# Indian Law for the Washington State Port Commissioner

Gabriel S. Galanda

Washington Pubic Ports Association Annual Meeting

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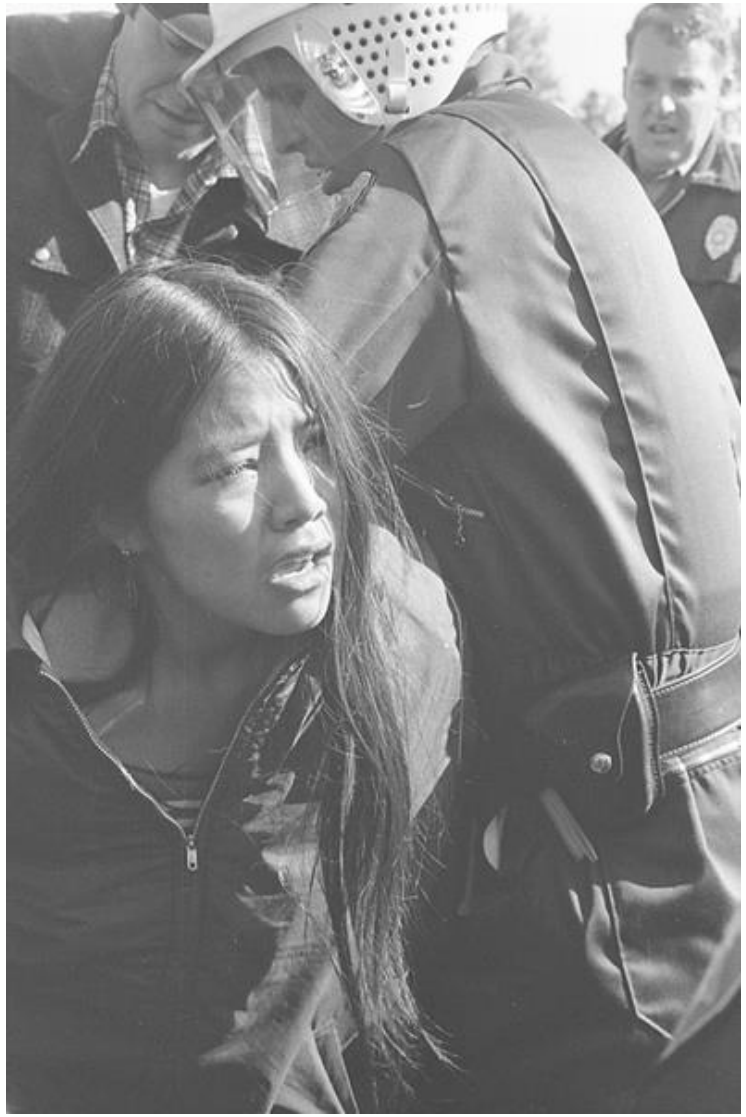

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# Yesterday

"[Indian communities] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their **deadliest enemies**."

- *U.S. v. Kagama*, 118 U.S. 375, 384 (1886).

# Today

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

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

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

# Overview

- U.S. Constitution & U.S. Supreme Court Precedent
- Stevens Treaties
- Caselaw
- Compacts, Consent, Consultation
- Tribal-State Policy & Centennial Accord
- Free, Prior & Informed Consent

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# Pre-Contact/Constitution

"Before contact with Europeans, Indians were organized in at least 2,000 groups with divergent languages, rituals, social systems, and methods of subsistence….The constituent social units of most native communities were clans or extended **kinship groups**."

- Cohen's Handbook of Federal Indian Law (2012 ed.) § 3.03.

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# U.S. Constitution

"The Congress shall have the power to...regulate commerce with foreign nations, and among the several states, **and with the Indian tribes**."

- U.S. Const., Art. I, Sec. 8, Commerce Clause
- *See also* Art. 1, Sec. 2 and 14th Amend. ("Indians not taxed")

# U.S. Supreme Court Precedent

"Indian tribes are "**distinct, independent political communities**, retaining their original natural rights" in matters of local self-government.

A Tribe "is a distinct community . . . in which the laws of [a state] can have no force."

- *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

In other words, Indian Tribes inherently possess "the right . . . to make their own laws and be ruled by them."

- *Williams v. Lee*, 358 U.S. 217, 220 (1959).

