

- Thank-you for the invitation to present this topic again.
- This is a large and complex topic.
- We can only touch on a few items.
- I am hopeful it will pique your interest in this important topic



Purpose

- Give an overview of federal – tribal relationships.
- Overview of obligations for fisheries management.
- Highlight some regional differences.
- Briefing book provides sources for additional information.

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- We expect that each of the Councils will provide additional training or information that includes more details about the specific relationships and initiatives with tribes and indigenous communities of their particular area.
- Several folks present that can provide additional information. Can't promise to have answers to all your questions, but will be happy to follow-up.
- Many distinctions important to individual tribes/communities and fishing agreements are not included.



Federal – Tribal Relationship Overview

Pre-Revolutionary America*

- Francisco de Victoria, 1532
- Principles related to land acquisition Later expanded.

* Largely from Felix Cohen's *Handbook of Federal Indian Law*

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➤ The Federal – Tribal relationship has its genesis in governmental relationships that pre-date the formation of the United States. For example, in 1532 Francisco de Victoria, a leading Spanish intellectual and academic examined in detail several theories of title advanced to justify Spanish confiscation of Indian lands. He concluded the “right of discovery” conveyed title only when property was ownerless ... and European “discoverers” had no right to Indian lands unless the Indian tribes voluntarily consented to their annexation.

➤ This led to the development of the principle that land could be acquired from Indians only with their consent through treaties and involved three assumptions: 1) both parties to the treaties were sovereign powers; 2) Indian tribes had some form of transferable title to the land; and 3) acquisition of Indian lands was solely a governmental matter, not to be left to individual colonists.

➤ Although not always followed throughout the history of European-Indian contact, these principles were acknowledged by the Dutch, British, and Spanish governments/representatives – and later followed by the colonies, and the U.S.



Federal – Tribal Relationship Overview

Articles of Confederation

Article IX. The United States in Congress assembled shall also have sole and exclusive right and power of regulating ... the trade and managing all affairs with the Indians ...

➤ There are two references to “Indians” in the Articles of Confederation. The above and an earlier reference limiting the “right” of States to engage in war without the consent of the “United States in Congress assembled” unless invaded by enemies of the State, or having “received certain advice of a resolution being formed by some nation of Indians to invade such State.”



Federal – Tribal Relationship Overview

U. S. Constitution

*Article I. Section 8 – Congress shall have Power ...
To regulate Commerce with foreign Nations, and among
the several States, and with the Indian Tribes.*

*Article 6 ... This Constitution, and the Laws of the
United States which shall be made in Pursuance
thereof; and all Treaties made, or which shall be
made, under the Authority of the United States, shall
be the supreme Law of the Land ...*

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- Indian Commerce clause.

- The supremacy clause.

- Treaties are part of the “supreme Law of the Land.”

- NOTE: “and all Treaties made” ... showing there were Indian treaties before the Constitution.



Federal – Tribal Relationship Overview

U. S. Supreme Court Decisions

The Marshall Trilogy

Johnson v M'Intosh (1823)

Cherokee Nation v Georgia (1831)

Worcester v Georgia (1832)

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➤ There are numerous federal court decisions that have help structure the relationship between Federal and Tribal governments. Although not my intent to provide a review of all pertinent judicial decisions, three early Supreme Court decisions are worthy of note ... they are referred to as the "Marshall Trilogy," after their author Chief Justice John Marshall. (And formed the basis for future, including current, federal judicial review.)

Johnson v M'Intosh

- First of trilogy cases.
- Citation has been staple of federal and state cases related to Indian land title for 200 years.
- The Tribe challenged the legality of the state of Georgia to oust the Tribe from its lands in spite of a treaty with the U.S.
- Affirmed tribal sovereignty and established doctrine of Federal trust responsibility.
- The case involved competing claims to the same lands acquired from the same Indian tribe by different means.
- Court ruled that Indian nations could only convey ownership to the U.S., not individuals.
- Court also restrained encroachment, not authorized by the U.S., into Indian territories and confirmed Federal control of Indian affairs.

Cherokee Nation v Georgia

- The Tribe challenged the legality of the state of Georgia to oust the Tribe from its lands in spite of a treaty with the U.S.
- SCOTUS ruled the Tribe "is a domestic dependent nation" with the relation of the Tribe to the Federal government like a "ward to guardian."
- The state could not interfere with the Cherokee Nation.

