

INDIAN SOVEREIGNTY IN OREGON

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Association of Oregon Counties

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INTRODUCTION

The following report was prepared for the Association of Oregon Counties at the request of their Task Force on Government-to-Government Relations. A League of Oregon Cities paper dated March 1996 formed the framework for the research; however the original paper's content has been substantially amended.

The AOC Task Force was established in 2003 to identify and examine key issues on Oregon tribal-government relationships. Task Force questions have originated from concerns in several areas: revenue raising authorities of Oregon tribes; rights of non-Indians on reservations; clarification of laws and authorities of tribes; issues on taking property off the tax rolls; and others. Clearly, each county has its own unique set of circumstances with tribal issues.

It needs to be said at the outset that a study on the topic of Indian Sovereignty in Oregon quickly becomes complicated. As an analogy, it might seem clear to indicate that the function of county assessment and taxation is to collect and distribute property taxes for taxing districts in Oregon. However, this statutory role is full of exceptions and has many moving targets. The concept thus can become more confusing than one might have thought. Similarly, this paper attempts to analyze tribal sovereignty in Oregon, but the clarity of issues quickly dissipates. The primary reason for this is that tribes are culturally diverse and have different historical authorities granted to them. Some tribal rights may be through treaty, some through congressional action, and others perhaps through court litigation. In order to clearly understand Indian sovereignty and tribal authorities from this patchwork, one must study each tribe individually. Even then, the information gathered may be amended or supplemented by the continuous flow of ongoing court cases, federal government agency actions, Congressional Acts, as well as written understandings between tribes and other parties.

The conclusion of this paper states that having a basic understanding of those with whom you interact is essential. To successfully deal with issues of concern, commissioners need to understand the tribe with whom they are dealing. Trust and respect between both parties must be built through education and open communication. In the end, there must be recognition that all parties are working for people of a common community.

HISTORY OF FEDERAL-INDIAN RELATIONS

The history of Federal-Indian relations is one of clauses, treaties, acts and policies that are often of a contradictory and confusing nature. One of the earliest descriptions of these relations is found in the **Northwest Ordinance of 1787**, which declared: “The utmost good faith shall always be observed towards Indians; their land and property shall never be taken from them without their consent.” In the 1790’s Congress passed laws that restricted the dealings of whites with Indians unless the federal government consented to the transactions. Between 1790 and 1834 **Trade and Intercourse Acts** were passed which made it clear that Indian tribes were to deal directly with the Federal government as opposed to the states. A U.S. Supreme Court decision of 1831 ruled that tribes were “domestic dependent nations” and possessed sovereignty, while being subordinate to the United States. In addition, the Court found that the Federal government had a “trust responsibility” for Indians.

A forty-year treaty-making period followed this decision. During that time, 370 treaties were made between the government and the Indian tribes. The legitimacy, success and longevity of these treaties varied. During the presidency of Andrew Jackson (1829-1837) the federal government negotiated with tribes in order to move them westward. In 1830, the **Indian Removal Act** was passed by Congress and resulted in the relocation of most eastern tribes either west of the Mississippi or to smaller reservations in the east. In many cases, reservations were created on less desirable lands far from the fishing, hunting and burial sites the tribes had claimed for centuries. These reservations could be created by executive order, acts of Congress, treaties with the federal government, or by the Office of Indian Affairs, which was established in 1824 and became the Bureau of Indian Affairs (BIA) in 1849. The BIA took land into “trust” for the tribes. Western territories, including Oregon, were gaining statehood during this time, and in most cases they were required to include “Indian disclaimer clauses” in their constitutions. The disclaimer clauses forced the states to relinquish any jurisdiction over Indian reservations, thus retaining tribal sovereignty and keeping the federal government’s exclusive authority over Indian affairs.

In passing the **Appropriations Act** in 1871, Congress suspended the formal treaty program that recognized Indian nations. However, “agreements” with Indian tribes, which had treaty status, continued to be approved jointly by the House and Senate. And, at least theoretically, all preexisting treaties were to retain their legal status.

The next piece of federal legislation to have a significant impact on tribal people and lands was the 1887 **General Allotment Act**. This act divided up the reservations and gave individual Indians parcels of land. U. S. citizenship was granted to those with allotments. In 1924 the **Indian Citizenship Act** granted citizenship to those Indians without allotments. This attempt to assimilate Indians into the mainstream of American society was not successful. Many Indians did not want to give up their communal life to become farmers and ranchers. Often those who did wish for that life style did not have the capital required for success in those occupations. In some cases non-Indians used

exceptions to obtain parcels of surplus land, and in other cases competition between Indians resulted in the powerful obtaining improved lands while children, the aged and others were left with tracts that in many cases were nearly worthless.

In an attempt to correct the failures of the Allotment Act, the **Indian Reorganization Act (IRA)** was passed in 1934. Allotments ended and tribes were encouraged to form governments with written constitutions. The IRA required that Indians be given preference in employment within the BIA. Revolving loan funds were set up and tribes were permitted to form business corporations. Some Oregon tribes ignored the IRA, and others rejected it. The Grand Ronde Indian Community and the Confederated Tribes of the Warm Springs in Oregon adopted it and organized corporations.