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# Indian Treaties

"[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the **supreme Law of the Land**; and the Judges in every State shall be bound thereby…"

- U.S. Const., Art. V, Cl. 2, Supremacy Clause

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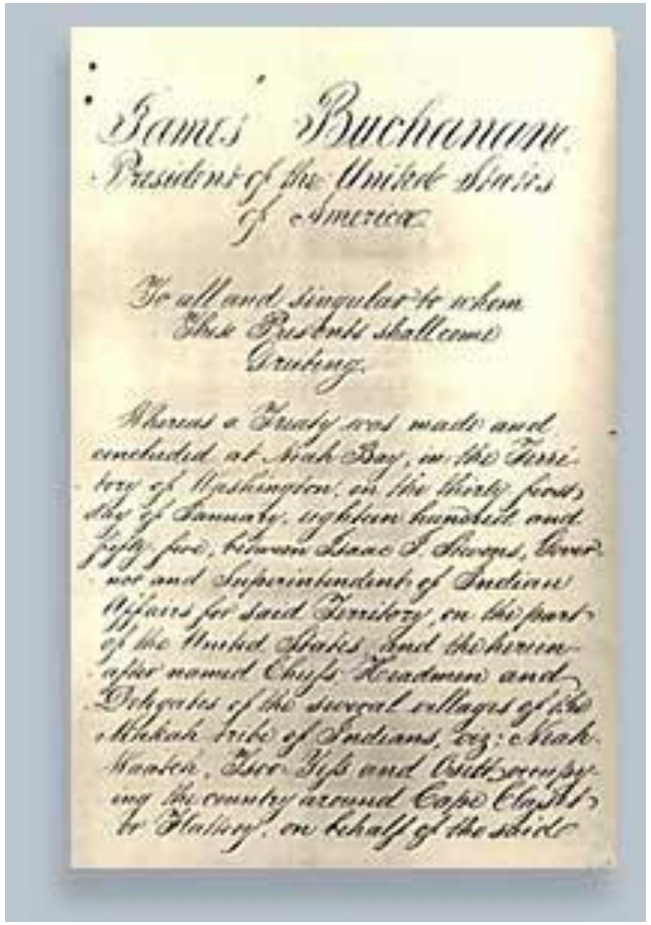
# Stevens Treaties



James Buchanan
President of the United States
of America

To all and singular to whom
these Presents
shall come
Greeting

Whereas a Treaty was made and
concluded at Mukl-te-eh, or Point
Elliott, in the Territory of Washington,
the twenty-second day of January, one
thousand eight hundred and fifty-five, by
Isaac I. Stevens, Governor and Superin-
tendent of Indian Affairs for the said
Territory, on the part of the United States,
and the hereinafter named Chiefs, Headmen
and Delegates of the Dwámish, Suquámish,
Sk-táhl-mish, Samáhmish, Smalh-kamish,
Skope-áhmish, S-káh-mish, Snoqualmoo,
Skai-wha-mish, N'Quentl-má-mish, Sk-táh-
le-jum, Stoluck-wha-mish, Sno-ho-mish,