Worcester v Georgia

- This case also involves the Cherokee Nation.
- Missionaries to Cherokee Nation appealed their conviction in Georgia courts for not having received a license from the Governor of Georgia to enter Cherokee country.
- SCOTUS ruled the conviction by the state void because the Tribe was a distinct community over which the laws of the state have no force.



Federal – Tribal Relationship Overview

Executive Memorandum

*Government-to-Government Relations with Native
American Tribal Governments (1994)*

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- Directs departments/agencies when undertaking an action they should be sensitive to “tribal rights and trust resources.”
- Activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty.
- Principles that executive departments and agencies ... are to follow in their interactions with Native American tribal governments.
 - A) Operate “within a government-to-government relationship with Federally recognized tribal governments.”
 - B) Consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect them. Consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.
 - C) Assess the impact of Federal government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during their development.
 - D) Take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribe.
 - E) Work cooperatively with other Federal departments and agencies to enlist their interest and support in cooperative efforts.
 - F) Apply the requirements of Executive Orders Nos. 12875 (“Enhancing the Intergovernmental Partnership”) and 12866 (“Regulatory Planning and Review”) to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities.



Federal – Tribal Relationship Overview

Executive Orders

12875 – Enhancing the Intergovernmental Partnership

*13175 – Consultation and Coordination with Indian
Tribal Governments*

➤ Issued October 26, 1993 “ ... in order to reduce the imposition of unfunded mandates upon State, local, and tribal governments; to streamline the application process for and increase the availability of waivers to State, local, and tribal governments; and to establish regular and meaningful consultation and collaboration with State, local, and tribal governments on Federal matters that significantly or uniquely affect their communities ...”

➤ Issued November 6, 2000 – “... establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes ...”



Federal – Tribal Relationship Overview

Department of Commerce

American Indian and Alaska Native Policy (1995)

- Outlines principles to be followed in all DoC interactions with federally recognized Native American and Alaska Native tribal governments.
- Acknowledges the government-wide fiduciary obligations to American Indian and Alaska Native tribes.
- Ten “Policy Principles”

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➤ Issued March 30, 1995 ... signed by Secretary of Commerce, Ron Brown

The Department of Commerce ...

- 1.... recognizes and commits to government-to-government relationship with American Indian and Alaska Native tribal governments ... tribes have a unique and direct relationship with the Federal government ... will deal with each tribal government, when appropriate to meet that tribe's need.
- 2.... acknowledges Congressional commitments (House Concurrent Resolution 331, 1988) and incorporates the “Policy Memorandum of the White House” (discussed above).
- 3.... recognizes its “trust responsibility and will consult and work with tribal governments prior to implementing any action when developing legislation, regulations, and/or policies that will affect tribal governments, their development efforts, and their lands and resources.”
- 4.... recognizes the “Indian Commerce Clause” of the Constitution (discussed above) and “understands ... trade and commerce were the original building blocks that established government-to-government relationships with the Indian tribes ... pledges to honor the constitutional protections secured to Indian Commerce.
- 5.... will “consult and work with tribal governments before making decisions or implementing policy, rules, or programs, that may affect tribes to ensure that tribal rights and concerns are addressed ... will involve tribes and seek tribal input at the appropriate level on policies, rules, programs, and issues that may affect a tribe.
- 6.... will identify and take appropriate steps to remove any impediments to working directly and effectively with tribal governments.
- 7.... will work cooperatively with other Federal departments and agencies, where appropriate, to further the goals of this policy ... to ensure that the rights of tribal governments are fully recognized and upheld.
- 8.... will work with tribes to achieve their goal of economic self-sufficiency.
- 9.... will internalize this policy ... into all operations and basic tenets of its mission ... will have an office or individual to coordinate this policy and act as liaison with tribes.
10. Effective Date ... March 30, 1995



Federal – Tribal Relationship Overview

Definitions

- Indian Tribe
- Tribal Government
- Tribal Officials
- Agency
- Policies That Have Tribal Implications
- Trust Resources

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➤ **Indian Tribe:** An Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

➤ **Tribal Government:** The recognized government of an Indian tribe and any affiliated or component Band government of such tribe that has been determined eligible for specific services by Congress or officially recognized by inclusion in 25 CFR part 83.

