

State Tribal Intergovernmental Relations

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As I read "old" documents first published in 1971 and 1973, and revised in 1978, I was once again acutely aware of how many people have been involved in both speaking out and working to put "pen to paper" on so many fundamental issues related to the daily lives of Indian people, the daily lives of tribal governments, and areas of difficulty and need in state-tribal relations. The readings have enhanced my abilities to contribute to these areas that need ongoing dialogue, improvement, and collaboration.

State Tribal Intergovernmental Relations

Introduction and Background

This paper began as a requirement for completing an Independent Learning Contract at The Evergreen State College. The plan was to research historical documents on state-tribal relations, explore preparatory information to the final version of Washington State's Centennial Accord, and access public documents of primarily Western states relevant to how they structure their state-tribal government relations. The intent was to overview, compare and analyze the structure of several state-tribal relations and if possible focus on how government-to-government relations were implemented in specific policy areas, especially health, social services, taxation and/or gaming. In a broader sense, it was hoped the readings and research might indicate how varying structures related to implementation of state-tribal government-to-government interests.

This study is motivated by both personal and professional interests. As Washington State's current Mental Health Division Tribal Liaison, I have a professional interest in having a longer historical understanding, before the Boldt decisions, of the Centennial Accord, and gaining a deeper layer of understanding about the variety of ways states formally structure their relations with tribal governments. I'm curious if similar policy areas are priorities in other states, if there are approaches Washington State can use to improve its intergovernmental relations with tribes, and also enhance my skills to respond to the needs of all the governments involved. In Washington State, given the specifics of state mental health statutes, county governments' responsibilities and deficits are also

involved in tribal-state government to government relations in public mental health policy. This means: 1) there are multiple overlapping jurisdictional issues; and 2) the state has committed itself to government-to-government relations with tribes, via the Centennial Accord, but has statutory realities it must both work with and work around to successfully achieve those commitments. I am also personally interested and curious about state-tribal intergovernmental relations and anticipate pursuing more knowledge and skills specific to the wider focus of intergovernmental relations.

I began this project with some assumptions I have found to be at least somewhat flawed. I assumed learning about how other states structure their relationships with tribes would help me understand if those structures can help improve Washington State's state-tribal relations. There are several weaknesses in this assumption. I have read the books identified for this project and talked with the people involved. The specific histories and details of each state and tribe are important: the number of federally recognized and unrecognized tribes; the presence or lack of urban Indian populations; the number of landless tribes; and the specific legal underpinnings all have bearing on the structures selected by states and the cooperation and collaboration between tribal and state governments on day to day issues of mutual concern. Also, I have come to believe focusing on the structure is less important than attending to some of the concerns articulated very eloquently in the 1983 *Handbook [on] State-Tribal Relations* [Commission on State-Tribal Relations]. The concerns and issues articulated in this document, though created twenty-three years ago, still provide

guidance for any of us interested in state-tribal government-to-government relations. I will focus a main portion of this paper on the Commission's guidance, as my analysis of the materials read and information reviewed suggests this is the most direct way to make practical progress on the many issues of concern to both tribal and state governments. I will also review some other states' structures of tribal-state relations.

The need to consciously develop state/tribal intergovernmental relationships led the National Congress of American Indians [NCAI] and the National Conference of State Legislatures [NCSL] to work together to "promote intergovernmental cooperation between states and tribes through a State-Tribal Relations Project." [NCAI website] Both NCSL and NCAI have information on their websites about this project and NCSL has a number of publications for sale addressing both general conceptual policy information and specific policy areas. As mentioned earlier an essential document for any interested in studying state-tribal relations¹ is the *Handbook on State-Tribal Relations* developed by The Commission on State-Tribal Relations [referred to as the Commission] chartered in 1977 by NCSL, NCAI and the National Tribal Chairmen's Association [NTCA].

