

# **TRIBAL ISSUES**

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**ISSUE:** Concerns over Tribal Remains at the Port Angeles Graving Dock, a Site Needed for Replacement of SR 104, Hood Canal Bridge

**AGENCY:** Department of Transportation (WSDOT)

**CONTACT:** Randy Hain – (360) 357-2605

**BACKGROUND:**

WSDOT's Olympic Region currently has under contract a project to replace the aged east half of the State Route 104 Hood Canal Bridge and retrofit the west half. Included in this bridge replacement project is construction of a graving yard in Port Angeles. The graving yard will enable WSDOT to construct floating pontoon and anchor portions of both this bridge and the State Route 520 Evergreen Point floating bridge. In August of 2003, archaeological artifacts were discovered during initial stages of graving yard construction. Following initial assessment it was determined the discovery was associated with the Klallam tribal village known as Tse-whit-zen. While this village was known to have been occupied between 1853 and the early 1900's, its exact location was not known. Extensive pre - construction archaeological testing also failed to turn up any evidence of the village. In April 2004, archaeological data recovery work commenced following concurrence between the Federal Highway Administration, WSDOT, Corps of Engineers, State Office of Archeology and Historic Preservation (OAHP) and the Lower Elwha Klallam Tribe on a memorandum of agreement and archaeological site treatment plan satisfying federal and state requirements. Facility construction was able to resume at that time as well, with a one-year delay in the critical bridge closure date from spring 2006 to spring 2007.

Archaeological data recovery efforts discovered the village site was much larger than estimated during initial site assessment work. The site is expected to be the largest pre-European contact village site excavated in Washington State. Along with a wide array of village dwellings and associated structures, approximately 250 burials have been located, recovered and repatriated to date during archaeological data recovery.

**CURRENT STATUS:**

WSDOT's archaeological consultants continue to work on data recovery, human remains recovery and construction monitoring activities. Data recovery field excavation work is expected to be complete in December of 2004. Facility construction continues and is targeted towards a 2007 bridge closure, at which time the newly constructed pontoons would be floated into place for construction completion.

The state continues to hold discussions with the Lower Elwha Klallam Tribe regarding investigating burials outside of the area being affected facility construction. The Tribe has continued to seek assurance that any and all burials located on the 22-acre property be located, recovered and repatriated regardless of whether or not they would be disturbed by facility construction. WSDOT and the federal agencies do not feel that assurance can be provided.

**ISSUE:** Impacts of the National Historic Preservation Act of 1966 on Drinking Water Construction Projects

**AGENCY:** Department of Health; Department of Community, Trade & Economic Development; Public Works Board

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### **BACKGROUND:**

In administering federal Drinking Water State Revolving Fund (DWSRF) loan programs, states must assure water systems comply with a large number of federal cross cutting authorities (statutes, rules, and directives that apply to federal funding but are not part of the program's enabling statute or rules). One of these "cross cutters" is Section 106 of the National Historic Preservation Act of 1966 (Section 106). The Section 106 process seeks to balance historic preservation concerns with the needs of the construction project. The process uses consultation among all parties with an interest in the effects of the project on historic properties. The goal of consultation is to identify historic properties potentially affected by the project, assess the project's effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties. During a recent site excavation for a DWSRF project in Island County, the Juniper Beach Water District discovered bones in a portion of the site known to be a Tribal burial ground and halted project construction. Section 106 requires additional preservation efforts in these situations. This was the first time this situation occurred on a DWSRF project in Washington.

### **CURRENT STATUS:**

The Environmental Protection Agency (EPA), which is the agency that administers the DWSRF program, has final authority to determine the process that Washington State must follow to fulfill Section 106 requirements. EPA had no process in place when the Juniper Beach situation occurred. EPA is now developing a process for handling all new DWSRF projects. DOH, CTED and the Public Works Board will participate in this effort.

EPA did meet with three tribes (the Tulalip, the Swinomish, and the Stillaguamish) and representatives from the Juniper Beach Water District, DOH and the Public Works Board. EPA developed a list of project-specific requirements the water district will have to comply with if they continue this project using DWSRF assistance.

### **OUTLOOK FOR 2005 AND BEYOND:**

We anticipate if other construction projects are impacted by Section 106 requirements, many will be related to Tribal historic sites. This will require close coordination and negotiations with EPA, CTED, Public Works Board, and the impacted water systems and Tribal governments. DOH and the Board expect projects costs will increase and construction will take longer. In addition, water systems may prefer using state funding sources rather than the federal DWSRF program to avoid the impact of this requirement. We may see a decline in the number of projects funded by DWSRF.

**ISSUE:** A change in the definition of gambling devices could undermine the foundation of the Compacts and would involve the loss of regulatory oversight.

**AGENCY:** Washington State Gambling Commission

**CONTACT:** Rick Day, Director, (360) 486-3446, [rickd@wsgc.wa.gov](mailto:rickd@wsgc.wa.gov)

**BACKGROUND:**

As noted in the paper on the Spokane Tribe, the state has authority only over Class III gambling, which include casino style games like Blackjack and craps. Generally, electronic machine gambling is Class III, and in Washington includes the 15,000 Tribal Lottery System (TLS) machines in play on the state's Indian reservations. The TLS easily accounts for over 70 percent of tribal gaming revenue. IGRA does allow electronic aids to Bingo which has led to what are called Class II gambling devices.

Washington Tribes currently operate approximately 748 Class II gambling devices. Class II gambling devices look very similar to the Class III gambling devices, and in many instances have similar game names and game schemes. The only noticeable difference between the Class II and Class III gambling devices may be a Bingo card symbol approximately 4" x 4" in the upper left corner of the terminal screen. Manufacturers are continuing aggressive efforts to produce devices that are allegedly Class II gambling devices.

**CURRENT STATUS:**

Interest in Class II gambling devices has increased in recent months. In some states, Tribes with revenue sharing agreements are looking for additional gambling revenue to be applied to tribal governmental programs like education, housing, and elder care that would not be included in any revenue sharing agreement with their state. In addition, if a gambling device is Class II, the negotiated limit on the numbers of machines do not apply and the state has no regulatory role.

Washington State does not have revenue sharing agreements with the Tribes. Therefore, the economic incentive to install Class II gambling devices is less than in other states. However, the Tribes are billed for state regulatory services which are based in part on the size of the operation, including the TLS. Charitable distributions by Tribes are also calculated based on TLS revenue and would be impacted by switching to Class II gambling devices.

**OUTLOOK for 2005 and BEYOND:**

As new Class II gambling devices are developed, the line between Class III and Class II gambling devices will become harder to distinguish. We now have Class II gambling devices that from the outside look almost identical to approved Class III Tribal Lottery System devices. Although the NIGC has classified some machines, they have limited technical ability in formal testing and evaluation to regulate Class II gambling devices. To ensure that the gambling devices are properly defined and to ensure compact compliance in the future, our agency may need to expand our review of all gambling devices brought into Washington State.

**OPPORTUNITY:**

This may develop into a sovereignty issue for some Tribes and challenge the positive relationship the Tribes and the state have concerning gambling regulation. The issue will require some open discussion between the Tribes and the state to ensure that effective regulation and positive government-to-government relationships continue.

**ISSUE:** A dispute with the Spokane Tribe of Indians about the need for a compact with the state and the legality of slot machines.

**AGENCY:** Washington State Gambling Commission

**CONTACT:** Rick Day, Director, (360) 486-3446, [rickd@wsgc.wa.gov](mailto:rickd@wsgc.wa.gov)

**BACKGROUND:**

The Indian Gaming Regulatory Act (IGRA) classifies gambling as Class I (traditional), Class II (Bingo) and Class III (casino style). The state has authority only over Class III which includes all casino style games like Blackjack and craps. The Spokane Tribe of Indians was one of the first to request negotiations for a Class III Compact under the auspices of IGRA. Negotiations were not productive and eventually broke down. The biggest area of disagreement was over the legality of slot machines. The Spokane Tribe sued the state, maintaining that the state had failed to negotiate in good faith. The state asserted its right to sovereign immunity and the case was dismissed.

