



# Tribal-State Collaboration & Compacting

Gabriel S. Galanda

Washington State House State Government & Tribal Relations Committee

December 4, 2023, 1:30 PM

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1776

Each Indigenous nation “occup[ies] its own territory...**in which the laws of [a state] can have no force**, and which the citizens of [that state] have no right to enter, **but with the assent of the [Indians] themselves...**”

- *Worcester v. Georgia* (1832); see also U.S. Const., Art. I, Sec. 8, Commerce Clause



## 1854-1856

The Stevens Treaties **reserved** lands to Indigenous nations for “**their exclusive use.**”

- The Stevens Treaties; see also U.S. Const., Art. VI, Cl. 2 (“[A]ll Treaties...shall be the **supreme Law of the Land**; and the Judges in every State shall be bound thereby... ”)

The Treaties also guarantee various off-reservation, usufructary rights (e.g., hunting, fishing, access).

- *United States v. Washington* (9th Cir. 2017); *Minnesota v. Mille Lac Band of Chippewa Indians* (U.S. 1999)



# 1973

“This is not to say that the Indian sovereignty doctrine...has remained static during the 141 years since *Worcester* was decided....[T]he doctrine has undergone considerable evolution in response to changed circumstances...[N]otions of Indian sovereignty have been adjusted to take account of **the State's legitimate interests in regulating the affairs of non-Indians**” in Indian country.

➤ *McClanahan v. Ariz. State Tax Comm'n* (U.S. 1973)

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# 1979-1980

- ▶ *Washington v. Confederated Tribes and Bands of the Yakama Nation* (U.S. 1979) (affirmed Washington's unilateral imposition of partial jurisdiction over certain actions on an Indian reservation under P.L. 280)
- ▶ *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n* (1980) (affirmed *U.S. v. Washington* and Tribal Treaty right to at least 50% of harvestable fish)
- ▶ *Washington v. Confederated Tribes of the Colville Reservation* (U.S. 1980) (affirmed Washington's imposition of taxes on on-reservation cigarette purchases by non-Indians)



# 1985

Governor Booth Gardner:

“wanted to clarify the responsibility of the State to be respectful of tribal sovereignty and make things better with the tribes.”

Was “interest[ed] in establishing strong government-to-government relationships that would last beyond his administration and tenure.”

**“hoped to lessen the reliance on lawsuits to settle issues.”**

- Dr. Barbara Leigh Smith, *The Centennial Accord: What has been its impact on government-to-government relations between tribes and the State in Washington?*

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# State “reliance in lawsuits”



MATT McVAY / THE SEATTLE TIMES, 1978  
Four years after the court decision giving Indians 50 percent of the state fish harvest, there were still protests. This one was at Friday Harbor.

## *Angry Whites Plan Fish-In Indian Style*

By MALCOLM MacNEV  
Sports fishermen and their supporters, angered by the special salmon season allowed the Indians on the Puyallup River, are threatening to turn out in force tonight to stage their own demonstration. Four boats were put in the river at the Clark's Creek Bridge last night, and reportedly one fish was caught in a net. Words flew back and forth between those in the boats and Indians along the bank who charge the fishermen were trespassing. Finally the boats were taken out of the river, the Indians returned to their camp, and sheriff's deputies who had been observing went about their regular business. This morning an anonymous caller said many organizations had been notified and asked to support tonight's fish-in. She said those organizing the demonstration hope for about 50

**Guerrillas  
Not Allowed  
To Exit Plane**

boats and that nets will be used. The demonstration is scheduled to start at 6 o'clock behind the Federal Meat Co. Thor Tollefson, director of the State Department of Fisheries, said he had heard of the planned demonstration. "Fisheries people will be on hand," he said, "and if they do this, they will be arrested." The Fisheries Department has granted the Puyallup Indians a special Monday-Tuesday-Wednesday season that started Sept. 21, and will run until the latter part of this month. Because of the size of the coho run, the Indians have also been granted a few bonus days. The complicated matter of Indian fishing rights is now in two courts. Pierce County Superior Court Judge Bartlett Rummel is studying what is "reasonable and necessary" in regulating Indians fishing in the light of a 1968 Supreme Court decision that said the state could regulate the fishing as a conservation measure. U.S. Attorney Stan Pitkin has filed a suit in federal court for seven Western Washington tribes to determine what their fishing rights are under treaties signed in 1854 and 1855.