Elected or duly appointed officials of Indian tribal governments or authorized intertribal organization(s).

➤ **Tribal Officials:** It is important to know, to the extent we can, what role or what authority “officials of authorized intertribal organizations” have when meeting about issues, concerns, proposed regulations, etc. In some cases there will be clear authority to represent member tribe(s) interest ... in many instances it will not be so clear.

➤ **Agency:** ... any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency, but does not include -(A) the General Accounting Office;(B) Federal Election Commission; C) the governments of the District of Columbia and of the territories and possessions of the United States, and their various subdivisions; or(D) Government-owned contractor-operated facilities, including laboratories engaged in national defense research and production activities (44 U.S.C. 3502(1)),

- ... other than those considered to be independent regulatory agencies under (44 U.S.C. 3502(5))
 - Board of Governors of the Federal Reserve System
 - Commodity Futures Trading Commission
 - Consumer Product Safety Commission
 - Federal Communications Commission
 - Federal Deposit Insurance Corporation
 - Federal Energy Regulatory Commission
 - Federal Housing Finance Board
 - Federal Maritime Commission
 - Federal Trade Commission
 - Interstate Commerce Commission
 - Mine Enforcement Safety and Health Review Commission
 - National Labor Relations Board
 - Nuclear Regulatory Commission
 - Occupational Safety and Health Review Commission
 - Postal Rate Commission
 - Securities and Exchange Commission
 - any other similar agency designated by statute as a Federal independent regulatory agency or commission



Federal Tribal Obligations

- General Federal Obligations to Tribes
- Specific obligations vary by region, depending on tribal status
 - Federally recognized treaty fishing rights.
 - Federally recognized tribes.
 - Seeking Federal recognition.
 - State recognition.
- Tribal and indigenous involvement most active in PFM, WPFMC, and NPFMC

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➤ So far we have been discussing general obligations to tribes.

➤ The Northeast Regional Office has frequent interactions with the Penobscot Indian Nation regarding Atlantic salmon ... occasionally Passamaquoddy Nation. Since these interactions are related to Atlantic salmon as endangered species (listed under the ESA) ... essentially outside the Council process.

➤ On the other hand, the Northwest Regional Office has frequent contact with over 30 tribes that have reserved treaty rights to harvest salmon (marine and river); additionally there are a number of tribes that have commercial marine fisheries of whiting, rockfish, groundfish, etc.

➤ But not restricted to treaty-reserved fishing rights, i.e., non-treaty tribes, in specific circumstances may have reserved fishing rights.

➤ Executive Order Tribes.

➤ There are 564 Federally recognized tribes.

➤ Service population of some 1.9 million American Indians and Native Alaskans.

➤ New tribes are recognized under procedures described in 25 CFR 83.

➤ Recognition, on behalf of the Federal government, is by secretary of the interior.

➤ The Chinook Tribe is an example of a State, but not Federally, recognized tribe.



Conservation Necessity Principles

Five Conservation Standards

- Restriction is reasonable and necessary
- Cannot be achieved by reasonable regulation of non-Indian activities.
- Least restrictive alternative.
- Restriction does not discriminate.
- Voluntary tribal measures are not adequate.

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- The conservation necessity principles articulate some of the general federal responsibilities based on previous court cases regarding consultation and the burden of conservation, e.g., *US v WA* and *US v OR*.
- The restriction is reasonable and necessary for the conservation of the species at issue.
- The conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities.
- The measure is the least restrictive alternative available to achieve the required conservation purpose.
- The restriction does not discriminate against Indian activities, either as stated or applied.
- Voluntary tribal measures are not adequate to achieve the necessary conservation purpose.

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North Pacific Fisheries Management Council



North Pacific Fisheries Management Council

Status

- 220+ federally recognized Native Villages (1971).
- Metlakatla fishing rights established by E.O. (pre-statehood).
- Consultation obligations expanded with E.O. 13175

➤ Legislation expanded NOAA Fisheries Service consultation obligations under E.O. 13175 to include Native Alaskan villages (referenced earlier), although 1995 DoC policy already included Alaska Native Villages established pursuant to the Alaska Native Claims Settlement Act.