History is important in tribal/state relations and some understanding of these organizations is valuable. NCAI "is the oldest national Indian organization in the United States...founded in 1944..." [Commission, 1983, p.1] NCSL "is a bipartisan organization that serves the legislators and staffs of the 50 U.S. states, it's commonwealths and territories"...It's mission is to "provide research,

¹ There has been a conscience choice to interchange use of 'state-tribal relations' and 'tribal-state relations' throughout this document. It is hoped this may assist a focus on the arena of inquiry rather than possible power differentials or assumptions of entrenched positions.

technical assistance and opportunities for policy makers to exchange ideas”, and collaborate on shared concerns to create a stronger voice in federal lobbying and advocacy efforts. [NCSL] NTCA, established in 1971, represents leaders of federally recognized tribal governments and serves as a national voice for its governments’ elected chairs.

Discussing tribal-state relations requires acknowledging the American Indian Law Center, Inc.

It is the “oldest national Indian legal and governmental advocacy group. It is an Indian-controlled, non-profit corporation organized for research, training, and service to Indian tribal governments and communities in all areas of law, policy and governmental affairs....formed in 1967 as an institute of the University of New Mexico School of Law [with] independent status in 1978...with close association with the law school. **The law center played an important role in the conception and formation of the Commission on State-Tribal Relations** [emphasis author’s] and was asked to provide staff for the Indian tribal participants on the commission because of its unique background of assistance to tribal governments in policy analysis and institutional development. [Commission, 1983, p.2]

The Commission was formed during heightened public attention to Indian Affairs, in the 1970’s and functioned from 1976 – 1987. After that time NCAI and NCSL continued its work via the State-Tribal Relations Project mentioned earlier. The Commission chose in its *Handbook* to focus “on the practical issues that are more important to the daily functioning of this complex, permanent and unavoidable intergovernmental relationship...” [Commission, p.13]

Key Concerns and Issues

State and tribal governments usually come together to discuss issues of shared concern or areas where jurisdiction raises questions and at times

differences needing resolution for the smooth and efficient operation of government and the provision of services to their citizens. In other words, often governmental policy or jurisdictional concerns are the instigating force that brings the governments together. These discussions may occur after significant litigation has occurred, or after efforts lacking collaboration have failed to resolve the concerns. This may indicate the parties are coming together with a less than pleasant attitude.

Washington State made significant progress, through the Centennial Accord, by agreeing with Federally Recognized Tribes to work together on issues of mutual concern. The state and tribal experiences surrounding what are often referred to as the Boldt Decisions left both parties millions of dollars poorer, but still unsatisfied with the results. The Centennial Accord is a valuable example of good minds continuing to work to identify how to improve tribal-state relations even in the midst of much discord and tension.

In order for state-tribal government-to-government relations to result in mutually successful outcomes there are many key, often unidentified, “guests” who arrive at a tribal-state government negotiation table along with the governments’ representatives. These “guests” must be addressed directly to enhance the skills of those government representatives who are exploring coordinated and collaborative governance. For many reasons, it is not unusual for tribal governments and state governments to bring to the table of their discussions:

- a) A lack of general information about how the other government[s] work[s], i.e. who makes decisions and policies, processes for decision making, policy making and budget development, who has what authority, government funding sources, stability of the revenue streams and any restrictions or regulatory oversight attached to revenues and expenditures, and areas of jurisdictional authority;
- b) Any special circumstances with which each government is operating;
- c) Unspoken and unexplored assumptions about the other government[s], including their motives and attitudes toward the government[s] with whom they are sharing the table;
- d) A lack of relevant historical knowledge and an understanding of how that history informs the current conversations;
- e) Different understandings about the role of the federal government in the discussions; and
- f) A lack of realization of how much state and tribal governments have mutual interests that can be furthered by mindsets of cooperation.

These “guests” have the potential, if unaddressed, of disrupting the significant opportunities existing for state-tribal collaboration, and many “win-win” negotiations.

Depending on the specific issue, it is often government administrators and/or elected leaders who are the actual participants in these discussions. Many people are busy and often focus with a “get the work done” kind of attention. This frequent precondition may make the time spent addressing the

previously identified “guests” seem wasteful or unproductive, sometimes it is even incorrectly identified as “process” and contrasted with a notion of “product”. I would assert the time spent addressing the “guests” directly is an important strategic decision state and tribal governments can make to improve the quality and efficiency of their discussions, negotiations, and/or collaboration.