Another federal policy reversal occurred in the 1950's as Congress debated the "Termination of Federal Supervision Over Certain Tribes of Indians" and eventually cut off assistance to the tribes in order to speed their transition into the mainstream of American life. Tribes and bands were terminated, tribal lands were sold, and many Indians received a one-time-only cash payment for their piece of the communal holdings. Others received land allotments, but lost them when they were unable to pay the taxes.

Public Law 280, passed in 1953, restricted some tribal jurisdiction on remaining reservations. The law, known as PL 280, gave the states of Oregon, California, Nebraska, Wisconsin, and Minnesota full criminal and some civil jurisdiction over most reservations in those states. In Oregon, the Warm Springs and Paiute Reservations were exempt from this law. States believed the law did not give them enough jurisdiction, because in-trust status remained for reservation land (meaning the land could not be taxed), and treaty rights, including those pertaining to hunting and fishing, remained intact. The tribes were also dissatisfied with the law because no tribal consent was required for giving jurisdiction to the states.

The 1960's brought another reversal in Federal policy. Fifteen years after the passage of PL 280, the **Indian Civil Rights Act** was passed. Under it, tribal consent was required before states could assume jurisdiction over tribal land, guaranteeing tribal systems of jurisdiction to endure into perpetuity. This began a new era for tribal governments. The 1970's saw restoration of some tribes that had been terminated in the 1950's. Indian business and employment were helped by the creation of an **Indian Business Development Fund**, the **Indian Financing Act** and the **Native Americans Program Act**. In 1975 Congress passed the **Indian Self-Determination and Education Assistance Act**, which allows tribes to administer many of the federal programs on the reservations. This has resulted in some tribes administering their own law enforcement, education, health and social service programs. Tribes may enter into joint-venture agreements with mineral developers as a result of the **Indian Mineral Development Act** of 1982. And they may issue tax-exempt bonds to finance programs as provided by the **Indian Tribal Government Tax Status Act**, also passed in 1982.

The **Indian Gaming Regulatory Act (IGRA)** was passed in 1988. This is a complex and detailed act that oversees gambling casinos, classifying types of games,

spelling out law enforcement and administration requirements and confirming the authority of tribes to engage in gambling for economic development and revenue expansion. The most controversial piece of this legislation deals with the requirements for Class III gaming. A tribe must have the state's written permission in a compact in order to engage in Class III gaming. However, the state is obliged to negotiate "in good faith," and the tribe is authorized to file suit against the state if this obligation is not met. Some parts of the act have been declared unconstitutional, and the history of the resulting court cases and their ramifications is lengthy and complex.

Federal policy in the 1990's continued in the direction of recognizing and promoting tribal rights and honoring previously made treaties. In 1994 President Bill Clinton issued an Executive Order directing all federal agencies to operate in a government-to-government relationship with all federally recognized tribes, protecting their sovereignty, rights to self-government, trust property and resources, and their treaty rights. This order was the impetus for some state governors, including Oregon's Governor John Kitzhaber, to work toward developing more state government-to-tribal government relationships with federally recognized tribes.

Congress passed **The Indian Tribal Economic Development and Contract Encouragement Act** in March 2000. Under the terms of this act, any party (including another governmental entity) entering into a contract with a tribe that requires federal approval is guaranteed to be informed about the tribe's sovereign immunity policy. This act was developed primarily in response to an effort by some congressmen to waive tribal sovereignty in the late 1990's. Rather than removing the sovereignty of tribes, the act requires tribes to inform other parties of the tribes' sovereignty prior to any contractual agreement, leaving no surprises about immunity at a later time.

The history of federal-Indian relations is one which seems to swing from treaties reflecting a respect for equals, to policies of forced assimilation with and without financial assistance, and back again to encouraging autonomy with a renewed emphasis on sovereignty. Current challenges to harmonious relations between the tribes and the federal government seem to originate as conflicts between state and local governments, and tribes. As these conflicts make their way through the court system, Supreme Court decisions may move the federal-Indian relationship in yet another direction.

RECENT DEVELOPMENTS IN STATE LAW

Over the past 20 years several Oregon Governors have been instrumental in encouraging state/tribal relations. One recent example was Governor Kitzhaber's **Executive Order No. EO – 96-30** signed in May of 1996. Its stated purpose was to formalize "... the government to government relationships that exist between Oregon Indian tribes and the State and to establish a process which can assist in resolving potential conflicts, maximize key inter-governmental relations and an exchange of ideas and resources for the greater good of all Oregon's citizens..." The Order directed six key action items including designation of persons in State agencies to serve as liaisons with tribal representatives and identify issues of mutual concern arising from state policy.

In each legislative session, numerous pieces of legislation relating to Indian tribes are introduced. As an example of the quantity of bills drafted and of interest to various Oregon tribes, a Confederated Tribes of Grand Rhonde legislative report for the 2001 session shows that they were following approximately 110 pieces of legislation.

