Drawing a Line in the Sand:
Tribal/County Jurisdictional Issues

A case study of the Tulalip Tribes’ Tidelands

Masters of Public Administration
Capstone Submission of:

Celine Cloquet-Vogler
Abstract

“Nobody cared about the tribes when they had nothing. Now we’re
looking at an era of transformation between Indian governments and surrounding
communities.” George Forman, attorney for Sycuan Band of the Kumeyaay
Nation. (North Dakota Law Review, 2004) When the Tulalip Tribes’ created
policy intended to strictly manage and regulate the repair and construction of
private structures on tribally owned tidelands, including bulkheads, docks and
beach stairs and to require leases for such private structures, a line in the sand
was drawn between tribal/county jurisdictions. The county declares the issue
disputable. The state describes the tribal/county jurisdictional issue as complex,
cautionary and sensitive and stresses that to date there is neither law or court
decision that addresses this issue directly nor any that address similar issues in a
manner that would establish a clear demarcation for all circumstances. However,
evidence brought forth in this capstone demonstrates circumstances that limit
state and local authority over non-Indian land on Indian reservations, for
jurisdictional questions require fact specific analysis, which I intend to outline in
this case study.
Tribal policy is complex. Tribes have experienced remarkable circumstances that, over time, have shaped the fiber of their existence. Under the plenary power of Federal government, Tribes have had to survive under the ebbs and flows of policy – moving from separatism and assimilation, and then back again as the pressure exercised the heartbeat of Indian law, which kept afloat Indian sovereignty’s very existence. Law is what has framed federal-tribal policy over the last two centuries. To understand Indian Policy, one must have a familiarity on Indian Law – no exceptions.

The methodology of case studies is to explain real-life interventions that are too complex for other western-academic schisms. There is nothing more complex then the federal trust status of Native American Indian Tribes. Thus, tribal explanatory research is best told in a story format because key operational links or occurrences can easily be tracked through time. In other words, it is important to understand a series of actions or events in order to define inference. Therefore, although a less desirable form of inquiry (Yin, 2003, p. 3), Indian Country must rely on case studies to tell stories, which in turn explain policy. Additionally, a single case study rather than multiple case studies is a more effective research design when researching Indian Country due to the inherent nature of each tribal history. Simply stated, as Charles Wilkinson reminds us,
“History is the essential foundation for an understanding of American Indian policy.” (Wilkinson, 2003)

By creating research design using the Tulalip Tribes’ (the Tribes) path to sovereignty – its history as Tribes who’s challenges continue today - include suburban sprawl spilling onto reservation lands; new wealth allowing the Tribes to assert control over its resources; and non-Indian landowners refusing to submit to a government in which they have no representation - as the unit of analysis in this explanatory study, a layperson will better understand how and why the jurisdiction of reservation tidelands is preserved for the Tribes. The effectiveness of case studies based on law provides for no biases. Evidence-based theory can eliminate questions of jurisdictional authority. What may appear to the non-tribal publics as unfavorable, once explained by case law and legislative acts, one may have a clearer understanding of Tribal policy when all time-developed evidence is present in a case study setting. Literally, after all, only law has shaped Tribal sovereignty. To define the law is to define the actions, formed by history.

The methodology used to present this capstone was dependent on 28 secondary data resources. The research accumulation creates a timeline and builds a case for tideland jurisdiction by collecting secondary data consisting of government orders, court orders, conferences, publications and the media: both
print and web-based. Interviews, at this time, due to the sensitivity of the issue, were not considered.

The present data reassures that Indian tribal rights are intimately connected with the Reservation waterways. It also proves that Tribal rights affect not only Indians within their reservations, but that they also affect property outside of reservations held by others. Because of the supremacy of Indian Treaties under the United States Constitution, these rights may be superior to rights based on state or common law. (Morisset, 2001)
The Line is Drawn

On January 22, 1855 a “contract” was designated, conferring that Isaac I. Stevens, governor and superintendent of Indian affairs, and the chiefs, headman, and delegates of tribes and bands of the area of Point Elliot, a total of 22 tribes and bands, agreed to “cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them as described.” Specifically, in article 5 of the 15 articles “contract” declared:

The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

Signatories to this “contract” were the Dwamish, Suquamish, Sk-kahl-mish, Sam-ahmish, Smalh-kamish, Skope-ahmish, St-kah-mish, Snoqualmoo, Skai-wha-mish, N'Quentl-ma-mish, Sk-tah-le-jum, Stoluck-wha-mish, Sno-ho-mish, Skagit, Kik-i-allus, Swin-a-mish, Squin-ah-mish, Sah-ku-mehu, Noo-wha-ha, Nook-wa-chah-mish, Mee-see-qua-guilch, Cho-bah-ah-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in the Territory of Washington. According to Robert Ruby and John Brown, the name
Tulalip stems from a native word meaning “almost land-locked bay.” The name came to be applied to the nearby Tulalip Reservation, as well as to its Indians, who came to be known as the Tulalip Tribes of the Tulalip Reservation. They were Coastal Salish people, mostly Snohomish, Stillaguamish, Snoqualmie, Skykomish, Skagit, and Samish Indians. (Brown and Ruby, 1992)

Indian Policy in America began with separatism, delineating boundaries of reservations. Today, these reservations total approximately 3,200,000 acres of land in Washington State. Of this total, about 2.5 million are held in fee title by the federal government. Individuals, mostly non-Indians, own the remaining 700,000 acres outright in fee. (Morisset, 2001) The Tulalip Reservation is inlayed in one of the fastest growing regions in the state – Snohomish County.
The Tulalip Reservation, one of four reservations created by the Point Elliott treaty, situated 40 miles north of what is now Seattle, has had a remarkable history. As tribal member Sherry Guydelkon believes, “Because the Tulalip Reservation has changed in ways that would have been unimaginable to tribal families 100 years ago, current tribal members have no trouble believing that they will see even greater changes during their lifetimes…” she stated when reflecting on the Tribes’ move to self-governance. ¹ (Guydelkon, 2001)