When observing the selections of juries for trials, potential jurors are often asked “do you think you can you put aside your [previously identified experiences], prejudices [articulated about certain groups of people], or attitudes about... to fairly judge this person on the facts presented or this case on its merits?” As an observer it has appeared to me that many people answer “yes” to this question when everything I have listened to them say to that point and everything I have ever learned about human behavior, would indicate “no”. Perhaps it is an inclination to think well of ourselves and to believe we can fairly judge or evaluate based on the “facts” that are presented. Unfortunately the jury room experience often does not reflect those hopes and beliefs.

I have also heard people trained as attorneys and working as judges or attorneys talk about the notion of “common sense” when discussing specific laws, jury processes and other aspects of applied law. They have often said the standard is what a man using common sense would have to say about this case, this information, this law, this business decision under review, this ‘fact’, etc. Unfortunately for tribal governments there is a profound lack of information about Federal Indian Law, local treaties with Indian Nations and their applicability today, how tribal governments work, etc. among the general public citizenry,

including municipal, county and state government administrative staff and elected officials. This precondition of a lack of knowledge is often coupled with misunderstandings and misinformation. In other words, important preconditions for having “common sense” have not been met. What may appear to some to be “fluff” or unnecessary “process” may be the first time some facts on a subject matter or having relevance to the discussion are ever heard by some of the participants. This can also be true for how state government operates and some of the details of its functioning. Once past the sharing of relevant information and history that can help all at the table have some degree of “common sense”, there is important information shared and assertions made in the Commission’s *Handbook of State-Tribal Relations* which are relevant today and helpful for productive conversations.

Jurisdiction

Jurisdiction—a term often used carelessly in the tribal-state discussion—means only the power or authority of a government to govern. Its scope may be defined in terms of territory, persons, subject matter or a combination of these elements....In the past, tribal-state conflict has resulted largely from the attempts of the governments to establish their exclusive power in these ambiguous areas or to avoid responsibility....[Commission, p. 15]

Issues related to questions of jurisdiction seem to be one motivation for state and tribal governments to collaborate. States and tribes may have overlapping jurisdiction over territory, persons and/or subject matter. At times the “total governmental system serving an Indian reservation area [is] a system including tribal, federal, state and municipal governments in a complex manner.”

[Commission, p. 14] One feature of this system can be ambiguities, a lack of clarity.

The *Handbook* suggests that state and/or tribal governments may make an assumption that all ambiguities must be clarified before government-to-government agreements can be executed. It suggests this assumption may be an unnecessary barrier to forward movement in state-tribal negotiations, and to consider working with the assumption that all ambiguity does not need to be resolved for tribal-state agreements on practical issues and concerns. As a participant in some state-tribal negotiations for the past several years, I find this suggestion helpful to mutual forward movement. My direct experience indicates this assumption has been a “deal stopper” when agreements were nearing stages of resolution, and also might suggest that not all questions must be answered before some questions can be. Indeed, this is an interesting approach I think may help to open up minds, and assist all involved in state-tribal relations to think “outside the[ir accustomed] box”. It is probably important to state this assumption has been a favorite of attorneys representing both various governmental parties, and service delivery parties who want one clear, complete answer and have not considered crafting agreements where there can be more than one answer or acknowledgement of more than one way of achieving the desired goals.

Another assumption can be that jurisdiction not yet exercised is jurisdiction relinquished. This is a particularly important assumption to name and address consciously in some state-tribal negotiations. Native Sovereign Nations have

many jurisdictional powers and opportunities that have not been utilized or fully realized due to many factors, including changing federal policies and laws, inadequate funding of tribal government and the relatively recent opportunities for tribal self-governance coupled with gaming revenues providing a stronger fiscal foundation for tribal economic development and the growth of tribal governments. The *Handbook* provides important elaboration. The following extensive quote is included here for its comprehensive identification of key content.

The lives of tribal and state policymakers would be greatly simplified if the jurisdiction of tribes and states were always allocated discretely within the three general categories of geography, persons or subject matter. But while all have a bearing on the issue, none is an invariable determinant.

...neither state nor tribal jurisdiction is determined wholly on a territorial basis...In most intergovernmental relationships, even if the territorial boundaries of each government overlap, they are clearly defined. But reservation boundaries and the jurisdictional status of areas within original reservation borders are often in dispute.