During the **2001 Legislative session** one bill that had significant and far reaching impacts on State/local government/tribal relations was **SB770**. This legislation was introduced at the request of the Commission on Indian Services. It essentially codifies Governor Kitzhaber's earlier Executive Order. Among the key important guidelines of the bill is: Section 2. (3) *A State agency shall make a reasonable effort to cooperate with tribes in the development and implementation of programs of the state agency that affect tribes, including the use of agreements authorized by ORS 190.110.* It is from this language that state agencies will most likely continue to offer programs or introduce pieces of legislation which may be counter to some local government desires. (See SB 180 below) SB 770 also was the impetus for agencies to start meeting with their counterparts in tribal government. These "cluster groups" meet on regular occasion and are seen by both parties as an excellent means of communication on issues of mutual interest.

Other examples of 2001 legislation of interest to Oregon tribes are:

SB 690: It directed the Teachers Standards and Practices Commission to establish a teaching-licensing program for the American Indian language and allows American Indian tribes to develop language tests used for licensing.

SB 385: It allows the Mental Health and Development Disability Services Division to contract with tribes to establish and operate community mental health programs.

HB 2332: This enterprise zone bill allows land within a reservation to receive tax credits to assist growth, development and expansion of employment and business opportunities. (An example of using this new law came in 2002 when the Oregon Economic and Community Development Department issued a Director's Order for the Confederated

Tribes of the Umatilla Indian Reservation enterprise zone to exempt motel and destination resort property from property taxes.)

There were seven pieces of legislation introduced during the **2003 session** that specifically dealt with tribal issues, services or programs. They are briefly described below followed by a longer discussion of **SB 180**.

HJM 5: Requests Congress to extend the accelerated depreciation schedule of business property on Indian Reservations beyond the sunset deadline of January 2004.
Status: Passed.

HJM 8: Requests an endorsement of funds from the National Parks Service to document the “1855 Treaty Trail” and incorporate those findings to coincide with the bicentennial of Lewis and Clark.
Status: Failed in Committee

HB 2257: At the request of State Parks, the bill allows the Parks Department to waive or reduce application fees for ocean shore improvements submitted by public bodies and tribal governments.
Status: Passed

HB 2162: At the request of the Employment Department, it would have applied provisions of the state’s employment law to tax paying Indian Tribes.
Status: Failed in Committee

SB 882: At the request of the Deschutes County Trial court, this bill authorizes the judge to enter into memorandums of understanding with the Warm Springs Tribe for adjudication of youths and youth offenders.
Status: Passed

SB 878: This bill authorizes American Indians to be eligible for Oregon Health Plan Plus benefits.
Status: Passed

SB 180: SB 180 was introduced at the request of the Oregon Department of Transportation. This bill is an example of a continuing trend of Oregon tribal government becoming more involved with state agency programs. In the 2001 legislative session, SB 770 directed the State through its agencies to promote positive government-to-government relations with Indian tribes. The bill authorizes ODOT to distribute money from the Elderly and Disabled Special Transportation Fund (STF) to Indian tribes. Sources of revenue for this fund are tobacco tax revenues and general funds. The bill would allow for a reallocation of monies rather than a change in funding available. *Historically, local governments in Oregon are not amenable to reallocating funds unless there are additional revenues available.*

Seventy Five percent (75%) of the STF funds are distributed by ODOT to counties, mass transit districts, and transportation districts, with the remaining distributed through discretionary grants. Of the nine federally recognized Indian tribal governments in Oregon only four have traditionally applied for STF funds through counties and districts. If these four tribal governments applied for discretionary grants to ODOT directly, they would be each be eligible for the minimum allocation of \$38,000. If all nine tribes participated, the effect on counties and districts could be \$720,000 per biennium.

Status: Passed in House and Senate

Political participation of Oregon Tribal Government:

In recent years, Oregon tribal governments have become more involved in the political arena as they pursue their interests. Two primary reasons for this are: Federal and State Executive Orders leading to more active government-to-government relations; and Tribes becoming monetarily more self-sufficient. The latter allows tribes to employ or retain the services of experts in all aspects of governmental services and programs. Tribal governments have lobbyists in Washington D.C. as well as in Salem. They are also becoming more involved in political campaigns. As sovereign nations, they are maturing and will continue to search for avenues that benefit their interests. The challenge for local governments, as well as Oregon tribes, is for all parties to find common ground that benefits the citizens they serve.

SOVEREIGNTY AND LAND ACQUISITION

Definitions useful for the narrative of this section:

Reserved Rights: Tribes today possess a range of rights and prerogatives that derive from their inherent sovereignty. Historical reserved rights include property rights such as the right to hunt, gather or fish. (*See foot note # 1*)

Indian Country: The terms Indian Country and Indian Reservation are often used interchangeably, but they are not the same. Indian country is a larger concept because it includes *all reservations and trust lands*.

Reservation: Land set aside by the Federal Government for the use, possession, and benefit of an Indian tribe or group of Indians.

Trust lands: Land owned by the Federal government that has been set aside for the exclusive use of an Indian or tribe.