This case study begins by taking a look at the disruption of reservations. Provoked by the westward expansion of homesteaders and immigrants putting pressure on the federal government to open more land for settlement, the United States moved away from separatism and effectively adopted a policy of assimilation. An Act of Congress, in 1871 asserted that there would be no more treaties with Tribes. From this point on reservations were established by Executive Order or an Act of Congress. On the eve of what could have become the complete genocide of the American Indian, President Ulysses S. Grant, during his Quaker Indian Peace Policy Era, acted decisively to begin two

---

¹ Tribal self-governance is an expansion of self-determination with notable changes in how federal funding is received and expended by tribes. Tribes have described tribal self-governance as a "new partnership" between the federal government and tribes. As defined by Congress in P.L. 106-260 (2000), the goal of self-governance is to permit an orderly transition from Federal domination of programs and services to provide Indian tribes with meaningful authority, control, funding, and discretion to plan, conduct, redesign, and administer programs, services, functions, and activities (or portions thereof) that meet the needs of the individual tribal communities.
decades of reform that for the first time promoted the welfare of Indians as individuals and broke ground for their eventual citizenship. An Executive Order, of December 23, 1873 issued that the boundaries established for the Tulalip Reservation, in January 22, 1855, be extended...

to wit: Beginning at low-water mark on the north shore of Steamboat Slough at a point where the section line between sections 32 and 33 of township 30 north, range 5 east, intersects the same; thence north on the line between sections 32 and 33, 28 and 29, 20 and 21, 16 and 17, 8 and 9, and 4 and 5, to the township line between township 30 and 31; thence west on said township line to low-water mark on the shore of Port Susan; thence southeasterly with the line of low-water mark along said shore and the shores of Tulalip Bay and Port Gardner, with all the meanders thereof, and across the mouth of Ebey's Slough to the place of beginning. (Tulalip Trilbes website, 2006)

In 1873 a survey took place in preparation of allotting lands of the Reservation to Tulalip individuals. According to Les Parks, an elected official on the Tulalip Board of Directors, "It took about 10 years to complete this process and in 1884, Tulalip individuals began receiving allotment patents to their
property. These ‘restricted fee patents’, or deeds, conveyed lands to Indian individuals to the high water mark.”

On February 8, 1887, Congress enacted the General Allotment Act (“GAA”), otherwise known as the Dawes Act, which was later amended by the Burke Act in 1906. Supports of the Act believed it would “civilize” Indians. Traits the Euroamericans associated with savagery – such as nomadism, collective economic strategies, and tribalism – would be replaced by traits associated with civilization – sedentary agriculture, private property, and individualism. (Greenwald 2002)

Allotments carved out the Tulalip Reservation between 1883 and 1909. Guydelkon goes on to say that during this time period “almost every inch of the Tulalip Reservation had been allotted to individual tribal families. After years of poverty and pressure imposed by Indian agents and real estate brokers, over half of the reservation land was sold out of trust.” (Guydelkon, 2001, p.1) Due to the federal social engineering policy of allotment, the result was that more than half of the reservation, some 13,995 acres, had been sold to non-Indians. Indians owned 4,571-acres; 3,845 acres of that land was tribally owned in trust. The
GAA was set up to where the individual allotment would fall out of trust, usually after 25 years. Indians had problems paying for state taxes and lost land. State intestacy laws divided ownership of land into smaller and smaller parcels. Indians also leased land to non-Indians on the Tulalip Reservation. The checkerboard pattern of land settlement within reservation boundaries exists today.

As a result of Congress's policy of forced assimilation premised on individualization of Indian land holdings, gradual breakup of Indian reservations and elimination of tribal governments was eminent until the Indian Reorganization Act (IRA) of 1934, which was enacted to prevent further erosion of the Indian land base and to strengthen tribal government. With the help of IRA, Tulalip families jumped at the change to become a legal Tribal entity. One of the goals of this newly established western-style formal governance was to regain the land that had been sold out of trust. Another goal was to always maintain that the Tribes owned the property below the high water mark, as held in trust by the federal government. (Parks, 2006) The IRA increased Tribal self-government and decreased federal control. The IRA halted the General Allotment Act; extended indefinitely the trust period for allotments still in trust; authorized tribes to organize and adopt constitutions; and granted Tribes power to manage internal affairs. Tulalips’ Constitution and Bylaws were approved.
January 24, 1936 and a Charter ratified October 3, 1936. The governing body was defined to include a seven member Tulalip Board of Directors.

In 1972, pursuant to Article VI of the Tulalip Tribes’ constitution, the Tribes established a comprehensive system of land use regulations and an administrative structure for implementing those regulations. In 1982, the Tribes created a seven-member Planning Commission charged with updating the land use regulations. Over the next decade, the Planning Commission developed a plan "balancing competing economic, development, housing, and natural resource priorities." Upon completion of the revised regulations, the Planning Commission prepared a zoning ordinance and map "to implement and preserve the integrity" of the plan. The zoning ordinance, Ordinance 80, was reviewed and approved by the Bureau of Indian Affairs and the Solicitor's Office in the Department of the Interior.