Neither state nor tribal jurisdiction is determined on a subject matter basis. Some categories are exclusively federal; others are arguably concurrent between federal and state or federal and tribal. In still other categories, states and tribes have the same subject matter jurisdiction, but the persons and territory over which it may be exercised is disputed or ambiguous. States are prohibited from interfering in the exercise of tribal self-government, and it is clear that this tribal power of self-government extends beyond the tribal membership for some purposes. Because tribes are considered to have inherent sovereignty, a particular state action may even be found to interfere with a hitherto unexercised tribal power.

...But the tribal-state relationship is riddled with inconsistencies and major questions that are still unresolved. [Commission, p. 16-17]

Analyzing the State-Tribal Relationship

Ground Rules

A section in the *Handbook* identifies helpful ground rules to adopt in intergovernmental relationships. The ground rules are:

1. Accept existing legal frameworks
2. Separate common from divergent interests
3. Avoid jurisdictional questions when possible

The third item has been addressed in some previous detail. The second item suggests state and tribal governments focus on their common interests first, and from there “isolate the divergent interests” [Commission, p. 19]. Washington State and applicable Federally Recognized Tribes meet at least annually, and under Washington’s current Governor Gregoire, semi-annually to implement the Centennial Accord and move forward on issues and action items of mutual concern. The most recent meeting occurred June 13th at The Evergreen State College’s Longhouse. It was interesting to note there were a number of times when both the Governor and Tribal Leaders shared information gathered from other meetings they had attended of Western Governors, or Tribal Leaders nationally and then asked each other for letter writing or lobbying efforts on various concerns to help successful decisions be made at the federal level, both legislatively and in administrative rule making. States and Tribes have many common interests.

A Realistic Look at Goals and Performance

It is possible for both tribal and state governments to have lofty goals at times articulated for political purposes and at other times to insure that guiding considerations are not forgotten in the midst of more specifically focused discussions. It is important for all parties to remember that while problems “may [be] different in detail, they [represent] real-world considerations that require compromise from idealized positions.” [Commission, p. 26] To reach workable state-tribal government-to-government agreements it is important for each government to realistically assess its own goals and performance. They also suggest the value in doing the same kind of work [identifying goals and performance] “with respect to the other government, keeping in mind that it is not compiling an adversary’s brief to persuade a court or to sway public opinion but rather attempting to function rationally in an intergovernmental relationship by arriving at an accurate view of the behavior of the other government.” [Commission, p. 26] The focus on the actual behavior of the government as contrasted with the expressed mission or idealized goals is important. There is a practical list of questions suggested for this recommendation.

1. What does the other government say its goals are?
2. What do its goals really seem to be as judged by its performance?
3. What moves it to act?
4. What does it fear?
5. And, especially, what does it seem to fear from our government? [Ibid.]

There is also an important suggestion “to identify and examine the negative impressions one has of the other government:

1. Why do we have this impression?
2. Is it based solely on fact or is it partly an impression or attitude which helps to justify a lack of communication or coordination?
3. Does the negative behavior, performance or attitude of the other government really set it apart or do we have similar problems with other governments with which we deal?
4. Do we ourselves have the same problem which we tend to overlook?
[Commission, p. 27]

Finally how does each government assess the information gathered? My experience to date would suggest that often state government administrators and officials do not realize how much tribal governments contribute to the state economy nor how often tribal governments perform work with separate funding streams that would otherwise be the responsibility of state government and an additional financial burden on the state. In the current sub section of health care where I now work, there is serious under funding. There is also strong agreement that the mental health system in Washington State needs to be transformed, and the state successfully became one of seven states selected for a five year federal grant to transform its mental health system. Several recent events highlight the state's lack of consciously including tribal governments accurately in their review and change processes.

1. The membership of a recent Joint Executive and Legislative Task Force on Mental Health was identified by the state legislature. It did not include a tribal government representative although it did include a county government representative.