In the mid 1990's, the Spokane Tribe imported and began operating slot machines without a compact, in violation of IGRA and the Johnson Act (a federal law covering slot machines and similar devices). Action was taken by the U. S. Attorney to seize the devices "in place". The action has been continued numerous times, allowing the Tribe to maintain and operate the devices during the court's consideration of the matter.

In 1999, at the request of the Governor, the Commission directed its staff to meet with the Tribe in an attempt to reach agreement on a compact. Negotiations ended in 2001 due to the Tribe's desire to continue to operate slot machines, devices which are illegal in Washington.

**CURRENT STATUS:**

The state and the Tribe have communicated periodically to determine if there are areas of agreement which could form the basis for new negotiations. No substantive changes in position have occurred.

The Tribe continues to operate three casino locations with gaming tables and over 1,000 slot machines without a Tribal-State Compact in violation of federal law. The case against the machines is scheduled for January 31, 2005, in U.S. District Court. The Washington Assistant Attorney General assigned to the Commission is assisting the United States Attorney with the case. If requested, the Gambling Commission may also assist with technical support.

**OUTLOOK for 2005 and BEYOND:**

It is likely the federal case will proceed to trial. It is unlikely the Tribe will be willing to modify its position and request negotiations.

**OPPORTUNITY:**

The outcome of the vote on Initiative 892 and the resulting statewide authorization of electronic gambling machines may impact the case in federal court. If the Initiative fails, a request from the new administration to the Tribal Chair to get the parties back to the table may be significant enough to get the negotiation process underway. Once at the table, it may be possible to once again seek resolution of the issues.

**ISSUE:** Impact of Initiative 892 (I-892) on the regulation of gambling in Washington State.

**AGENCY:** Washington State Gambling Commission

**CONTACT:** Rick Day, Director, (360) 486-3446, [rickd@wsgc.wa.gov](mailto:rickd@wsgc.wa.gov)

**BACKGROUND:**

I-892 authorizes the same number (18,225) and type of electronic scratch ticket machines (EST) as tribal casinos with a portion of the revenue generated used to reduce property taxes. The Washington State Lottery would allocate, regulate, distribute, and license the machines. The Gambling Commission, the Tribes, and the National Indian Gaming Commission (NIGC) would continue to regulate the gambling machines operated by Tribes.

The EST machines would be placed in approximately 2,000 new locations. The number of machines an operator would receive would be based on the size and type of license they currently hold. More machines may become available to operators if another Compact is approved, or if the number of machines currently allowed the Tribes is increased.

**CURRENT STATUS:**

I-892 will be on the November ballot. If it passes, it will very likely impact Tribes and lead to future requests for Compact renegotiations. If it does not pass, it seems likely there will continue to be requests for machine gambling by non-tribal owners, whether commercial, charitable, or both. For example, in the 2003 legislative session, there were two bills introduced that would have allowed machines, House Bill 1948 and House Bill 2282.

**OUTLOOK for 2005 and BEYOND:**

Passage of the Initiative would result in two regulatory systems for machine gambling in the state: one for Tribes regulated by the Gambling Commission, Tribes, and the NIGC, and one for electronic scratch ticket machine licensees regulated by the Lottery Commission. The current limits on tribal casinos, including the number of machines, features of the machines (for example, no cash in or out), and hours of operation are based on the type and scope of gambling allowed in the state. Changes in these conditions would likely lead to requests for changes in the current Compacts.

With an increase in the number of machines in the state, the amount of revenue per machine may decrease, which could impact funds available for Tribal programs. If tribal revenue decreases, this could also result in decreases in local community contributions required in the Compacts. In addition, 25 percent of the agency's funding is from Tribes to reimburse the agency for licensing and regulation.

If I-892 passes, it is likely to face legal challenges. The Constitution states that "...Lotteries shall be prohibited except as specifically authorized ... by referendum or initiative approved by a sixty percent affirmative vote of the electors voting thereon ...". The most unusual situation may result from a vote that is less than 60 percent but more than 50 percent. Each side will argue about whether a 60 percent vote is required.

**OPPORTUNITY:**

Perhaps the result of this vote will provide a foundation for discussions on the future direction of Tribal-State negotiations. If I-892 passes there may be a need for legislative action to clarify some provisions of the Initiative.

**ISSUE:** Local controversy regarding land the Cowlitz Tribe recently purchased and asked the government to designate as initial reservation land, and local controversy over the Tribe operating a casino on the designated land.

**AGENCY:** Washington State Gambling Commission

**CONTACT:** Rick Day, Director, (360) 486-3446, [rickd@wsgc.wa.gov](mailto:rickd@wsgc.wa.gov)

**BACKGROUND:**

The Cowlitz Tribe in southwest Washington became federally recognized in January of 2002. On August 23, 2002, the Tribe requested negotiations with the state for a Tribal/State Compact, and the parties started negotiations in September of 2002. The Tribe subsequently requested that the state place the negotiations on hold. Although the Tribe does not have a reservation at the present time, it has filed an application with the Department of the Interior to place certain lands located in unincorporated Clark County (near La Center) into trust.

Significant controversy has surrounded the Cowlitz casino project and potential impacts relating to non-tribal gambling businesses and the City of La Center's tax base.

Pursuant to the Indian Gaming Regulatory Act (IGRA), §2719, a Tribe may conduct Class III gaming on lands acquired after 1988, if such lands are designated as the Tribe's initial reservation or as the restoration of lands for a Tribe restored to federal recognition. A similar Compact was signed in February 2002, with the Snoqualmie Tribe, providing that the Tribe could conduct Class III gaming on its initial reservation land as acknowledged by the Secretary of the Interior.

**CURRENT STATUS:**

On September 28, 2004, the Tribe sent a letter to the Governor's Office, again requesting negotiations. The Tribe stated that it plans to develop a premier casino/entertainment facility, and that it has already entered into management and development agreements for that purpose. The Tribe's letter also stated that it has commenced the Environmental Impact Statement process with the federal government, which will include public hearings on its fee to trust application.

**OUTLOOK for 2005 and BEYOND:**

The Tribe's letter begins formal negotiation. There does not appear to be significant legal or technical issues that would stand in the way of reaching a Compact agreement similar to that allowed for other newly recognized Tribes. If the Tribe is seeking a Compact similar to other Tribes' initial Compacts, the process could be completed within four to six months. However, the decision by the United States Department of Interior regarding an initial reservation often takes several years. Even if the state approved a Compact, gaming could not begin until the trust land decision was final.

**OPPORTUNITY:**

The federal initial reservation and land into trust process takes a considerable length of time. In the interim, it may be worthwhile to use this time as an opportunity to facilitate further communication between the Tribe and the community regarding the state's negotiating process, plans, and regulation of tribal casinos.

**ISSUE:** Prospect for Tribal Revenue Sharing With the State.

**AGENCY:** Washington State Gambling Commission

**CONTACT:** Rick Day, Director, (360) 486-3446, [rickd@wsgc.wa.gov](mailto:rickd@wsgc.wa.gov)

**BACKGROUND:**

Under certain conditions, defined by the Department of Interior (Department), Tribes can sign agreements with states to share a portion of their gaming revenue. No Washington Tribes have such revenue sharing agreements. In recent years, the topic has received increased attention within the state. At least one Tribe has informally indicated to Gambling Commission staff that they have raised this issue directly with the Governor's Office.

The Indian Gaming Regulatory Act (IGRA) and the rules adopted by the Department do not specifically address the topic of revenue payments to states. However, the Department has issued Compact approval letters signed by the Assistant Secretary for Indian Affairs, which set forth the Department's policy concerning such agreements. One such approval letter dated January 24, 2003, to the State of Arizona noted the following:

“To date, the Department has approved payments to a state only where a compact provides tribes with substantial exclusivity for Indian gaming, *i.e.* where a compact provides a tribe with substantial economic benefits in the form of a right to conduct Class III gaming activities that are on more favorable terms than any rights of non-Indians to conduct similar gaming activities in the State. The payment to the state must be appropriate in light of the exclusivity right conferred on the tribe.”