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**North Pacific Fisheries
Management Council**

Primary Council-Tribal Issues

- Halibut Subsistence Program
- Salmon bycatch
- Most issues indirectly Council-related.
- No specific Council membership provisions.

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- Formal structure for consulting with Alaska Natives on subsistence fishing through the Alaska Native Subsistence Halibut Working Group.
- The primary interaction with “tribes, and tribally authorized organizations,” is not with the Council, but rather with the agency pursuant to section 119 of the Marine Mammal Protection Act (MMPA) – Cooperative Agreements for the co-management of the Native harvest of marine mammals.
- However, individual Native Alaskan community members are active with the Council in representing their individual interests and the agency provides the opportunity to consult on issues that may affect Native Alaskan villages/entities depending on the applicable law(s).
- Related to the pollock fishery.
- For example, MMPA, NEPA, etc.



MSA Provisions (section 305(i))

Alaskan Community Development Programs

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- The Community Development Quota Program (sec 305(i)(1)) established in order to:
 - i. To provide eligible western Alaska villages with the opportunity to participate and invest in fisheries in the Bering Sea and Aleutian Islands Management Area;
 - ii. To support economic development in western Alaska;
 - iii. To alleviate poverty and provide economic and social benefits for residents of western Alaska; and,
 - iv. To achieve sustainable and diversified local economies in western Alaska.

- No particular “tribal” component.

- Involves communities which, although primarily populated with Alaska Natives, are not tribal entities and are nor entirely native.

- CDQ organizations are not tribal or Native organizations.



MSA Provisions (section 305(j))

WP and NP Regional Marine Education and Training

- Regionally-based marine education and training programs in the Western Pacific and the Northern Pacific.
- Programs or projects that improve communication, education, and training on marine resource issues throughout the regions.

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➤ ... to foster understanding, practical use of knowledge (including native Alaska Native, Hawaiian, and other Pacific Islander-based knowledge), and technical expertise relevant to stewardship of living marine resources.

➤ ... in cooperation with the WPFMC and NPFMC, regional educational institutions, and local WP and NP community training entities, establish programs or projects that will improve communication, education, and training on marine resource issues throughout the regions and increase scientific education for marine-related professions among coastal community residents, including indigenous Pacific islanders, Native Hawaiians, Alaskan Natives, and other underrepresented groups in the region.

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Pacific Fisheries Management Council



Pacific Fisheries Management Council

Status

- Over 30 tribes with Federally recognized treaty/tribal fishing rights (Puget Sound, Washington Coast, Columbia River, Oregon, and Idaho).
- Many other Federally recognized tribes (who have had lost access to salmonids).

All FMPs involve tribal fishing rights.

Council fisheries managed as part of larger group of fisheries

Council membership provision for treaty tribal member and alternate (302(b)(5)(D))





Pacific Fisheries Management Council

Federal court mandated tribal/non-tribal allocations.

- *US v WA, US v OR*
- *Hoh v Baldrige*

Pacific Salmon Treaty

ESA Standards and "Secretarial Order"

➤ *US v OR* (1969) ... precedent-setting ... Judge Belloni ... set the stage for Boldt. Addressed state regulation of tribal fisheries ... ordered the protection of treaty fishing rights must be a priority of state regulations co-equal with conservation or runs for other users. Court found tribes have an "absolute right to that fishery and are entitled to a fair share of the fish produced by the Columbia River System."

➤ *US v WA* (1974) ... state can not interfere with treaty-protected rights to fish off-reservation in "usual and accustomed" fishing areas for religious, ceremonial, or subsistence purposes ... "in common with" gives the tribes an equal share (50%) of the harvestable salmon run, and determined the tribes could regulate their on and off reservation tribal fisheries provided they possessed competent leadership, an organized government, fisheries enforcement, and trained fishery scientists/managers. This effectively conferred management authority over tribal fisheries to the tribes themselves, allowing tribal self-management and state-management to co-exist within a relationship of co-management.

➤ ... three Washington coastal tribes (Hoh, Quileute, and Quinault) ... moved from management by aggregate to the right to "take approximately fifty percent of each run of salmon, managed on a river-system by river-system, run-by-run basis."