What engaged the Tribes to legally steward their waters was the 1974 Boldt Decision ² which not only brought back pride to the people, but had immediate economic and cultural benefits across reservations. Struggling Tribes re-invested in fisheries and used money netted from catches to help build tribal

---

² U.S. District Judge George Boldt's ruling interpreted the language of treaties made with Washington tribes more than a century earlier. He determined that the treaties reasserted Indian rights to half of the salmon harvests in perpetuity.
governments and enhance reservation infrastructures. However, long before Boldt, the U.S. Supreme Court once observed that salmon “were not much less necessary to the existence of the Indians than the atmosphere they breathed.” (Kamb, 2004)

Another monumental case was the litigation of *U.S. v. Washington*. In this case, courts affirmed that the Indians’ treaty right to fish included the right to harvest shellfish imbedded in the state’s tidelands and bedlands. The court has held that usual and accustomed places for shellfish harvesting are the same as those for salmon and include "... all bed lands and tidelands under or adjacent to these areas." (*U.S. v. Washington, 9th Cir. 1978*) Clearly, the treaty right to harvest shellfish within usual and accustomed grounds and stations exists whether or not the underlying bed lands or tidelands are in private ownership. Thus, Indian rights in tidelands within or adjacent to reservation give rise to habitat protection rights, confirmed in *U.S. v. Washington*. Since treaty rights include reserved fishing rights, including the right to access to fishing places and environmental protection, the state is barred from authorizing actions under any state policy that would violate these rights.

Today the Tulalip Reservation exterior boundaries enclose a land-base of 22,000 acres. Non-tribal landowners own 47 percent of the reservation’s property and most waterfront homes. The reservation is located entirely within
the county of Snohomish and comprises approximately 1.6% of the county's land area. About two thousand tribal members and eight thousand non-members inhabited the reservation's twenty-two thousand acres. But only twenty years earlier, in 1985, less than 1,000 tribal members lived on the reservation, and only about 1,000 non-tribal members lived on the reservation – a huge growth in population has occurred in the last two decades, on the reservation, which is consistent with the Snohomish County growth pattern.

<table>
<thead>
<tr>
<th>County</th>
<th>Population 1950</th>
<th>Population 2002</th>
<th>Percentage growth</th>
</tr>
</thead>
<tbody>
<tr>
<td>King</td>
<td>733,000</td>
<td>1,774,000</td>
<td>242%</td>
</tr>
<tr>
<td>Kitsap</td>
<td>76,000</td>
<td>235,000</td>
<td>309%</td>
</tr>
<tr>
<td>Snohomish</td>
<td>112,000</td>
<td>628,000</td>
<td>561%</td>
</tr>
</tbody>
</table>

(Washington State Ferries, 2006)

As of April 19, 2004 the Tribes have 3,611 members. Many services to its members include preschool, higher education assistance, health and dental clinics, a pharmacy, a state-licensed chemical dependency recovery program, senior retirement home and cultural activities. In addition to two Marysville School District (MSD) elementary schools, the Tribes collaborate with MSD in providing on-Reservation middle school and high school alternative programs.
The Tulalip Tribes provides over-sight to the Tulalip Housing Authority, which provides nearly 300 housing units for Tribal members, and to the Tulalip Utilities District, the primary provider of water/sewer services. (Tulalip Tribes’ website 2006) Health and social service programs are mainly funded by revenue earned from the Tribes’ business park leases, casino ² and other entertainment facilities.

---

² The Tribes, after the Indian Gaming Regulatory Act became law, opened a casino in 1991 after committing to the first state-tribe casino gaming compact. Prior to the casino, the Tribes offered an entertainment center featuring computerized bingo games in 1983.
The Tides Turn

On March 9, 2006, after offering over six public meetings, and deliberating for close to three years, the Board of Directors (elected political officials) of the Tulalip Tribal Government officially asserted jurisdiction of the beaches along their reservation by passing a Tidelands Management Policy resolution, within Ordinance 80, that severely restricts development along the reservation shoreline; a first policy of its kind in Tulalip history.

Therefore, since Indian jurisdictional rights can best be understood in a historical perspective, founded judicially, let's begin with the definition of trust responsibility. It first appeared in Chief Justice Marshall's decision in Cherokee Nation v. Georgia (1831).

In Cherokee Nation, the Nation filed an original action in the Supreme Court to enjoin enforcement of state laws. The Court refused original jurisdiction, finding that the tribe was neither a state of the United States nor a foreign state, and thus not entitled to bring suit directly before the Court. The Court concluded
rather that tribes were "domestic dependent nations" and that their relationship to the United States resembled "that of a ward to his guardian." (Cherokee Nation, at 17). President Andrew Jackson refused to follow this decision and initiated the westward removal of the Five Civilized Tribes of the Cherokee Nation.

It is from this holding that the trust responsibility doctrine has developed. That doctrine has been articulated as follows:

"Trust obligations define the required standard of conduct for federal officials and Congress. Fiduciary duties form the substantive basis for various claims against the federal government. Even more broadly, federal action toward Indians as expressed in treaties, agreements, statutes, executive orders, and administrative regulations is construed in light of the trust responsibility. As a result, the trust relationship is one of the primary cornerstones of Indian law." (Cohen, 1941)

Chief Justice Marshall opined on two other cases, with the three combined decisions referred to as the Marshall Trilogy. So important were these cases, that for the last 150 years they were cited in nearly every Indian decision from the Court – remaining as the foundation of Indian law. The other two cases are *Johnson v. M’Intosh*. Marshall examined the doctrine of discovery, which held
because the United States had adopted the doctrine of discovery, the US held
title to the Indian Lands. Because Indian tribes did not have full title, they could
not convey it. Only the United States could do so, by extinguishing the Indian
right of occupancy by purchase or by conquest. (Johnson v. M'Intosh)

The third case of the Trilogy, Worcester v. Georgia, involved an appeal by
missionaries to the Cherokee Nation who had been convicted in Georgian courts
for not having received a license from the Governor of Georgia to enter Cherokee
country. The conviction of the missionaries was reversed. Marshall held that the
relationship between the United States and the Cherokee Nation resembled that
of a guardian to its ward, but did not divest the tribe of its sovereignty. He stated
“the settled doctrine of the law of nations is, that a weaker power does not
surrender its independence – its right to self-government, by associating with a
stronger and taking its protection.” The Marshall Trilogy stands for the
proposition that Indian tribes had lost the ability to transfer their lands or enter
treaties with any entity except the United States, but were otherwise unchanged,
distinct entities that could continue to rule their own territories within the United
States. Over the next century and a half, the courts and Congress attempted to
erode those clear rules, but they still remain the foundation of Indian law.