The economic benefit to the Tribe must be quantifiable and cannot stem from something that the state is required to negotiate under IGRA. The Department has required varying degrees of economic analysis and reports to support a finding of substantial economic benefit.

**CURRENT STATUS:**

Only one Tribe has asked for more formal discussions relating to revenue sharing. However, the Tribe connected this discussion to resolution of other issues including gas and cigarette tax disputes. Several legislators have inquired about revenue sharing and the Gambling Revenue Task Force Report issued in January of 2004 contained brief summary information. No official negotiation or discussion is underway.

**OUTLOOK for 2005 and BEYOND:**

Payments approved by the Department have ranged from a few percent of the Tribe's net win up to 30 percent. Any potential tribal revenue sharing agreements in this state must provide the Tribe with substantial exclusivity for Indian gaming that provides a significant and quantifiable economic benefit to the Tribe. Passage of I-892 would prevent such exclusivity.

**OPPORTUNITY:**

The Washington Tribes' market share of gambling receipts exceeds 50 percent and will likely exceed \$800 million in 2004. If I-892 does not pass, it may be worthwhile to use this as an opportunity to initiate discussions with the Tribes concerning future exclusivity of electronic gaming machines in exchange for revenue sharing.

**ISSUE:** Municipal Water Law Implementation

**AGENCY:** Department of Health (DOH)

**CONTACT:** Rich Hoey; 360.236.3160; [rich.hoey@doh.wa.gov](mailto:rich.hoey@doh.wa.gov)

**BACKGROUND:**

Washington's 2003 Municipal Water Supply-Efficiency Requirements Act, commonly called the Municipal Water Law is part of a multi-year effort to reform the state's water laws. The law provides municipal water suppliers with greater assurance they have the legal right to use the water identified in their water rights, requires water utility plans to be consistent with land use plans adopted at the local level, and establishes reasonable and achievable water use efficiency requirements. The law directs DOH to develop a water use efficiency rule for public water systems by the end of 2005 and to convene an advisory committee to provide input on the development of the new rule.

Tribal governments and environmental groups are unhappy with the provisions of the law. They believe that the law gives municipal water suppliers an unfair advantage for using water for drinking water over other uses such as maintaining and enhancing the fishery resource. Tribal governments have indicated they may file a legal challenge to the law.

**CURRENT STATUS:**

DOH formed a subcommittee of its Water Supply Advisory Committee (created by RCW 70.119A.160) to develop recommendations on the elements necessary for a sound and sustainable water use efficiency rule. As required by the Legislature, this subcommittee includes individuals that are not members of the advisory committee. Representatives from the Tulalip Tribes and Yakama Nation are members of the subcommittee.

DOH has also initiated outreach efforts with other tribal representatives to obtain their input into the rule making process. DOH hopes to have meetings with tribal government representatives during the later part of 2004 in order to get broader input on tribal interests in water efficiency. By seeking tribal input into the water use efficiency rule, DOH hopes to ease some of their concerns about the water suppliers using the resource unwisely.

**OUTLOOK FOR 2005 AND BEYOND:**

- Continued outreach by DOH to tribal governments on water use efficiency and other implementation aspects of the Municipal Water Law.
- Tribal governments are reportedly considering potential legal challenges to the Municipal Water Law, including a potential challenge on constitutional grounds that the legislature overstepped its authority to effect water (property) rights retroactively.
- Since the Municipal Water Law gave rights to use water for other than in-stream flow uses, tribal governments continue to be interested in water resources legislation, especially efforts to set minimum in-stream flows.

**ISSUE:** Federally Reserved Indian Water Rights

**AGENCY :** Department of Ecology

**CONTACT :** Tom Laurie, 360/407-7017, [tlau461@ecy.wa.gov](mailto:tlau461@ecy.wa.gov)

**BACKGROUND** Unquantified tribal water rights cloud the certainty of state-issued water rights throughout the state, and conflicts between state and tribal rights are growing.

Indian water rights are typically the most senior water rights and represent a significant obligation of available water resources in basins throughout the state. Tribal water rights date from “time immemorial” or from the creation of tribal reservations, generally the late 1800’s, and are not lost if unused. These water rights are based on case-law principles that the U.S. implicitly reserved water rights sufficient to effectuate the purposes of Indian reservations. Tribes contend that their treaty fishing rights also include off-reservation instream flows for fish. Washington has 29 federally recognized tribes, 21 of which have treaty reserved fishing rights, and 26 Indian reservations.

The only method we currently have for quantifying tribal waters rights is through a state general adjudication of water rights. In the on-going Yakima Basin adjudication (initiated in 1977), all of the parties agreed that, in addition to irrigation water, the Yakama Nation is entitled to water for fish flows. The court awarded water to fulfill the tribe’s treaty right to fish in their usual and accustomed places, including off-reservation instream flows.

**CURRENT STATUS:** Water users around the state have become more aware of dormant Indian water rights through the watershed planning process and due to more assertive actions by tribes. Until quantified, the department has few tools to protect senior tribal water rights or to ensure that junior rights are not later impacted by tribes exercising their senior right. Some tribes and the NW Indian Fisheries Commission have been highly critical of the state’s attempts to modernize the water code and in particular contest the 03’ Municipal Water Bill (C5 L03) contending that it will diminish flows needed for fish.

At the 2003 Centennial Accord meeting, Governor Locke suggested that fighting for the status quo will not advance or protect tribal water rights. He proposed that the state and tribes work together to find ways to directly address tribal water rights. This offer engaged tribes in a new way. It generated several successful high-level state/tribal meetings to explore approaches for resolving Indian water rights and was bolstered by extensive outreach from the Governor’s water team to tribes during the 04 legislative session.

**OUTLOOK for 2005 and BEYOND:** It is likely that Tribes will challenge most additional water withdrawals and any changes to the water code or administration that may facilitate further withdrawals. They also will fight changes to the adjudication system that could precipitate proceedings in state court.

**OPPORTUNITY:** Tribes recognize the cost, length and risk of general adjudications and are likely to remain interested in engaging with the state to find other ways of meeting their water needs. Some local governments are also interested in finding ways to resolve these uncertainties. The Nooksack River watershed planning group, with the Lummi Nation and the Nooksack Tribe, is developing an alternative model for settling the tribal claims to instream flows for fish. Continued support for this local effort may result in an approach that can be used in other basins. Other approaches may also be possible.

**ISSUE:** Representatives of the state, the Squaxin Island Tribe, and local governments are divided about the best long-term management approach for Capitol Lake in Olympia - whether to maintain this body of water as a freshwater lake or restore it to an estuary.

**AGENCIES:** The Departments of General Administration, Natural Resources, Ecology, and Fish and Wildlife

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**BACKGROUND:**

General Administration (GA) is responsible for managing 33 buildings and 485 acres on the state's Capitol Campus in Olympia, including the 260-acre Capitol Lake. Capitol Lake was created in the 1950s by damming the Deschutes River to create a reflecting basin for the Capitol and help with flood control. However, sediment from the Deschutes River is slowly turning the lake into a freshwater marsh. Pollution and noxious weed infestations are also concerns. Dredging the lake is costly and subject to rigorous permitting processes.

Restoring the body of water to an estuary has been suggested as a solution to its problems. However, little is known about whether a viable estuary is possible in the current surroundings. Removing the dam and recreating an estuary would also be costly, and would likely require upgrades to adjacent infrastructure such as Deschutes Parkway and the Fourth Avenue Bridge.

For the past decade, GA has been working in partnership with eight other state, tribal, and local government entities in the Capitol Lake Adaptive Management Plan (CLAMP) advisory committee to develop a long-term management plan for Capitol Lake. In addition to the state agencies named above, the Advisory Committee includes the Cities of Olympia and Tumwater, Port of Olympia, Thurston County, and the Squaxin Island Tribe.

In 2002, the CLAMP committee completed a 10-year plan for managing Capitol Lake to address many issues, such as water quality, flood hazard management, and noxious weed control.

Members of the CLAMP committee (and the local community) remain divided on the issue of whether to maintain Capitol Lake as a lake or restore it to an estuary. The Squaxin Island Tribe has been among the strong advocates of returning the lake to an estuary.