“Commercial and sports fishermen (and some non-Natives who were not fishermen) were furious. . . . Non-Natives protested the decision for years. . . . Similarly, the state initially sought to weaken the decision by attacking it with similar cases, but these efforts were not successful.”

- Phil Dougherty, *Boldt Decision: United states v. State of Washington*, History Link (Aug. 25, 2020)



# 1988

“One template for...new [State-Tribal] arrangements is the Class III compacting process created in the Indian Gaming Regulatory Act” of 1988.

- ▶ Matthew L.M. Fletcher, *Retiring the “Deadliest Enemies” Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 74 (2007)

# 1989

On Aug. 4, 1989, Gov. Gardner and 26 Tribes consummated the Accord, “making Washington and the tribes the first in the Nation to . . . [memorialize a] relationship to strengthen tribal and state government-to-government relations.”



- Dr. Barbara Leigh Smith, *The Centennial Accord*, *supra*.

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# 1991-92

The state “complains that, in effect, [U.S. Supreme Court] decisions...give them **a right without any remedy.**”

➤ *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla.*  
(U.S. 1991)

“Although the Tribe's sovereign immunity bars [a state] from pursuing its most efficient remedy—a lawsuit—to enforce its rights...**States are free to...enter into mutually satisfactory agreements with tribes...**”

➤ *Oklahoma Tax Comm’n, id.*

The Tulalip Tribes negotiated the first Class III gaming compact with the state in 1992.

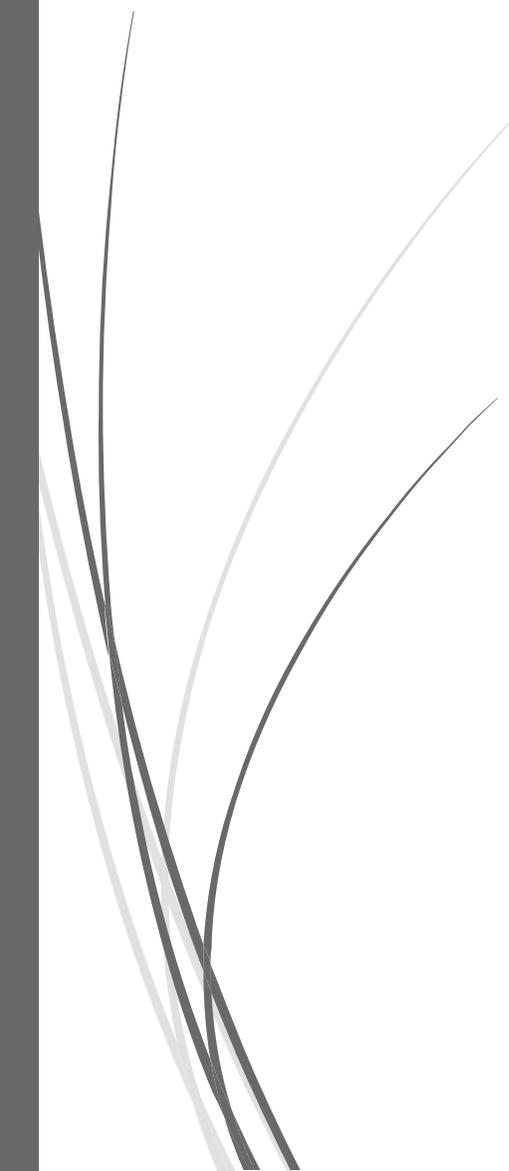


# Still, local “reliance on lawsuits”

- ▶ *County of Yakima v. Confederated Tribes and Bands of the Yakama Nation* (U.S. 1992) (allowed Yakima County to impose an ad valorem property tax on reservation fee land owned by the Yakama Nation or Yakama members)
- ▶ *Lummi Indian Tribe v. Whatcom County* (9<sup>th</sup> Cir. 1993) (allowed Whatcom County to impose ad valorem property tax on reservation fee land owned by the Lummi Nation)