2. When the Joint Task Force prepared its report for the legislature, it literally did not have Tribal Mental Health in its picture chart of the public mental health system in Washington State. It is relevant to note tribes ease the service burden of the county Regional Support Networks and bring additional money to the state by choosing to provide mental health services.
3. It is questionable if any of the legislators, or their staffers, involved in the Joint Task Force recognize Tribal mental health programs exist, that they bring additional money into the state, and are often the only way rural residents have an accessible health care provider.
4. It took many months of serious lobbying and repeated work on the part of individual tribes, the Indian Policy Advisory Committee, the American Indian Health Commission of Washington State, and the state's Mental Health Division Tribal Liaison, for the Governor's Mental Health Transformation Grant [T-Grant] staff to include separate Tribal Forums in its process for soliciting input to what needs changing in the state's mental health system.

While T-Grant staff expressed support for the idea of Tribal Forums it appears: a) the tribal liaison process set up by the state's Department of Social and Health Services lacks the positional "clout" to effect informed, respectful, and strategically effective behavior on the part of the state; b) likely something in the internal decision making process of T-Grant

“executive” staff determined this was of insufficient importance to include in their planning process from the beginning, but instead required the tribes to “make them” do it. This executive decision to not act in an accurate government-to-government manner with tribes and the process used [and not used] is in fact an example of some of what needs to be transformed in the state’s current mental health system.

These events are identified as “subject matter” specific examples of how government performance may contrast with espoused goals.

The term “subject matter” is being specifically used to reference one of the three areas jurisdiction may cover. Mental health services specifically, and health care generally is an example where “states and tribes have the same subject matter jurisdiction, but the persons and territory over which it may be exercised is disputed or ambiguous.” The instances mentioned above are also useful as specific examples that indicate: a) how difficult it is to make change in ‘business as usual’ habits; b) how much effort may be expended by governments to engage other governmental partners in necessary intergovernmental relations; c) how effective and more efficient governmental administrative decisions could be if state and tribal governments had a more in-depth understanding of each other, the habit and assumption of an ongoing working relationship; and d) how much time is wasted just getting to the table, eclipsing opportunities for earlier strategic moves that have significant budgetary influence and potential for both state and tribal governments.

The Commission made a “call” to all engaged in a state-tribal intergovernmental dialogue to “shift the focus from where it is today—laying all problems at the door of ‘jurisdiction’—to where it ought to be—making intergovernmental coordination and cooperation one of the standards to which governmental performance is held to account.” [Ibid.] [Highlight author’s]. These words are highlighted given the current and past state Governors’ trend to look at government performance, and in light of the recent examples that reflect a lack of tribal-state intergovernmental relations. There is currently a process being used by Washington State called GMAP, government management, accountability and performance. It would be an interesting exercise for the governor to request a specific GMAP on state-tribal relations, or to ask each Administration and Division to include it as one of their performance measures, given the 1983 advice of the Commission, and the current state use of GMAP to assess the reality of government functioning. The Commission noted “most of the tribal-state agreements which are now in effect rest on the exercise of discretion by legislative and executive branches of the respective governments and are largely voluntary and self-enforcing.” [Ibid., p 49]. A specific type of GMAP on state-tribal relations might investigate how many state-tribal agreements are currently operative, for how long and at whose discretion.

Other States

An overview of other states’ structuring of their relationships with tribal governments may help bring perspective to our circumstances in Washington. A 2003 report by the National Association of Social Workers lists the following

information. The 2000 Census identifies 281.4 million people in the United States and of that 4.1 million or 1.5 percent report they are American Indian/Alaska Native [AI/AN] [NASW]. “Four out of every 10 American Indians, or approximately 43% of the total Indian population live in the American West, the Midwest 17 percent...Over half of all people who reported to be AI live in just 10 states. In order of highest AI population: California, Oklahoma, Arizona, Texas, New Mexico, New York, Washington, North Carolina, Michigan and Alaska.” [ibid.] The National Conference of State Legislatures’ website section on State-Tribal Relations lists all state committees and commissions on Indian Affairs separated by state legislative committees dedicated to Indian Affairs and state executive branch Indian Affairs Commissions or contacts. The information that follows is based on the NCSL website updated January 2006. The order reflects that mentioned in the 2003 article of NASW. The reader will notice population demographic changes in the past three years that changes the order of precedence based on AI population.