As previously discussed in the first section of this report, during 1950's the Federal Government adopted a general policy to reduce the number of recognized tribes and to speed assimilation of Indian people into the "wider culture". The result was that most tribes in Oregon were "terminated". (The two exceptions were the Confederated Tribes of Warm Springs and the Confederated Tribes of Umatilla.) There has followed a number of efforts by tribes to regain land and status through Congressional action or through the U.S. Court of Claims. Many of those efforts continue today which forces interaction between different parties. There are currently nine (9) federally recognized Indian tribes in Oregon, with eight (8) having established reservation land. (See chart, pg.20) In some circumstances, tribes and local government have had open lines of communications and have been able to work out relationships taking advantage of their legal authorities and finding ways to co-exist and even benefit each other. In other areas tribal-municipal relations have been marked by independent actions, lack of coordination and bad feelings.

Indian country (reservations and trust lands) has the distinction of being a ***sovereign nation***. As Chief Justice John Marshall termed them in a landmark Supreme Court decision in 1831, they are "domestic dependent nations . . . distinct independent political communities retaining their original rights as the undisputed possessors of the soil".

As sovereign nations, tribes have the power to:

- Choose their own form of government
- Make their own laws
- Keep their own forms of judicial and governing bodies
- Regulate trade within their boundaries
- Determine the use of their property and other resources
- Tax property and resource use
- Determine their membership
- Govern the conduct of members and non-members on tribal lands; and
- Exercise the many rights of an independent government
(See footnote 2 for Rights of Way discussion)

Reservations are lands having designated boundaries, however parcels of land within a reservation may be owned by a variety of parties. These include a tribe, individual tribal members, and non-Indian persons. For some reservations, almost all residents are members of the tribe, as in the case of The Warm Springs Reservation. On other reservations, substantial portions of those living on a reservation are non-Indian and own property, as in the case of The Umatilla Reservation. Tribes also own parcels of property outside the reservation.

When land is purchased outside of a reservation by a tribe, or by individual tribal members, they hold title similar to any person privately owning fee land. Tribes are increasingly devoting their economic resources to purchasing lands and applying to the Bureau of Indian Affairs (BIA), which is part of the US Department of Interior, to have these parcels transferred to trust status. There are several reasons to do this. One is to make such land tax exempt. The land is also available for economic development, housing, and other related purposes, and can receive benefit from federal programs for those purposes.

Fee-to-Trust Process: The history of tribal trusts are a result of the Indian Reorganization Act of 1934 (IRA), which was enacted to remedy the loss to Indians of over 90 million acres of Indian Lands from the General Allotment Act of 1887. In the IRA, the US Secretary of the Interior is authorized to hold land for Indian tribes, and individual Indians, in trust. Once such land has been designated to be “*held in-trust*”, it has status as being part of the *sovereign Indian nation*.

Through application to the BIA, conversion of land into the trust category and thus into a tax-exempt status, is neither immediate nor automatic. In July of 1995 the BIA issued regulations governing the fee-to-trust process. The regulations for such application process are found in 5 CFR 151.10. (See footnote 3 for BIA trusts application)

Municipalities must pay close attention to the fee-to-trust applications that they receive. Ignoring these applications or missing deadlines could prevent the municipality from challenging a development program or an issue such as taking land off the tax rolls.

Regulations require that the BIA notify state and local governments when they receive an application from a tribe to process a taxable parcel of land to trust status. The notification is provided for the purpose of allowing government entities an opportunity to comment. Notices must identify the land to be transferred and the requesting tribe, as well as the tribes proposed use of the land.

BIA regulations 25 CFR 151.10 provides affected governments 30 days to comment. 25 CFR 2.9 provides for a 30-day appeal period during which a local government may appeal a preliminary decision by the BIA. This appeal period is not available when the Assistant Secretary of the Department of the Interior makes a decision to take land into trust. In either case there is opportunity for judicial review.

Counties have had varying degrees of success in commenting on trust applications. In a few cases, counties say they have not been getting comment requests from BIA yet through their assessor they know that land continues to be pulled off the tax roll. There also is a large divergence of how counties respond to applications. Polk County has a standing philosophy that they will comment favorably to all trust land applications for the Grande Round Tribe. Klamath County has a policy to request disapproval of applications since the land would be taken off the tax rolls. Jefferson County also comments unfavorably on such applications with a high degree of success compared to other counties. BIA's acceptance of Jefferson County's perspective seems to stem from the fact that the Warm Springs Reservation already has considerable acreage, and the Board of Commissioners has an excellent working relationship with Oregon's congressional delegation.

Waiving Sovereignty Immunity as part of Trust Land Negotiations.

Jurisdictional disputes are often intractable and can consume massive resources. Many tribes are willing to consider government-to-government agreements covering a wide variety of municipal services. These agreements can ensure that public services reach all residents of a municipality, can foster good will between tribes and municipalities, and can help in sharing burdens and expenses.

As a general principle, Indian tribes, tribal entities and agencies, and tribal employees and officials cannot be sued in any court. There are two ways sovereign immunity may be waived. A tribe itself may waive its immunity, and the second is that Congress has the plenary power over Indian affairs and may waive sovereign immunity of Indian tribes.

