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Washington Tribal/State Relations Evolving, But Further Work Is Needed

By Gabriel S. Galanda

Polarity accurately describes the historic legal relationship between the State of Washington and those tribal governments indigenous to our state. Tribal sovereignty, i.e., "the right of reservation Indians to make their own laws and be ruled by them,"[1] has always been antipodal to state sovereignty as a matter of Anglo-American jurisprudence. So much so, that by the late 1800s nascent states were deemed the Tribes' "deadliest enemies" by none other than the U.S. Supreme Court.[2] And over the ensuing century, tribal and state governments waged a zero-sum battle over who would regulate Indian Country.

But today, in what is the era of Indian self-determination as a matter of both federal policy and tribal behavior, tribal/state opposition is waning. As noted by leading Indian law scholar, Professor Matthew T. Fletcher:

> States and tribes are beginning to smooth over the rough edges of federal Indian law — jurisdictional confusion, historical animosity between states and Indian tribes, competition between sovereigns for tax revenue, economic development opportunities, and regulatory authority — through cooperative agreements. In effect, a new political relationship is springing up all over the nation between states, local units of government, and Indian tribes.[3]

Washington tribal/state relations and the new political relationship between our state's sovereigns are indeed evolving. Still, based on the Washington Supreme Court's three most recent Indian law decisions, more progress is required to achieve tribal/state congruity throughout official state policy. In particular, the increasingly cooperative relationship between the Tribes and State must be better appreciated when the Court next evaluates regulatory power or adjudicatory jurisdiction in Washington Indian Country.

Deadliest Enemies

In what is perhaps the most influential decision in all of federal Indian law, *Worcester v. Georgia*, U.S. Supreme Court Chief Justice John Marshall declared that state law "can have no force" within an Indian nation's territorial jurisdiction.[4] That proclamation most certainly polarized tribes and states throughout the country, including Washington, from the moment it became a state in 1889 and for the next 100 years.

Throughout the first half of the 20th Century, millions of acres of land were stolen from Washington Indians.[5] Indian women here were sterilized through the 1930s.[6] And until modern times, tribal children were removed from their parents, taken out of state and washed of their cultural identity, before being used for manual labor in "Indian schools."[7]

If such forces of overt "assimilation" and "termination" policy toward Indians were not enough to permanently polarize Indian and non-Indian society, tribal/state governmental relations were deeply wedged in 1963, when Washington unilaterally assumed full criminal jurisdiction and partial civil jurisdiction over Indians on remaining Indian lands pursuant to federal Public Law 280. University of Washington Professor Robert T. Anderson attributes the State's grab of tribal inherent authority to "local racism and jurisdictional jealousy."[8]

Over the next decade, Washington's "fish wars" ensued, with state and local law enforcement utilizing criminal arrest to deprive Indians of treaty-reserved fishing rights, making matters even worse.[9] An epic clash of sovereigns ensued in the *U.S. v. Washington* litigation, resulting in a controversial decision by U.S. District Court Judge George Boldt that guaranteed the Tribes half of the fish harvest[10] and by 1979 a momentous Indian victory before the U.S. Supreme Court.[11]

Among other things, the judicial affirmation of the Tribes' reserved treaty right to fish as "their source of food and commerce" solidified a foundation for the economic development we are witnessing throughout Washington Indian Country today.[12] Above all though, "the Boldt Decision" entrenched Washington Tribes as a legal and political force to be reckoned with.

The Accord

Litigation between the sovereigns continued throughout the 1980s. Yet, with federal and state "Indian law" remaining rather dynamic and most uncertain, litigation-worn Washington tribal and state leaders began to consider the wisdom of forging a new avenue of tribal/state relations. Diplomacy emerged. Relationships formed. Mutual respect occurred. And sure enough, those rough legal edges began to soften.

In 1989, the State and Tribes signed the Centennial Accord, both in commemoration of the 100th anniversary of Washington's statehood and in homage to Washington's first sovereigns. Founded on a government-to-government relationship, the Accord, which today exists in a life of its own, "respects the sovereign status of the parties, enhances and improves communications

between them, and facilitates the resolution of issues." The State and Tribes expressly "recognize that their relationship will successfully address issues of mutual concern when communication is clear, direct and between persons responsible for addressing the concern." Pivotally, a new way was forged.

Ten years later, the State and the Tribes reunited "in the spirit of understanding and mutual respect of the 1989 Centennial Accord and the government-to-government relationship established in that Accord," with a desire to strengthen their relationships and "cooperation on issues of mutual concern." They created the Millennium Agreement, whereby they pledged continued cooperation through the development of "enduring channels of communication [and] institutionaliz[ed] government-to-government processes that will promote timely and effective resolution of issues of mutual concern," and a state-tribal "consultation process, protocols and action plan."

The Millennium Agreement coincided with the negotiated introduction of machine gaming to Washington Indian Country in 2000. Machine gaming has since brought unprecedented economic opportunity to Washington tribal communities and, in turn, infused tens of thousands of jobs and billions of dollars into our state's economy.

