Federal Indian Law: 1942:6) Indian and Non-Indian Citizens - The Public Interest

The State of Washington places this issue high on its list of critical issues that must be resolved, and indeed, the State asserts (without qualification) that this issue is already largely resolved in general terms. The issue remains unresolved in particular terms, according to the Washington Attorney General, because Indian Governments enact laws that affect the personal and property interests of non-Indians within reservation boundaries. The State of Washington objects to such Indian Government enactments on three counts:

1. The State frequently assumes the responsibility to represent its citizens or parens patriae interests in situations that affect the powers of the state or its economic or political interests.

2. A unique attribute of tribal governments is that, unlike the national, state, or local governments, those who reside within the boundaries of reservation are not necessarily entitled to participate in the selection of those who make tribal laws. Indeed, non-members constitute the majority of many reservations. This is at odds with a basic notion of the American democratic tradition: Consent of the governed.

3. Tribal claims are actively asserted to change the status quo which has been in existence for approximately one hundred years. Such claims thus threaten long established life patterns, ownerships, and livelihoods.

The Indian Government position is simply stated:

1. Self-government includes the power of a tribe to establish its own form of government ... to control the conduct of persons ... and to administer justice and preserve law and order ... for all citizens and all activities beneficial to the people.

2. The right of self-government extends to all areas under the jurisdiction of Tribes, and to all persons within those areas, including those lands within the exterior boundaries of a reservation.

Despite the fact that the State says it recognizes the sovereignty of Indian Nations, and it recognizes the right of Indian Nations to govern, it appears to be willing nevertheless to ignore these powers when the interests of non-

Indians and the State of Washington are affected by an Indian Government's exercise of governmental powers. For the state, a reservation boundary does not exist when it decides that its interests are affected. The logical result of this view is that "where ever non-Indians establish a residence, or where ever a non- Indian visits, the state's governing authorities can be applied". If this notion were applied by the state in absolute terms, then it would be obliged to extend its powers of governance into every state of the United States and into countries outside the United States. This would, of course, be impractical as well as absurd.

The state's policy constitutes a hostile form of aggression against Indian Nations since it threatens to undercut the basic governing authorities of an Indian Nation. Non-Indians resident within the boundaries of Indian Country must be understood to have left the jurisdiction of the State of Washington once they chose to cross into territories over which an Indian Nation has jurisdiction. Their race, place of former residence or citizenship cannot be considered the basis for justifying the extension of state power into Indian Country. Such an extension of power constitutes hostile annexation of territory (a form of colonization), and usurpation of legitimate governmental powers. A similar action by the U.S. federal government or by the neighboring states of Idaho and Oregon against the State of Washington would be considered a violation of the state's sovereignty, and a serious threat to the state government's powers. Indian Nations which have substantial non-Indian populations within their borders are clearly victimized by what can be regarded as nothing short of "state anarchism".

In all fairness to the State of Washington, it should be recognized, the U.S. government is as culpable as the State of Washington since its Department of the Interior is largely responsible for creating the influx of non-Indians into Indian Country. The U.S. government has actively pursued a policy of annexation inside Indian Country for the better part of two centuries. Failing as it did to destroy Indian Nations through wars of attrition, destruction of the "tribal mass" with enactments like the General Allotment Act and the "termination and liquidation policy" during the late 1940s and 1950s; the United States persisted in its protracted efforts to systematically transfer control of Indian lands (parcel by parcel) from Indian Nations to the United States and then into private non-Indian ownership and occupation. U.S. practices which fostered occupation of Indian Country by its citizens clearly contribute to State confusion and State intrusions into Indian Country.