There are many cases involving a waiver of tribal sovereign immunity in a contractual context. In March 2000, the Indian Tribal Economic Development and Contract Encouragement Act was passed. The broad purpose of this act was to provide disclosure of Indian tribal sovereign immunity in contracts involving economic development. It is based on the apparent agreement that Indian tribes and their

contracting partners are generally best served if questions of immunity are addressed, resolved, or at least disclosed when a contract is executed. As an example, the City of Cascade Locks has negotiated an agreement that, should a casino be located there, the Warm Springs Tribes would pay the city to mitigate certain impacts and provide revenue to provide services and facilities that the casino will need. For example, the draft agreement specifies that the Tribes will pay the city monies from hotel/motel revenues equivalent to the amount the city receives from non-Indian lodging businesses.

RIGHTS OF NON-INDIANS IN INDIAN COUNTRY

As explained in the previous section, all land that is part of the reservation or held in trust for a tribe is considered “Indian country” and comes under the authority of the sovereign nation. For the most part, a tribe decides who may come within the boundaries, and what the laws will be, including those concerning land use and taxation. (See footnote 4) Courts have upheld the right of an Indian tribe to assess charges, fees, and taxes to non-Indians and non-Indian corporations in Indian country. Non-Indians who come onto reservations for business and/or tourism are subject to tribal law and tribal courts. This includes non-Indian visitors to casinos and resorts owned by the tribes. Unless a state’s gaming compact with a tribe includes a waiver of sovereign immunity, tribes cannot be sued over incidents that occur at the casinos and resort properties. This holds true for Oregon and for all other states that have Indian casinos. (See footnote 5 for *Indians subject to property taxation*)

Most Indian country in Oregon is inhabited predominantly by tribal members. The main exception is the reservation of the Confederated Tribes of Umatilla. Because of the General Allotment Act of 1887, parcels of “surplus” land were sold to non-Indians, which has resulted in what some call a “checkerboard reservation,” meaning that throughout the reservation there are pieces of land owned not by the tribe, but by non-Indians. For the most part, the Tribe and the non-Indians have been comfortable with this situation, but occasionally the issue of non-Indian rights surfaces.

Some recent Supreme Court decisions concerning this issue have restricted the civil jurisdiction of the tribes in cases of non-Indians on land owned by non-Indians within Indian country. In *Montana v. United States* (1981) the Supreme Court held that the Indian tribe could not regulate fishing and hunting by non-Indians on land they owned within the reservation unless the tribe could meet one of two requirements: show that the non-Indians had entered into “consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements;” or show that what the non-Indians were doing “threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.” These two requirements became known as the “*Montana* exceptions” and have been applied to later court cases concerning tribal jurisdiction, including taxation authority, over non-Indians on non-Indian land. (See footnote 6)

Tribes generally have civil regulatory jurisdiction over their members and trust lands. They may also have civil regulatory authority over non-Indians when that authority is delegated by Congress, or by the state or local governments through intergovernmental agreement.

GAMING

Gaming has clearly become an enormous economic opportunity for tribes geographically situated to take advantage of it. The industry has grown considerably. In 1996, the original version of this paper reported Indian gaming to have generated an estimated \$5-6 billion nationally. In 2000 that figure had grown to \$10 billion from 325 gambling facilities helping to fund government enterprises and programs for 198 tribes. Eight of the nine federally recognized tribes in Oregon have built casinos on reservations or trust land and, in most cases, have developed motel and conference facilities. With Governor Ted Kulongoski's recent announcement that he would not appeal a federal court ruling, it appears that the Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians will be the ninth tribe to own a gaming establishment in Oregon.

The 1988 Indian Gaming Regulatory Act provides for administrative oversight and proper law enforcement for gaming facilities. The three stated purposes of the law are: (1) to provide a statutory foundation for Indian gambling operations as a means of promoting economic development, self-sufficiency, and strong tribal government; (2) to prevent infiltration of organized crime and other corrupting influences; and (3) to establish federal regulatory authority, federal standards, and a National Indian Gaming Commission. As mentioned in the section on Federal Relations, the act also defines the classifications of gaming types and spells out how application is made for Class III gaming.

The IGRA restricts gaming activities to Indian lands, which are defined as all lands that are within any Indian reservation, or that are held in trust. (See section on Sovereignty and Land Acquisition for how land can be placed in trust) When a tribe applies for an acquisition of land in trust for gaming, the process is governed by the IGRA. According to the act, gaming is prohibited on land acquired after October 17, 1988 unless one of the seven exceptions in IGRA's section 20 is met. The exceptions that apply to Oregon are:

1. The lands are within or contiguous to the boundaries of the tribe's reservation as it existed on October 17, 1988;
4. The lands are taken into trust by the Secretary of the Interior upon determination that gaming on the newly acquired lands would be in the best interests of the tribe and would not be detrimental to the surrounding community, but only if the governor of the state concurs in the Determination;
5. the lands are taken into trust as part of the settlement of a land claim; as part of the initial reservation of a tribe acknowledged by the secretary under the federal acknowledgement process; or the lands are restored for a tribe that is restored to federal recognition.