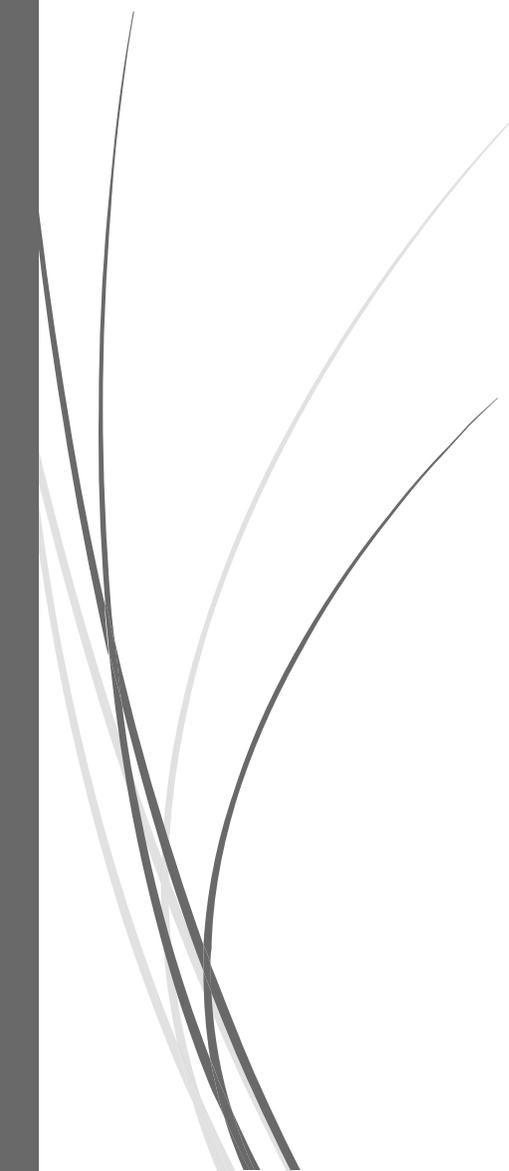
# 2012



- ▶ In 2012, Sen. John McCoy spearheaded the passage of RCW 43.376, the State Tribal Relations Act—as per the Millennium Agreement.
- ▶ “[S]tate agencies must:
  - ▶ (1) Make reasonable efforts to collaborate with Indian tribes in the development of policies, agreements, and program implementation that directly affect Indian tribes and develop a **consultation process** that is used by the agency for issues involving specific Indian tribes...
  - ▶ (4) Submit an **annual report** to the governor on activities of the state agency involving Indian tribes and on implementation of this chapter.”



# Today



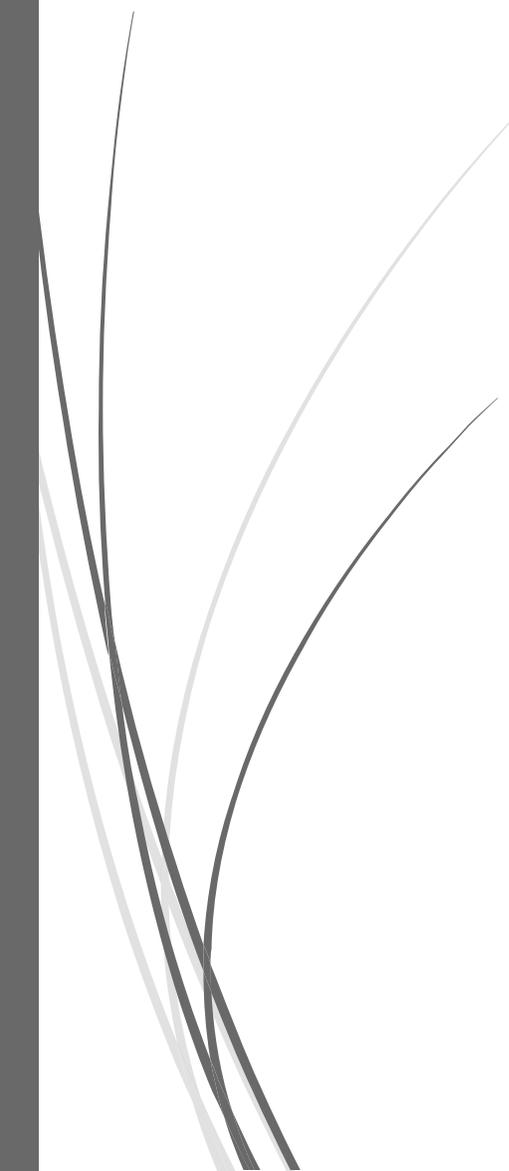
“States and tribes are beginning to smooth over the rough edges of federal Indian law . . . [namely] jurisdictional confusion, historical animosity between states and Indian tribes, competition between sovereigns for tax revenue, economic development opportunities, and regulatory authority. . . .