Deliberate U.S. promotion of non-Indian occupation of Indian Country has, indeed created a situation where many Indian Nations have a majority population of non-Indians. The State of Washington presumes that such a condition demands that the political values, economic values and social values of the United States and of the State of Washington must be imposed on the governing institutions of an Indian Nation. It is no doubt true that many non-Indian residents within Indian Country believe that they should have a right to participate in Indian Government, thus sharing in political

power within a reservation. And it is true that few, if any Indian constitutions, recognize the right of resident-non-members to participate in Indian government. But, it must be recognized even by the most fervent republican or democrat, that the presence of large numbers of non- member visitors and residents within Indian Country was not (and is not) a product of Indian National policy or Indian Government design. Non-members and their ancestors chose to take residence within Indian Country -- and , consequently knowingly or unknowingly accepted a form of "alien status" within Indian Country. U.S. annexation policies and policies encouraging non-Indian occupation of Indian Country created the presence of a large "alien population" with limited rights under the power of Indian governments. That Indian governments either choose to impose or not impose laws to regulate and control this population is entirely within the sovereign right of an Indian Nation. An Indian Nation would be committing political and cultural suicide if it denied its right to exercise such powers.

Sizable non-member resident populations within Indian Country do pose a problem for Indian Governments, just as they pose a political problem for the State of Washington and the United States. But, the solution to this problem cannot be the expansion of state and federal powers into Indian Country, continued annexation of Indian territory or systematic denial of Indian Governmental powers. All of these constitute hostile actions which can result in nothing less than conflict and growing confrontations, or the destruction of Indian Nations and their governments. Continuation of these actions constitute nothing less than a form of genocide and ethnocide committed by the State of Washington and the United States.

The rational solution to this problem must come from a full and complete respect for Indian National sovereignty; recognition that the presence of non-Indians within Indian Country is a product of U.S. policies hostile to Indian Nations; and a recognition that the non- Indian presence is a function of individual choice, no matter how ill- informed. To resolve the problem, nonmember residents must be given a choice either to remain inside Indian Country under the conditions defined by Indian Governments, or they must be assisted by the United States (which created the problem in the first place) to leave Indian Country and take up new residence outside of Indian Country.

The State of Washington must recognize that its powers and authorities end at the boundaries of Indian Country. If it has concerns about the interests of individuals who claim citizenship in the State of Washington or elsewhere in the United States, and if it has proprietary interests it seeks to protect, the State of Washington has an obligation to approach the concerned Indian Government to seek a mutually acceptable accommodation. The Indian Government is obliged, in accordance with its own perceived interests, to deal with non-member and corporate interests in what ever way it chooses. The State of Washington or the United States would claim no less an obligation in dealing with alien residents, foreign corporations or the interests

of other countries and Indian Nations.

Proprietary Interests in an Overlapping Domain

The State of Washington considers its ownership of lands, tidelands and submerged lands seriously threatened by claims made by both the United States and Indian Nations. The state asserts its claim to various lands under the "Equal Footing Doctrine" which declares that all states formed after the original "thirteen" shall have all the same rights and powers of the first states of the Union. The State of Washington interprets this doctrine to mean that the U.S. Constitution ensures its primary ownership of lands beneath navigable waters and other lands.

Indian Nations claim an aboriginal ownership of many of the same lands, tidelands and submerged lands claimed by the State. The Indian Government position is expressed in terms of applying tribal jurisdiction to "... those lands within the exterior boundaries of a reservation, those lands and tidelands outside the boundaries of a reservation which are held in trust by or for a Tribe, the ceded portions of original tribal lands wherein Indians have special rights, such as hunting and fishing, and all such lands and resources which may at any future time come under the jurisdiction of Indian Tribes or Nations."

The relative positions of the State and Indian Nations are clearly diametrically opposed to each other, but the positions are based on the application of different authorities. The State asserts that its claims preempt tribal claims because of the "Equal Footing Doctrine", thus taking the view that what applies to the original thirteen states also applies to the State of Washington.