(Exceptions 2,3,6 and 7 apply specifically to Oklahoma, Wisconsin and Florida)

The most complicated and controversial exception is that which requires the governor's concurrence because this exception provides tribes with an opportunity for off-reservation gaming.

The BIA delegates responsibility to its area offices for conducting consultations with the governor, tribes, and governmental officials of local jurisdictions within thirty miles of a proposed acquisition. The officials respond to expected impacts on the environment, community's social structure, infrastructure, land use patterns, and services provision. The tribe also responds to these items, as well as to projected income, expenses, employment, tourism benefits, training benefits, and community relationship benefits from the venture. The tribe must justify the benefits and address any potential problems it might encounter with the location. The responses are gathered and forwarded to the Secretary of the Interior for final determination of whether the facility will be in the best interest of the tribe and not detrimental to the surrounding community. If the secretary gives approval, the state governor can then concur or not. When the governor does agree, a Tribal-State compact is developed, and it may include provisions relating to such things as criminal and civil laws directly related to, and necessary for, the licensing and regulation of gaming.

There are judicial and political challenges to the provision requiring the governor's approval of in trust land acquisition for gaming. They include concerns about the constitutionality of state powers over federal decisions, tribal sovereignty vs. state jurisdiction, tribal competition for gaming opportunities, and a "family values" argument that opposes additional gaming sites. Many amendments to the IGRA have been proposed, including multiple suggestions to change or remove Section 20, but none have been enacted.

Two Oregon tribes are currently in the application process for gaming on trust land. The previously mentioned Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians have the secretary's approval to build the Three Rivers Casino at the Hatch Tract site near Florence. The Confederated Tribes of Warm Springs is seeking to build a casino either in Hood River or in Cascade Locks. While no official action has been taken, there has been some discussion of the Grand Ronde tribe acquiring land in Portland for the purpose of a gaming facility in the future.

There continues to be much debate over the IGRA, and states and tribes work toward amending it to better meet their needs. Off-reservation gaming is a controversial topic that is currently affecting local and statewide politics in Oregon.

COUNTY-TRIBAL RELATIONS

Relationships between tribal governments and individual counties vary considerably depending upon the issues of concern. In Lane County's case a major issue is the siting of a casino in Florence. In Klamath County one key concern is the reinstatement of a reservation. In Umatilla, the use of trust property off the reservation is of concern. How well business is conducted between both parties is to a large extent determined by how well they conduct themselves politically. It is safe to say that in some counties the elected officials on both sides have good working relationships, while in others, the relationships are strained.

Since this paper is written for AOC, the emphasis of examination here is with counties. Two basic premises are important to realize. First, tribal governments, along with their programs and services, continue to become more sophisticated. Many of these programs have the potential to affect the welfare and employment of non-Indian populations within the counties. Second, there is an increased financial ability of tribes to fund these programs, hire expert staff in all areas, and otherwise pursue tribal goals. These trends combined with tribal sovereign status have placed counties in a special, and sometimes sensitive relationship with tribes. There is no substitute to having each affected county develop a working relationship with its respective tribes. As understanding increases, misperceptions tend to decrease and mutual respect tends to grow. When tribes and counties commit to investing adequate time, they begin to recognize their shared concerns, coordinate their efforts, and develop ways to best provide services to meet the needs of their constituents.

A fine example of a working tribal-county relationship is that of the Confederated Tribes of Grand Ronde and the Polk County Board of Commissioners. Since 1991 the Commissioners and the Tribal government have worked together in a number of ways to enhance their shared community. Soon after being elected, the Commissioners went to the Tribal Council to learn about the Tribe's plans for buying land and placing it in trust. As the Commissioners understood how the Tribe planned to use the land, they began making more favorable comments on the BIA Trust Applications. The Tribe and the Commissioners looked for ways they could share costs and responsibility for road maintenance, law enforcement, and health and welfare needs of their shared constituents. Tribal dollars have provided infrastructure improvements, underwritten the cost of additional Polk County Sheriff's deputies, purchased educational materials and training programs for Polk and Yamhill County schools, and given money to local Head Start programs. The Spirit Mountain Casino has become the largest employer in Polk County with a 1600-member workforce. In 1997, the Spirit Mountain Community Fund was established. It is funded by six percent of casino profits that are shared by various non-profit organizations throughout the eleven Western Oregon counties that comprise the ancestral lands of Grand Ronde Tribal members. By spring 2003, the Fund had given \$20 million to charities. This cooperative relationship and these accomplishments have taken years to develop and come to fruition. Both governments have been committed to

spending the time, sharing information, dispelling misperceptions and myths, and finding common ground in order to improve their community. Their success has been remarkable.