Good Neighbors

In the years since the Centennial Accord was forged, countless tribal/state controversies have been resolved through communication and cooperation, rather than controversy and litigation. Those government-to-government processes have resulted in numerous pacts between state and tribal governments that apportion police power, distribute impacts, share tax revenues and establish fee-for-service relationships.

With Washington's policymakers seeing significant tangible benefits from such accords, including tribal six-figure impact payments to counties, cities and towns, state statutes and policies encouraging, if not mandating, tribal/state collaboration have proliferated statewide.

In 1995, the Washington Supreme Court promulgated Civil Rule 82.5, which requires Superior Courts to "recognize, implement and enforce the orders, judgments and decrees of Indian tribal courts."[13] Many Washington tribal codes likewise require tribal courts to extend full faith and credit or comity to state and federal court rulings, respectively.[14]

In the same spirit, the Legislature passed a statute in 2010 that authorizes cross-deputization agreements between local and tribal governments so that tribal law enforcement officers can enforce state law as "general authority Washington peace officers."[15] As a corollary, state police officers can enforce state criminal process by following tribal criminal search and arrest procedures.[16]

Critically, as we ascend from the Great Recession, commerce has not been exempted from the State's new Indian policy. In 2011, the Department of Revenue amended Washington Administrative Code § 458-20-192 to codify "policies and objectives of the Centennial Accord and the Millennium Agreement," and require that the agency consult and collaborate with the Tribes on a government-to-government basis; especially to "provide additional guidance regarding business activities engaged in by Indians and by nonmembers doing business with Indians."

The next year, the Legislature enacted a statute requiring all state agencies to establish "a government-to-government relationship" and "make reasonable efforts to collaborate" with the Tribes.[17]

Potentially of most consequence, in 2012 the Legislature passed a law that will allow tribes individually to petition the governor to have the State retrocede from "all or part" of the criminal and civil jurisdiction it usurped from the Tribes under Public Law 280 in 1963.[18] The retrocession process involves not only a "government-to-government meeting" between a petitioning tribe and the governor, but "the tribe and affected municipalities are encouraged to collaborate in the adoption of interlocal agreements ... with the goal of ensuring that the best interests of the tribe and the surrounding communities are served by the retrocession process."[19]

In all, the process is designed to ensure understanding and reconciliation of "the effects of retrocession on both Indian and non-Indian communities."[20] The process epitomizes the new, less-polarized political relationship between our state's sovereigns and how it permeates state policy. And with still more collaborative work to be done between the Tribes and their next-door neighbors in local government, the process provides a platform for far more inter-local progress.[21]

Nevertheless, recent Washington Supreme Court decisions suggest that tribal/state polarity has yet to vanish altogether from the highest levels of state government.

The Outliers

In *State v. Eriksen*, five justices ruled that a Lummi police officer who pursued a non-Indian drunk driver on the Lummi Reservation could not stop her after following her off the reservation or detain her until county police arrived to arrest her.[22] This decision reversed on reconsideration a 2010 decision that tribal police can "engage in fresh pursuit of suspected drivers first encountered on the reservation."[23]

That initial ruling proclaimed: "Our decision today harmonizes with common sense and sound policy."[24] Yet, in reversing itself a year later, the Court expressed concern about "undermining Washington's sovereign authority to regulate arrests in the state" by extending tribal police power off reservation, even in the instance of fresh pursuit.

The majority's stated rationale unfortunately epitomizes diametrically opposed tribal/state relations of decades past. Indeed, the justices admitted that their ultimate decision "create[d] serious policy problems, such as the incentive for intoxicated drivers to race for the reservation border,"[25] and purposefully left the solution to political and legislative devices.

In a decision handed down this summer, *State v. Clark*, the Court unanimously affirmed a theft conviction of a Colville Indian based upon a trial court's refusal to suppress the fruits of Omak police officers' search of the defendant's home on reservation trust lands.[26] The justices held that "the State does not infringe tribal sovereignty by searching reservation lands unless it disregards tribal procedures governing the execution of state criminal process" thereon.

Although the Colville Tribes have codified procedures for "a State to obtain a tribal warrant in addition to a state warrant," that did not prove to be enough to invalidate the search, which was executed pursuant to a state warrant. As the Court noted, the tribal provision did "not govern the way the State executes its own process"

on Indian lands, thus "the State did not infringe the Colville Tribes' sovereignty with the search."[27]

The implication that sufficient tribal procedures can govern state and local police officers' execution of state criminal process in Indian Country was "based upon accommodating the interests of the Colville Tribes with those of the State."[28] Yet, hearkening back to tribal/state dynamics of old, the Court paternalistically warned the Tribes against ever "regulat[ing] the execution of state criminal process in a manner that meaningfully frustrates the State's ability to punish those who break the law."[29]

And last year, in *Automotive United Trades Org. (AUTO) v. Gregoire*, the Court considered whether tribal governments were indispensable parties under Civil Rule 19 to an action brought by a gas station retail association challenging tribal/state fuel tax compacts.[30] Although the five-justice majority determined that the Tribes are necessary parties whose joinder is not feasible due to sovereign immunity, the Court ruled that the Tribes were not indispensable.