The foundation for land claims by the original thirteen states is in the Royal Proclamation of 1763 declared by Great Britain's King George III. This proclamation was subsequently encoded in U.S. law through the Northwest Ordinance of 1787 and the Trade and Intercourse Act (s). The Royal Proclamation of October 7, 1763 provided:

"And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom we are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them as their Hunting Grounds; We do therefore, with the Advice of Our Privy Council, declare it to be Our Royal Will and Pleasure, that no Governor or Commander in Chief in any of Our Colonies ... do presume, upon any pretence whatever, to grant Warrants or Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions ... that no Governor or Commander in Chief

in any of Our other Colonies or Plantations in America, do presume, for the present and until Our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North-West, or upon any Lands whatever, which not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians or any of them.

* * * We do hereby strictly forbid, on Pain of Our Displeasure, all Our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without Our especial Leave and License for that Purpose first obtained.

And We do further strictly enjoin and require all Persons whatever, who have either willfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands, which, not having been ceded to, or purchased by Us. are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements."

The Northwest Ordinance served as the legal device by which the Royal Proclamation, just quoted, became a part of U.S. law. Just as the Royal Proclamation asserted the right and power to deal with Indian Nations to be in the King, the Northwest Ordinance places the right and power to deal with Indian Nations in the central government. The prescriptions for dealing with Indian Nations on questions concerning land are conditioned on the grant of consent by Indian Nations. The Northwest Ordinance was passed by the Congress, prior to the adoption of the U.S. Constitution "for the government of the territory of the United States, north west of the river Ohio." The Ordinance provided that "there should be formed in the said territory not less than three, nor more than five states" and that such states "shall be admitted, by their delegates, into the Congress of the United States, on an equal footing with the original states, in all respects whatever." The Ordinance declares:

"The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars, authorized by Congress; but laws founded in justice and humanity, shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."

Relying on interpretations by the U.S. Supreme Court (notably *Caldwell v. The State of Alabama* [1 Stew. & Potter (Ala.) 327. 1832]) the State of Washington asserts "States Rights" as a defense against Indian National claims.

Indian Nations draw on original ownership or "aboriginal ownership", which predates the existence of the State of Washington as the basis for their

defense against state claims. Since the U.S. Courts have rarely recognized "aboriginal ownership" as a legitimate legal doctrine the Indian Nation position has suffered from the more narrow and limited approach by the courts which tend to recognize only state interests or federal interests.

Legislation, Litigation and/or Negotiations?

The Washington State Attorney General's analysis in The State of Washington and Indian Tribes concludes that "Tribal-State disputes, like many other disputes in our society, may be resolved by three major avenues: Negotiation, Litigation, and Legislation." The state regards legislation in the U.S. Congress as a legitimate, albeit uncertain, method for settling disputes with Indian Nations. The method is seen as a last resort by the state simply because the Congress is viewed as being unwilling to consider controversial issues such as those which arise between tribes and the state. Litigation is viewed as a method to develop a solution in stages or as a way to test claims. It is also seen as a device which can create a climate for settling disputes through negotiations.

Negotiations are considered to be of limited potential, though more desirable than litigation. The state views negotiations as more desirable method for dispute settlement because of the ability to deal with an issue in its broad context as well as its details. Negotiations are also regarded as more flexible and allow more direct control over the outcome by the parties. The state, however, views negotiations as less likely to occur without litigation or Congressional intervention.

Indian Nations also comment on Negotiations, Litigation and Legislation as alternatives for dispute resolution, and view each in much the same way as the state. But, the Indian Government view offers two additional alternatives which the state has not apparently considered: Establishment of a framework for the ongoing conduct of government-to- government relations between the tribes and the state; and, establishment of a Tri-Party Intergovernmental Mechanism which involves Indian Governments, the State Government and the Federal Government in ongoing conflict resolution.

Indian Nations and the State of Washington have undergone an intense baptism during the last decade where both have engaged in confrontations directly, in the U.S. Congress, through federal litigation and more recently direct negotiations. Both governments have come to essentially the same conclusions about the relative strategic and tactical value of each method for resolving disputes, and both have found each method to have built-in limitations. Due to the State of Washington's historical and political frame of reference, it seeks to settle disputes within the framework of the U.S. federal system. Indeed, because the state is an active member of that system, it is only natural that its scope of options are limited to institutions and

mechanisms within the federal system.