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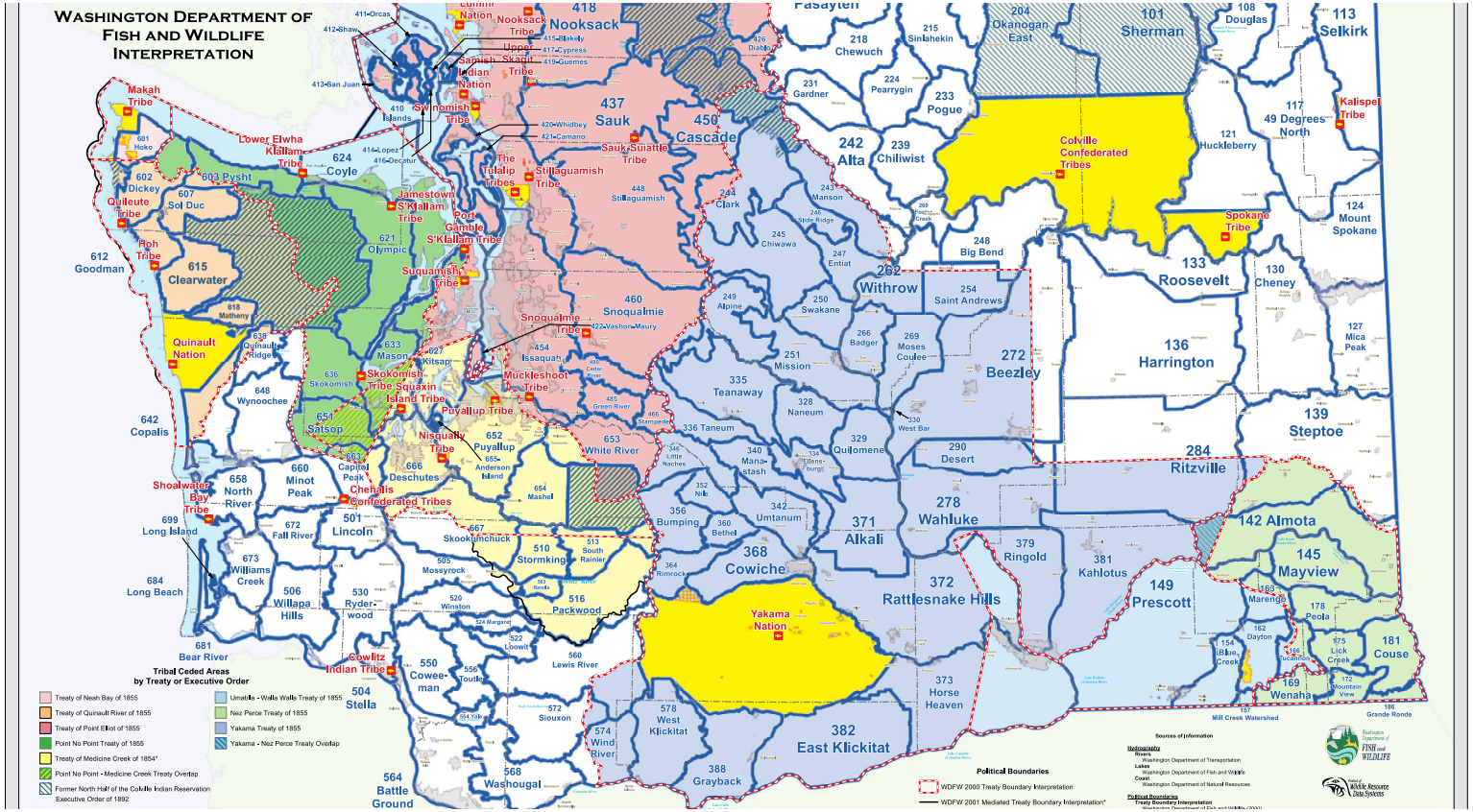
# Washington Stevens Treaty Territory

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# Indian Treaties

- The Stevens Treaties guarantee Washington Tribes various rights that extend beyond modern Indian reservation lands. See *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017).
  - Yakamas' "**right to travel** on the public highways includes the right to travel…for purposes of trade." *Washington State Department of Licensing v. Cougar Den, Inc.*, 586 U.S. ___ (2019).
  - **Usufructary rights** to fish, hunt, gather and worship on "ceded lands." *Minnesota v. Mille Lac Band of Chippewa Indians*, 526 U.S. 172, 178 (1999).
  - **Access rights** to those lands for subsistence and commercial purposes. *U.S. v. Washington*, 157 F.3d 630 (9th Cir. 1998).

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# Indian Treaties

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

- *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017).

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# Indian Treaties

"Really, this case just tells **an old and familiar story**. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dissatisfied with the consequences of one of those promises…now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do."

- *Washington State Department of Licensing v. Cougar Den, Inc.*, 586 U.S. ___ (2019) (Gorsuch, concurring).

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# Caselaw

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

- *Worcester, supra*.

  "[T]he Indian sovereignty doctrine [includes a] concomitant **jurisdictional limit** on the reach of state law."

  - *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 170–71 (1973).

  Counties lack "a concomitant right to exert in rem land use regulation over [on-reservation fee] lands."

  - *Gobin v. Snohomish Cty.*, 304 F.3d 909, 918~~7~~ (9th Cir. 2002).

  Counties and cities "infringe [upon] tribal sovereignty by searching reservation lands in disregard[ for] tribal procedures governing…state criminal process."

  - *State v. Clark*, 178 Wn.2d 19 (Wash. 2013).

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# Caselaw

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

- *McClanahan*, 411 U.S. at 170–71.

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# Caselaw

Tribes possess "'common law immunity from suit traditionally enjoyed by sovereign powers.'"

- *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)).