California

This state has 108 tribes with an AI/AN population of 333, 346. The state’s legislature has an Assembly Select Committee on California Indian Nations. Other tribal issues are assigned either to the Committee on Governmental Organization, the Committee on Judiciary, or the Committee on Health & Human Services. The Executive branch has a Native American Heritage Comm. focused on the “preservation and protection of Native American human remains, associated grave goods and cultural resources.” [CERES]

Oklahoma

Oklahoma has 37 tribes and an AI/AN population of 273,230. The legislative branch has a Joint Committee on State-Tribal Relations, and a Native American cultural and educational authority. Its executive branch has an Oklahoma Indian Affairs Commission that serves as the liaison between the state's tribal governments, AI population and state government. Four statutes guide the commission: 1) the creation of state and federal legislation; 2) the creation of an advisory committee; 3) the development and implementation of research projects and reports; and 4) the development of cooperative programs between tribes and state, federal, local, private entities, health organizations, educational agencies, tourism and economic development entities.”

Arizona

This state has 21 tribes and an AI population of 255, 879. A legislative day “Indian Nations and Tribes” is a statutorily required annual meeting with legislators and tribal leaders [Ariz. Rev. Stat. 41-1108]. The legislature also has a House Committee on Natural Resources, Agriculture, Water and Native American Affairs. The executive branch has a Commission on Indian Affairs that submits an annual report to the Legislature and makes recommendations to the governor and legislators on Indian issues. [NCSL] [Ariz. Rev. Stat. 41-541 to 543]

Texas

Texas has 3 tribes, and an AI population of 118,362. They have a legislative Senate Subcommittee on Native American Affairs. The executive branch lists the Office of Attorney General as their contact on Indian affairs.

New Mexico

New Mexico has 23 tribes with an AI population of 173,483. The legislature has a Joint Indian Affairs Committee that meets periodically during the year when the legislature is not in session, a Senate Indian and Cultural Affairs Committee that meets regularly during legislative sessions, and a Joint Legislative Committee on Compacts, created in 1999 per SB 737 which meets on demand. The executive branch has an Indian Affairs Department whose Secretary is part of the Governor's cabinet.

New York

This state has 9 tribes and an AI population of 82, 461. They have no dedicated legislative committee. The executive branch has a Bureau of Indian Affairs in its State Office of Children and Family Services.

Washington

Washington has 29 federally recognized tribes with an AI population of 93, 301. The NCSL website lists 28 tribes, bringing additional question to the accuracy of the information listed on its' website. There is no dedicated legislative committee. A Working Group on State-Tribal Legislative Relations housed at the Northwest Indian Applied Research Institute is mentioned. The executive branch has the Governor's Office of Indian Affairs.

North Carolina

This state has 6 tribes and an AI population of 99, 551. The NCSL website lists a House Military, Veterans and Indian Affairs Committee. The executive branch identifies a North Carolina Commission on Indian Affairs [N.C. Gen. State. 143B-404 to 411] created in 1971 by the North Carolina General Assembly, and a State Advisory Council on Indian Education [N. C. Gen. Stat. 115C-210]. The Commission's focus is at least as much on individual Indian needs as tribal governments.

Michigan

While this state has 16 tribes, and an AI population of 58,479, it has no legislative committee identified to focus on Indian affairs. It mentions an AI Affairs specialist in the Department of Civil Rights as it's only executive branch activity. This organizational structure reflects no formal state-tribal intergovernmental focus, and a lack of understanding the difference between political status and an individual's ethnic/cultural/racial status.

Minnesota

This state, with 8 tribes, has less tribes than Michigan but a similar population with a 54,478 AI population. This state also has no legislative committee focused on AI or tribal affairs, but does have a Minnesota Indian Affairs Council.

Montana

This state forms another contrast to the 2 states above with 7 tribes and a 56,068 AI population. By contrast it has a State-Tribal Relations Interim

Committee, a Montana Office of Indian Affairs, and a special advisor to the Governor. There is also a State-Tribal Economic Development Commission, created in 1999 per HB 670.

State-tribal relations are extremely complex. The Western states tend to have established some Indian Affairs government structure and development. Given the limited scope of this inquiry additional comparisons and questions are left to further research and future projects. It is my hope that as more of us become better educated to explore, analyze and facilitate tribal-state relations we will support enhanced tribal governance and readily seek the opportunity for more mutually beneficial government-to-government relationships.

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