**CURRENT STATUS:** After lengthy public debate, it became clear that credible research on whether an estuary is even feasible was necessary to determine a long-range management decision. The State Capitol Committee approved the 10-year plan, including a provision for an estuary feasibility study, provided that the CLAMP committee members secure the funding for the study by July 2005. That funding effort is now underway.

**OPPORTUNITY:** This issue presents an opportunity to bring greater clarity to governance of the Capitol Campus, and to the government-to-government relationship between GA and the Squaxin Island Tribe.

**ISSUE :** Lake Roosevelt Impacts Of Columbia River Initiative

**AGENCY :** Department of Ecology

**CONTACT :** Tom Laurie, 360/407-7017, [tlau461@ecy.wa.gov](mailto:tlau461@ecy.wa.gov)

**BACKGROUND:** Ecology launched the Columbia River Initiative in 2001. The CRI is designed to improve conditions for fish while providing water for new uses by adding water to the river during the Spring and Summer months. New water use from the river would be based on a principle of “3 buckets in first, then no more than 2 buckets out”. This principle provides for out-of-stream uses while ensuring that the environment for fish improves over current conditions. Outreach to 6 potentially affected tribes (Yakama, Colville, Spokane, Nez Perce, Umatilla & Warm Springs) was initiated and has been maintained throughout the process. There is broad support for this concept among the tribes.

In the long term, water for this initiative would be put into the river from efficiencies in water use, new storage and possibly Canadian sources. But in the short term we have approached the Bureau of Reclamation to use a limited amount of Lake Roosevelt water -- from about 12 inches to about 20 inches of water elevation in the April through August period, with lake levels being returned to current levels by September 30 each year. This amounts to 82,500 or 132,500 acre feet per year.

The Lake forms the boundary of the Colville and Spokane reservations. The Bureau of Reclamation is prepared to consider the drawdown but has asked the State to get tribal concurrence first. The state is negotiating with the Colville Confederated Tribes and the Spokane Tribe to mitigate impacts to tribal resources and to potentially establish new state/tribal cooperative approaches to meeting tribal water needs.

**OUTLOOK for 2005 and BEYOND:** Should this project proceed with water use from Lake Roosevelt, the state and Colville and Spokane Tribes will need to have specific agreements on mitigation and cooperation that will be implemented over the next year or more. The other tribes with treaty fishing rights in the Columbia mainstem are likely to remain supportive and engaged.

**OPPORTUNITY:** The agreements with the tribes will likely benefit citizens living on and around the reservations and could lead to the state and tribes jointly investigating, developing and benefiting from new storage projects.

**ISSUE:** Lake Roosevelt Superfund Listing, Colville & Spokane Tribes

**AGENCY:** Department of Ecology

**CONTACT:** Tom Laurie, 360/407-7017, [tlau461@ecy.wa.gov](mailto:tlau461@ecy.wa.gov)

**BACKGROUND:** Teck Cominco, the world's largest integrated lead-zinc smelter, operates a smelter just over the border in Trail, British Columbia. It has dumped the equivalent of one full dump truck of slag every hour for 60 years- about 400 tons of slag a day. Altogether the plant has dumped a total of about 13.4 million tons of heavy metals-tainted slag containing arsenic, cadmium and lead into the Columbia from 1896 to 1996, when Canadian regulators ordered a halt to the practice. The plant is also responsible for dumping hundreds of tons of mercury into Lake Roosevelt.

The slag and mercury were carried downstream by the Columbia River into Lake Roosevelt, the 130-mile impoundment of the river behind Grand Coulee Dam. Lake Roosevelt is one of the state's largest recreational areas with 1.5 million annual visitors. The Lake forms the boundary of both the Colville and Spokane reservations.

In August 1999, the Colville Tribe petitioned EPA to conduct a Preliminary Assessment under the Superfund law to determine impacts to public health and environment from releases of hazardous substance to the Upper Columbia River Basin. EPA's preliminary survey in March 2003 found widespread industrial pollution in sediments throughout the upper Columbia, including elevated lead levels near Northport, high mercury levels near Kettle Falls and high zinc levels near the border with Canada. EPA studies show the site meets the technical requirements for Superfund listing and in December 2003 EPA ordered the company to pay for studies required under the law.

**CURRENT STATUS:** Teck Cominco has refused to comply with the order, contending that U.S. law does not extend to a Canadian company operating inside Canada. Teck has offered to pay for and conduct human health studies, up to \$13 million, but will not fund ecologic studies and refuses to be responsible for potential natural resource damages. EPA has unsuccessfully attempted to get Teck Cominco's U.S. subsidiary, Spokane-based Teck Cominco American Inc., to agree to take legal responsibility for the cleanup. The American subsidiary recently opened a \$70 million zinc mine near Metaline Falls, Washington, to feed the Trail smelter. The Colville Confederated Tribes Chairman and a Council Member, acting as individuals, sued Teck Cominco in U.S. District Court for Eastern Washington in July for failing to comply with EPA's order. The Governor and Attorney General joined the lawsuit on August 21, 2004.

**OUTLOOK for 2005 and BEYOND:** The state's goal is to have a comprehensive study to answer the questions about human health and ecological impacts to the Lake from the many years of industrial discharge to the River. Ecology has supported either a Superfund listing or a Superfund alternative process that provides the same substantive coverage to achieve this goal.

**OPPORTUNITY:** Canadian and U.S. officials are discussing an intergovernmental approach to the studies and eventual apportionment of clean up responsibilities. The U.S. Dept. of State now proposes to have EPA continue its investigation under Superfund laws while enhancing Canada's role in the process including sharing data, consultation, joint assessment of source controls and designation of responsible parties in each country.

**ISSUE :** Tribal Air and Water Quality Jurisdiction within Reservations

**AGENCY :** Department of Ecology

**CONTACT :** Tom Laurie, 360/407-7017, [tlau461@ecy.wa.gov](mailto:tlau461@ecy.wa.gov)

**BACKGROUND :** EPA's policy on Indian Reservations effectively results in 26 "states" within Washington for the purposes of environmental jurisdiction.

EPA has developed procedures to delegate federal Clean Air Act and Clean Water Act programs to tribes. This is called "treatment as a state" status. Ecology has responded on behalf of the state to EPA's request for comments on tribal applications for treatment as a state under these federal programs. When delegated, these programs confer federal environmental authority to tribal governments over all lands and all residents within Indian reservations. The 9<sup>th</sup> Circuit Court of Appeals has upheld EPA's delegation of water quality programs to tribes. While WA has assumed delegated authority for both Air and Water Quality Act implementation across the remainder of the state, EPA believes that it cannot delegate its federal programs to the state within Indian reservations without explicit Congressional approval (as within the Puyallup Reservation under the provisions of the Puyallup Land Claims Act).

There are 26 Indian Reservations within Washington and many have significant populations of non-Indian residents. Air and water cross the borders between state jurisdiction and EPA/tribal jurisdiction of every reservation. Tribal standards can affect upstream dischargers and water clean-up plans (TMDLs).

**CURRENT STATUS:** Five tribes in Washington State have EPA approved water quality standards and each differ somewhat from the state standards. Five are pending approval. No tribes have sought air authority so far.

EPA has been developing a rule to establish default federal standards for waters in Indian Country; they received extensive feedback from both states and tribes in early 2004, but have taken no further action so the status is uncertain.

EPA has proposed a federal rule to regulate air sources within Indian reservations in our region but has not completed this rule. EPA's proposal is currently being challenged by the Yakima Air Authority based on its concern that EPA's rule will lead to tribal jurisdiction over non-members within reservation boundaries.

**OUTLOOK for 2005 and BEYOND:** Ecology, tribes and EPA have developed effective intergovernmental approaches to dealing with water quality issues where there are cross-border flows. These have been successful and are expected to continue.

Further, Ecology and the 20 tribes represented by the NW Indian Fisheries Commission have agreed to work on a government-to-government protocol for improving our interaction around water quality in off-reservation areas affecting tribal fisheries.

The tribal jurisdiction over non-members within Indian reservations will be highly controversial on reservations with significant populations of non-Indians. Two reservations with pending applications for treatment-as-a-state in this category are the Lummi Nation and the Yakama Nation.