There are, of course, success stories of other tribal-county cooperative efforts in Oregon. In the 1996 version of this paper, mention is made of the Cow Creek Band of the Umpqua Indians and their partnerships with Douglas County and the cities in the South Umpqua area. The Confederated Tribes of the Umatilla Indian Reservation were also highlighted in that report as having a positive, cooperative relationship with the surrounding governments. At that time the Chairman of the Board of Trustees and the Executive Director for the Tribe met regularly with Umatilla County Commissioners. Newly appointed Executive Director, Don Sampson, sees communication about projects before they begin as essential to the strength of intergovernmental relations and accomplishments. He also believes that litigation is expensive and unnecessary, and that tribes and counties can find ways to work cooperatively to provide needed services. The Confederated Tribes of Umatilla currently operates a health care center and a homeless shelter that are available to Umatilla County and the surrounding counties. The Klamath Tribes have established a drug/alcohol treatment center at Chiloquin that serves tribal members, thereby taking some of the burden from county services. In the same vein, the Tribe is working to make Tribal Court an appropriate venue for hearing child welfare cases for members. The Warm Springs Tribal Court has recently, through a Memorandum of Understanding between the Tribes and Jefferson County, begun to adjudicate juvenile offenders who are tribal members. There are many other examples of successful cooperative efforts between counties and tribes throughout the state.

Because each tribe and each county has unique needs, concerns, and interests, there is no set of solutions to developing protocol and maintaining government-to-government relationships. Awareness, sensitivity and respect are key ingredients. Patience and time are necessary, especially when the relationship has had a negative history. Recognizing that counties and tribes have the same goal, which is to efficiently provide services to constituents, will be helpful as county-tribal relationships are built and strengthened.

RECOMMENDATIONS AND CONCLUSIONS

This research leads to basically three conclusions. First, each county in Oregon has its own unique set of circumstances with tribal government. Personalities and governmental processes, various tribal histories, and the complexity of special issues are different from one county to another. There is therefore no single magic formula for working on tribal issues. Second, the material found in this paper is a compilation of research and discussions with various persons, and the recorded observations are those of the writer and not of someone of the legal profession. Should the Association of Oregon Counties wish to further explore some of the technical issues, obtaining counsel from experts in various fields would be advisable. This also holds true for individual counties that have questions or find themselves in difficult situations with tribal governments.

The third conclusion is that local government-tribal relationships can be nurtured in the ways most relationships are strengthened: education that promotes understanding; practicing mutual respect; spending enough time; and recognizing and working toward shared concerns. Generally speaking, the more counties understand about tribal laws and customs, the better their relationships will be with tribal governments, and the more successful their cooperative efforts can be.

The following recommendations are offered to assist county officials in their relationships with tribal government:

For county counsels and other county officials who are members of the bar, the Oregon State Bar conducts a training program entitled “Doing Business in Indian Country.” (See Bibliography/Resources)

Portland State University’s Institute for Tribal Government is another available training resource. While it primarily offers training for tribal leaders on effective leadership skills and Congressional level processes, the director, Elizabeth Furse, has said the program can be modified to address the training needs of county officials wanting to work more cooperatively with tribal governments. (See Bibliography/Resources for contact information)

Another training option for county officials is the Legislative Commission on Indian Services, which is a state commission charged with serving as a point of access for finding out about state government programs and Indian communities. The Commission’s Director, Karen Quigley, has offered to develop training sessions for county commissioners interested in better understanding Indian Law in general, and tribal laws specific to individual tribal groups in the state. This could be done at an AOC conference or regionally.

Cluster group meetings between tribal staff and state agencies are considered to be very successful endeavors. In discussing this with Karen Quigley she thought that a

similar process for county staff and tribes would be worthwhile. Contacting her office to explore how this might be set up would be useful. As an observation, currently county staff seems to work well in their issues with tribes. It often is the tribal councils and county commissioners that have difficulty since their discussions tend to focus on broader more difficult issues and politics become problematic.

One Commissioner offered good advice relating to choosing issues on which to negotiate. For both a commission and tribe, the parties would be well advised to not challenge each and every issue that surfaces in their relationship. This only burdens the process and sets a disruptive atmosphere when there is a need to negotiate a major issue.

Meet with tribes on their turf, and on yours, as frequently as possible. In one case, a County had met only twice with a tribe over the past five years. Be patient and diligent when meetings are cancelled at the last moment.

Realize that a tribe's economic vitality may be of some assistance to a county's services and programs. As partners, you have more clout, especially when the tribes can use their sovereign status in working with the federal government on issues.

Indian law and tribal-governmental affairs are complex and interwoven. History, politics, geography and culture contribute to the challenges and potential for successful interaction between county and tribal government. Perseverance and greater knowledge by all parties are the first steps to bringing enhanced livability for all citizens of Oregon.

RECOGNIZED TRIBES IN OREGON

TRIBES	DATE OF RESERVATION	COUNTY LOCATION	ACRES OF RESERVATION	ENROLLMENT	RESTORATION
Burns Paiute	1935 and 1972	Harney	13,738	313	1972
Confederated Tribes of Grand Ronde	1857 and 1988	Yamhill and Polk	11,040	4,800	1983
Confederated Tribes of Siletz	1855 and 1980	Lincoln	4,204	3,502	1977
Confederated Tribes of Umatilla	1855	Umatilla and Union	172,000	2,300	Never terminated
Confederated Tribes of Warm Springs	1855	Clackamas, Jefferson, Linn, Marion and Wasco	641,035	3,980	Never terminated
Coquille Indian Tribe	1996	Coos	6,512	750	1989
Cow Creek Band of Umpqua Indians	1853 and 1986	Douglas	102	1,163	1982
Confederated Tribes of Coos	1941 and 1984	Coos	6	681	1984
Klamath Tribe	1864	Klamath	In planning	3,374	1986

FOOTNOTES

1) Reserved rights: In 1954 Congress amended Public Law 280 – which granted certain states jurisdiction over offenses committed by or against Indians. However, P.L. 280 said that “nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States . . . or shall deprive (the same) of any right, privilege or immunity afforded under Federal treaty, agreement, or statute with respect to *hunting, trapping, or fishing or the control, licensing, or regulation thereof*”. Uneven Ground, pg 132.