➤ "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act"

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Coastwide: Pacific Salmon Treaty covers fisheries and protects stocks in Southeast Alaska, Canada, Wa., Or., & Idaho

Ocean: Pacific Fisheries Mgmt. Council schedules fisheries and protects stocks in Wa., Or. & Ca.

“Terminal” & “Extreme Terminal”: Wa. & tribes manage stocks and fisheries on the Washington Coast, Columbia River and in Puget Sound



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**Western
Pacific
Fisheries
Mgmt
Council**

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The map shows the Western Pacific region, including the North Pacific Ocean and South Pacific Ocean. Key island groups and individual islands are labeled: Northern Mariana Islands, Guam, Wake Island, Hawaiian Islands, Johnston Atoll, Palmyra Atoll, Howland Island, Baker Island, Jarvis Island, and American Samoa.

➤ Thanks to Charles Ka'ai'ai for contributing slides for this section.



Western Pacific Fisheries Management Council

Hawaii, American Samoa, Guam, Northern Mariana Islands (NMI) and the uninhabited U.S. islands of the Pacific.

Indigenous people defined differently.

Seven of 13 voting Council members are people of indigenous descent from communities of American Samoa, Guam, and NMI

- Hawaii: recognized by State, seeking Federal status, descendants of inhabitants prior to 1778 (20%).
- American Samoa: Deeds of Cession of 1900 (90%).
- Guam: Organic Act of Guam, 1950 (40%)
- Northern Mariana Islands: Covenant to establish a Commonwealth, 1986 (90%).
- Pacific Insular Areas contain unique historical, cultural, legal, political, and geographical circumstances which make fisheries resources important in sustaining their economic growth (MSA 2(a)(10)).



Western Pacific Fisheries Management Council MSRA Provisions

Indigenous Provisions

Pacific Insular Area Fishing Agreements

Western Pacific Community Development Program (305(i))

- Provide access ... to fisheries.
- Develop criteria ...
- ... take into account traditional indigenous fishing practices ...

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- Western Pacific Community Development Program (305(i))
- Western Pacific Community Demonstration Project Program (305 note)
- Western Pacific Regional Marine Education and Training (30(j))
- Applies to island areas except Hawaii.
- Authorized foreign fishing within the EEZ at the request of the Governor of the Island area.
- Revenues from agreement provided to island governments.
- Provide access for Western Pacific communities to fisheries managed by the Council.
- Notwithstanding any other provisions of the Act, the Council shall take into account traditional indigenous fishing practices in preparing any fishery management plan.



Western Pacific Fisheries Management Council MSRA Provisions

Western Pacific Community Development Program Eligibility (305(j))

- Location and criteria
- Aboriginal (fishing) people indigenous to the area ...
- No previous harvesting or processing capability ...
- Community Development Plan

➤ Located within the Western Pacific Region; meet criteria developed by the WPFMC, approved by the Secretary and published in the FR.

➤ No previous harvesting or processing capability to support substantial participation in fisheries in the Western Pacific Region ...

➤ Develop and submit a Community Development Plan to the Council and Secretary ...



Western Pacific Fisheries Management Council MSRA Provisions

Western Pacific Community Development Program Demonstration Project Program (305, note)

- Direct grants to eligible western Pacific communities.
- \$500,000/fiscal year.
- CDPP Advisory Panel
- Appropriate Federal agencies may provide technical assistance.

➤ Secretary is authorized to make direct grants to eligible western Pacific communities, as recommended by the Council, to foster and promote indigenous fishing practices and enhance Western Pacific Region community-based fishing opportunities.



In Summary

- **Unique and distinctive relationship.**
- **Right of tribes to set own priorities and make decisions affecting their resources and distinctive ways of life.**
- **Individual tribal circumstances differ.**
- **Effective working relationships and consultations processes are key.**

➤ There are unique and distinctive relationships between the U.S. and tribes as defined by treaties, statutes, executive orders, judicial decisions ... different than other relationships with the Federal government.



In Closing

- **Contact Information:**
 - Gary S. Sims, Ph.D.
 - 503.780.9779
 - gary.sims@noaa.gov





In Closing

Thank-you