**OPPORTUNITY:** Intergovernmental cooperation will continue to be a means to provide citizens with coordinated and consistent environmental protection and regulation across boundaries.

**ISSUE :** Tribal Objection to State Water Quality Standards

**AGENCY :** Department of Ecology

**CONTACT :** Tom Laurie, 360/407-7017, [tlau461@ecy.wa.gov](mailto:tlau461@ecy.wa.gov)

**BACKGROUND :** In July 2003 Ecology adopted water quality standards for waters of the state. The standards are currently pending EPA approval. A number of tribes and the NW Indian Fisheries Commission objected to the standards on both technical and procedural grounds. They contend that the standards do not sufficiently protect their treaty right to harvest fish. Ecology consulted with tribes before adopting the standards by rule. Some tribal representatives, however, believe that Ecology should not just consult but rather actually defer to them as “fisheries managers” in setting standards related to fish. EPA and the federal fisheries services have and will be consulting with tribes as they make their decisions on the adequacy of the standards. Ecology’s Water Quality Partnership group, made up of a wide variety of stakeholders, has been frustrated by EPA’s lack of action on the state’s proposed standards and is concerned about the role of tribes in the process.

**CURRENT STATUS:** EPA is expected to approve some sections of the standards and try to return other sections to Ecology for additional work, rather than formally disapproving them. Most of the additional work is expected to be in areas with which tribes also have expressed concerns. Ecology will need to decide whether to agree to do the additional work involved in further rule-making on the standards, or to request a formal denial which would then require EPA to promulgate their preferred changes through a federal rule process. Ecology’s decision will likely hinge, at least in part, on whether the technical and scientific basis for the changes could be supported in the state’s rule-making process.

**OUTLOOK for 2005 and BEYOND:** Ecology and tribes represented by the NW Indian Fisheries Commission (20 tribes) have agreed to work on a government-to-government protocol for improving our interaction around water quality. This is likely to include clearer procedures for communication and consultation and better coordination between the governments. Ecology will also work with the Water Quality Partnership group to help participants understand the tribes’ status and role in the state and federal processes.

**OPPORTUNITY:** A clear process with common expectations that is formally endorsed by tribes and Ecology will improve our working relationship. Tribes and Ecology are likely to continue to have disagreements over technical issues but a robust process should minimize future misunderstandings and may lead to strategies for resolving significant technical issues.



Christine O. Gregoire.

# ATTORNEY GENERAL OF WASHINGTON

1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

October 1, 2004

RECEIVED

OCT 04 2004

DEPARTMENT OF ECOLOGY  
OFFICE OF DIRECTOR

The Honorable Bill Finkbeiner  
Washington State Senate  
PO Box 40445  
Olympia, WA 98504-0445

Re: *United States v. Washington*, Civil No. C70-9213 (W.D. Wash.)  
Subproceeding 01-1 (Culverts)

Dear Senator Finkbeiner:

The purpose of this letter is to inform you of the status of the above-referenced litigation (commonly referred to as the "Boldt Phase II" or "Culvert" case) and our efforts to negotiate a resolution. As you may know, the specific subject of this litigation is an alleged treaty-based obligation on the part of the state to repair and/or replace state road culverts that block salmon passage. In addition to the fiscal impact of culvert repair and/or replacement, the underlying legal issues have potentially broader application to other activities in the state that may affect fish and their habitat.

By way of background, "Boldt Phase II" refers to the second phase of litigation that was initially filed by the federal government and several Indian Tribes in 1970. In that litigation, the US and Tribes asked the federal courts to declare that the "Stevens treaties"<sup>1</sup> require the state to protect fish habitat from environmental degradation. The Federal District Court initially agreed in 1980, finding that the treaties required the state to refrain from degrading or authorizing others to degrade fish habitat to an extent that would deprive the Tribes of the ability to earn a moderate living from fishing. A three-judge panel of the United States Ninth Circuit Court of Appeals, however, reversed most of what the district court had decided regarding the environmental degradation claim. The panel held, instead, that the treaties do not guarantee any particular quantity of fish, and do not create an absolute right to relief from all state or state-authorized environmental degradation of fish habitat. The panel's decision was in turn reviewed by the larger group of Ninth Circuit judges, which ruled in 1985 that the question as presented was too abstract for a decision at that time. This *en banc* opinion, however, left the door open for the Tribes to return to court with a concrete set of facts for resolution by the court.

In January 2001, treaty Tribes and the United States government brought "Phase II" back to court. They used as concrete facts, culverts that underlie state highways and roadways. In this new lawsuit, the Tribes and the United States claim the treaty right of "taking fish at usual and accustomed grounds and stations" prohibits the state from building or maintaining culverts that block fish passage. The Tribes and the United States asserted the treaties guarantee adequate numbers of fish to provide the Tribes with a moderate living, and preclude state-caused environmental degradation that reduces the number of fish to below that level.

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<sup>1</sup> The "Stevens treaties" are a group of treaties that Isaac Stevens negotiated on behalf of the United States with Indian Tribes in the Pacific Northwest in 1854-55. They secure to the signatory Tribes the "right of taking fish" at the Tribes' usual and accustomed fishing places.



# ATTORNEY GENERAL OF WASHINGTON

Senator Finkbeiner  
October 1, 2004  
Page 2

The state filed an answer and counterclaim against the United States and the plaintiff Tribes that denies the existence of such a right and also focuses on the federal government's role in the fish passage problem. The federal government has many culverts on its own lands that block fish passage. In addition, federal agencies have authorized, approved, funded, or otherwise participated in some aspect of the installation, maintenance, or schedule for remediation of virtually every state culvert.

In the spring of 2002, the court suggested that the parties explore settlement. The litigation deadlines were set aside for a time, and the parties began engaging in settlement negotiations in May 2002. Negotiations have proceeded on two tracks. The first track, referred to as the "Technical" track, involved efforts by tribal, state, and federal biologists and engineers to reach agreement on how and when the parties will identify and repair their culverts. The "Technical" track participants have successfully addressed many issues. Funding culvert repair and/or replacement, however, remains a key question. The second track, referred to as the "Policy/Legal" track, involved efforts by tribal, state and federal lawyers and policy leads to agree on language that would describe the relevant legal principles arising from the treaties. The attorneys and policy leads for the parties made progress in negotiating potential language, but have now encountered an issue which has caused impasse. The state negotiators were willing to recommend language describing legal principles that would apply to the state when acting in its proprietary capacity (i.e. with regard to the management of state owned land). State negotiators, however, were unable to recommend that the same language applies when the state is acting in a regulatory capacity (i.e. permitting or conditioning actions or activities involving private lands or other non-state property).

Although all sides remain willing to continue discussions, the issue over which we have reached impasse is a very significant one. Despite sincere efforts, no avenue to break the impasse has yet been found.

As a consequence of the impasse, the parties have recently submitted a revised trial schedule that will lead to trial in July of 2006. Our state litigation team will resume active preparation for trial of this important matter.

Sincerely,



ROBERT K. COSTELLO  
Deputy Attorney General  
(360) 664-2961

RKC:tlt

cc: Tom Fitzsimmons, Chief of Staff, Governor's Office  
Bob Nichols, Executive Policy Advisor, Office of Financial Management  
Dr. Jeffrey Koenings, Director, Fish & Wildlife  
Rex Derr, Director, Parks & Recreation Commission  
Linda Hoffman, Director, Ecology  
Douglas MacDonald, Director, Transportation  
Doug Sutherland, Director, Natural Resources

**ISSUE:** Consolidation of DSHS contracts with Tribes from multiple contracts to a single agreement

**AGENCY:** Department of Social and Health Services, Office of the Secretary

**CONTACT:** Colleen F. Cawston, 360-902-7816, [cawstcf@dshs.wa.gov](mailto:cawstcf@dshs.wa.gov)

**BACKGROUND:** During the 1999 Centennial Accord meeting, the Tribes requested that all their contracts with DSHS be consolidated into a single contract. Secretary Braddock embraced this concept and began collaborative work with the DSHS Indian Policy Advisory Committee to develop guidelines and identify tribes to participate in a pilot project. A few of the essential components of the project are to have a single billing and reporting process, single monitor visits and single point of contact for both the tribes and state.