"[T]ribal immunity applies no less to suits brought by States (including in their own courts) than to those by individuals."

- *Bay Mills, id.*

A Tribal party can generally only be sued—including by a state—if either Congress or the Tribe has clearly and unequivocally waived Tribal sovereign immunity.

- *Santa Clara, supra*.

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# Compacts

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

- *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 514 (1991).

"Although the Tribe's sovereign immunity bars [a state] from pursuing its most efficient remedy—a lawsuit—to enforce its rights, adequate alternatives may exist…since States are free to…enter into **mutually satisfactory agreements with tribes**…"

- *Oklahoma Tax Comm'n*, id.

"One template for these new arrangements is the Class III compacting process created in the Indian Gaming Regulatory Act" of 1988.

- Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, *supra*.

# Consent

- Compacts are predicated on **Tribal consent**—to allow the State into Tribal regulatory affairs, whether it be access upon Tribal lands or the collection of state taxes.
- Compacts and inter-local agreements in Washington State have been negotiated since at least the late 1980s or early 1990s.
- The Tulalip Tribes, for example, negotiated:
  - The first Class III gaming compact with the State in 1992.
  - Inter-local land use permitting agreement with Snohomish County in 1998.
- In 2008, the Legislature authorized cross-deputization agreements between tribal and local governments, by which some tribes allow non-tribal officers to enforce tribal law on tribal lands. RCW 10.92.010.

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# Consultation

- Tribal consent is only obtained through a process of meaningful government-to-government consultation.
- In short: "Stop, look, and **listen**."
  - *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir.1999).
- Federal-tribal consultation has long been federal law and policy:
  - Treaty with the Kaskaskia, Peoria, Etc., May 30, 1854, art. 7, 10 Stat. 1082, 1084.
  - President Lyndon B. Johnson, Special Message to Congress on the Problems of the American Indian: "The Forgotten American," 1 Pub. Papers 336 (Mar. 6, 1968)
  - President William J. Clinton, Government-to-Government Relations with Native American Tribal Governments: Memorandum for the Heads of Executive Departments and Agencies, 59 Fed. Reg. 22,951, 22,952 (Apr. 29, 1994).
  - President Barack Obama, Governments: Memorandum for the Heads of Executive Departments and Agencies, 59 Fed. Reg. 22,951, 22,952 (Apr. 29, 1994).

# Local Consultation

- Washington law, most notably the Shoreline Management Act and Shoreline Master Programs ("SMPs"), requires local government entities to consult with tribes. RCW Chapter 90.58.
- SMPs "shall include a mechanism for documenting all project review actions in shoreline areas [and] a process for periodically evaluating the cumulative effects of authorized development on shoreline conditions…a **joint effort** by local governments, state resource agencies, **affected Indian tribes**, and other parties." WAC 173-26-191(2)(a)(iii)(D).

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# Local Consultation

- In preparing or amending SMPs, "[l]ocal governments are encouraged to work interactively with neighboring jurisdictions, state resource agencies, **affected Indian tribes**..." WAC 173-26-201(2)(a).
- "Prior to undertaking substantial work, **local governments shall notify affected Indian tribes** to identify tribal interests…and methods for **coordination and input**." WAC 173-26-201(3)(b)(iii).
- Cowlitz County's SMP, for example, requires the county to "**consult with…tribes** to maintain an inventory of areas containing potentially valuable archaeological data…"

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# Lack of Local Consultation = Disaster

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# Local Consultation

Local governments, including Ports, should consult and collaborate with Tribal neighbors not only about archaeological resources, but also "to smooth over [any] rough edges," relating to "jurisdictional confusion, historical animosity between states and Indian tribes, competition between sovereigns for tax revenue, economic development opportunities, and regulatory authority…."

- Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations, supra.*

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# Tribal-State Policy

1972: Gov. Dan Evans issued E.O. 72-11, creating the Governor's Indian Advisory Council "for both sovereign Indian Nations and the state of Washington **to evaluate and coordinate more closely** with respect to meeting the needs of Indian communities."

1980: Gov. Dixie Lee Ray issued E.O. 80-02, establishing the Governor's Office of Indian Affairs "to work with Indian tribes to establish a relationship…that will be conducive **to improving communications and facilitating joint problem solving efforts**."

1985: Gov. Booth Gardner:

> "wanted to clarify the responsibility of the State to be respectful of tribal sovereignty and make things better with the tribes."
>
> Was "interest[ed] in **establishing strong government-to-government relationships** that would last beyond his administration and tenure."
>
> "hoped to lessen the reliance on lawsuits to settle issues."