The policy language within Tulalips Ordinance 80 maintains tribal
ownership of reservation beaches from the extreme low-water mark to the mean
high-watermark. The extreme low-water mark is the lowest point of a low tide. The mean high-water mark is the point at which half of all high tides are higher and half of all high tides are lower. The policy was created because Tribal leaders say waterfront development, mostly by non-tribal landowners, had damaged the tidelands. Ancient tribal fishing customs are hindered, water quality has suffered because of pollutants that seep into the bay, and the fish population is declining, according to the tidelands management policies. A policy, which expanded the 1855 Treaty of Point Elliott boundaries, in an executive order of 1873, guaranteed the beach to the tribe. Since the 1970’s the Tribes’ scientists began noting the deterioration of the shoreline evidenced by several negative effects to the tidelands after researching and maintaining their own scientific data. The environmental degradation at some of its bays’ water is so bad beach closures and swimming is prohibited due to increased bacteria levels found in the waters. Gathering shellfish for consumption is prohibited as well. For years, stretches of water have been off-limits to shellfish harvesting and swimming because of increasing bacteria levels. Though many kinds of bacteria can plague shellfish Beds, Tulalip Bay is polluted with fecal coliform – human and animal waste. When interviewed for an article, Bob Woolrich, the manager of the state Health Department’s shellfish program stated that the Tulalip Tribes’ sewage-treatment plant is partly to blame. Although the plant may meet state
standards, any outfall near shellfish beds is enough to warrant fishing closures. (Schwarzen, 2005). The 30-year old degrading treatment plant has had problems in the past. According to a quote in Schwarzen’s article, Chris Coar, a U. S. Environmental Protection agency compliance officer stated that, “Looking back at the plant’s performance records for the past five years, the plant has failed acidity, oxygen-level and suspended-solids tests from time to time.” (Schwarzen, 2005) The Tribes are looking for help from Indian Health Services, the federal agency that helped build the plant. Help needed consists of an evaluation and repair of sewage lines. When this help will come is unknown, according to Kurt Nelson, the Tribes’ leading fish and wildlife biologist. Nelson told Schwarzen that the issues concerning the condition of the tidelands are numerous. Nelson pointed out that the large population of wildlife in the area as well as agricultural issues. Tulalip Creek, which empties into the bay, crosses land used for cattle and buffalo grazing. Farm animals have access to the water. In addition, the stormwater system, which collects runoff from yards, is also a problem. Thus, in December of 2005, the Tribes took steps to improve the integrating of their lands by deciding to not renew land leases to nontribal homeowners. In March of 2006, the Tribes’ asserted their jurisdiction onto the tidelands, in efforts to preserve one of the most important physical features of the Tulalip Reservation by passing the Tidelands Management Policy.
A great deal of development has occurred along the Reservation shoreline over the years. The shoreline is studded with marinas, parking lots, public buildings, houses, cabins, docks, bulkheads, and beach access stairways. Unfortunately, this development has had negative impacts on shorelines on the Reservation and throughout Puget Sound. (The Tulalip Tribes Tidelands Management Policies, 2006)

Evidence presented to the Board from the Natural Resources Department showed that there are approximately 73 docks and piers, and 124 mooring buoys along the Reservation shoreline while there are less than 15 private docks and buoys along the rest of Snohomish County’s shoreline, excluding the city of Everett. Many of the private-owned structures and uses are located on tribally owned tidelands without permission or compensation to the Tribes. Over the years the Tribe and its members have been increasingly prevented from gaining access to the tideland reserved within the treaty for their use. Having been exempt from the state’s Shoreline Management Act (SMA) of 1971, Tribes are now taking the necessary steps to participate in the preservation of shorelines, or as the SMA reads:

The shorelines of the state are among the most valuable and fragile of its natural resources and there is great concern throughout the state relating to their
utilization, protection, restoration and preservation." (Clallam County Shoreline Master Program, 1976)

Shortly after 1971, an initiative –The Initiative to the Legislature No. 43 - in Washington grew out of discontent with the states already lapsed Shoreline Management Act. Although placed on the ballot by 160,000 signatures, the initiative to create a 500-foot control zone failed, partly because alarmed legislators had also placed revision to the Management Act on the same ballot. The revision, which passed, created a 200-foot control zone. (Kaufman and Pilkey, 1979)

Washington State became the first state to achieve a federally approved state Coastal Zone Management Program (CZM) Program in 1976. Washington’s CZM program is based primarily upon our Shoreline Management Act of 1971, as well as other state land use and resource management laws. The State, through the Department of Ecology, participates in the nation-wide CZM Program. The CZM program is a voluntary state-federal partnership that encourages states to adopt their own management programs in order to meet the federal goals of protection, restoration, and appropriate development of coastal zone resources. The states have broad latitude to adapt federal goals to state and local circumstances, needs, and legal traditions.
The Tribes have an even greater stake within the shorelines, in addition to the state’s concerns.