**CURRENT STATUS:** Guidelines have been developed by collaboration with the Department and the Tribes. A training module has been developed by Indian Policy and Support Services and is provided annually to the Tribes and Department personnel. Currently there are three tribes operating under a consolidated agreement with an additional tribe finalizing its plan. The first consolidated monitor visit was completed in June, 2004

**OUTLOOK FOR 2005 AND BEYOND:** While many steps have been completed, this project remains a “work in progress”. The Department must identify whether contracts that are categorized as “fee-for-service” can or cannot be added to this process. Among issues needing review are: the requirement that the tribe must initiate this contract process through the submission of a letter of intent and a plan; the extent to which the process actually increases efficiency of all parties; and the extent to which Contract Consolidation should become the way in which Tribal contracts are administered.

**OPPORTUNITY:** It is possible that when the Department of Social and Health Services is successful in consolidating contracts covering the broad spectrum of services provided, it can be a model for other state agencies. This will reduce the administrative workload of both the tribes and the state.

**ISSUE:** Funding for Tribal Programs that Provide Temporary Assistance for Needy Families (TANF) in Washington State

**AGENCY:** Department of Social and Health Services, Economic Services Administration, State Tribal Relations Unit (STRU)

**CONTACT:** Sarah Colleen Sotomish, STRU, (360) 725-4661, [Sotomsc@dshs.wa.gov](mailto:Sotomsc@dshs.wa.gov)

**BACKGROUND:** Under federal welfare law, tribes have the option to administer TANF programs in place of the state. Funding is based on the amount of federal funds spent under the AFDC program in FFY 1994 for Indian families residing in the tribe's service area. Once the tribe's federal grant is determined, the state's TANF block grant is reduced by that amount. State law requires the transfer of a "fair and equitable amount" of state Maintenance-of-effort (MOE) funds for TANF to support Tribal TANF programs. "Fair and equitable" is not defined in statute.

**CURRENT STATUS:** Six Washington tribes and one consortium operate TANF programs: Lower Elwha Klallam and Port Gamble S'Klallam Tribes (since 1998); Quinault Nation, Quileute Tribe, and the Confederated Tribes of the Colville Reservation (since 2001); Spokane Tribe (since 2003); and SPIPA, a consortium of the Skokomish, Squaxin Island and Nisqually Tribes (2004). In SFY 05, these programs will receive over \$18.9 million in federal TANF funds and over \$13.8 million in state MOE funds.

**OUTLOOK FOR 2005 AND BEYOND:** The state is currently in Tribal TANF negotiations with six tribes: Lummi Nation, Nooksack, Tulalip, Muckleshoot, Hoh, and Shoalwater Bay tribes. The Upper Skagit Tribe recently informed the state of its intent to operate Tribal TANF. Additional Tribal TANF programs will have a significant impact on the level of TANF and state MOE funds available to the state as more funding goes to tribes.

**OPPORTUNITIES:** Work with tribes to: (1) seek Congressional support for a greater financial commitment from the federal government for Tribal TANF; (2) encourage mutual consultation in assessing the impacts of any potential reductions in federal and state funding on WorkFirst (the state's TANF program) and Tribal TANF programs; and (3) define "fair and equitable" in relation to state funds.

**ISSUE:** Inadequate Funding for Indian Child Welfare

**AGENCY:** Department of Social and Health Services, Children's Administration

**CONTACT:** Charlene Ramirez, (425) 673-3269 [rcha300@dshs.wa.gov](mailto:rcha300@dshs.wa.gov)

**BACKGROUND:**

During the last legislative session, Indian Child Welfare (ICW) funding was cut by \$260,000. Tribes and off-reservation contractors are now struggling with ways to continue the provision of prevention services, child protective services, and child welfare services without jeopardizing the health and safety of children in their care. If this funding is not restored, tribes and contractors report the following potential outcomes:

- Reduction in tribal ICW staff
- Reduction in transportation options for families living in rural areas of the reservations for the purpose of accessing needed child protective or child welfare services.
- Reduction in the recruitment of Indian foster homes for Indian children when out-of-home placement is imminent or necessary to protect the child from further abuse and/or neglect
- Increase in the number of out-of-home placements due to the lack of available services and interventions
- Increase in the number of Indian child protection and child welfare cases from tribal court jurisdiction to State court jurisdiction
- Increase in the number of runaway youth due to the lack of transportation and appropriate intervention services for teenage youth
- Reduction or elimination of prevention services, parenting classes, and cultural activities.

**CURRENT STATUS:**

Children's Administration is continuing efforts to restore the funding. The Department will be seeking full restoration in its 2005- 2007 budget.

**OUTLOOK FOR 2005 AND BEYOND:**

If the funding is not restored, the Administration will initiate dialogue with the tribes to ensure tribes are able to investigate allegations of abuse and/or neglect within their current resource allotment. Local agreements will need to be developed between Children's Administration and the tribes to address access to State resources for the purposes of investigation and provision of child welfare services if they are not available within current tribal allotments.

**ISSUE:** Medicaid Encounter at Tribal Clinics

**AGENCY:** Department of Social and Health Services,  
Medical Assistance Administration & Health and Rehabilitative Services  
Administration

**CONTACT:** Roger Gantz, 360-725-1880 [gantzrp@dshs.wa.gov](mailto:gantzrp@dshs.wa.gov)

**BACKGROUND:**

As set forth in Washington's Medicaid State Plan, encounter payments are for the following services: physicians, physician assistants, nurse midwives, advanced registered nurse practitioners (ARNP), speech-language pathologists, audiologists, physical therapists, occupational therapists, podiatrists, optometrists, dentists, chemical dependency counselors, psychiatrists, psychologists and other mental health professionals. Currently, DSHS contracts with some 30 tribal health facilities and 2 urban tribal FQHCs to serve DSHS AI/AN clients.

In SFY 2003, the department paid tribal facilities \$24.8 million in encounter rate payments to serve an estimated 7,760 Medicaid AI/AN and non-native clients. In addition, DSHS paid the tribal facilities \$3.3 million for non-encounter rate services - most expenditure were for pharmacy services. The following are a listing of tribal facility encounter rate policy issues that need further clarification: Services billable as an Encounter, Services billable as Encounter payment coverage for Medicaid Non-Natives; DSHS tribal encounter payment rate options. Encounter payment coverage restrictions for Non-Medicaid Clients – Medical Care Services (GAU/ADATSA), State Children's Health Insurance Program (SCHIP); and managed care contracts.

**CURRENT STATUS:**

In coordination with IPSS two workgroups have been established and convened in September. Next meeting of the Billing & Mental Health Workgroups are set for October. Financial decision package has been submitted to OFM regarding Tribal reimbursement for services to non-natives is not known at this time.

**OUTLOOK FOR 2005 AND BEYOND:**

Have the workgroups continue to meet and address the billing instructions revisions, providing recommendations to the administration for changes. To determine any barriers that may exist for tribal communities to access mental health and chemical dependency resources, and provide recommendations to the administration.

**OPPORTUNITIES:**

The review process has helped to identify inconsistencies in the Medicaid Managements Information System (MMIS) system. In clarifying billing of tribal clinics for services, the amount of services being properly matched in Accounting and Financial Reporting System (AFRS) will increase. Thus increasing services the state has been providing match dollars for. This ongoing communication with the tribes is beneficial to the state in helping to identify methods and programs as part of the strategy to address health disparities.