The justices professed affording "heavy weight" to the Tribes' sovereign status and "respect for sovereign immunity," but in the final analysis ceded to citizen-plaintiffs: "Where no other forum is available to the plaintiff, the balance tips in favor of allowing this suit to proceed without the tribes."[31]

As one commentator suggests, the Court's majority failed to appreciate that the State and Tribes "spent much of the latter half of the 20th century in court — at substantial cost — litigating territorial taxation disputes" and that "[i]nstead of direct taxation, states were encouraged by the U.S. Supreme Court to 'enter into mutually satisfactory agreements with tribes for the collection of taxes.'"[32] Drawing our state's sovereigns back into court, although potentially healthy for certain special interests, is an unhealthy regression in modern relations between our state's sovereigns.

Today, unlike during most of our state's history, it is well-pronounced state policy that tribal and state governments should be given every opportunity to resolve their differences bilaterally and cooperatively — as equals. That resulting dynamic is one of co-regulation, and of benefit- and impact-sharing, rather than of zero-sum legal dueling.

Hopefully, our state Supreme Court will carefully consider this State's new policy of Indian relations when next crafting a remedy that affects the inherent rights of both of our state's sovereigns. Better yet, there won't be a next time. ■

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[1] *Williams v. Lee*, 358 U.S. 217, 271 (1959).

[2] *United States v. Kagama*, 118 U.S. 375, 384 (1886).

[3] Matthew L.M. Fletcher, "Retiring the 'Deadliest Enemies' Model of Tribal-State Relations," 43 Tulsa L. Rev. 73, 74 (2007).

[4] *Worcester v. State of Georgia*, 31 U.S. 515, (1832).

[5] Andrew H. Fisher, *Shadow Tribe: The Making of Columbia River Indian Identity* 96–111 (2010); *see also* Joseph William Singer, "Lone Wolf, or How to Take Property by Calling it a 'Mere Change in the Form of Investment,'" 38 Tulsa L. Rev. 37, 45 (2002) (discussing the taking of Indian lands vis-à-vis allotment generally).

[6] Charles Rutherford, "Reproductive Freedoms and African American Women," 4 Yale J.L. & Feminism 255, 273–74 (1992).

[7] Lindsay Glauner, "The Need for Accountability and Reparation," 51 DePaul L. Rev. 911, 942–43 (2002).

[8] *See* Robert T. Anderson, "Negotiating Jurisdiction: Retroceding State Authority Over Indian Country Granted by Public Law 280," 87 Wash. L. Rev. 915, 922.

[9] *See, e.g.*, Puyallup Tribe of Indians, Fishing: History: *http://www.puyallup-tribe.com/history/fishing/* (last visited Oct. 10, 2013).

[10] *United States v. Washington*, 384 F. Supp. 312, 328 (W.D. Wash. 1974).

[11] *State of Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

[12] *U.S. v. Washington*, No. 70-9213, 2013 WL 1334391, at *24 (W.D. Wash. Mar. 29, 2013) (citation omitted).

[13] Wash. CR 82.5(c).

[14] Snoqualmie Tribal Code § 5.1 ("The judgments, orders, warrants, decrees, subpoenas, records of a foreign court, and other judicial actions are presumed to be valid and will have the same effect as Tribal Court orders, judgments, decrees, warrants, subpoenas, records and actions ....").

[15] RCW § 10.92.020.

[16] Makah Tribal Code § 1.4.05 ("All judges and personnel of the Tribal Court shall be authorized to cooperate with ... with all federal, state, county and municipal agencies ....").

[17] RCW § 43.376.020. Such legislative and agency pledges carry the force of law pursuant to the state Administrative Procedures Act. *Kennewick Public Hosp. Dist. v. Pollution Control Hearings Board*, 126 Wn. App. 1030 (2005).

[18] RCW § 37.12.160(1).

[19] RCW § 37.12.160(2).

[20] Anderson, *supra* note 8, at 950.

[21] *See, e.g., Confederated Tribes of Chehalis Reservation v. Thurston County Bd. of Equalization*, 724 F.3d 1153 (9th Cir. 2013) (county efforts to tax tribal real property struck down); Gabriel S. Galanda, "Advancing the State-Tribal Consultation Mandate," Indian Country Today Media Network (Oct. 17, 2012) (discussing how states' "little siblings too frequently still act like tribes' deadliest enemies").

[22] 172 Wn.2d 506, 259 P.3d 1079 (2011).

[23] *State v. Eriksen*, 166 Wn.2d 953, 216 P.3d 382 (2009). This opinion has been withdrawn by the Court.

[24] 216 P.3d at 407.

[25] 172 Wn.2d at 514.

[26] *State v. Clark*, 178 Wn.2d 19, 308 P.3d 590 (2013).

[27] *Id.* at 31–32.

[28] *Id.* at 31, n.6.

[29] *Id.*

[30] *Automotive United Trades Org. v. State*, 175 Wn.2d 214, 285 P.3d 52 (2012).

[31] *Id.* at 233.

[32] Trent Latta, "Analyzing *Automotive United Trades Organization v. State of Washington*," 66 Wash. Bar News 22, 27 (2012) (citation omitted).

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