The Puget Sound shoreline is one of the most important physical features of the Tulalip Reservation to the Tulalip Tribes of Washington, its members, and non-tribal residents. The shoreline is where many ancestral settlements and burial sites are located and where Tribal fishing, gathering, cultural activities, and recreation continue to this day.

(The Tulalip Tribes Tidelands Management Policies, 2006)

Within their policy position paper the Tribe indicated that Washington State’s Department of Ecology had prepared an environmental impact statement, in consideration of adopting revisions in the SMA. The statement contained among other things, a lengthy bibliography that included scientific literature regarding bulkheads and their effects. According to tribal planner Joe Sparr, “Bulkheads built by residents are a particular concern on the shoreline because they change wave action in a way that damages salmon habitat.” (Logg, 2003) Today, Tribes play an increasingly critical role in regulating the environment on reservation lands and waterways. As Tribes' regulatory muscles grow - often with the blessing of the federal government - the regulated community must learn to adapt not only to different regulatory standards and procedures, but also to a different legal system.
A growing trend of similar actions from other shoreline Tribes in the area has occurred. The Lummi Nation and the Swinomish Indian Community – two neighboring governments – enacted similar policies prior to the Tulalips. However, across Puget Sound waters The Suquamish Tribal officials have asserted their dissent regarding the city of Bainbridge Island’s Critical Areas Ordinance, believing the measure falls short of protecting marine shorelines central to Native American culture. The Tribe is suggesting natural buffers in undeveloped shoreline areas to protect tidelands and waters surrounding the island. Tribal members traditionally have used those areas for fishing and shellfish gathering. They predict the habitat for treaty-protected fish and shellfish could be hurt if the city fails to call for the buffers. (Pritchett, 2006)
The Non-Tribal Landowners' Opinion

Immediately, a non-tribal landowner association of the Tulalip Reservation beach communities was formed after the Tribes announced, via an open public meeting that Tidelands policy will include:

- Construction of new private or community structures on the beaches is prohibited, unless a tribal department is responsible for the construction and obtains a special permit.
- Repair or replacement of existing bulkheads is prohibited unless an upland structure is in danger of being destroyed by the tides.
- Repair or replacement of existing docks and stairways to the beaches is prohibited unless the structures are made permanently and publicly accessible to three or more property owners.
- Owners of existing docks, stairways and bulkheads are subject to lease agreements with the Tulalip Tribes.

Presidencies have been set regarding Tribal leases. The Supreme Court has long held that tribal sovereignty interests are strongest with regard to on-reservation conduct of tribal members. In such cases, state law is generally inapplicable but for "exceptional circumstances." The Supreme Court's decision in Montana v. United States sets out the guiding principle that Indian tribes
generally lack jurisdiction to regulate non-members on the reservation, but it
recognized two exceptions to that rule. Under the first Montana exception, "[a]
tribe may regulate, through taxation, licensing, or other means, the activities of
nonmembers who enter consensual relationships with the tribe or its members,
through commercial dealing, contracts, leases, or other arrangements." Under
the second Montana exception, "[a] tribe may . . . exercise civil authority over the
conduct of non-Indians on fee lands within its reservation when that conduct
threatens or has some direct effect on the political integrity, the economic
security, or the health or welfare of the tribe." In its most recent decisions, the
Supreme Court continues to follow closely the principles of Montana v. United
States, which it has referred to as "the pathmarking case" on Indian tribes'
regulatory authority over non-members. (US v. Montana)

These non-tribal fee simple landowners, a force of 500, vow to continue to
assert their ownership of their tidelands and promise to be a force to be reckoned
with. According to a statement in a past article published in the Seattle Post-
Intelligencer, the homeowners: the Marysville Tulalip Community Association
(MTCA) feel the facts and documentation are very clear in regards to their
ownership of tidelands and therefore, in all likelihood, a court will have to step in
and reaffirm the fee simple owners’ right to these tidelands and reaffirm
jurisdiction to the state of Washington and Snohomish County. (Langston, 2003)
However, according to *Johnson v. M'Intosh*, The Tribes’ individual Indians could not have conveyed land they did not own. The Tribes assert that the land between high water and low water still belongs to the Tribe, via the Bureau of Indian Affairs, and is held in trust by the federal government. Because the restricted fee patents only conveyed land to individual Indians to the high water mark, they could not legally sell and convey land to the low water mark. (Parks, 2006) The Tulalip Marysville Community Association purports Snohomish County should regulate their land, including “tideland”, after all, land taxes paid go to the county, but the county hasn't taken any public steps to that end. In its shoreline management plan, the county designates the tidelands as "disputed lands." (Snohomish County website)

Spokesperson for TMCA asserts in a recent letter published in the Everett Harold that there is no documented evidence that the federal government withheld the tidelands aside from these allotted lands. (Mitchell, 2006). For the last two years the organization has been meeting regularly in addition to raising money for a potential legal battle and for the research of original land grants. They have also joined a nationwide network of activists fighting tribal attempts to assert jurisdiction and taxing authority over non-Indians. “The Tulalip Tribes wrongly perceived they own these tidelands, which were sold with the uplands. For nearly 100 year, many landowners have had possession of valid legal
documents that clearly describe their property to the low water mark. These non-tribal owners are understandably upset now that the Tulalip Tribes are claiming ownership and jurisdiction over these tidelands, threatening them with regulations, fees and citations, “stated Tom Mitchell (Mitchell, 2006)