**ISSUE:** State's Ability to Provide Services to Indian Children

**AGENCY:** Department of Social and Health Services, Children's Administration

**CONTACT:** Charlene Ramirez (425) 673-3269 [rcha300@dshs.wa.gov](mailto:rcha300@dshs.wa.gov)

**BACKGROUND:** As required by all states, in November of 2003 the Federal Department of Health and Human Services completed the Child and Family Safety Review (CFSR) for Washington State's child welfare system. The purpose of the review was to identify strengths and areas requiring improvement related to the safety, permanency and well-being of children. States are required to develop approved Program Improvement Plans (PIP) to address areas of deficiency found through the review. In the development of Washington State's PIP, meetings were held to afford the Tribes and Recognized Indian Organizations input to the plan's development. Final Program Improvement Plans are developed with the goal of improving the following outcomes:

- ❖ **Safety**-First and foremost, children are protected from abuse and neglect. A child is safely maintained in their home whenever possible and appropriate.
- ❖ **Permanency**- Children have permanency and stability in their living situations. Family relationships and connections are preserved for children.
- ❖ **Family and Child Well-Being**-Families have enhanced capacity and support to provide for their children's needs. Children receive appropriate services to meet their physical, educational and mental health needs.

The PIP also addresses improvement related to systemic issues such as: array of services, collaboration, and quality assurance, all of which support improved practice and case outcomes.

**CURRENT STATUS:** Recommendations from statewide workgroups and tribal forums have been incorporated into the State's PIP and presented to the Department of Health and Human Services for final approval. A final, agreed upon plan is expected to be released by mid October and will become part of the state's ongoing comprehensive plan or Kids Come First II Initiative. The plan will require support from the legislature for the Administration's decision package request.

**OUTLOOK FOR 2005 AND BEYOND:** The Kids Come First II improvement plan includes the following initiatives to improve Indian Child Welfare (ICW) Service delivery and outcomes:

- Early identification of Tribal status
- Early engagement of Tribes in decision making
- Tribal licensing and IV-E agreements with individual tribes
- Development of a specific ICW Quality Assurance program
- Enhanced training on ICW and on active efforts vs. reasonable efforts
- Support for customary adoptions
- Updated ICW Manual to support consistency
- Development of practice guidelines to apply Kids Come First initiatives to ICW cases.

The PIP goes beyond the requirements of HHS, to address the requirements of the Tribal/State Agreements of Washington State and the Tribes of Washington

**OPPORTUNITY:** There is tremendous opportunity to be the first state to develop a comprehensive Indian Child Welfare Quality Assurance model, which supports safety, permanency and well-being for Indian children served by Children's Administration.

**ISSUE:** Cigarette compacting – Potential 2005 Legislation

**AGENCY:** Department of Revenue

**CONTACT:** Leslie Cushman, Assistant Director, Special Programs Division, 570-3201

**BACKGROUND:**

In 2001 the Legislature authorized the Governor to enter into compacts with certain Indian Tribes regarding taxation of cigarettes. The compacts resolve decades of conflict between the State and Tribes over the sale of contraband cigarettes to non-Indians. These agreements make it legal for non-Indians to purchase cigarettes from Tribes. Compacts benefit the Tribes through Tribal tax revenues and the change to lawful status. They benefit the State because all cigarettes are stamped and taxed, access to low-priced cigarettes is reduced, law and order is improved, and non-Indian stores no longer have to compete against in-state sellers of tax-free cigarettes. The authorizing statute delegates to the Department of Revenue the responsibility of negotiating on behalf of the Governor. Overall, 21 of the 29 Tribes in the State are identified in the statute. The compacts provide for an exemption from State taxes, contingent on the Tribe imposing a tax of 100% of the State cigarette and sales tax, and using such revenues for essential government services. Tribes may elect to begin the tax imposition at 80% of the State rates, so long as at the end of three years the Tribe is at 100% of the State rates.

As of October, fourteen Tribes have signed compacts with the Governor: Squaxin Island, Upper Skagit, Tulalip, Jamestown S'Klallam, Nooksack, Chehalis, Port Gamble S'Klallam, Swinomish, Nisqually, Samish, Muckleshoot, Yakama, Lummi, and Sauk Suiattle. Four additional Tribes are in discussions with the Department of Revenue: Skokomish, Kalispel, Snoqualmie, and Suquamish.

**CURRENT STATUS:**

The Puyallup Tribe is not one of the 21 Tribes with whom the Governor may negotiate a cigarette compact. The Puyallup Tribe is the most significant source of Indian-smokeshop contraband cigarettes in this State. The Department estimates that sales at the 23 Puyallup smokeshops represent between thirty to 40 million dollars in uncollected State tax. The Tribe and the Governor's Office have been discussing the possibility of a lower tax rate than authorized under the existing enabling legislation, this lower tax rate justified on the very different business model on the Puyallup Reservation. Where most Tribes operate the cigarette smokeshops as Tribal enterprises, all but one of the 23 Puyallup smokeshops are owned by Tribal members as opposed to the Tribe itself. The Tribe contends that a tax basis of 100% of the State rates would for all practical purposes put most of the member smokeshops out of business. This is because the profit retained by the businesses currently would, under the existing statutory scheme, be transmitted to the Tribal government as tax revenue and no longer be available to business owners for operating expenses or profit. The Department of Revenue has acted in a support capacity during these negotiations, providing background, working with the Tribe on fiscal estimates, and providing input to the Governor's staff.

**OUTLOOK for 2005 and BEYOND:**

The Puyallup Tribe is expected to seek legislation during the 2005 session that would authorize the Governor to negotiate a lower Tribal tax rate. While existing law calls for a Tribal tax of 80 percent ramped up to 100 percent within three years, the Puyallups are seeking a rate around 70 percent of the State rate. The introduction of proposed legislation containing operative terms that are distinct from current law, and seemingly more favorable to Tribal smokeshops, will raise policy issues and could be a significant barrier to passage of such legislation. It is also expected that of the other 7 Tribes not covered by the existing compact statute, the Cowlitz, Colville, and Makah Tribes will seek to be added to the current statute, which requires a tax rate of 100% of State taxes.

**ISSUE:** Concurrent Taxation of NonIndians Conducting Business on Tribal Trust Land - Quil Ceda Village

**AGENCY:** Department of Revenue

**CONTACT:** Leslie Cushman, Assistant Director, Special Programs Division, 570-3201

**BACKGROUND:**

Federally recognized Indian Tribes have the authority to impose taxes. This authority has been deemed “an essential attribute of Indian sovereignty” and “a necessary instrument of self-government and territorial management.” In certain circumstances, this authority to tax extends beyond Tribal members to non-Indians. The imposition of State taxes on the same activities the Tribes seek to tax results in conflict and disputes. This overlapping jurisdiction is known as “concurrent taxation.” The Tulalip Tribes currently license all businesses operating with the reservation and impose a real estate excise tax. The Tulalip Tribes has developed a business park on trust land adjacent to I-5. The first major tenants are Wal-Mart and Home Depot. The Tribe has smaller tenants as well. The Tribe operates a casino nearby, is planning to develop a hotel, and will soon be opening a high-end factory store mall. The Tribe has chartered what it refers to as a “borough” encompassing the trust land. The borough is designated “Quil-Ceda Village.” The charter is pursuant to an ordinance, the Tulalip Tribes Subdivision Act.

**CURRENT STATUS:**

The Tulalip Tribes had intended to impose a retail sales tax equal to the State tax on retail customers of those tenants. The tax revenue would provide a stream of revenue against which the Tribe would bond. The Tribe informed the Department of Revenue of its plans and objective, which was to preempt the State of Washington from its tax authority over the non-Indians, specifically the retail transactions between its tenants and their non-Indian customers. The Tribe’s legal theory was by developing a municipal-like infrastructure and providing amenities, it had added to the value of the activities; thus the Tribe had a greater interest in the activities than did the State, and State tax was thereby preempted. The Department disagreed with this view on the basis the activities of the Tribe were not significantly involved with the sale of the products, and more importantly the products came from off-reservation. The Department’s position is that state tax was not preempted by federal law. The impacted businesses are currently reporting B&O tax and state and local sales tax to the Department of Revenue. Overall collections are estimated to be between six and eight million dollars annually, a portion of which is distributed to Snohomish County.

Preemption of state tax is a federal tax outcome developed through U.S. Supreme Court case law. State tax may be preempted if after weighing the relative state, federal, and Tribal interests at stake it is found that the exercise of state authority would violate federal law. This analysis is known as the balancing test and it must be viewed in light of the holding of the *Colville* decision. The *Colville* holding is that generally a Tribe does not have a legitimate interest in selling goods created off reservation free from state tax. “It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest.” *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 US 134 (1980.)