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

# Centennial Accord

Gov. Gardner "had his Chief of Staff Dick Thompson talk with leaders about facilitating a process to develop **a new framework for working together**."

"The conversation began with…meeting with widely respected tribal leaders Mel Tonasket (Colville)and Joe DeLa Cruz (Quinault)."

Then "it was **time to call the tribes together**."

Jamestown S'Klallam Chairman Ron Allen "became chairman of an ad hoc team of tribal leaders to develop the new process [and] an important writer of the Accord in collaboration with Bob Turner, the Governor's Policy Advisor…"

Tribal and state leaders "sat in the hallway…working the language and precepts of the integrity and objectives of the state/tribal relationship on [Alllen's] computer. They brought the draft to Thompson the next day and he said he liked it."

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

# Centennial Accord

On Aug. 4, 1989, Gov. Gardner and 26 Tribes consummated the Accord, "making Washington and the tribes **the first in the Nation** to establish such a [memorialized] relationship to strengthen tribal and state government-to-government relations."

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

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# Centennial Accord

- "This Accord provides a framework for that **government-to-government** relationship and implementation procedures to assure execution of that relationship."
- "[T]he parties share a desire for **a complete Accord** between the State of Washington and the federally recognized tribes in Washington reflecting a full government-to- government relationship and will work with all elements of state and tribal governments to achieve such an accord.
- "This Accord encourages and provides **the foundation and framework for specific agreements** among the parties outlining specific tasks to address or resolve specific issues."

# Centennial Accord

- On Nov. 4, 1999, Gov. Gary Locke, AG Christine Gregoire, and tribal leaders gathered at Leavenworth and reaffirmed their continuing support for the Centennial Accord by signing the Millennium Agreement.
- The 1999 pact restated the goals of the original Accord and recommitted the State and Tribes to a number of goals, including:
  - Strengthening the government-to-government relationship between the state and tribal governments;
  - Cooperating and communicating more effectively;
  - Developing a consultation process; and
  - **Encouraging the state legislature to codify a structure for addressing issues of mutual concern**.

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# Millennium Agreement

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

# Centennial Accord

- In accordance with RCW 43.376, the State's various agencies have adopted "Accord Plans," with consultation requirements enforceable under the State Administrative Procedures Act.
- Consider the Department of Health's Consultation and Collaboration Procedure:

> In addition, any entity listed in the "Parties to Consultation" Appendix C can request a pre-consultation meeting using mechanisms in Section III or a consultation meeting using the form in Appendix A. To the extent permitted by law, DOH shall not proceed on any policy or action that has tribal implications or is not required by law, unless and until DOH, prior to proceeding on the policy or action, has adhered to the consultation process.

# Free, Prior & Informed Consent (FPIC)

- The roots of FPIC date back to 1919, when the International Labor Organization (ILO) complained "that indigenous peoples themselves were left entirely out of the planning and implementation of programs."
- In the 1980s, the World Bank Group adopted FPIC, in the context of displacement of Indigenous peoples from their homelands.
- By the late 1980s, American Indigenous peoples proposed FPIC to the Working Group on Indigenous Peoples (WGIP).
- In 1989, ILO Convention No. 169, upon consultation with Indigenous peoples, codified FPIC.
- In 1993, WGIP produced a first draft Declaration on the Rights of Indigenous People (UNDRIP), which the UN General Assembly approved in 2007.
  - Carla F. Fredericks, *Operationalizing Free, Prior, and Informed Consent*, 80 Alb. L. Rev. 429, 432 (2017).

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# Free, Prior & Informed Consent (FPIC)

- In 2010, the United States "len[t] its support" to UNDRIP, with its four FPIC provisions, including:
  - Nation "States shall consult and cooperate in good faith with the indigenous peoples…in order to obtain their [FPIC] **before adopting and implementing legislative or administrative measures that may affect them**."
- The Obama Administration's decision came after three consultation meetings with U.S. Tribes and more than 3,000 written comments.

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# Conclusion

After nearly 50 years of "sovereign Indian Nations and the state of Washington" working together "to evaluate and coordinate more closely with respect to meeting the needs of Indian communities," Washington's Ports should adopt a government-to-government approach of consultation and collaboration with neighboring Tribal governments.


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# Thank You

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