“There are dozens of organized groups that seek to curtail tribal rights. Many such groups oppose tribal rights to self-govern in the environmental and land-use areas and believe that tribes should be subject to state and local environmental and land-use laws,” declared Indian Law attorney, Michelle Hickey. One such group is called The Citizens Equal Rights Alliance (CERA). Stated in their mission statement, CERA feels that “Federal Indian Policy is unaccountable, destructive, racist and unconstitutional. It is therefore CERA’s mission to ensure the equal protection of the law as guaranteed to all citizens by the Constitution of the Unites States of America.” (Hickey, 2006)

“The rise of groups like the community association on or near reservations across the country has paralleled Tribes’ increasing political clout,” said Ron Allen, the chairman of the Jamestown S’Klallam Tribe on the Olympic Peninsula and former president of the Nation Congress of American Indians. “They’re popping up because in the last 10 years, the Tribes, as they’ve matured as governments, have begun to exert more governmental control over their reservations...Tribes face a challenge as they learn to deal with organized
criticism and opposition, and that situation is complicated because groups' messages are often commingled with racists and discriminatory positions.” (Heffter, 2003)

According to attorneys Lynn Slade and Walter Stern, Tribal environmental regulation potentially can affect all businesses in and around Indian lands or reservations. Tribes have comprehensive power over their members on reservations or on other tribal lands. However, while tribes may have regulatory powers over non-Indians and Indian members of other tribes in certain circumstances, those powers are not clearly defined. Generally, tribal powers derive from three major sources: inherent tribal authority akin to sovereign powers of states or the federal government; treaties with the United States; and federal statutory delegations of authority to tribes. (Slade and Sterns, 2006) The average public is naïve on Tribal inherent sovereignty. Case in point: in 1999, The First American Education Project (FAEP) was founded by Indian leaders wanting to bring Indian issues to the forefront of the political process by educating elected officials, political candidates, members of the media and the general public about issues of importance to Native Americans. In 2002, FAEP initiated a nationwide analysis to gauge the general public's understanding of Native American issues. One question particularly relevant to this case study was - Do people “respond much more positively to the idea that Native American
tribes “have the right to self-determination and self-governance” than to the idea that tribes “are sovereign nations?” A strong majority (65%) of respondents agree that “Native American tribes have the right to self-determination and self-governance”, while 24% disagreed. However, fewer than half (43%) agreed that “Native American tribes are sovereign nations” while a third (43%) disagreed and another 23% were not sure.  

4 (The First American Education Project, 2002)
The County’s Opinion

What preempted the Tulalips’ Tideland Management Policy for the non-tribal, beachfront people of the Tulalip Reservation was the Shoreline Management Act of 1971 Chapter 90.58. RCW. The Snohomish County is charged with maintaining, with the assistance of the Washington State Department of Ecology, the general welfare of the shoreline within its county. The county is aware that a complex set of jurisdictional questions has developed which pertains to the legal applicability of the Shoreline Management Act within the boundaries of the Tulalip Indian Reservation. Specifically, several important legal issues relating to the degree of sovereignty any and all Indian tribes may have over the lands (both Indian and non-Indian owned) within their Reservations remain unresolved. In addition, a number of specific boundary location questions exist which pertain to lands claimed by the Tulalip Tribes as portions of the Reservation ceded to them by the United States Government in 1873.

“Measuring” degrees of sovereignty is an issue that is being stressed by general publics and politicians, feeling pressure from their constituents, more so than ever before. By 1980, nationally, noted in a Senate report, there were a growing number of areas in which States and Indian tribes had found their jurisdiction or authority in conflict. (Senate Calendar No. 809 1980, January 3).
After discussing this situation with representatives of the Tulalip Tribes at several meetings, it was agreed that a special section including both map and text would be included in the Snohomish County Shoreline Management Master Program to point out and briefly explain this complex set of jurisdictional issues. Pinpoint issues were agreed upon in definition:

**Land Ownership Patterns** - There are basically three types of land ownership on the Reservation - allotted lands, owned by individual Indians; alienated lands, owned by non-Indians; and tribal lands, owned by the Indian Tribes.

**Allotted Lands** - Shortly after the Reservation was established in 1855, the Federal Government assigned individual parcels of land to the Indian families on the tribal rolls and in some cases forcibly relocated the families from the small settlements on the shores of Puget Sound to their designated parcels. These lands are held in trust and managed by the Bureau of Indian Affairs on behalf of each Indian owner.

Snohomish County does not attempt to apply its land use control authority to those lands, which are mutually agreed upon as being allotted.

**Tribal Lands** - Over the years since 1935, certain parcels of unallotted lands have reverted to tribal ownership. In 1939, the Tribes also began acquiring
allotted lands throughout the Reservation. Tribal lands are generally held in trust status with joint management responsibility being shared between the Tulalip Tribes and the Bureau of Indian Affairs.

Snohomish County does not apply its land use control authority to those lands, which are mutually agreed upon as being Tribal.

**Disputed Lands** - There are several areas on the periphery of the Tulalip Reservation, which for the purposes of this Master Program have been unofficially declared as disputed lands. This disputed lands label has been applied to these areas based on the uncertainty surrounding their jurisdictional status. The Tulalip Tribes have made jurisdictional claims on lands, tidelands and waterways that have not been acknowledged or agreed upon by Snohomish County or the State of Washington.

The largest single block of disputed lands which may fall under the jurisdiction of the Shoreline Management Act are the tidelands running most of the western length of the Tulalip Reservation. Other areas include the bed lands of Tulalip Bay, portions of Steamboat Slough and tidelands lying west of Smith Island.