In effect, **a new political relationship is springing up all over the nation between states, local units of government, and Indian tribes.**”

► Fletcher, *Retiring the “Deadliest Enemies” Model of Tribal-State Relations*, *supra*.



# Today



- ▶ Tribal-State Co-Managers' List of Agreed Fisheries
- ▶ Tribal-State gaming compacts
- ▶ Tribal-State fuel tax compacts
- ▶ Tribal-State cigarette tax compacts
- ▶ Tribal-State cannabis compacts
- ▶ Tribal-State TANF agreements
- ▶ Tribal-State child support agreements
- ▶ Inter-local cross deputization agreements
- ▶ Inter-local land use agreements

# Today

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AUTHORITY WASHINGTON STATE PEACE OFFICERS  
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**Snohomish County Council  
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**ORIGINAL**

**COOPERATIVE LAW ENFORCEMENT AGREEMENT  
BETWEEN  
THE TULALIP TRIBES OF WASHINGTON  
AND  
SNOHOMISH COUNTY**

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# Today

## **INTERLOCAL AGREEMENT BETWEEN THE SPOKANE TRIBE OF INDIANS AND STEVENS COUNTY COMMISSIONERS**

This Interlocal Agreement is entered into this third day of October 2022, between the Spokane Tribe of Indians, a federally recognized Indian Tribe, herein after referred to as “Tribe”, and Stevens County, a Washington municipal corporation, hereinafter referred to as “County”, pursuant to the authority granted by Chapter 39.34 RCW.

RECEIVED JAN 20 2017

**COPY**

## **SECOND INTERGOVERNMENTAL LAND USE PLANNING AGREEMENT BETWEEN THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION AND FERRY COUNTY**

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# Still, inter-local collaboration needed

LOCAL NEWS

## City of Milton overlooked Puyallup and Muckleshoot Tribes' concerns about megachurch construction, lawyer says

Construction on a Megachurch has begun in Milton. KING 5 has learned that tribal concerns voiced to the city were overlooked, breaking typical treaty rights.

National

## A Native American tribe plans to build an opioid treatment center, but neighbors have vowed to block it

A classic not-in-my backyard fight has erupted in the Pacific Northwest over a recovery and medical center for an area hit hard by addiction and overdose deaths

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# Still, inter-local collaboration needed

- ▶ State statutes requiring **local government consultation and collaboration** with affected Indigenous nations are particularly important.
- ▶ Inter-local “jurisdictional confusion” or intransigence still occurs.
  - ▶ Fletcher, *Retiring the “Deadliest Enemies” Model of Tribal-State Relations*, *supra*
- ▶ RCW 36.70a.040(8): Facilitates inter-local GMA consultation via county-tribal memoranda of agreement.
- ▶ RCW 28A.300.108: Requires tribal consultation training and schedule for school district board directors and staff.
- ▶ RCW 28A.345.070(2): Requires tribal-district consultation updates at Washington state school directors' association's annual regional meetings.



# Still, AGO “reliance on lawsuits”

“Washington has a remarkably **one-sided view** of the Treaties.”

➤ *United States v. Washington* (9th Cir. 2017)

“Really, this case just tells **an old and familiar story**. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dissatisfied with the consequences of one of those promises.”