2) Title 18, U.S. Code, Sec. 1151 defines Indian Country and includes all land within the boundaries of an Indian reservation, including land owned by a non-Indian. **Rights of Way** through Indian country, such as railroad tracks, utility power lines, and roads and highways, remain a part of Indian country. Thus tribal governments may exercise certain powers on thoroughfares such as traffic enforcement. Possession and ownership of rights of ways remains that of the governmental entity and functions of maintenance and improvements remain with ownership. In the case of counties, road funds are used to maintain roads on reservations. Occasionally combining federal funds given to a tribe with other match moneys from a county leads to creative financing. In one case, for a capital project, the BIA required that a county temporarily transfer title of the road to the tribe in order to receive funding.

3) According to the regulations of 5 CFR 151.10, when applying to take land into trust status, **a tribe must provide the following information to the BIA.**

- A legal description of the property, and a tribal request for the Trust status.
- Official citations of federal statutes under which the transaction is to take place and a tribal government resolution authorizing the acceptance of the transfer.
- Discussion of whether third parties will be using the land
- Discussion of the need to take the land into trust, and justification why the present status of the land will not serve the need. Avoiding taxation may not be used as a reason.
- Description of the purposes of the transfer. The tribe must specifically explain the intended use of the acquired land (e.g. Housing, economic development) and how the acquisition will enhance that use.
- Assessment of impact on local government. The tribe, after consulting with local government, must describe any existing conflicts over taxation and services such as: policing, utilities, zoning and fire protection.
- Indication of resolution of problems and conflicts. Where conflict exists, tribes must also describe how they intend to resolve conflicts over tax funded activities.
- Proof of compliance with the National Environmental Act and federal hazardous waste laws.

4) Land owned by tribal members in conventional fee simple may be subject to local or state government jurisdiction, but only in “exceptional circumstances”. In *New Mexico. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983) Judge William C. Crosby noted that these circumstances must be “rare and truly exceptional”.

5) Tribal land on a reservation is tax exempt. Land owned by individual tribal members on a reservation may or may not be taxable depending on the designation of their title. States and municipalities may assess property taxes on Indian-owned fee land on a reservation if such lands are found to be “alienable”. This term applies to situations where a person owns property and then is able to sell, lease, or otherwise encumber their own fee land in the same manner as any other U.S. citizen. Tribal or individual member purchase of land off a reservation is not sufficient to take land off the tax rolls. Until an application has been made to place land in-trust, such land is taxable.

6) *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation* (1989) held that the Yakima Indian Nation did not have the authority to zone non-Indian land in an area of the reservation in which half of the land in the vicinity was owned by non-Indians, unless they could prove the existence of one of the “*Montana* exceptions.”

In *South Dakota v. Bourland* (1993), the consideration was whether a tribe could exercise authority over non-Indians who held a federal right to use (not own) land on the reservation. Congress had set aside a piece of land on a reservation for the construction of a dam. The lake that was created by the dam was opened to the public, by Congress, for general boating and other recreational purposes. Since the area was in tribal trust land, the tribe argued that it could regulate non-Indian activities. Instead, the Court held that Congress, in giving the right to use the land, “implied the

loss” of the tribe’s right to regulating non-members’ activities unless they could prove one of the “*Montana* exceptions.”

The previously described cases deal with land use rights. *Atkinson Trading Co., Inc. v. Shirley* (2001) is a case about taxation rights. The issue was whether a tribe could assess a hotel occupancy tax on guests at a hotel owned by a non-Indian and located on land within a reservation, but also owned by a non-Indian. The tribe argued that it provided the police, emergency medical and fire protection to the hotel and guests. The Court found that neither of the “*Montana* exceptions” was present in this case. Therefore, the tribe was not allowed to assess the occupancy tax.

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Don Sampson, Executive Director of The Confederated Tribes of the Umatilla Indian Reservation.

Bob Willoughby, Cascade Locks City Manager.

WEB SITES:

www.leg.state.or.us/cis (includes information about the Legislative Commission of Indian Services and directories for the nine federally recognized tribes in Oregon)

www.indiancountry.com (national source for current news articles on Indian issues)

www.law.ou.edu (listing of American Indian Law Review Legislation and a directory of the libraries that own it)

www.tribalgov.pdx.edu (includes information about the Portland State Institute for Tribal Government)

<http://www.doi.gov/bureau-indian-affairs.html> (Bureau of Indian Affairs site, includes information that is general and tribe-specific)