Shoreline planning environment designations have been applied to all these disputed lands by Snohomish County. (Snohomish County website)
The State’s Opinion

Washington State Department of Ecology stresses that the application of the SMA to land within Indian reservations is a complex legal issue that should be approached with caution and sensitivity, noting that to date there is no law or court decision that addresses this issue directly nor any that address similar issues in a manner that would establish a clear demarcation for all circumstances. The Department’s best distillation of case law on this is as follows:

- Indian tribes have the authority to plan for and regulate tribal trust lands and lands allotted to, and held in trust for, tribal members within their reservations. They also have the authority to regulate land within reservation boundaries owned by non-members in areas where Indians own significant amounts of land and make up a majority of the population.

- State and local governments do not have the authority to regulate tribal trust lands and land allotted to and held in trust for tribal members. So, presumably, the SMA and shoreline master programs do not apply to these properties.

- State and local governments may regulate land within reservation boundaries that is owned in fee by non-tribal members where non-Indians
make up more than half the population and own nearly half the land. So, presumably, the SMA and shoreline master programs do apply to these properties.

However, other circumstances may limit state and local authority over non-Indian land on Indian reservations. In addition, the factors that the courts look to in deciding if local and state governments have authority over land on reservations are unclear and may change. This means that jurisdictional questions require fact specific analysis. Even after such an analysis, the extent of authority may be unclear. (Washington State Department of Ecology, 2006)
Summary

In summation, one can clearly see now the over laying issues and presiding law that exists to interpret Tulalip Tribes/Snohomish County jurisdictional boundaries. When inspecting relevant Acts of Congress affecting Indian County and interpreting case law over a series of centuries, the notion is clear that, indeed, The Tribes’ authority exists. Commingling governments together however is often awkward and complex. Complexities of federal, state and treaty law has produced mixed outcomes for Tribes, such as in the case of the Suquamish Tribe, and not such the case of the Lummi Nation and the Swinomish Indian Community. When a shoreline or adjacent tideland is within Indian country, the state may simply lack jurisdiction to regulate activities therein or authorize development. The issue turns on the application of jurisdiction principles and the specific legal history and situation of the particular reservation in question. (Morisset, 2001) Every Tribe has their own story, and thus, case studies – analyzing government-to-government models on a case-by-case base are essential in understanding Tribal governance within a broader audience – a broad audience of about 98% of the population, considering only 2% of the population is Native American.

During the process of educating, it’s important to clearly describe the timeline of events that have occurred in American Indian federal policy. In doing
so, people who doubt “tribal sovereignty” can gain an insight and understanding of Tribal politics and policy. Or, simply stated, as Ron Allen has said, “We’re just having to educate them about who we are and what we’re doing.” (Heffter, 2003)

With the Tribes drawing a line in the sand regarding jurisdiction, and the county and state reactions remaining stalemate, this case currently remains active and may likely be decided in a Federal Court. A lesson within this case study is to understand that non-tribal members living on Tribal reservations must always be mindful that, as the power of tribes to regulate increases, so will the potential for overlap and conflict among tribal, state and federal regulations.

This is a case study of not just history but of a government-to-government relationship model. Further research would indicate variations of models, on a case-by-case basis. Do County and Tribal intergovernmental relations work best under Memorandum of Understandings (MOU) that express definitions and define procedures? Can MOU’s endure political pressure from local constituents? Can administratively-functional models of Tribal/County issues be framed by MOU’s or are there other options, such as leaving the decision of the issues upon a federal court decision. How many MOU’s established are working, how many have collapsed, why have they collapsed? Thousands of MOU’s have been established with Tribes and County’s throughout the United States. On May 17, 2004 Snohomish County Executive Aaron Reardon and Tulalip Tribes
Chairman Stanley G. Jones, Sr. signed a Memorandum of Understanding; on the same historic grounds the Treaty of Point Elliott was signed. The memorandum was secured to commit the county and the Tribes as allies, interested in fostering better communication and conflict resolution. "This memorandum is overdue. Over the past decade the relations between Snohomish County and the Tulalip Tribes has grown stronger, but there are still those who prefer the old politics that seek to divide rather than unite," Executive Aaron Reardon stated. (Snohomish County website) In this case study, the non-tribal landowners are seeking the dividing. The MOU to piece together Tribal/County relations, in this case, wasn’t strong enough hold the governments together under the pressure of the non-tribal landowners on the Tulalip Reservation. Due to the scope of this study being specific to one Reservation, additional research is due to review other Tribal/County relations. What are the variables of these relations? Why are some counties less resistant to Tribal law, compared to other counties?

This story ends by reminding people that Native American history in Puget Sound “is one of trauma, transformation, and tradition. The world has changed in innumerable ways since the arrival of whites and other immigrants on these shores, yet those changes have not erased what it means to be native. As the First People of the Puget Sound country enter the 21st century, they are doing so with a renewed vision of their place." (Coll-Peter Thrush)
The trauma consisted of the disruption of life when Lewis and Clark explorers opened up the Pacific Northwest for western expansion. Treaties were created but not upheld. American Indians experienced policy that would swing like a pendulum from separatism to assimilation and then back again. The dim reality of the Indian reservations was highlighted in the Meriam Report of 1928. Transitions to repair the dark periods the allotments created included the Indian Reorganization Act of 1934, only to be stamped out by the Termination period in the 1950's. The Tulalip Tribal government successfully positioned itself from poverty to prosperity since the 1970's, once formulating a western-style governance, with Federal Indian Policy such as the Self Determination Act, Indian Gaming Regulatory Act and the Self Governance Act, which, combined, brought social, health, safety, educational services and law and order to its citizens and gave strength to the Tribes' efforts to protect the environmental health of its reservation land and shoreline by establishing planning committees, ordinances and codes.