In 2001 and each successive legislative session thereafter the Tulalip Tribes have been proponents of legislation to allow either sharing of revenue, comprehensive tribal taxing authority that preempts state taxes, or municipal-like status for Quil Ceda Village. The Department of Revenue has been supportive of trying to obtain a legislative solution, as opposed to litigation. The 2004 legislation, SHB 1879, authorized the Department of Revenue to enter into an agreement with the Tulalip Tribe, on a pilot basis, for collection and distribution of a tribal tax, such tax to be the same as would be imposed by a city.

**OUTLOOK for 2005 and BEYOND:**

The Tulalip Tribes are expected to seek sponsorship of legislation in the 2005 session regarding Tribal taxing authority. Federal court activity in this area could impact the State’s position and level of risk in this situation. See “Fuel Sales by Tribes - Squaxin Island Tribe / Swinomish Tribe Fuel Tax Litigation” discussion.

**ISSUE:** Fuel Sales by Tribes-Squaxin Island Tribe/Swinomish Tribe Fuel Tax Litigation TET-3

**AGENCIES:** Departments of Licensing and Revenue

**CONTACTS:**

DOL issues: Jeff Beach, Manager Fuel Tax (360-664-1844) [jbeach@dol.wa.gov](mailto:jbeach@dol.wa.gov)

Mary Tennyson, Sr. Assistant Attorney General (360-753-0225) [maryt@atg.wa.gov](mailto:maryt@atg.wa.gov)

Art Farley, Manager Motor Carrier Services (360-664-1820) [afarley@dol.wa.gov](mailto:afarley@dol.wa.gov)

DOR issues: Leslie Cushman, Ass't. Director, Special Programs, 570-3201, [LeslieC@dor.wa.gov](mailto:LeslieC@dor.wa.gov)

**BACKGROUND:**

The Squaxin Island Tribe and the Swinomish Indian Tribal Community have plans to purchase tax free motor vehicle and special fuel, blend in the federally required detergent additives (or other additives) on their reservation or trust lands, and assert that this is fuel manufactured on their reservations. The fuel would be sold at retail fueling stations on the reservations to tribal members and non-tribal members. The Tribal position is that no state taxes would be collected or remitted to the state on any sales, the majority of which are to non-tribal members. Each tribe has one retail outlet near its tribal casino. Each retail outlet is located on reservation or trust property adjacent to state highways.

The Squaxin Tribe approached the State Department of Revenue, asking for a ruling on the taxability of its proposed activities. The Department of Revenue ruled the tribe's proposed activity would be a manufacturing activity, the Tribe would not be subject to manufacturing tax, and the ultimate consumer would be exempt from sales and use tax. The Department of Revenue specifically did not rule on the applicability of the fuel tax. The motor vehicle fuel tax is administered by the Department of Licensing and this department declined to rule that the fuel is exempt from the motor vehicle fuel tax.

**CURRENT STATUS:**

The Tribes sued the Department of Licensing in federal court in December 2003. The case is set for trial January 18, 2005. There are federal court cases in other jurisdictions that may impact WA. In August 2004, the 9<sup>th</sup> and 10<sup>th</sup> Circuits held Idaho and Kansas fuel taxes could not be applied to fuel sold by Indian Tribes on-reservation. In the 10<sup>th</sup> Circuit case, because the Court found that the market for the Tribe's sales of fuel was a direct result of the presence of its casino in a remote area, the Court found "value generated on the reservation" existed, even though the Tribe was importing the fuel from off-reservation for resale. This is a much broader interpretation of the term than any other court has used in the past. The 9<sup>th</sup> Circuit court examined the mechanics of the Idaho tax and held that the Idaho fuel tax was impermissibly imposed on Indian retailers. The 9<sup>th</sup> Circuit case could impact Washington's fuel tax depending on how a court views our statute's operative sections regarding ultimate liability. The facts of the 10<sup>th</sup> Circuit case are narrow and its application is somewhat limited. Both cases are being appealed to the US Supreme Court.

**OUTLOOK for 2005 and BEYOND**

If the Squaxin Tribe's proposal were implemented, the fuel tax revenue loss is estimated at approximately \$272,000 per year. If the Squaxin Tribe had a State-Tribal Fuel Tax Agreement, the tribe would receive approximately \$65,898 per year, which represents the formula calculated to represent the fuel tax on sales to enrolled Squaxin Island tribal members. The estimated fuel tax revenue loss if the Swinomish tribe's proposal were implemented, is \$275,000. The Swinomish Tribe has a State-Tribal Fuel Tax Agreement using the formula method, under which the tribe currently receives \$83,202 per year.

If all tribes in the state were to engage in a similar fuel blending process that was determined to be exempt from the state fuel tax, the potential revenue loss is estimated to be from \$113 million (15% market share) to \$227 million (30% market share) per year. If all tribes had a State-Tribal Fuel Tax Agreement, the total dollar payments to the tribes are estimated at approximately \$5 million to \$7 million per year.

If these issues have not been resolved, the Governor could be asked to make a determination to resolve the issue through more discussions, further litigation, or legislation.

**ISSUE:** Implementation of State legislation on Tribal government property tax exemption

**AGENCY:** Department of Revenue

**CONTACTS:** Peri Maxey, Assistant Director, Property Tax Division, 570-5860  
Leslie Cushman, Assistant Director, Special Programs Division, 570-3201

**BACKGROUND:**

All real and personal property in this State is subject to property tax each year based on its value, unless a specific exemption is provided by law. Property owned by the United States, the State of Washington, counties, cities, and other local governments is exempt from property tax under the State Constitution. This tax treatment does not extend to Tribal governments.

Generally, Tribes and their members are not subject to State taxation in Indian country. Indian Country is all land within the reservation. It includes all trust land, either inside or outside the reservation. And it includes land that is "restricted as to alienation," meaning the land cannot be sold without the approval of the Bureau of Indian Affairs. The exception to this general exclusion from state tax is where Congress has clearly given the States authority over Tribes. The U.S. Supreme Court has ruled that Congress has so acted in regard to fee land owned by Tribes and their members. Tribes acquire fee land for a wide variety of purposes and hold land both inside and outside reservation boundaries.

Tribes regularly make applications to the federal government to place their land in trust status. With such status, the land is not subject to property tax. Due to on-going litigation against the U.S. Department of Interior and some changes in practices at the federal level, the fee-to-trust process can take years from start to finish. Because of this change in the application timeline, Tribal governments approached the Legislature, seeking an exemption from tax for Tribal property. The 2004 legislature enacted Substitute House Bill 1322, which provides an exemption for Indian Tribes if property is used exclusively for essential government services. Essential government services are defined in statute as "including, but not limited to, Tribal administration, public facilities, fire, police, public health, education, sewer, water, environmental and land use, transportation, and utility services."

**CURRENT STATUS:**

The Department of Revenue worked closely with County Assessors and Indian Tribes in developing an understanding of the different perspectives regarding scope and breadth of interpretation. An emergency rule has been filed and permanent rulemaking is underway. A final rule will likely be adopted in early 2005. Legislative testimony and history indicate that commercial activities of Tribes, particularly casinos, were not intended to be covered by the tax exemption. Some Tribes have put forth arguments that some commercial activity is eligible, such as a subsidized oyster business that is not by itself profitable. The Department has taken the position that activities not typically undertaken by governments and that compete directly with non-Indian businesses are not covered by the tax exemption. On the other hand, activities that compete with non-Indians but typically are provided by governments are covered, such as campgrounds, swimming pools, or boat launches, are covered by the tax exemption.

**OUTLOOK for 2005 and BEYOND:**

There is some ambiguity in the legislation regarding commercial activities. The Department will administer the application process, which will provide for uniformity and consistency in the application of the law across the 39 Counties and 29 Tribes. The Department expects Tribes will appeal some denials and Assessors will appeal some allowances of the exemption. The consultation with the Tribes, the early and regular communication with the Assessors, and the extensive work on the Rule provide a solid administrative record for the Department. It is possible that County Assessors could seek a legislative clarification in 2005, but more likely will wait to see how the exemption is implemented in practice.