Indian Nations view the options of litigation, legislation and negotiations as appropriate due to their long association with the federal system. However, due to their different frame of historical and political reference they also see options in the establishment of government-to-government relations (not very different from the conduct of treaty relations), and the creation of an intergovernmental mechanism outside the context of the federal system as a possible alternative.

NEW BASIS FOR INTERGOVERNMENTAL FRAMEWORK?

From the very earliest contacts between Indian Nations, European states and the United States of America it has been recognized by Indian and non-Indian scholars and jurists alike that the differences between Indian peoples and the colonizing peoples were so great that restraints must be placed upon them to prevent conflict and confrontations. Great Britain's King George III considered this problem and, thus, issued the Royal Proclamation of 1763.

Similarly, the United States Continental Congress deemed it necessary to restrain its citizens and its states from interfering with Indian Nations by enacting the Northwest Ordinance of 1787. Despite frequent enactment of laws to restrain non-Indians the encroachments by individual citizens and state governments into Indian Country have persisted. Indeed, it was the pervasive tendency of states and U.S. citizens to violate U.S. treaties with Indian Nations, and violate U.S. law that it was stingingly observed near the close of the nineteenth century that Indian Nations "...owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." (*United States v. Kagama* 118 U.S. 375 [1886]).

After two hundred twenty-two years, the conflict and confrontations between Indian Nations and "the people of the States" continues unabated. The issues that characterize these conflicts and confrontations are little different now than at any time during these two centuries: Governance and jurisdiction over peoples and lands, use and disposal of natural resources, and the preservation and exercise of national sovereignty.

Until 1966, there were three methods of conflict resolution between Indian Nations, and the United States and its states: war, negotiations and legislative enactments. On October 10, 1966 the United States enacted Public Law 89-635 (codified at 25 U.S.C. 1362 (1976)), which recognized the right of a tribe to file suit in United States district court without reference to the amount in controversy for cases arising under the laws, constitution, or treaties of the United States. Litigation, legislation and negotiations have become the principal options available to Indian Nations and the State of

Washington as they seek a solution to the many kinds and levels of conflict.

Despite the availability of these options, litigation in the U.S. courts has served as the primary method for dealing with tribal-state conflicts. In recent years, both the State of Washington and Indian Nations have come to be less satisfied with their reliance on the U.S. courts. In many instances state government officials and Indian government officials view litigation as too slow, piecemeal, expensive and divisive; creating a tendency toward polarization between opponents rather than encouraging "harmonious state-tribal relations." As other point out, "A court is simply unable to answer the broad social, economic, and political issues."

This sentiment, combined with a recognition that the U.S. Congress is either unable or unwilling to deal with tribal-state controversies, has contributed to a movement within Indian governments and the state government to define alternative methods to resolve tribal-state disputes. Increasing interest in bilateral and multi-lateral negotiations is the apparent result of the search for an alternative.

In this analysis we have attempted to describe the stated policies and interests of Indian governments and the government of the State of Washington. If negotiations or some other method is to be a viable alternative to conflict then it is essential that the positions of the State of Washington and the Indian Nations are clearly spelled out. Indeed, this is a necessary precondition for beginning the process of establishing "harmonious state-tribal relations". With the recent publication of the State of Washington's views concerning tribal-state relations, and the clearly stated positions of Indian governments as spelled out by the Conference of Tribal Governments and the Inter- Tribal Study Group on Tribal-State Relations it may now be possible to establish a new basis for intergovernmental efforts to resolve the broad social, economic and political issues that have characterized tribal-state conflict.

During the first five years of the 1980's it is possible that Indian governments and the state government have begun to define the basis for rational discussions based on improved understanding. A small step may have actually been accomplished in that direction as a result of the independent search for alternatives to conflict begun by the Indian governments in 1977, and the separate inquiry by the Washington State Office of Attorney General just concluded in 1985.

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