The stability of prosperity has allowed the Tribes to assert traditions held by elders to pass on now to the youth. The Boldt Decision and Washington v. United States has breathed new inspiration and hope into securing tribal fishing treaty rights while events such as the Canoe Journeys - Healing through Unity -
which was hosted by the Tulalips in 2003, confirms the forwarding of stewardship and a renewal of a culture.
References


Clallam County Shoreline Master Program (1976) Prepared by the Clallam County Shoreline Advisory Committee & the Clallam County Planning Department.


Greenwald, Emily (2002). Reconfiguring the Reservation. Albuquerque, NM: University of New Mexico Press


Morisset, Mason D. Tribal Rights And Their Effect On Our Concept Of Property Rights In The Northwest. November 15 & 16, 2001


Senate Calendar No. 809 (1980, January 3). Authorizing The States And The Indian Tribes To Enter Into Mutual Agreements And Compacts Respecting Jurisdiction And Governmental Operations In Indian Country.


Glossary

Allotments
Parcels of land created on the Tulalip Reservation by the U.S. government that were allotted to individual members of the Tribe for home sites under Article VII of the Treaty of Point Elliott or other applicable federal law.

Bulkhead
A wall erected generally parallel to the waterline for the purpose of protecting adjacent uplands from erosion caused by waves or current action. Bulkheads may be built of posts and timbers, concrete, large rocks (riprap), or other materials.

Coast line
The low water datum line for purposes of the Submerged Lands Act (Public Law 31). See shoreline.

Dock
A platform built out from the shore into the water and supported by pilings or floats; providing access to boats and ships.

Extreme Low Tide
The lowest line on the land reached by receding tide.

Indian Country
The starting point for analysis of jurisdictional issues, which is not limited to land actually owned by Indians, but also includes non-Indian lands within the exterior boundaries of a reservation – which is called Indian Country. Indian law and policy continue to focus primarily on the reservation system.

Indian Gaming Regulatory Act Of 1988
Established a statutory basis for operation of gaming by Indian Tribes as a means of promoting Tribal economic development, self-sufficiency, and strong Tribal governments.

Indian Tribe
Any Indian Tribe, band, nation or other organized group or community, including any Alaska Native Village as defined in section 3(c) of the Alaska Native Claims Settlement Act which is exercising powers of self-
government and which is recognized by the Secretary of the Interior as eligible for serviced proved by the United States to Indians because of their status as Indians.

**Jurisdiction**

In law, jurisdiction from the Latin *jus, juris* meaning "law" and *dicere* meaning "to speak", is the practical authority granted to a formally constituted body or to a person to deal with and make pronouncements on legal matters and, by implication, to administer justice within a defined area of responsibility. As a topic, it draws its substance from Public International Law, Conflict of Laws, Constitutional Law and the powers of the executive and legislative branches of government to allocate resources to best serve the needs of each society.

**Marysville Tulalip Community Association**

A membership-fee based association of beachfront landowners who reside on a total of ten beaches on the Tulalip Indian Reservation.

**Mean high-tide**

"Mean High Tide" is an ambulatory line representing the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years. This is an unchanging elevation, and the mean high tide line is where that unchanging elevation meets the shore as the shore exists at any particular time.

**Memorandum of Understanding**

A memorandum of understanding (MOU) is a legal document describing an agreement between parties. It is a more formal alternative to a gentlemen's agreement, but generally lacks the binding power of a contract.

**Secretary of Interior**

The position of the head of the Department of the Interior; appointed by the president of the United States. The position of Interior Secretary was created in 1849.

**Shoreline**

The intersection of the land with the water surface. The shoreline shown on charts represents the line of contact between the land and a selected water elevation. In areas affected by tidal fluctuations, this line of contact
is the mean high water line. In confined coastal waters of diminished tidal influence, the mean water level line may be used. See coast line.

**Shoreline Management Act**

Washington’s Shoreline Management Act (SMA) was adopted by the public in a 1972 referendum “to prevent the inherent harm in an uncoordinated and piecemeal development of the state’s shorelines”.

**Shoreline Stabilization**

Actions taken to reduce adverse impacts caused by current, flood, wake, or wave action. These actions include all structural and nonstructural means to reduce impacts due to flooding, erosion, and accretion. Examples of specific structural and nonstructural shoreline modification activities include revetments, riprap, bulkheads, and bank stabilization.

**Treaty**

A treaty is a binding agreement under international law concluded by subjects of international law, namely states and international organizations. Treaties can be called by many names: treaties, international agreements, protocols, covenants, conventions, exchanges of letters, exchanges of notes, etc.; however all of these are equally treaties, and the rules are the same regardless of what the treaty is called.

**Treaty of Point Elliot**

The Point Elliott Treaty was signed on January 22, 1855, by Isaac Stevens, Governor of Washington Territory, and by Duwamish Chief Seattle, Snoqualmie Chief Patkanim, Lummi Chief Chow-its-hoot, and other chiefs, subchiefs, and delegates of tribes, bands, and villages.

**Tulalip Board of Directors**

The governing body of the Tulalip Indians shall consist of a council, known as the Tulalip Board of Directors. This Board shall consist of seven (7) members duly elected to serve three (3) years, two (2) being elected each year, except that every third year three (3) shall be elected.

**Ordinance**

The responsibility of the Tulalip Board of Directors is to promulgate and enforce ordinances, which shall be subject to review by the Secretary of the Interior, governing the conduct of members of the Tulalip Tribes, and providing for the maintenance of law and order and the administration of
the justice by establishing a reservation court and defining its duties and powers; to safeguard and promote the peace, safety, morals, and general welfare of the Tulalip Reservation by regulating the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting non-members of the Tulalip Tribes shall be subject to review by the Secretary of the Interior; and to regulate the inheritance of property, real and personal, other than allotted lands within the territory of the Tulalip Reservation, subject to review by the Secretary of the Interior.