➤ *Washington State Department of Licensing v. Cougar Den, Inc.*, (U.S. 2019) (Gorsuch, concurring)



# Still, Tribal-State accord needed

[Environment](#) | [Local News](#) | [Local Politics](#) | [Times Watchdog](#) | [Traffic Lab](#)

## Huge spike in costs to help salmon could derail WA transportation budget

Nov. 19, 2023 at 6:00 am | Updated Nov. 19, 2023 at 6:00 am

Opinion

## WA has an obligation to tribes and all citizens to fix salmon-blocking culverts

Nov. 26, 2023 at 12:01 pm | Updated Nov. 26, 2023 at 12:01 pm



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# Still, Tribal-State accord needed

## Cougar Den Prevails in Administrative Proceeding Initiated by Washington State's Continued Effort to Impose Motor Fuel Tax Despite Losing at SCOTUS

📅 October 4, 2023 👤 Matthew L.M. Fletcher

October 11, 2023

### Washington Attorney General Continues His War Against The Yakama Treaty

By Joe Sexton



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# Consultation, collaboration, compacts

- State 11<sup>th</sup> Amendment sovereign immunity and Tribal common law sovereign immunity create bilateral, negotiation leverage.
- Both parties must understand each side's litigation positions, but concede that "reliance on lawsuits" is generally not good policy.
- The State must understand that the Tribal position isn't merely legal or political—it's also moral and cultural, if not spiritual.
- Both parties will likely need to concede something to reach accord.
- Neither party is likely to get everything they want in a compact.
- The State Legislature should continue to legislate inter-local consultation requirements that will facilitate compacting.

# New political relationships

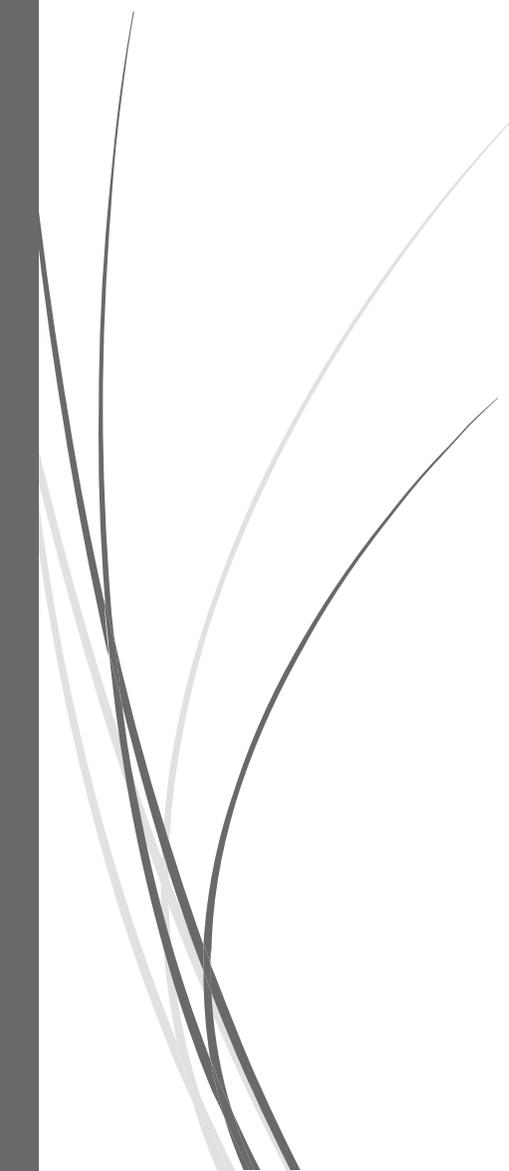


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# Resources



Cohen's Handbook of Federal Indian Law (2012 ed.)

NWIFC Treaties Page, <https://nwifc.org/member-tribes/treaties/>

Yakama Treaty, <https://www.yakama.com/about/treaty/>

Centennial Accord, <https://goia.wa.gov/relations/centennial-accord>

State Agency Accord Plans, <https://goia.wa.gov/relations>

DAHP Tribal Consultation Page, <https://dahp.wa.gov/tribal-consultation-information>

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# Thank You

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